DOCUMENTS

THE OBJECTIVES RESOLUTION AND ITS IMPACT ON THE ADMINISTRATION OF JUSTICE IN PAKISTAN

Lecture delivered by
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To
The Participants of the 1st Lawyers' Shariah Course on 3rd August, 1987 at the International Islamic University, Islamabad

It is a matter of great pleasure for me to speak to you, my brethren of the legal profession and members of the noble calling of law, who are privileged to have attended this 1st Lawyers' Shariah Course so thoughtfully arranged by the Shariah Academy on the eve of your return to your own battlefield, the Law Courts of Pakistan.

These are indeed exciting but challenging times for lawyers and jurists. The old Anglo-Saxon legal system hitherto in force in our country is crumbling slowly but surely and is being replaced by the magnificent edifice of the Islamic Shari'ah. This remarkable transformation is occurring not so much by the efforts of the legislators in the Halls of the Legislatures, but is coming about largely by the efforts of lawyers and judges in the Courts of Law. Thus, for instance declarations such as "Man having been born in the image of Allah cannot be permitted in matters of judgment to do injustice" which you hear today are not to be found in the discourses of any religious scholar or in the speeches of public figures in the National Assembly or the Senate. Instead they are found in the judgments of the cases decided by the judges of the highest Courts of the country.
Indeed a magnificent chapter is being added today to the Judiciary's enviable record and it is God's Grace that we are present to participate therein and witness it.

With these preliminary remarks let me pass on to the subject on which I have been asked to say a few words this morning.

The First Constituent Assembly of Pakistan adopted a Resolution on 7th March, 1949 called the "OBJECTIVES RESOLUTION" whose opening words were:

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.

This Resolution, with minor omissions and additions and alterations in its phraseology, appeared as a preamble to the Constitutions of 1956, 1962, the Interim Constitution of April, 1972 and the Permanent Constitution which came into force on 14th August, 1973. In the turbulent constitutional history of Pakistan the provisions of this Resolution were often invoked before the High Courts and the Supreme Court by suitors to establish the illegality or otherwise of actions taken by the Executive or other forces. But although this Resolution was referred to by these Courts to be "the corner stone of Pakistan's legal edifice" and the "bond which binds the nation" embodying "the spirit and fundamental norms of the constitutional concept of Pakistan" and represented "the ideology, aim and the final object of the country and the nation" it was not accepted as a "Supra-Constitutional instrument" and was held to be "unjusticeable and a preambulatory provision".

Hamoodur Rehman, C.J. in the well-known case of Ziaur Rehman Vs. The State observed:

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 too 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 or 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.\(^6\)

The position of this Resolution, however, underwent a dramatic change when on 30th December, 1985 while lifting Martial Law and reviving the Constitution of 1973 by the Revival of Constitution Order, 1985 (P.O. 14 of 1985) it was indeed incorporated and made a part of the Constitution. This was done by inserting a new provision in the Constitution, numbered as Article 2-A whereby the Objectives Resolution was made substantive part of the Constitution and was to have effect accordingly.\(^7\) The condition laid down by Chief Justice Hamoodur Rehman to enable the Objectives Resolution to acquire the same status and authority as the Constitution itself was thus satisfied and the Objectives Resolution converted from a Preamble into a substantive part of the Constitution itself with the result that henceforth any measure which was in conflict with "the ideology, aim and the final object of the country and the nation", could be questioned. Indeed, its impact has already started manifesting itself. In this connection, let me tell you what its impact has been on the case relating to the compulsory retirement of civil servants. First I may give you the background.

