IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE UMAR ATA BANDIAL

CIVIL APPEALS NO.545 TO 550 OF 2015
(Against the judgment/order dated 17.4.2015 of the Lahore High Court, Lahore passed in W.Ps. No.7955, 5323 and 8008 of 2015)

1.	LDA through its D.G.	(in C.As.545, 547 & 548/2015)
2.	Province of Punjab through Chief Secretary, Punjab & another	(in C.As.546 & 549/2015)
3.	Province of Punjab through Secretary Housing Urban Development, Lahore	(in C.A.550/2015)

…Appellant(s)

VERSUS

1.	Ms. Imrana Tiwana and others	(in C.As.545 & 546/2015)
2.	Fahad Malik etc.	(in C.As.547 & 549/2015)
3.	Lahore Conservation Society, etc.	(in C.As.548 & 550/2015)

…Respondent(s)

For the appellant(s): Kh. Haris Ahmed, Sr. ASC
Mr. Mustafa Ramday, ASC
Ch. Akhtar Ali, AOR
Mr. Asrar Saeed, Chief Engineer LDA
Mr. Nawaz Manik, Director Law EPA Punjab
(in C.As.545, 547 & 548/2015)

Mr. Makhdoom Ali Khan, Sr. ASC
Mr. Khurram Mumtaz Hashmi, ASC
Mr. Tariq Aziz, AOR
(in C.As.546, 549 & 550/2015)

For the respondent(s): Mr. Salman Akram Raja, ASC
Respondent No.1 in person
(for respondent No.1 in C.As.545 & 546/2015)

Mr. Raza Kazim, Sr. ASC
(for respondent No.1 in C.As.548 & 550/2015)

Mr. Mirza Mehmood Ahmed, ASC
Respondent No.1 in person
(for respondent No.1 in C.As.547 & 549/2015)

Mr. Shahid Hamid, Sr. ASC
Ms. Ayesha Hamid, Advocate
(for respondent No.10 in C.A.547/2015)

On Court's notice: Mr. Salman Aslam Butt,

Attorney General for Pakistan
Mr. Razzaq A. Mirza, Addl.A.G. Punjab
Mr. Mudassir Khalid Abbasi, A.A.G. Punjab

Dates of hearing: 22.06.2015 to 25.06.2015, 29.06.2015 to 03.07.2015, 06.07.2015 to 08.07.2015

JUDGMENT

MIAN SAQIB NISAR, J.-

1. The facts of this case though hotly disputed are relatively uncomplicated. Under challenge is the Signal Free Corridor Project (the "Project"). The Lahore Development Authority ("LDA"), a statutory authority established by the Government of Punjab ("GoPb"), is "*introducing*" two underpasses, 7 U-turns and 5 overhead pedestrian bridges on an existing 7.1 kms of the existing Jail Road and Main Boulevard. It starts from Qurtaba Chowk (roundabout) and ends at Liberty Market Main Chowk. According to the judgment of the High Court, this remodeling would convert this stretch into "a signal free, high speed expressway".

2. These appeals arise out of a judgment of the Full Bench of the Lahore High Court in 3 Writ Petitions. CAs No.545, 547 and 548 of 2015 have been filed by LDA against the common judgment in 3 Writ Petitions. CAs No.546, 549 and 550 of 2015 have been filed by GoPb.

3. Writ Petition No. 5323/2015: "Fahad Malik etc. v. Government of Punjab, etc." was filed to challenge the Project. The Petitioners in the Writ Petition alleged that the Project required the cutting down of a large number of trees, an Environmental Impact Assessment ("EIA") was mandatory from the Environmental Protection Agency, Punjab, ("EPA") prior to the commencement of the Project and that the Project fell within Serial No.2 of Part-D of Schedule-II of the Pakistan Environmental Protection Agency (Review of IEE & EIA) Regulations, 2000. The Project was called into question alleging that it would result in severe environmental degradation, it was irrational and discriminatory and violated Articles 37, 38 and 140A of the Constitution.

4. That on 26 February 2015 and 6 March 2015 the High Court granted restraining orders, which had the effect of stopping all work on the Project. The High Court directed that the EPA complete the EIA review and place its decision before the Court on 20 March 2015.

5. The EPA issued Public Notices in the press. It conducted a public hearing. The private respondents in these appeals participated in the process. After the completion of this process, the EIA approval was granted by EPA on 19 March 2015.

6. In the hearing of 20 March 2015 the Appellants GoPb and LDA argued that as the Project had been approved by EPA, the restraining orders be vacated. The High Court, however, directed the EPA to submit before it the entire record forming the basis of the EIA approval. It also directed that the record of the deliberations, which formed the basis of the EIA approval, and the detailed reasons dealing with the objections raised against the Project during the Public Hearing be submitted.

7. On 20 March 2015 Writ Petition No. 7955/2015 and Writ Petition No. 8008/2015 were also taken up for hearing. The former challenged the vires of several provisions of the LDA Act, 1975. The grievances included usurpation of Local Government functions enumerated in section 87 Punjab Local Government Act, 2013 ("PLGA 2013"). It was alleged that the democratic rights of the citizens of Lahore Division and the democratic functions of the Local Government of that area were usurped by the GoPb through the LDA Act, 1975 and by the unconstitutional exercise of executive powers. That besides violating the Fundamental Rights of the Petitioners the Project also violated, *inter alia*, Article 140A of the Constitution.

8. In Writ Petition 8008 of 2015 besides making allegations similar to those in Writ Petition No. 7955 of 2015, it was submitted that the approval granted by the Punjab EPA was illegal and violated the provisions of the Punjab Environment Protection Act 1997 ("PEPA").

9. That a full bench of the Lahore High Court after hearing arguments accepted these petitions, struck down Sections 6, 13, 13A, 14, 15, 16, 18, 20, 23, 24, 28, 34A, 34B, 35, 38 and 46 of the LDA Act, 1975 as *ultra vires* the Objectives Resolution, Articles 2A, 4, 9, 14, 17 and 25 of the Constitution and as offensive to Articles 32, 37 (i) and 140A of the Constitution. The Project was stopped and the National Accountability Bureau (NAB) was directed to initiate an inquiry against DG, LDA and DG, EPA.

10. That while detailed submissions were made before the High Court on the flaws of the Project and about its justification and rationale, the High Court declined to examine these issues.

11. According to the impugned judgment the "*merits or demerits of the Project*" and the "*rationality and justification for having such a Project*" were not examined by the High Court. The "*policy dimension of the Project or the technical viability of the Project*" was also not examined. It was made clear by the High Court that it was "*neither assuming the role of EPA or stepping into the shoes of the consultant who prepared the EIA or the concerned members of the civil society who, inter alia, opposed the Project on the ground of misplaced, inappropriate and irrational allocation of public funds.*"

12. The preliminary objections to the maintainability of the petitions and the inappropriate nature of the judicial review jurisdiction to examine questions of fact were overruled as the Court considered itself concerned with deciding constitutional questions that went to the root of the definition of democracy and federalism under the Constitution.

13. Mr. Khwaja Haris Ahmed, Senior ASC arguing for the Appellant LDA divided his submissions in four part:

    a) That the High Court should not have interfered in the matter as adequate alternative remedies were available to the Petitioners in the form of an appeal to a statutory tribunal constituted under PEPA.

    b) That in the exercise of its discretionary jurisdiction under Article 199 of the Constitution the High Court should have exercised judicial restraint.

    c) Such restraint should normally be exercised in policy matters.

    d) That the judgment of the High Court was vitiated by the bias of the senior member of the full bench.

