P L D 1973 Supreme Court 49

Present: Hamoodur Rahman, C. J., Muhammad Yaqub Ali, Waheeduddin Ahmad, Salahuddin Ahmed and Anwarul Haq, JJ

THE STATE-Appellant

Versus

ZIA-UR-RAHMAN AND OTHHERS-Respondents

Criminal Appeals Nos. 61, 62, 63, 64 and 69 of 1972, decided on 8th January 1973. 4, (On appeal from the judgment and order of the Lahore High Court, Lahore, dated the 6th July 1972, in Writ Petition No. 403 of 1972/No. 404 of 1972/No. 223 of 1972/No. 335 of 1972/No. 625 of 1972).

(a) Constitution-Government under written Constitution Normal scheme under system is to have trichotomy of power between the executive, the Legislature and the Judiciary-Each of these organs may be fashioned in variety of different forms and shapes-Constitution defines the functions of each organ and also specifies territories in which, the subjects in respect of which, and sometimes even the circumstances in which these functions will be exercised by each of these organs or sub-organs Limitations on each organ, inherent.

In the case of a Government set up under a written Constitution, the functions of the State are distributed amongst the various State functionaries and their respective powers defined by the Constitution. The normal scheme under such a system, with which we are familiar, is to have a trichotomy of powers between the executive, the Legislature and the Judiciary. But each of these organs may itself be fashioned in a variety of different shapes and forms. Thus the Legislature may be unicameral or bicameral; the legislative subjects may be divided between the federating units and the federation in a federal system or even the legislative power may be divided between the executive and the Legislature as in our present system. The executive may take the Presidential or the Parliamentary form. The judiciary also may consist of various types and grades of Courts with the highest at the apex either as an ultimate Court of appeal or a Court of Cessation. There may also be other administrative tribunals outside the judicial pyramid.

In all such cases, it will also be the function of the Constitution to define the functions of each organ or each branch of an organ, as also specify the territories in which, the subjects In respect of which and sometimes even the circumstances In which these functions will be exercised by each of these organs or sub-organs. Limitations would, therefore, be inherent under such a system so that one organ or sub-organ may not encroach upon the legitimate field of the other. Thus, under a written Constitution, the Legislature of a federal unit will not be able to legislate in respect of a subject which is within the field of the federal Legislature, nor will a federal Legislature be able to legislate upon a subject which is within the exclusive field of the Legislature of the federating units. It cannot, therefore, be said that a Legislature, under a written Constitution, possesses the same powers of "omnipotence" as the British Parliament. Its powers have necessarily to be derived from, and to be circumscribed within, the four corners of the written Constitution.

(b) Constitution-What is-Constitution, an instrument by which Government can be controlled-Constitution a supreme law standing higher in position than other laws of the country-Even non-Constitutional provisions, if incorporated in Constitution, stand on same footing as strictly Constitutional provisions.

The Constitution, as defined by K. C. Where, far countries which have a written Constitution, "is a selection of the legal rules which govern the Government of that country and which have been embodied in a document or collection of documents." It generally embodies the fundamental principles upon which the Government of the country should be established and conducted, but there is no set pattern or form provided for a Constitution. It may take a variety of forms. Some Constitutions endeavor to lay down In detail the whole Governmental structure of the country while others merely establish the principal institutions of Government and fill in the details by sub constitutional laws organising the institutions and regulating the exercise of public power through the organs or Institutions so vet up. Of late, the practice has also grown up of incorporating within the Constitution itself a declaration of fundamental rights and even basic principles of State policy. In countries which adopt a detailed Constitution, the Constitution is thought of as an instrument by which Government can be controlled, and it is for this reason that generally some measure of rigidity in the procedure for the amendment of the Constitution is also introduced, and the Constitution is conceived, of as a fundamental or an organic or a Supreme law standing in a somewhat higher position than the other laws of the country. It then assumes the position of a law on the basis of which the vires of all other sub-Constitutional laws and the validity of Governmental actions can be judged. Thus, even non-Constitutional provisions, if incorporated in a Constitution,, acquire a higher sanctity and stand on the same footing as -strictly constitutional provisions. No differentiation can be made between them, once they have been given a constitutional status by being incorporated in the Constitution itself.