During the Martial Law period a new Chapter (Chapter 3-A) entitled "Federal Shariat Court" was added in Part VII of the Constitution of 1973 by General Muhammad Zia-ul-Haq by promulgating President's Order I of 1980. By this Order a Court called the Federal Shariat Court was constituted which was empowered to examine and decide the question whether or not any law or provision of any law presently in force in Pakistan, is repugnant to the Injunctions of Islam, as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet. Taking advantage of this situation some civil servants who felt dissatisfied with the certain provisions of the Civil Servants Acts whereby the competent authority could retire civil servants holding the post of Additional Secretary or any equivalent or higher post in the Government or who had completed 25 years of service qualifying for pension or other retirement benefits even though the normal retirement age was 60 years; challenged them before the Federal Shariat Court. This case was heard at length and the Federal Shariat Court in a well-considered judgment found that the impugned provisions of the Civil Servants Act were indeed repugnant to the Qur'an and the Sunnah. It was therefore, directed that the impugned provisions be repealed.\(^8\)
The judgment of the Federal Shariat Court was challenged before the Supreme Court on appeal and was heard by the Shariat Appellate Bench of the Supreme Court (consisting of five judges) and ultimately dismissed by the majority. (Three Judges considered that the judgment of the Federal Shariat Court was correct and should be upheld while the remaining two were of the opinion that the impugned provisions of the Civil Servants Act were not repugnant to the injunctions of Islam and, therefore, the appeals filed by the Government should be allowed). Since the opinion of the majority prevails and is binding also on the minority, the result of the judgment is that the impugned provisions of the Civil Servants Act have been found to be against the injunctions of Islam and must, therefore, be repealed. What is of crucial importance to us, however, is that in coming to the above conclusion, reliance has, inter-alia, been placed on the Objectives Resolution of 1949. It would, therefore, be of interest to quote the relevant part of the judgment in full and I quote:

There is a provision, section 4 of the Civil Servants Act, 1973, which reads as hereunder:

"4. Tenure of office of civil servants:
   Every civil servant shall hold office during the pleasure of the President".

Similar provision exists in all the Provincial Civil Servant Acts, except that of the Punjab. It is a provision which had its precedent in Article 216 of the Interim Constitution, 1972; Article 176 of 1962 Constitution; Article 180 of the 1956 Constitution; section 240 of Government of India Act, 1935, section 96-B of Government of India Act, 1915 introduced in 1919. It can truly be said to be our heritage of the colonial past.

Section 4 of the Civil Servant Acts has, at its back, Article 240 of the present Constitution which is in the following words:-

"240. Subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined:

a) in the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under Act of Majlis-e-Shoora (Parliament); and

b) in the case of the services of a Province and posts in connection with the affairs of a Province, by or under Act of the Provincial Assembly.

Explanations:- In this Article, 'All-Pakistan Service' means a service common to the Federation and the Provinces, which was in existence immediately before the commencing day or which may be created by Act of Majlis-e-Shoora (Parliament)."
Such a constitutional and statutory base has prompted the Federal Government and also the Sind Government to take up the position that

"infrastructure of Civil Service is inherently a prerogative of every Government".

Indeed, if this power or prerogative, and the tenure at its pleasure, is conceded to the designated authorities, as it has been by the Federal Shariat Court in the impugned judgment, for no fault has been found with it, then no limitation can be placed on its exercise and the subject can admit of no debate or controversy and cannot be a subject matter of adjudication in Courts in proceedings like the one before us.

The legal amplitude of tenure at pleasure appears clearly from the following comment on it (43 American Jurisprudence):

"Removals at Will or Pleasure:— The general rule as to offices created to be filled by appointment is that if the legislature does not designate the term of the office, the appointee will hold only during the pleasure of the appointing power, and may be removed at pleasure, at any time without notice or hearing. So, too, statutes sometimes provide with respect to certain officers that they shall within the tenure prescribed be removable at pleasure, which of course, means without requiring any cause for such removal... No formal charges or hearings are as a rule required where a public officer holds only at the pleasure of his superiors, as where the provision for appointment prescribes no definite term and does not require that the removal be for cause, or where the removal depends on the exercise of personal judgment on the question whether cause for removal exists. It has been seen that the holder of a public office without a definite term holds at the pleasure of the appointing power. So, also a grant in general terms of the power to remove public officers carries with it the right to remove at any time or in any manner deemed best, with or without notice and hearing".