14. Elaborating his submissions he urged that the PC I of the project should have been read with its EIA. Article 140A of the Constitution cannot dilute provincial legislative and executive powers. He submitted that the reliance of the High

Court on the doctrine of regulatory capture was misplaced. He further submitted that to the extent of inconsistency between the LDA Act and the PLGA, the former prevailed and the LDA Act impliedly repealed provisions of PLGA. He further submitted that the non-obstante clause in the LDA Act made it override the PLGA. That Local Government elections were yet to be held; therefore a vacuum existed which was rightly filled by the LDA Act, 1975.

15. He submitted that an appeal from the decision of PEPA was provided to the Environmental Tribunal headed by a former judge of the High Court and a second appeal was provided to a Division Bench of the High Court itself. An adequate remedy was available to the Petitioners and the High Court should not have issued the writs. He submitted that the concept of regulatory capture was not attracted to the case. The mere fact that appointments in the EPA were made by the GoPb does not suggest that there was regulatory capture. This was particularly so when there was no evidence on the record nor finding by the Court to suggest that such a defect had occurred. He submitted that legislation should not be struck down on vague concepts like subsidiarity.

16. The learned Senior ASC submitted that even the judgment conceded that in spite of promulgation of PLGA the Provincial Government retained certain minimum functions. That without these the Provincial Government would become completely ineffective.

17. Mr. Makhdoom Ali Khan, Senior ASC adopted the arguments of Mr. Khwaja Haris Ahmed with a caveat that he was not adopting or pursuing the bias argument. He submitted that the remarks against the learned Senior ASC be expunged and that the matter should rest there. He argued that Article 140A did not divest the Provincial Government of its legislative or executive authority. Articles 137, 142 and 140A of the Constitution have to be harmoniously construed.

18. Mr. Shahid Hamid, Senior ASC appearing for the Project Contractor submitted a plan giving details of the proposed project along with cost summary.

19. He submitted that the notable features of the project are:

    (i) Existing right-of-way of the Main Boulevard is 200 feet wide while that of Jail Road is 150 feet wide. The project is being executed within the existing rights-of-way.

(ii) There will be no increase in the number of lanes. Main Boulevard has six lanes. Jail Road has six lanes. These numbers will remain unchanged.

(iii) The service roads on either side of the Main Boulevard and along the Jail Road will remain as they are.

(iv) The medians along the Main Boulevard and the Jail Road will remain intact. Width of the median on the Main Boulevard from Zahoor Elahi road crossing to the Main Market will increase from 15 feet to 40 feet.

(v) There are 8 traffic signals between Qurtaba Chowk and Liberty Market roundabout. As a result of the project these will be replaced with 9 U-turns and 2 underpasses.

(vi) 196 trees have to be cut. These will be replaced with 1300 trees.

(vii) Existing green areas along the two roads is 160 kanals. This will increase to 182 canals.

(viii) Air and noise pollution will decrease while traffic congestion will be greatly eased.

(ix) The project is manifestly in the public interest and its impact on the environment will be positive and not adverse.

20. Mr. Shahid Hamid submitted that the project was included in the approved Integrated Master Plan 2021 for Lahore. It was included in the approved budget of the LDA for 2013-14. It has since been approved by the EPA also. The alleged irregularity involved in announcing the project without EPA clearance has thus been cured. He forcefully added that in fact there was no irregularity because as per entry at serial No.2 of Part-D of Schedule-II of the Pakistan Environmental Protection Agency Review of Initial Environmental Examination and Environmental Impact Assessment Regulations 2000 projects for maintenance, rebuilding or reconstruction of existing roads do not require an EIA. The meaning of 'rebuild' includes "*to make important improvements or changes in*". The Meaning of "reconstruct" includes "*to remodel and/or to make changes so as to make it the work more effectively.*"

21. Mr. Raza Kazim, Sr. ASC leading the arguments for the Respondents submitted that the questions relating to the project were of secondary nature and the decision of the case did not depend on them. He submitted that the validity of the EIA approval, regulatory capture, the merits of the project and flaws in the process were not germane to the controversy. He referred to Black's Law Dictionary for the definition of the term "*devolution*" and submitted that he who

devolves dies and the one upon whom authority is devolved is the only living institution. He submitted that after the insertion of the Article 140A in the Constitution all the political, administrative and financial responsibility and authority of the Province were devolved on the Local Government. In none of these matters the Province was left with any legislative or executive authority. All such authority had passed to the Local Government. There cannot even be a sharing of the authority between the governments.

22. Mr. Mehmood Ahmed Mirza, ASC supported the judgment of the Lahore High Court. He submitted that the constitutional issue was correctly decided by the High Court. He further submitted that the project violated the provisions of the LDA Act because it was repugnant to the Master Plan. Any project which was not in consonance with the Master Plan could not be upheld. He submitted that the project was malafide. He further submitted that Article 140A of the Constitution was an enabling provision and envisaged a third tier of the government. He also submitted that the process through which EIA was approved was neither meaningful nor transparent. The project was not in the public interest and would not result in the development of the city.

23. Mr. Salman Akram Raja, ASC in support of the judgment submitted that Article 140A of the Constitution is a paradigm shift whereby the executive, administrative and financial authority of the Province has been bifurcated between the provincial and the Local Government. He disagreed with Mr. Mirza that Article 140A was an enabling provision. He submitted that prior to Article 140A the Province had executive authority under Article 137 of the Constitution. Now, that is divided between the provincial and Local Governments. He submitted that one type of executive authority (LDA Provincial Government) could not take over the functions of the other kind of executive authority (Local Government) simply because there was a vacuum. He traced the history of the Local Government in the subcontinent in great detail and submitted that activities which earlier were Provincial Government functions were now in the Local Government's domain. He submitted that on the basis of a historic reading of the functions of the Local Government, except for spillovers and economies of scale all executive functions were local. In this context urban/spatial planning were Local Government functions.

24. He questioned why the government was spending the massive sum of Rs. 1.5 billion on the signal free corridor project. He submitted that insofar as the entire

discussion in the judgment on regulatory capture was concerned that was unnecessary and perhaps irrelevant. All that was argued before the learned judges of the full bench was that the DG EPA was one person and he should not alone be allowed to exercise the statutory powers vested in PEPA.

25. The above account merely adumbrates what was argued over the course of days. The details are in our analysis of the issues. Setting it all out here in great detail would add to the length of the judgment unnecessarily. It would also be tedious and repetitious. We may add that before us, lengthy submissions with copious references to case law have been made by the counsel for the parties over the course of many days. Besides these submissions we have had the benefit of detailed pleadings and have examined the documents on the record. We have carefully considered every argument raised, and all materials and record adduced by all the Parties. We have chosen, however, not to set out a lengthy account of each side's case in this judgment, but instead have in the course of the analysis below, simply summarised some of the principal points. In so far as any argument or document which has not been specifically identified or recorded in the body of this judgment, this does not mean it has not been taken into full consideration.

26. The first and pivotal question that concerns this Court is whether the High Court was justified in striking down several provisions of the LDA Act, 1975 on the touchstone of Article 140A read with Fundamental Rights, Article 9, 14, 17 and 25 of the Constitution as well as Articles 32 and 37(i) thereof. During the hearing of the appeals counsel on both sides of the divide candidly acknowledged that this indeed was the heart of the matter.