Geoffray Wilson's Cases and Materials on Constitutional and Administrative Law, p. 191; Mac Cormic v. Lord Advocate; Yardley's Source Book of English Administrative Law, p. 2; Garner on Administrative Law, p. 14; Cooley on Treatise on Constitutional Limitations; Fazlul Quader Chowdhury v. Muhammad Abdul Haque P L D 1963 S C 486 and Fazlul Quader Chowdhury v. Shah Nawaz P L D 1966 S C 105 ref.

(c) Constitution Judiciary - Supreme Court; creature of Constitution-Can neither claim nor has the right to strike down any provision of Constitution-Court does claim, however, the right to interpret the Constitution even if provision in Constitution is a provision seeking to oust jurisdiction of the Court.

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

This is a right which it acquires not de hors the Constitution but by virtue of the fact that it is a superior Court set up by the Constitution itself. It is not necessary for this purpose to invoke any divine or

super-natural right but this judicial power is inherent in the Court itself. It flows from the fact that it is a. Constitutional Court and it can only be taken away by abolishing the Court itself.

(d) Constitution-Judiciary-Jurisdiction and judicial power of-Distinction between the two-Constitutional position of Courts and their relationship with Legislature.

There is a distinction between "judicial power" and "jurisdiction" of Courts. In a system where there is a trichotomy of sovereign powers, then ex necessitate rei from the very nature of things the judicial power must be vested in the judiciary. "Judicial Power" has been defined in the Corpus Juris Secundum, Vol. XVI, para. 144, as follows :-

"The judiciary or judicial department is an Independent and equal co-ordinate branch of Government, and is that branch thereof which is intended to interpret, construe, and apply the law, or that department of Government which is charged with the declaration of what the law is, and its construction, so far as it is written law."

This power, it is said, is inherent in the judiciary by reason of the system of division of powers itself under which, as Chief Justice Marshal put it, "the Legislature makes, the executive executes, and the judiciary construes, the law." Thus, the determination of what the existing law is in relation to something already done or happened is the function of the judiciary while the pre-determination of what the law shall be for the regulation of all future cases falling under its provisions is the function of the Legislature.

It may well be asked as to what is meant by "jurisdiction"? How does it differ from "judicial power"? Apart from setting up the organs the Constitution may well provide for a great many other things, such as, the subjects in respect of which that power may be exercised and the manner of the exercise of that power. Thus it may provide that the Courts set up will exercise revisional or appellate powers or only act as a Court of a cessation or only decide constitutional issues. It may demarcate the territories in which a particular Court shall function and over which its writs shall run. It may specify the persons in respect of whom the judicial power to hear and determine will be exercisable. These are all matters which are commonly comprised in what is called the jurisdiction of the Court. It expresses the concept of the particular res or subject-matter over which the judicial power is to be exercised and the manner of its exercise. Jurisdiction is, therefore, a right to adjudicate concerning a particular subject-matter in a given case, as also the authority to exercise in a particular manner the judicial power vested in the Court.

In exercising this power, the judiciary claims no supremacy over other organs of the Government but acts only as the administrator of the public will. Even when it declares a legislative measure unconstitutional and void, it does not do so, because the judicial power is superior in degree or dignity to the legislative power; but because the Constitution has vested it with the power to declare what the law is in the cases which come before it. It thus merely enforces the Constitution as a paramount law whenever a legislative enactment comes into conflict with it because, it is its duty to see that the Constitution prevails. It is only when the Legislature fails to keep within its own Constitutional limits, the judiciary steps In to enforce compliance with the Constitution. This is no doubt a delicate task which has to be performed with great circumspection but it has nevertheless to be performed as a sacred Constitutional duty when other State functionaries

disregard the limitations imposed upon them or claim to exercise power which the people have been careful to withhold from them.

On the other hand it is equally important to remember that it is not the function of the judiciary to legislate or to question the wisdom of the Legislature in making a particular law if it has made it competently without transgressing the limitation of the Constitution. Again if a law has been competently and validly made the judiciary cannot refuse to enforce it even if the result of it be to nullify its own decisions. The Legislature has also every right to change, amend or clarify the law if the judiciary has found that the language used by the Legislature conveys an intent different from that which was sought to be conveyed by it. The Legislature which establishes a particular Court may also, if it so desires, abolish it.