We have to apply to this or such a provision the test of injunctions of Islam, as laid down in the Holy Qurʾān and Sunnah of the Holy Prophet. With regard to State and its authority over individuals there are Verses 58 and 59 of Sūrat al-Nisāʾ. The translation of the verses is as follows:

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68 إِنَّ اللَّهَ يُحَمِّلُ عَنْكُمْ ذَلِكَ الْبَيِّنَةَ إِنَّ اللَّهَ أَنتُونَ حَكِيمًا وَبَصِيرًا

إِنَّ اللَّهَ يُبَيِّنَ لِلَّيْلِ النَّيْتَ وَالْأَرْضِ وَمَا يُخْزِنُ عَلَيْهِمَا وَلَيْتَ ثُمَّأَاتُ
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Allah doth command you to render back your Trusts
To those to whom they are due;
And when ye judge
Between man and man,
That ye judge with justice;
Verily how excellent
Is the teaching which He giveth you
For Allah is He Who heareth
And seeth all things" (4:58)

O ye who believe
Obey Allah and obey the Apostle
And those charged with authority among you.
If ye differ in anything
Among yourselves, refer it
To Allah and His Apostle
If ye do believe in Allah
And the Last Day:
That is best, and most suitable
For final determination." (4:59)

Mawlānā Maudūdī [Mawdūdī] in his Ṭafḥīm al-Qur'ān, (Volume 1, page 363,) commenting on these Verses remarks:

Translation: This verse constitutes the basis of the entire religious, cultural, and political structure of Islam; it is the first article of the constitution of the Islamic state.¹⁰

Mawlānā Muftī Muhammad Shafi' in his Mūrif al-Qur'ān, Volume 2, pages 445 and 448 comments in the following words:

Translation: The government offices are Allah's trusts. It proves that all government posts and ranks are Allah's trusts and the government officials and rulers are trustees who possess the authority to appoint and depose. In this verse this point is particularly worth noting that by declaring government offices as trusts, Almighty Allah has first of all made it clear that since a trust must be handed over only to those to whom it belongs, and as it is not permissible to hand over it to the poor and needy on compassionate grounds, the government offices which usually pertain to public affairs, are trusts as well and only such persons deserve them who are suitable for these posts on the basis of their skills, qualifications and capability and who are the best available persons.¹¹

The substance of these verses was adopted in the opening words of the Objectives Resolution of Pakistan in the following words:

"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".

These words then became the opening words of the preamble of our first Constitution in the following words:
"Whereas sovereignty over the entire Universe belongs to Allah Almighty alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust".

The subsequent Constitutions continued it till 1985 when by Presidential Order No. 14 of 1985 it was incorporated in the Constitution of 1973 as Article 2-A. The opening words now are as hereunder:

"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 concept of Delegated Authority held in trust enshrined in Verse 58 has invariably and consistently been given an extended meaning. Additionally, all authority being a delegated authority and being a trust, and a sacred one for that matter, must have well-defined limits on its enjoyment or exercise. In the Holy Qur'an more so, but also both in the Western and the Eastern Jurisprudence delegated authority held in trust has the following attributes:

(i) The Authority so delegated to, and held in trust by, various functionaries of the State including its Head must be exercised so as to protect, preserve, effectuate and advance the object and purposes of the trust;

(ii) All Authority so enjoyed must be accountable at every stage, and at all times, like that of trustee, both in the hierarchical order going back to the ultimate delegator, and at the other end to the beneficiary of the trust;

(iii) In discharging the trust and in exercising this delegated authority, there should not only be substantive compliance but also procedural fairness".

Applying these tests, it must be held that the concept of tenure at pleasure is repugnant to the Injunctions of Islam. You will observe that as a result of this pronouncement the most important power vesting in the hands of the Government, namely, the power to remove senior civil servants from service; a power conferred on it by Solemn Acts adopted by competent legislatures has been found, because of its repugnancy with the Objectives Resolution, to be unlawful. The Objectives Resolution is, therefore, no longer a preambulatory provision. It has become justiciable and enforceable and as you have just seen, is being duly enforced.