27. That the analysis of the High Court on the scope of Article 140A, its role in our constitutional scheme and the vires of the various provisions of the LDA Act, 1975 is contained in paragraphs 48 to 99 of the judgment. These observations can be summarized as follows:

    i. The principle of subsidiarity requires that decisions be taken at the lowest permissible level (paragraphs 73, 74, and 83 of the judgment). Local Government being at such a level ought to be given core functions (paragraph 59 of the judgment) by the provincial legislature (paragraphs 68 and 71 of the judgment). Section 87 of the PLGA 2013 confers such functions on the Local Government (paragraph 86 of the judgment). These functions cannot be "*stripped*"; "*reversed*" or "*rolled back*" without

challenging the "*legislative design*" of Article 140A (paragraphs 71, 77, 78 and 89 of the judgment).

ii. There are only three exceptions to the rule against "*stripping*", "*reversal*" or "*roll back*" of devolved functions. These are: (a) ineffectiveness of the Local Government; (b) spill overs; and (iii) economies of scale (paragraphs 75, 82, and 88 of the judgment).

iii. Subject to the above three exceptions the provincial framework has to conform to Article 140A as this is the "*basic architecture*"/"*basic structure*" of the Local Government (paragraphs 76 and 89 of the judgment).

iv. Section 4(1) of PLGA 2013 which requires the Local Government to "*function within the provincial framework*" and to "*faithfully observe the Federal and Provincial laws*" means that the Local Government will be complemented by the Provincial framework. It does not mean that the Province can impede, interfere or dilute the powers or functions of the Local Government. These functions will be exercised by the Local Government to the exclusion of the Provincial Government (paragraphs 76, 79 and 89 of the judgment).

v. The legislative powers under Articles 142 and 143 of the Constitution are to be exercised "*Subject to the Constitution*", which means that the remainder of the Constitution has to be considered. That would include: (a) Federalism; (b) Objectives Resolution; (c) Principles of Policy; (d) Article 140A of the Constitution and (e) Fundamental Rights, Articles 9, 14, 17 and 25 (paragraph 91 of the judgment). No Provincial or Federal law can impede the Local Government (paragraph 97 of the judgment).

vi. LDA Act, 1975 offends Article 140A. Section 6, 13, 13A, 14, 15, 16, 18, 20, 23, 24, 28, 34A, 34B, 35, 38 and 46 of the LDA Act were, therefore, struck down (paragraphs 95, 96 and 97). Likewise the executive authority of the Provincial Government, in the absence of legislation, cannot extend to Local Government affairs (paragraph 92 of the judgment).

28. That encouraging the growth of the Local Government institutions and decentralization of the Government administration are Principles of Policy under Articles 32 and 37(i) of the Constitution. However, the validity of an action or of

a law cannot be called into question on this basis in view of Article 30 (2) of the Constitution:

I. Zulfiqar Ali Babu v. Government of Punjab; PLD 1997 SC 11 at page 22B

II. Farhat Jaleel v. Province of Sindh; PLD 1990 Karachi 342 (DB) at page 354 E

III. Ghulam Mustafa v. Province of Sindh; 2010 CLC 1383 (Karachi HC) (DB) at page 1391 B

IV. Shazia Irshad Bokhari v. Government of Punjab; PLD 2005 Lahore 428 (DB) at page 434 D.

29. That although the Objectives Resolution has been made a substantive part of the Constitution by Article 2A, this Court has held that Article 2A cannot be used to strike down statutes:

I. Kaniz Fatima v. Wali Muhammad; PLD 1993 SC 901 at paras. 8 and 9;

II. Tank Steel and Re-Rolling Mills Pvt. Ltd. V. Federation of Pakistan, (PLD 1996 SC 77) at 84 E;

III. Zulfiqar Ali Babu v. Government of Punjab; PLD 1997 SC 11 at 22C;

IV. The Province of Punjab v. National Industrial Cooperative Credit Corporation; 2000 SCMR 567 at 606 F

30. Article 4 has also not been accepted as a criterion to test the vires of legislation:

Fauji Foundation v. Shamimur Rehman; PLD 1983 SC 457 at 595-7, paras. 153 to 156

31. Indeed, in the exercise of its jurisdiction under Article 184(3) of the Constitution this Court has observed that it can read the Objectives Resolution, Article 2A and the Principles of Policy together with Fundamental Rights:

I. Pakistan Muslim League (N) v. Federation of Pakistan; PLD 2007 SC 642 at 670 – 671 J;

II. Human rights case; 1993 SCMR 2001 at 2004 A;

III. Benazir Bhutto v. Federation of Pakistan; PLD 1988 SC 416 at Page 489;

32. This does not, however, mean that the Principles of Policy, the Objectives Resolution, and Article 2A either on their own or when read together can be used to strike down laws. All that it means is that these Articles can be used to understand and interpret the chapter on Fundamental Rights in its proper context. This may facilitate an interpretation of Fundamental Rights in harmony with and not divorced from their constitutional setting. The object of this approach is to harmoniously construe the various provisions of the Constitution in a holistic manner. This approach does not deviate from the view taken by the Court that the Objectives Resolution, Article 2A and the Principles of Policy cannot provide a criterion to test the validity of statutes and to strike them down.

33. With the introduction of Article 140A in the Constitution, the establishment of a system of Local Government is no longer a Principle of Policy. The Constitution mandates that each Province shall, by law, establish a Local Government System and devolve political, administrative and financial responsibility and authority to the elected representatives of the Local Government. Following this command of the Constitution, the Provincial Assembly of Punjab has enacted PLGA 2013. In like manner the Provincial Assemblies of Balochistan, KPK and Sindh have also enacted the Balochistan Local Government Act, 2010, Khyber Pakhtunkhwa Local Government Act, 2012 and Sindh Local Government Act, 2013, respectively.

34. Section 72 of the PLGA 2013 lists the functions of the Union Councils. Sections 76 and 77 list the functions of the District Councils. The functions of the Municipal Committees are listed in Section 81 and the functions of the Metropolitan and Municipal Corporations are listed in Section 87. Section 65 provides that the Provincial Government may also devolve one or more of its functions to the Local Government. Section 148 provides that notwithstanding any specific provision of the PLGA, the Local Government shall also perform the functions listed in the Eighth Schedule. This Schedule lists as many as 105 general powers of Local Governments. Read in an expansive manner these functions can virtually trump the Provincial Government. It would be left with little to do except perhaps to enact legislation further broadening these functions. This Court does not favour an interpretation which would reduce the role of the

Provincial Government to that of a mere cipher. It would eschew a course which makes Article 137 of the Constitution redundant by severing the link between the extent of executive authority of a Province to the matters subject to its legislative authority.

35. At the same time if Article 140A is not to be a merely hollow constitutional promise the Provincial Government is obliged to devolve, by law, some political, administrative and financial responsibility on the Local Government. This much is beyond doubt. This Court is not inclined to hold that Article 140A is an exercise in futility and the Provincial Government continues to retain the same wide legislative and executive authority that it did before its insertion. **The question is where to draw the line**.

36. Articles 137 and 140A have to be read in harmony. Neither overrides the other. These provisions provide a scheme for a representative government and participatory democracy in the country. These provide a scheme to establish Local Government and articulate a framework within which the Provincial Government must function. The authority conferred on the Province and the responsibilities devolved on the Local Government form part of a common scheme. These are not to be used as trumps. One cannot cancel the other. These are co-equal norms. They weave the constitutional fabric.