Corpus Juris Secundum, Vol. XVI, para. 144 ref.

(e) Constitution - Judiciary - Judiciary in exercise of its judicial power, cannot strike down any provision of Constitution either because it is in conflict with the laws of God or of nature or of morality or some other solemn declaration which the people themselves have adopted for Indicating the form of Government they wish to establish -Formal written Constitution, once lawfully adopted by a competent body accepted by the people, including the judiciary, as the Constitution of the country, the judiciary cannot claim to declare any of its provisions ultra vires or void, on basis of a document, however solemn or sacrosanct, if the document not incorporated in Constitution or does not form part thereof-Such document cannot control the Constitution-Objectives Resolution of 1949 does not have the status or authority as the Constitution itself-Its appearance in Constitution only as a preamble makes It stand on no higher footing than a preamble-It cannot control the substantive parts of Constitution-Constitution of Pakistan (1972).

The question was whether any document other than the on situation itself can be given a similar or higher status or whether the judiciary can, in the exercise of its judicial power, strike down any of the provisions of the Constitution itself either, because it is in conflict with the laws of God or of nature or of morality or some other solemn declaration which the people themselves may have adopted indicating the form of Government they wished to establish. Some of the provisions of the Constitution of Pakistan (1972) were challenged as being violative of the fundamental principles accepted by the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th March 1949, and it was urged that the High Court was entitled to strike down such provisions. The contention was that the Objectives Resolution is the "grund-norm" for Pakistan; it was a supra-Constitutional document and stood above even the Constitution of Pakistan (1972) or any Constitution that may be framed in the future.

Held: After a formal written Constitution has been lawfully adopted by a competent body and has been generally accepted by the people including the judiciary as the Constitution of the country, the judiciary cannot claim to declare any of its provisions ultra vires or void. This will be no part of its function of interpretation. Therefore, 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. This does not, however, mean that the validity of no Constitutional measure can be tested in the Courts. If a Constitutional measure is adopted in a manner different to that prescribed in the Constitution itself or is passed by a lesser number of votes than those specified in the Constitution then the validity of such a measure may well be questioned and adjudicated upon. This, however, will be possible only in the case of a Constitutional amendment but generally not in the case of a first or a new Constitution, unless the powers of the Constitution-making body itself are limited by some supra-constitutional document.

In Asma Jilani's case P L D 1972 S C 139 it has n of been laid down that the Objectives Resolution is the grund-norm of Pakistan but that the grund-norm is the doctrine of legal sovereignty accepted by the people of Pakistan and the consequences that flow from it. It does not describe the Objectives Resolution as "the cornerstone of Pakistan's legal edifice" but has merely pointed out that one of the counsel appearing in the case had described it as such. It is not correct, therefore, to say that the Objectives Resolution has been declared "to be a transcendental part of the Constitution" or to be a "supra Instrument which is unalterable and immutable".

The "grund-norm" referred to by the Supreme Court was something even above the Objectives Resolution which "embodies the spirit and the fundamental norms of the constitutional concept of Pakistan'". It was expected by the Objectives Resolution itself to be translated into the Constitution. Even those that adopted the Objectives Resolution did not envisage that it would be a document above the Constitution. It is incorrect, therefore, to say that it was held by the Supreme Court that the Objectives Resolution of the 7th of March 1949, stands on a higher pedestal than the Constitution itself.

Asma Jilani v. The Government of Punjab P L D 1972 S C 139 ref.

(f) Constitution of Pakistan (1972)-Provisions of, not in violation of any principle of Objectives Resolution of 7-3-49.

Even if the Objectives Resolution is treated as a document from which the makers of the Constitution must draw inspiration and seek guidance, then, too, there is nothing in the 1972--Constitution to show that any of the ideals laid down in the objectives Resolution has been violated. Indeed, the 1972-Constitution itself more-or-less faithfully reproduces the Objectives Resolution of 1949, as its own preamble in the same manner as the Constitution of 1956 did. It cannot, therefore, be said that any provision of the Constitution of 1972 is in violation of any of the principles of the Objectives Resolution of 1949.

(g) Constitution of Pakistan (1972)-A valid instrument and framed by a competent body.

(h) Constitution-Body framing Constitution-Not "omnipotent"-Limitations on its power, however, political and not justiciable.