The next question which arises is whether it is only the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court, who can avail of the powers of declaring any existing law to be un-Islamic under Chapter 3-A of Part VII of the Constitution? If this was all, the scope of administration of justice
in accordance with the injunctions of Islam would be quite small because the jurisdiction exercisable by these Courts under this Chapter is somewhat limited. Under the provisions of Chapter 3-A the validity of the existing laws which do not come under the category of fiscal laws or laws relating to the levy and collection of taxes and fees or banking or insurance practice and procedure can only be examined. Even in matters wherein the Federal Shariat Court and the Supreme Court have the jurisdiction to examine the validity of the law, these Courts cannot issue any interim orders. Indeed, even their final judgments do not become enforceable as soon as they are pronounced but will become operative only on a later day to be specified in the order. This is so because time must be granted to the Executive and the Legislative Branches of Government to frame a new law which accords with the injunctions of Islam in order to replace the existing law which has been found to be un-Islamic. Thus, it is only if the Courts of general jurisdiction could have the authority to say whether an existing law is or is not Islamic, unhampered by the limitations imposed on the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court, then alone the goal of administration of justice in conformity with the precepts of Islam can become a reality. A valiant effort to achieve this goal has recently been made by a Judge of the Sind High Court, who was earlier also the Chairman of the Council of Islamic Ideology - I mean Mr. Justice Tanzil-ur-Rehman. This Herculean attempt has been made in a case where one could have least expected, namely, while deciding a matter as to whether the defendant should be granted leave under Order XXXVII Rule 3 of the C.P.C. to defend the suit.18

The Bank of Oman Limited, a limited company incorporated outside Pakistan, namely, in Dubai, which is also transacting business in Pakistan, has a local branch in Karachi. The East Asia Trading Company Ltd., a private limited company in Karachi, which is mainly engaged in the business of import and export, had a current account with the said Bank. According to the case of the Bank, loan facilities had been granted, since 1980-81, to Messrs. East Asia Trading Co. Ltd. on their request. These appear to have been availed of in full measure so that by August, 1984 the defendant company had come to owe to the Bank a sum of over 75 lakh of rupees. Accordingly, the Bank filed a suit in the Sind High Court under its original civil jurisdiction under the provisions of the Banking Companies (Recovery of Loans) Ordinance, 1979 read with Order XXXIV of the Code of Civil Procedure for the recovery of that amount. In this suit, the various guarantors who had furnished guarantees etc. for securing repayment of the loan were also impleaded as defendants; one of these was Mrs. Mubaraka Piracha, a share-holder and Director of the East Trading Co. Ltd., Karachi. She was sued as a mortgagor inasmuch as she had deposited the Title Deed of her property situated in Karachi to secure payment to the Bank of "any amount outstanding that may have been or may be lent alongwith the interest" agreed between,
the Bank of Oman and Messrs East Asia Trading Company Ltd. (The mortgage executed by Mrs. Mubaraka was thus by deposit of "title deed" as visualised in Clause (f) of Section 58 of Transfer of Property Act, 1882). In English Law such a mortgage is called an equitable mortgage.

The suit was resisted by Mrs. Mubaraka and she also prayed for leave to defend the suit; one of the pleas raised by her in defence was that the Memorandum executed by her was not a kind of mortgage that was recognised in Islam because the concept of an equitable mortgage is purely an English concept which is alien to the law of Islam and is not recognised by it. This defence afforded the judge to undertake a comprehensive examination of the whole matter. In the first place he considered the question whether an equitable mortgage was or was not recognised in Islam and, thereafter, tackled the crucial question as to whether a Court exercising Original Civil Jurisdiction could give effect to such a plea, even if it was well founded.