37. We are also acutely conscious of the fact that the other three Provinces have also enacted Local Government legislation. They too have listed the functions of the Local Government in their respective statutes. The four Provincial statutes may not be identical but are similar in many respects. The other three Provincial Governments are not represented in this case. Our interpretation of the Constitution will bind those Provinces as well. We must, therefore, decide this case on the narrowest possible ground. The issues which are not germane to this controversy must be left to be decided in a case where these are determinative for the controversy. Constitutional cases, even otherwise, must be decided on the narrowest possible grounds. Keeping these principles in sight we proceed to examine the statutory and constitutional provisions.

38. Section 87 of the PLGA 2013 lists the functions of the Metropolitan and Municipal Corporations. The High Court in paragraph 86 of the judgment expressed the view that this provision clearly delineated "*the devolved core functions and responsibilities of the Local Government (LMC)*".

39. That these functions cannot be "*stripped*" (paragraph 78) and that the Provincial Government cannot "*take any step that reverses or rolls back*" (paragraph 89) these functions. That any interference in this, "*political, administrative and financial space of the Local Government System, would be undemocratic*" and once the devolution has taken place, "*any interference or dilution of this power by the Provincial Government or any other authority, without there being any change in the legislative design, which draws its power under Article 140A*" would be impermissible. That these basic core functions read with Article 140A of the Constitution provide the "*basic architecture*" (paragraph 76) and "*basic structure*" (paragraph 89) of the Local Government System, which cannot be stripped, reversed or rolled back.

40. This effectively means that once a Provincial Government has enacted a statute devolving certain basic functions on the Local Government it loses its powers to amend the Provincial law. These provisions become unamendable. These functions cannot be abridged or curtailed. They can only be expanded. The constitutionally conferred legislative authority of the Provincial Assembly to amend the law, with regard to Local Government, can only be exercised to enhance and not to curtail the functions of the Local Government.

41. This is an interpretation which we cannot endorse in spite of the fact that we accept that the Local Government must have meaningful powers under the PLGA 2013. We also find it difficult to accept the interpretation that once such powers or functions are conferred by a provincial law, the Provincial Assembly is denuded of the power to amend this law except in a particular manner. It is impermissible to so curtail or limit the legislative authority of the Province in Local Government matters. Constitutions must be interpreted with an eye to the future. These are living documents. The future may throw up issues which require legislative intervention. The functions and responsibilities of the Local and Provincial Governments may require further articulation. This Court cannot today rule that irrespective of the circumstances, which may compel such modification or the political realities of the day that may require a re-think, the Province would have no legislative authority in the matter.

42. It is well settled that the legislature of today cannot enact a law or pass a resolution, which binds a successor legislature. Such a commitment made either through a resolution or legislation, whereby the powers of a future legislature to amend a law are abridged will not bind a successor Legislature or even the same Legislature. This is black letter constitutional law. If any authority is required for

this it can be found in *Re: Special Reference under Article 187 of the Interim Constitution of the Islamic Republic of Pakistan by President Zulfikar Ali Bhutto; PLD 1973 SC 563 at 576 J:*

> *The form of the resolution proposed to be placed before the House, itself contemplates that legal and constitutional measures may be necessary to give effect to the object sought to be achieved. It is for this reason that a "firm assurance" is being sought from the assembly. No violation for any provision of the Constitution is, therefore, even contemplated. Such an assurance too will be nothing more than a pious wish, for legally it would not bind any future Parliament or present Parliament, for when the legislative measure or constitutional amendment is brought before a House, the House will be free to consider it uninhibited by any assurance it may have given earlier. No Legislature can legally abrogate its sovereign right to legislate as and when a legislative measure is brought before it in the light of its own provisions. The Legislature cannot be bound by any previous promise or assurance to legislate in a particular manner. Such a promise or assurance will neither be legally binding nor enforceable.* ***(Emphasis Supplied).***

43. Such an interpretation would lead to difficulties in working of a republican government. It may give undemocratic results. A political party in majority in a Provincial Assembly as well as the Local Bodies when faced with imminent defeat in a forthcoming political election may devolve all political, administrative and financial responsibility and authority to the Local Government. Another political party, which wins the Provincial elections and forms the Provincial Government would be faced with a situation where all its powers have been devolved on the Local Government. It would be left with no political, administrative or financial functions or responsibilities. Its role would have been reduced to that of a mere facilitator of the Local Government. Yet, it would be unable to amend the Local Government legislation, reducing the powers of the Local Government and conferring some authority on itself. The defeated political party and the outgoing government would, thus, have denied it the fruits of its success in the provincial elections. It would have no authority be it political, administrative or financial to run the affairs on the Provincial plane.

44. The interpretation of the High Court that once the core functions have been devolved on the Local Government these cannot be "*rolled back*" (in other words amended), cannot, therefore, be sustained.

45. Such an amendment in the functions or responsibilities can take place by amending the PLGA 2013. This can also be done by enacting or amending other laws which have the effect of trimming the PLGA 2013. To state that while the Provincial Legislature may take the former route it cannot take the latter is to restrict the legislature in the mode and manner of the exercise of its legislative powers. This would result in defeating the substance. In the absence of a constitutional command to the contrary, a Court cannot read such limitations into the exercise of legislative authority.

46. The High Court, too, acknowledged that such provincial legislation cannot be immutable in all circumstances. In paragraphs 75, 82 and 88 of the impugned judgment, it was observed that the Provincial Government can perform the functions and exercise the authority devolved on the Local Government in three situations:

I. When the Local Government lacked capacity or was ineffective;

II. When the function was of a nature which spilled over from the territory of one Local Government into that of another; and

III. When economies of scale justified such intervention.

47. That there may be other circumstances in which a Provincial Government may be compelled to act were not countenanced by the High Court.

48. The High Court, therefore, interpreted even Section 4(1) of PLGA 2013, which required the Local Government to "*function within the Provincial framework*" and to "*faithfully observe the Federal and Provincial laws*" to mean that the Local Government could only be complemented by the framework of Provincial legislation. The Province, according to the impugned judgment had no authority to impede, interfere or dilute the powers or the functions of the Local Government. These functions were to be exercised by the Local Government to the exclusion of the Provincial Government. (paragraphs 76, 79 and 89)

49. If this were so once the Province had exercised its legislative authority to devolve certain political, administrative or financial functions or authority on the Local Government its legislative and executive authority would be correspondingly abridged. If political, administrative and financial powers were devolved to the fullest extent, the Province would be left with no legislative or executive authority. It would also lose the means to recoup such authority by legislation. This would mean that once a Provincial Legislature conferred the full panoply of political, administrative and financial responsibility on the Local Government, its own constitutional, legislative and executive authority would be taken over by that of the Local Government now and forever. The impractical results that it may lead to and the constitutional principles against which such an interpretation runs have already been identified by us.

50. The High Court was of the view that Articles 142 and 137 of the Constitution, being prefaced by the words "*Subject to the Constitution*" mean that the remainder of the Constitution had to be considered (paragraph 91). That these Articles would be subordinated to all those provisions which were not so prefaced. Article 140A, not being prefaced by such words, the legislative and executive constitutional authority of the Province would be subject to the principles of Federalism, Objectives Resolution, Principles of Policy, Fundamental Rights, 9, 14, 17 and 25 and Article 140A of the Constitution. As a result no provincial or federal law could impede Local Government (paragraph 97).