A body having the power of framing a Constitution is not "omnipotent" nor can it disregard the mandate given to it by the people for framing a constitution or can frame a Constitution which does not fulfil the aspirations of the people or achieve their cherished objectives, political, social or economic. These limitations on its power, however, are political limitations and not justiciable by the judiciary. If a Constituent Assembly or National Assembly so acts in disregard of the wishes of the people, it is the people who have the right to correct it. The judiciary cannot declare any provision of the Constitution to be invalid or repugnant on the ground that it goes beyond the mandate given to the Assembly concerned or that it does not fulfil tee aspirations or objectives of the people. To endeavour to do so would amount to entering into the political arena which should be scrupulously avoided by the judiciary. With olitical decisions or decisions on questions of policy, the judiciarys not concerned. Its function is to enforce the Constitution and to see that the other organs of the State confine themselves within the limitations prescribed therein; but in doing so it must remember that it too is subservient to the Constitution and Its power to hear and determine is subject to the limitations contained therein and can be exercised only with regard to the subjects over which it is given jurisdiction and in the manner prescribed. By virtue of the fact that it has been set up a3 that organ of the State which is to adjudicate upon disputes, it has the right to exercise its "judicial power" to bear and determine even in cases where its own jurisdiction is in question. If there is a dispute on the point as to whether it has or has not jurisdiction over a certain subject-matter, it can certainly hear and determine that dispute, even if the result be that it had to hold that it has no jurisdiction.

(i) Constitution of Pakistan (1972), Art. 281-Interpretation-Scope and nature of validation granted by cl. (2) of Art. 281-To what extent the words used in Art. 281 have ousted ,the jurisdiction of the Courts and in respect of what matters Words "done or purported to have been done" in Art. 281(2) Effect.

Stroud's Judicial Dictionary; The Punjab Province v. Malik Khizar Hayat Khan Tiwana P L D 1956 F C 200; Mian Iftikharud-Din v. Muhammad Sarfraz P L D 1961 S C 585; Muhammad Khan v. The Border Allotment Committee P L D 1965 S C 623; Smith v. East Elloe Rural District Council (1956) 1 All E R 855; Bhagchand v. Secretary of State 54 I A 338 and Naryan Hajri v. Yashwant Raoji A I R 1928 Born. 352 ref.

(j) Interpretation of statutes-Intention of Legislature to be gathered from word, used by it-Two clauses in same Article using two different words-Intention not same.

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

(k) Constitution -To be read as a whole, giving every part thereof meaning consistent with provision of Constitution.

(l) Mala fide-Act done mala fide is an act without jurisdiction.

Zafar-ul-Ahsan v. The Republic of Pakistan P L D 1960 S C 1133 Abdul Rauf v. Abdul H amid Khan P L D 1965 S C 67Ig Muhammad Jamil Asghar v. The Improvement Trust P L D 1965 S C 698 and Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri P L D 1969 S C 14 ref.

(m) Interpretation of statutes--Statute containing both general provisions as well as special provisions for meeting particular situation-Special provision applicable to particular situation--Maxim Generalia specialibus nor derogant (General words do not derogate from special).

It is a well-established rule of interpretation that where in a statute there are both general provisions as well as special provisions for meeting a particular situation, then it is the special provisions which must be applied to that particular case or situation instead of the general provisions.

(n) Pakistan Army Act, 1952-Rule 58 of Rules framed under Act Sentence passed by Special Military Court-Promulgation necessary for act of confirming authority but not of Military Court-Work of Military Court ends with recording of finding and sentence and so far as that Court concerned that is the "final order".

Ex-Captain Muhammad Akram Khan v. Islamic Republic of Pakistan P L D 1969 S C 174 considered.

Criminal Appeal No. 61 of 1972

M. B. Zaman, Advocate-General, Punjab (Kh. M. Tufail, Advocate Supreme Court with him) instructed by Ijaz Ali, Advocate-on-Record for the State.

M. A. Qureshi, Advocate-on-Record Supreme Court for Respondent No. 1.

M. Anwar, Senior Advocate Supreme Court instructed by M. A. Rahman, Advocate-on-Record for Respondents Nos. 2 to 4.

Criminal Appeal No. 62 of 1972

M. B. Zaman, Advocate-General, Punjab (M. Tufail, Advocate Supreme Court with him) instructed by Ijaz Ali, Advocate-on-Record for Appellants.