In order to answer the first question the concept of a mortgage in the light of the Injunctions of Islam was examined in great detail. He then turned to the second question, namely, whether a Court exercising original civil jurisdiction can declare any "existing law" to be invalid if he finds the same to be un-Islamic. While dealing with this question the learned Judge examined at great length the history of constitution-making in Pakistan, with particular reference to the Islamic provisions contained in the various Constitutions adopted so far, especially the effect of Chapter 3-A introduced in Part VII of the Constitution (by President's Order I of 1980) establishing the Federal Shariat Court and conferring upon it the jurisdiction to declare as invalid any provision found in any existing law to be un-Islamic. He also took note of the recently promulgated Revival of the Constitution Order 1985, whereby the Objectives Resolution was made a substantive part of the Constitution by the insertion of Article 2-A in the Constitution of 1973 and after a thorough examination of all these instruments it was opined that so far as the first question is concerned, although the so-called equitable mortgage provided for in clause (f) of Section 58 of the Transfer of Property Act, 1882 is not Islamic inasmuch as the concept of a rahn (mortgage) without delivery of possession of the mortgaged property is not recognised in Islam, but he could not declare this provision of law to be invalid because the Federal Shariat Court had, while carrying out a suo moto examination of the provisions of the Transfer of Property Act, 1882 found that none of its provisions except the provision relating to the interest - was repugnant to the injunctions of Islam. Since he was bound to follow the said declaration, despite his own view on this matter being different (because all High Courts are bound by the judgment of the Federal Shariat Court under Article 203-XG of the Constitution), he would only express the hope that the Federal Shariat Court would
consider the advisability of reviewing its opinion on this question at some later date in the light of the discussion made in this judgment. The learned Judge, in passing, also observed that the provision of interest in the Banking Companies (Recovery of Loans) Ordinance, 1979 appeared to be un-Islamic and was liable to be struck down. However, he left this question to be considered in more fullness at the final hearing of the suit.

As regards the other important question namely whether a Court while deciding a suit in exercise of original civil jurisdiction is competent to pass a judgment keeping in view the principles and provisions of the Objectives Resolution; the answer was returned in the affirmative. In support of this finding it was observed that under the provisions of Article 268 of the Constitution which provides for continuance of existing laws - when any Court is required to enforce any "existing law" it shall construe it in a manner so as to bring its provisions in accord with the Constitution. But as the Court has been empowered to adapt, alter, repeal or amend any such existing law while enforcing it under Article 268, accordingly clause (f) of Section 58 of the Transfer of Property Act can be altered, amended or even repealed by the Court construing this provision of law in case it finds it repugnant to the Objectives Resolution which, by virtue of the provisions of the newly inserted Article 2-A in the Constitution, has become a substantive part of it.

The upshot of the entire discussion was summed up by the learned Judge as follows:

The principles and provisions of the Objectives Resolution, by virtue of Article 2-A, are now part of the Constitution and justiciable. Any provision of the Constitution or law, found repugnant to them, may be declared by superior Court, as void, subject, however, to the limitations imposed by Article 203-A, B(c), 203-D, 203-G and 203-XG of the Constitution, whereby special and specific jurisdiction has been conferred on the Federal Shariat Court to declare the law (as defined by Article 203-B(c) read with Article 203-G or any provision thereof as repugnant to the Injunction of Islam laid down in Holy Qur'ân and Sunnah of the Holy Prophet (Peace be upon him).

The wheel has turned full circle. New and exciting prospects have appeared on the horizon and a new dawn is rising. It is now upto you, my dear friends, by your earnest endeavours, research and dedication to secure to the Muslims in Pakistan justice according to the precepts of Islam and restore to them their glorious heritage.

God Bless you all.
ANNEX

CONSTITUTION OF PAKISTAN -

ARTICLE 2A

THE OBJECTIVES RESOLUTION

In the name of Allah, the most Beneficent, the most Merciful.

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;

This Constituent Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent State of Pakistan;

Wherein the State shall exercise its powers and authority through the chosen representatives of the people;

Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed;

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'ān and the Sunnah;

Wherein adequate provision shall be made for the minorities to profess and practise their religions and develop their cultures;

Wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;
Wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;

Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;

Wherein the independence of the Judiciary shall be fully secured;

Wherein the integrity of the territories of the Federation, its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded;

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity.

NOTES AND REFERENCES

1. Pakistan Vs. Public at Large (PLD 1987 S.C. 304 @ 337) Per M.A. Zullah, J.
2. Asma Jilani Vs. Govt. of Pakistan (PLD 1972 S.C. 139)
5. Zia-ur-Rehman Vs. The State (PLD 1986 Lah. 428)
7. President's Order No. 14 of 1985 – Article 2 and Schedule (Item 2).
   Text reproduced as Annex hereto.
12. Pakistan Vs. Public at Large (PLD 1987 S.C. 304 @ 359 to 362) Per Shafi-ur-Rehman, J.