51. This interpretation gives too wide a scope to the words "*Subject to the Constitution*". In *Muhammad Khan v. The Border Allotment Committee; PLD 1965 SC 623 at 633 F,* this Court held that the words "*Subject to this Constitution*" in Article 98 (2) meant that the jurisdiction provided for in Article 98(2) of the 1962 Constitution could be exercised except where the Constitution itself created a bar. For example, no writs could be issued to the President, the Governor or in relation to proceedings in the Legislature on account of certain provisions in the Constitution. The words "*Subject to the Constitution*" were inserted for Article 98(2) to keep it consistent with provisions in the Constitution which bar jurisdiction of Courts in certain matters."

52. The words "*Subject to the Constitution*" in Articles 142 and 137 of the Constitution simply mean that where the Constitution itself places a bar on the

exercise of legislative or executive authority by the Province such authority cannot be exercised in spite of its conferment by these Articles. For instance, while the Province has executive authority under Article 137, this authority must be so exercised so as to secure compliance with federal laws, which apply in that Province [Article 148(1)]. It must also be so exercised so as not to impede or prejudice the executive authority of the Federation [Article 149(1)]. Likewise, the legislative authority of the Province under Article 142 of the Constitution can be conferred on the Federation under Article 144. Further, neither the executive nor the legislative authority of a Province can be exercised in a manner which violates Fundamental Rights. Any such exercise would fall foul of Article 8 of the Constitution.

53. The words, "*Subject to the Constitution*" do not, therefore, make Articles 137 or 142 subservient to the remaining provisions of the Constitution. All that these mean is that where the Constitution creates a specific bar to the exercise of such executive or legislative authority or provides a different manner for such exercise then that authority must either not be exercised at all or exercised in such manner as the Constitution permits. It does not mean that the provision prefaced with such words is a subordinate constitutional provision. It also cannot mean that once the Province has devolved certain powers on the Local Government, its legislative and executive authority is effaced by that of the Local Government. The said provisions are not subordinate, but provisions, the exercise of authority under which, is untrammeled except where the Constitution itself creates a specific and overriding bar.

54. The Province is under an obligation under Article 140A of the Constitution to establish, by law, a Local Government System and to devolve political, administrative and financial responsibility on the Local Government. Yet, in doing so it is not stripped bare of its executive and legislative authority under Articles 137 and 142 of the Constitution. The Provincial and the Local Governments are to act in a manner, which complements one another. The Constitution, therefore, envisages a process of participatory democracy, where the two governments act in harmony with one another to develop the Province. The authority of neither destroys the other. Article 140A cannot be used to make the provisions of Article 137 and 142 either subordinate to it or otiose. One constitutional provision cannot, unless it is so specifically provided, override another and must be harmoniously construed together, as repeatedly held by this Court:

I. Hakim Khan v. Government of Pakistan; PLD 1992 SC 595 at 616 D;

II. Kaneez Fatima v. Wali Muhammad; PLD 1993 SC 901 at 910 A, 912 E and 914 G;

III. Zaheeruddin v. The State; 1993 SCMR 1718 at 1743 E, F and G;

IV. Al-Jehad Trust v. Federation of Pakistan; PLD 1996 SC 324 at 515 LLLL;

V. Pakistan Lawyers Forum v. Federation of Pakistan; PLD 2005 SC 719 at 763 N and P;

VI. Raja Muhammad Afzal v. Government of Pakistan; PLD 1998 SC 92 at 97 A;

VII. Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan; PLD 1998 SC 1263 at 1313 I, 1318 P, 1357 W and 1392 WW;

55. The creation of a Local Government System, and the conferment upon the Local Government of certain political, administrative and financial responsibilities does not deprive the Province of authority over its citizens and deny it all role in the progress, prosperity and development of the Province. The creation of a Local Government System does not spell the end of the Provincial Government in the Province. To the contrary it strengthens the Provincial Government by entrenching democracy at grass root level.

56. That even after the insertion of Article 140A the Provincial Government would continue to have the authority to enact and amend statutes, make general or special laws with regard to Local Government and local authorities, enlarge or diminish the authority of Local Government and extend or curtail municipal boundaries. This power of amendment has, however, to be informed by the fact that if the Provincial Government oversteps its legislative or executive authority to make the Local Government powerless such exercise would fall foul of Article 140A of the Constitution. An excessive or abusive exercise of

such authority would not be countenanced by this Court. It would be struck down.

57. In India too the Constitution was amended to provide for Local Government. Its powers were enumerated in the Twelfth Schedule to the Constitution. In respect of development of a roads project by the State Government a question arose whether after the constitutional amendment the State Government any longer has any role in such matters. In *Society for Preservation of Environment & Quality of Life, Hyderabad v. State of Andhra Pradesh – AIR 1997 Andhra Pradesh 381 at p.386, para.5, 6 & 7* it was held that the "*matters enumerated in Schedule-XII thus continue to be a State subject and the State's executive power being co-extensive with subjects of legislation does not in any manner go out of its hands except to the extent under the laws made by the legislature. It is nowhere, however, seen in the Hyderabad Municipal Corporation Act that obligations for the construction, maintenance, alteration and improvements of streets, bridges, sub-ways, culverts, cause-ways or the like vested in the self-government called Municipal Corporation would denude the State Government of its power to create roads and necessary facilities for the City of Hyderabad."*(Emphasis Supplied).

58. This still leaves the question as to what is to be the scope of the political, administrative and financial authority to be conferred on the Local Governments. It is obvious that the conferment of all such authority on the Local Government would completely efface the Provincial Government within a Province and would violate Articles 137 and 142 of the Constitution. On the other hand, a complete failure to devolve any such authority would violate Article 140A of the Constitution. It is therefore clear that some meaningful political, administrative and financial authority must be devolved on the Local Governments. The extent of such devolution has to be between nothing and everything. The Constitution makers could have determined the scope of such devolution by enumerating Local Government powers within the Constitution itself. They chose, however, not to do so.

59. The omission by the Constitution makers to specifically enumerate such powers was deliberate. They left the scope of such powers to be determined by each Province in accordance with the prevailing circumstances and political realities of the day. They acknowledged that the process must be initiated, yet were conscious of the fact that it has to be gradual. As Local Governments

evolve, more and more powers would have to be devolved. Room was left for political experimentation, constitutional dialogue and growth. Instead of enumerating Local Government powers the Constitution makers left these to be worked out in harmony between the Provincial and Local Government. Why? Because they were conscious that political processes are evolutionary in nature. Institutions take root over time. They draw strength from a continuous constitutional dialogue between the people and their elected representatives. Implicit in this was also the recognition that the imposition of a ready-made model from the top often proves dysfunctional. It retards rather than accelerates political consensus. Much more stable is a model, which develops after mutual give and take over time. The progress of law, the development of political processes and the growth of institutions is often like the progress of a mountaineer: two steps forward, one step back. It may appear to be slow but patience is rewarded with stability.

60. Judges should be wary of rushing in where Constitution makers hesitated to tread. The line will emerge gradually with time. It will be made apparent by a constant process of give and take at various levels between the two elected government and between the elected representatives and their constituents. A judge made clear bright lined divider would have the advantage of certainty. At the same time it would suffer from the limitations of having by-passed the political processes and having not been tested in the crucible of time. It would be brittle and lack flexibility. It would freeze political debate. It would retard the growth of politics and the evolution of the republic. That is inevitable when unelected judges take over the policing of lines which are better manned by the people and their elected representatives.

61. The High Court has acted on the assumption that the Provincial Government and the Provincial Assembly have operated and will inevitably operate in a manner injurious to Local Government. That a nascent Local Government, therefore, needs protection from the Provincial Government ogre. Such paternalism may no doubt provide some protection to Local Government but at the same time it would also retard the political processes that strengthen and promote stability in new institutions. This Court would much prefer a solution which allows constitutional dialogue and political processes to evolve the dynamics of devolution that would lead to the development of stable and functionally efficient institutions over a period of time.

62. There is no doubt that, as correctly noted by the High Court, the amendments made in the LDA Act, 1975 give LDA the authority to act, to undertake projects and to carry out work, which under the PLGA 2013 is within the Local Government domain. The functions of the Municipal Corporations under Section 87 of PLGA 2013 and that of the LDA under the LDA Act 1975 overlap.

63. That Section 46 of the LDA Act, 1975 by giving overriding effect to its provisions is capable of being construed in a manner which makes it a statute which can override Local Government authority under PLGA 2013. If full sway is to be given to the authority of LDA under the LDA Act, 1975 it may indeed erode Local Government authority within the Lahore Division. The High Court believed it would indeed do so. It, therefore, used Article 140A as a criteria for constitutional validity and by invoking Fundamental Rights, 9, 14, 17 and 25 struck down Sections 6, 13, 13A, 14, 15, 16, 18, 20, 23, 24, 28, 34A, 34B, 35, 38 and 46 of the LDA Act, 1975. (paragraph 91)

64. The power to strike down or declare a legislative enactment void, however, has to be exercised with a great deal of care and caution. The Courts are one of the three coordinate institutions of the State and can only perform this solemn obligation in the exercise of their duty to uphold the Constitution. This power is exercised not because the judiciary is an institution superior to the legislature or the executive but because it is bound by its oath to uphold, preserve and protect the Constitution. It must enforce the Constitution as the Supreme Law but this duty must be performed with due care and caution and only when there is no other alternative.

65. Cooley in his “Treatise on Constitutional Limitations”, Pages 159 to 186, H.M. Seervai in “Constitutional Law of India”, Volume I, Pages 260 to 262, the late Mr. A.K. Brohi in “Fundamental Law of Pakistan”, Pages 562 to 592, Mr. Justice Fazal Karim in “Judicial Review of Public Actions” Volume I, Pages 488 to 492 state the rules which must be applied in discharging this solemn duty to declare laws unconstitutional. These can be summarized as follows:

I. There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;

II. Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;

III. A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;

IV. If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;

V. The Court will not decide a larger constitutional question than is necessary for the determination of the case;

VI. The Court will not declare a statute unconstitutional on the ground that it violates the spirit of the Constitution unless it also violates the letter of the Constitution;

VII. The Court is not concerned with the wisdom or prudence of the legislation but only with its constitutionality;

VIII. The Court will not strike down statutes on principles of republican or democratic government unless those principles are placed beyond legislative encroachment by the Constitution;

IX. Mala fides will not be attributed to the Legislature.

66. These principles have been repeatedly articulated by this Court:

I. Province of East Pakistan v. Sirajul Haq Patwari; PLD 1966 SC 854 at 954

II. Mehreen Zaibun Nisa v. Land Commissioner; PLD 1975 SC 397 at 433

III. Kaneez Fatima v. Wali Muhammad; PLD 1993 SC 901 at 915 J

IV. Multiline Associates v. Ardeshir Cowasjee; 1995 SCMR 362 at 381

V. Ellahi Cotton Mills Limited v. Federation of Pakistan; PLD 1997 SC 582 at 676

VI. Dr. Tariq Nawaz v. Govt. of Pakistan; 2000 SCMR 1956 at 1959-1960

VII. Mian Asif Aslam v. Mian Muhammad Asif; PLD 2001 SC499 at 511

VIII. Pakistan Muslim League (Q) v. Chief Executive of Pakistan; PLD 2002 SC 994 at 1010, 1031, 1032

IX. Pakistan Lawyers Forum v. Federation of Pakistan; PLD 2005 SC 719 at 767 V, 773 CC & DD, 774 EE

X. M/s. Master Foam (Pvt.) Ltd. v. Government of Pakistan; 2005 PTD 1537 at 1556 F

XI. Watan Party v. Federation of Pakistan; PLD 2006 SC 697 at para. 40, p. 727

XII. Federation of Pakistan v. Haji Muhammad Sadiq; PLD 2007 SC 133 at 160 L, 168 V

XIII. Dr. Mobashir Hassan and others v. Federation of Pakistan and others; PLD 2010 SC 265 at 349 G & H

XIV. Iqbal Zafar Jhagra v. Federation of Pakistan; 2013 SCMR 1337 at 1379 J

67. The High Court discussed Articles 9 (Right to life) and 14 (Dignity of man) in Paragraphs 24, 25, 91 and 96 of the judgment. However, in the judgment there is no discussion on how these rights are violated by the provisions of the LDA Act, 1975 which have been struck down. No attempt has been made to put these provisions next to these Fundamental Rights and state why the two cannot be reconciled.

68. Article 17 (Freedom of Association) is discussed in Paragraphs 85, 91 and 96 of the judgment. This right, it is observed would be rendered meaningless if the elected political party in the Local Government System is not allowed to function in the devolved political, administrative and financial space and the citizen is not permitted to participate in this political space. It is further observed in Paragraph 85 of the impugned judgment that when the devolved powers of the Local Government are abridged, diluted or impeded by the Provincial Government it offends the constitutional provisions of political and social justice besides Fundamental Rights, 9, 14, 17 and 25. There is, however, no discussion on why one or more of the provisions which have been struck down encroach upon these fundamental rights. There is also no discussion on why these fundamental rights cannot be exercised on account of these legislative provisions.

69. Article 25 (Equality) has been invoked (paragraphs 90, 91 & 96 of the judgment) on the ground that the residents of Lahore are denied the right to a democratic process while areas outside the jurisdiction of Lahore the Local Government has full sway.

70. There is no discussion on why given the size of the population the expanse of the area, the nature and complexity of the problems and the needs of a mega city, Lahore cannot be dealt with and its growth and development promoted in a manner different from other parts of the Province. A government must not be compelled to follow a cookie cutter approach or else to suffer judicial condemnation. All difference is not discrimination. Such a classification is not *per se* unreasonable.

71. This Court has on several occasions held that where the statute is not *ex facie* repugnant to Fundamental Rights but is capable of being so administered it cannot be struck down unless the party challenging it can prove that it has been actually so administered:

I. Federation of Pakistan v. Shaukat Ali Mian; PLD 1999 SC 1026 at 1058 Z;

II. Benazir Bhutto v. Federation of Pakistan; 1991 MLD 2622 at 2638-39 D;

III. East and West Steamship v. Pakistan; PLD 1958 SC 41 at 50 B;

IV. Jibendra Kishore Achharyya Chowdhry v. The Province of East Pakistan; PLD 1957 SC 9 at 33 C

72. This the petitioners before the High Court could not establish. And indeed the High Court did not so find. There was, therefore, no basis to strike down the provisions of the LDA Act, 1975.

73. As the test for striking down statutes is not met the provisions of the LDA Act, 1975 could not have been struck down by the High Court. At the same time, this Court is mindful of the fact that if the provisions of the LDA Act, 1975 are interpreted as giving the LDA authority to overlap and override the Local Government and Section 46 is given full sway, it would result in a Local Government that is devoid of all authority be it political, administrative or financial.

74. The solution, therefore, lies in reading the provisions of the two statutes in harmony. The LDA Act, 1975 is to be regarded as an enabling statute. It allows LDA to act in support of and to complement the Local Government in the exercise of its functions and responsibilities. Where the Local Government is unable to act because of a lack of resources or capacity, or where the project is of such a nature that it spills over from the territory of one Local Government to another or where the size of the Project is beyond the financial capacity of the Local Government to execute; the LDA can step in and work with the Local Government. Economies of scale, spillovers and effectiveness are merely illustrative of the situations in which the LDA can act in the exercise of its functions to carry out developmental and other work and perform its statutory functions. These are not exhaustive. Life and time may throw up other situations and create circumstances which may warrant LDA action to be taken in consultation with the Local Government within the purview of PLGA, 2013. Closing the categories today will freeze growth and retard progress.

75. Likewise the Provincial Government, in the exercise of its legislative and executive authority can aid and support the Local Government. The Provincial Government is also not prevented from taking the initiative for the growth and development of the people and the Province in the exercise of its legislative

and executive authority. The exercise of such authority must, however, be in the public interest. It should encourage institutional growth and harmony. It must be in consultation and with the participation of the Local Government. To complement is not to take over.

76. We are conscious that at times a Local Government too may decline consent for extraneous reasons. Where such consent is unreasonably withheld or denied for considerations other than in the public interest the Provincial Government would be at liberty to act in the public interest while constantly drawing guidance from the provisions of the PLGA 2013 as for the time being in force. Indeed the courts too can step in and interfere with such a failure to grant consent.

77. Viewed in this light the LDA Act, 1975 and the legislative and executive authority of the Province are not inconsistent with Article 140A of the Constitution. These create a framework where the Provincial and Local Governments and authorities of the Provincial Government work together in the public interest.

78. That being so what should one make of Section 46 of the LDA Act, 1975 which gives its provisions overriding effect. Its use as a tool to demolish the PLGA would be repugnant to Article 140A. To strike it down would mean that even where the provisions of the LDA Act conflict with provisions of other statutes it would not override those. That cannot be the legislative intent. We are of the view that Section 46 would apply only in the event of a conflict or inconsistency between its provisions and that of other statutes. It would have no application and cannot be used to make the LDA Act to otherwise stall PLGA 2013 when substantive factual or policy grounds are unavailable. When harmoniously construed, as stated above, there is no conflict between the provisions of the PLGA 2013 and the LDA Act 1975.

79. The maxim *ut res magis valeat quam pereat* applies. An interpretation that validates outweighs one that invalidates. As observed by Cardozo J albeit in dissent in Panama Refining Company v Ryan 293 U.S. 388, 439 (1935) "*When a statute is reasonably susceptible of two interpretations, by one which it is unconstitutional and by the other valid, the court prefers the meaning that preserves to the meaning that destroys*". Antonin Scalia and Bryan Garner in their treatise, Reading Law: The Interpretation of Legal Texts at page 66 state; "*The presumption of validity disfavours interpretations that would nullify the*

provision or the entire instrument". Section 46, therefore, need not be struck down. It is interpreted as being a provision which does not trump or destroy or abridge any provision of the PLGA, 2013. Read thus it does not offend Article 140A and need not be struck down.

80. It will also not be appropriate to enumerate the minimum or maximum political, administrative and financial powers which must be conferred upon the Local Government to satisfy the mandate of Article 140A of the Constitution. These have to be worked out by the Local and Provincial Governments in a constitutional dialogue over time. The contours will emerge and the content will be identified as the political process continues and democracy takes root. It cannot be done wholesale and here and now. In this the Provincial Government, as the repository of all legislative and executive authority in the Province, must take the initiative. It is, therefore, for the Provincial Government to work constantly and tirelessly to fulfill the mandate of Article 140A and realize its ideals.

81. Where this mandate is abdicated or exceeded the courts will step in. It would, however, be imprudent to provide here an exhaustive catalogue of the dos and don'ts. It would freeze both the provincial and Local Governments in airtight compartments. The ship of state and government, like life and law, does not sail smoothly in watertight compartments. As observed by Holmes J in Bain Peanut Co. v Pinson 282 U.S. 499, 501 (1931): "*we must remember that the machinery of Government would not work if it were not allowed a little play in its joints*". Or as he wrote in his book The Common Law at page 1:"*The law embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics … Life is painting a picture; not doing a sum*". It would also tie down the judges in future to this catalogue which in the facts of the case before them may prove to be non-exhaustive or inaccurate. Like Stewart J in *Jacobellis v Ohio 378 U.S 184, 197 (1964)* I too "*shall not today attempt further to define the kind of materials I understand to be embraced within that short-hand description and perhaps I could never succeed in intelligibly doing so. But I know it when I see it…*" It is best in such situations to move forward with caution so that our judgments prove to be stepping stones towards a democratic future and not fetter us to the past.

82. The High Court has also ignored a number of realities of the day. Elections to Local Government in the Province have not taken place as yet. There is no

conflict at the moment between Local and Provincial authorities. Developmental work, even if it fell within the domain of the Local Government, could not have been abandoned and all projects brought to a standstill simply because the Local Government did not exist. Even if these functions could be assumed to be within the exclusive domain of the Local Government and could only be exercised by it to the exclusion of everyone else, even then, given the reality of the day, the Provincial Government could not be taken to task for carrying out development work.

83. There was, and at the moment is, a political vacuum due to the absence of elected Local Government. The High Court itself acknowledged that this was so and allowed the LDA to continue with day to day repair and maintenance work and complete all pending projects (paragraph 100). The High Court also acknowledged that the Project too was pending and "*was stopped through an interim order*" (paragraph 100 A). Yet, the High Court ruled that the Project had, "not commenced" (paragraph 100) and, therefore, struck it down as unconstitutional. No reasons were given for treating this Project differently from all other pending projects. Further, the Court gave no reason why there being a vacuum, LDA and/or Provincial Government could not carry out development works. It is settled law that the law abhors a vacuum:

I. Ghazala Tariq v. Federation of Pakistan; 2005 PLC (CS) 271 at 273 A

II. Mumbar and another v. Ijaz Hussain and others; 2007 SCMR 533 at 536 A

III. Air League of PIAC Employees v. Federation of Pakistan; 2011 SCMR 1254 at 1279 Q

IV. Sarfraz Saleem v. Federation of Pakistan and others; PLD 2014 SC 232 at 235 B & C

It was, therefore, not at all necessary to either strike down laws or interfere with the Project.

84. Although counsel for both sides submitted that the real issue in the case was constitutional and the discussion on the process followed by the regulator was

perhaps unnecessary; yet they at the same time spent considerable time on the issue. We, therefore, feel it necessary to discuss this aspect of the case too albeit briefly.

85. Even Mr. Salman Akram Raja ASC disassociated himself from the findings of the High Court on regulatory capture. Indeed he was right in doing so. The doctrine applies where a statutory body set up to regulate a group is then manned by the persons from that group to defeat regulation. It would not apply where the regulated includes the government because inevitably appointments to such regulatory bodies have to be made by the government. That does not mean that the government can defeat the legislative intent by not appointing persons to such bodies or by making appointments of such persons who will act but only under its dictation. The power to appoint has to be exercised in a fair manner and the exercise of authority by the appointee has to be transparent, in the public interest and non arbitrary.

86. The government does not have an absolute discretion in the matter. For as Douglas J wrote in New York v U.S 342 U.S. 882, 884, "*Absolute discretion like corruption marks the beginning of the end of liberty*". Even where legislative bodies confer discretion on regulators without meaningful standards it is the duty of those on whom such discretion has been conferred to structure it. They must develop standards to regulate it. They should confine their discretion through principles and rules. This has been the consistent view of this Court: *Chairman RTA v. Pak Mutual Insurance Co. PLD 1991 SC 14 at 26*.

87. This was clearly not done in the present case. Further, Section 5(6) of the Punjab Environmental Protection Act, 1997imposed a mandatory duty on the Provincial Government to constitute Advisory Committees under the said Act. This Committee is meant to assist the Environmental Protection Agency in evaluating the environmental impact of projects under consideration. The failure by the Provincial Government to constitute the said Committee violated its statutory duty.

88. In spite of the fact that we were not inclined to strike down the statutory provisions and our reading of the Constitution is very different from that of the High Court we hesitated before taking a different view from the High Court on these aspects of the case. We would have struck down the EIA for these reasons but eventually decided against it.

89. We decided so because in our view as per entry at Serial No.2 of Part-D of Schedule-II of the Pakistan Environmental Protection Agency (Review of IEE & EIA) Regulations, 2000 projects for rebuilding or reconstruction of existing roads do not require an EIA. The meaning of rebuild includes "*to make important improvements or changes in*". Meaning of reconstruct includes "*to remodel and/or to make changes so as to make it work more effectively*". The Project, therefore, did not require EIA approval.

90. Further and more important is the fact that the impugned judgment has not recorded any objection to the EIA on its merits, nor have the respondents highlighted any objection that has remained unattended and yet is fatal to the EIA. Moreover, the statute provides an appeal to an Environmental Tribunal presided over by a retired judge of the High Court and a second appeal to a Division Bench of the High Court itself. Neither of these remedies have been availed by the objecting respondents. We cannot strike down the EIA upon a mere presumption or apprehension.

91. This should not, however, be construed as an endorsement of the failure by the Punjab Government to constitute Advisory Committees under PEPA. The failure to do so immediately would be a violation of a statutory duty and provide grounds for striking down an EIA. Such committees must be constituted immediately and in any event no later than 45 days. Further, in the exercise of its authority the EPA has to act in a fair, non-arbitrary and non-discriminatory manner. It must not act under the dictation of the Punjab Government. It must act fairly and free from governmental influence. It must also record cogent reasons for both granting and refusing an EIA. The duty to record reasons is mandatory. Where no reasons are recorded the courts would be justified in concluding that no good reasons exist. That would render the administrative or regulatory order void.

92. We now turn to one peripheral and one consequential matter. While accepting the writ petitions the learned judges of the High Court made a number of disparaging remarks about a learned senior counsel. Such remarks undoubtedly cause reputational damage. The temptation to go down this road must be avoided except in the rarest of rare cases. And even then the reasons for making such remarks must be carefully and clearly stated. In this case the remarks have been made without a word of explanation about what occasioned these. All the learned counsel for the respondents chose not to defend the

remark at all. We direct that these remarks contained in paragraph 10, 21 & 22 of the judgment be expunged.

93. Having dealt with the peripheral now to the consequential matter. As we are partly allowing these appeals, allowing the Project to be completed and upholding the EIA, the directions issued in paragraph 100A of the judgment against various officials have to be vacated.

94. These are the reasons for partly allowing these appeals by our short order. The short order reproduced below is to be read with these detailed reasons:

(i) Elected Local Governments are presently not in existence in the Province of Punjab. The Provincial Government through its agencies is performing their duties and functions. The disputed Signal Free Corridor Project was conceived by an agency of the Provincial Government, LDA, in the year 2014 and included in its budget allocation for 2014-15. Construction of the project was awarded to the Contractor on 19.02.2015, who had already undertaken construction in the value of Rs.60 million before the interim restraint order was issued by the learned High Court on 06.03.2015. In the vacuum resulting from the absence of an elected Lahore Metropolitan Corporation, the initiation, approval and execution of the disputed Signal Free Corridor project by the Provincial Government through its agency, LDA, is held to be valid. The said project may accordingly be completed subject to provision of additional facilities for pedestrians, *inter alia*, including road crossing and passes at intervals of one-kilometre or less along the project road distance.

(ii) Subject, *inter alia*, to the criteria of spill over, economies of scale, effectiveness as shall be determined in the detailed reasons by the Court, any

new project falling within the domain of Lahore Metropolitan Corporation for approval or execution shall not be undertaken by the Provincial Government or its agency without prior consultation and consent, unless withheld without justified reasons, as the case may be, of the elected Lahore Metropolitan Corporation in respect of such project.

(iii) Article 140A of the Constitution of Islamic Republic of Pakistan casts a mandatory obligation on the Provinces to establish Local Governments possessing meaningful authority and responsibility in the political arena, administrative and financial matters. It is the duty of a Province through the Provincial Government and the Provincial Assembly to purposefully empower Local Governments in the Province so as to comply with their mandatory obligation under Article 140A of the Constitution.

(iv) In the present case, the powers in relation to master plan and spatial planning historically belonging to Lahore Metropolitan Corporation have been superimposed with similar functions vesting in LDA under Provincial law. To the extent of conflict in the exercise of their respective powers and functions by the two bodies or on account of legal provisions having overriding effect, Article 140A of the Constitution confers primacy upon the authority vesting in an elected Local Government over the powers conferred by law on the Provincial Government or an agency thereof. Notwithstanding the above, the Provincial Government is in any case under a duty to establish harmonious working relationship with an elected Local Government wherein respect is accorded to the views and decisions of the latter. Accordingly, Section 46 of the Lahore Development Authority Act, 1975, purporting to override conflicting action taken by an elected Local Government, is held to be against the scheme of the Constitution and should either be read

down or declared *ultra vires* as determined in the detailed judgment.

(v) Section 5(6) of the Punjab Environmental Protection Act, 1997 imposes a mandatory duty on the Provincial Government to constitute Advisory Committee under the said Act. This Committee is meant to assist the Environmental Protection Agency in evaluating the environmental impact of projects under consideration. The failure by the Provincial Government to constitute the said Committee violates its statutory duty. However, in the present case the impugned judgment has not attended any objection to the EIA on its merits, nor have the respondents highlighted any objection that has remained unattended and yet is fatal to the EIA. Moreover, the right of appeal and further remedies on the merits of the EIA approval available under the Pakistan Environmental Protection Act, 1997, have not been availed by the objecting respondents. The EIA cannot be struck down upon presumption or mere apprehension.

(vi) It is improper that disparaging references are made in the impugned judgment to a learned senior counsel, who had objected to the composition of the Bench. Contents of paragraphs 10(d), 21 & 22 in the impugned judgment containing such remarks are accordingly expunged. Equally, the academic expositions on the concepts of subsidiarity and federalism within the federating units, in the present case a Province, cannot be made grounds by the impugned judgment for striking down statutory law. The only touchstone for this purpose is conflict of statutory law with the provisions of the Constitution. Consequently, the said grounds adopted by the impugned judgment are rejected.

(vii) The action proposed in the impugned judgment to be taken against the officials of the LDA or any other

person as envisaged by paragraph 100A thereof is also set aside.

Judge

Judge

Judge

Islamabad, the
8th July, 2015
Approved For Reporting
Waqas Naseer/*