Nemo for Respondent No. 1.

Yahya Bakhtiar, Attorney-General instructed by Fazal-i-Hussain, Advocate-on-Record for Respondent No. 2.

Maqbool Ahmad, Advocate-on-Record Supreme Court for Respondents Nos. 3 and 4.

Criminal Appeal No. 63 of 1972

M. B. Zaman, Advocate-General, Punjab (M. Tufail, Advocate Supreme Court with him) instructed by Ijaz Ali, Advocate on-Record for Appellant.

M. A. Rahman, Advocate-on-Record Supreme Court for Respondent No. 1.

Yahya Bakhtiar, Attorney-General (absent on 20-10-72 and 23-10-72) instructed by Fazal-i-Hussain, Advocate-on-Record for Respondents Nos. 2 and 3.

Criminal Appeal No. 64 of 1972

M. B. Zaman, Advocate-General Punjab (M. Tufail, Advocate Supreme Court with him) instructed by Ijaz Ali, Advocate-on Record for Appellant.

M. A. Rahman, Advocate-on-Record Supreme Court for Respondent No. 1.

Yahya Bakhtiar, Attorney-General (absent on 20-10-72 and 23-10-72) instructed by Fazal-e-Hussain, Advocate-on-Record for Respondents Nos. 2 and 3.

Criminal Appeal No. 69,of 1972

M. Anwar, Senior Advocate Supreme Court instructed by M. A. Rahman, Advocate-on-Record for Appellant.

Yahya Bakhtiar, Attorney-General (absent on 20-10-72 and 23-10-72), instructed by Fazal-i-Hussain, Advocate-on-Record for Respondent No. 1.

Ijaz All, Advocate-on-Record Supreme Court for Respondent No. 2.

Nemo for Respondent No. 3.

Dates of hearing: 16th, 17th, 18th, 19th, 20th and 23rd October 1972.

JUDGMENT

HAMOODUR RAHMAN, C. J.--These appeals arise out of the judgments and the orders of the majority of a Full Bench of five learned Judges of the Lahore High Court in Writ Petitions Nos. 223, 335, 403, 404 and 625 of 1972, and they are before us under certificates granted by the High Court under Article 186(2) of the Interim Constitution of the Islamic Republic of Pakistan.

Criminal Appeal No. 63 of 1972 has been filed by the Government of Punjab to call in question the order of the High Court in, Writ Petition. No. 223 of 1972 directing that the cast against Muhammad Mukhtar Rana should now be heard by an ordinary Criminal Court and Criminal Appeal No. 69 of 1972 has been filed by Muhammad Mukhtar Rana to call in question the order of the High Court dismissing his Writ Petition No. 625 of' 1972.

Criminal Appeal No. 64 of 1972 has been filed by the Government against the order of the High Court allow wing Writ Petition No. 335 of 1972, filed by Muhammad Riaz Shahid who was a co-accused

with Muhammad Mukhtar Rana in a criminal case registered against them under sections 148 and 302/149 of the Pakistan Penal Code.

Muhammad Mukhtar Rana, who had been elected as a Member of the National Assembly from a constituency in Lyallpur, although not named as an accused in the original F. I. R. lodged alleging offences under sections 307/452 and 148 of the Pakistan Penal Code for a murderous assault on one Abdul Khaliq, a Mill owner of Lyallpur, was sought to be arrested in that connection, and according to Newspaper reports published on the 14th of February 1972, warrants of arrest had actually been issued against him. He applied for bail before arrest to the High Court and was granted interim bail by a learned Single Judge of that Court on the 17th of February 1972. Thereafter, the Investigating Officer added another charge under Martial Law Regulation No. 16(a), and on the 19th of February 1972, the Martial Law Administrator, Zone 'C'. Passed orders for the hearing of the case against him and his co-accused by a Special Military Court. The learned Single Judge who had granted interim bail, in these circumstances, referred the matter to the -Chief Justice of the High Court for constituting a larger Bench, and a Full Bench of three learned Judges was then constituted.

On the 6th of March 1972, the Advocate-General, Punjab, prayed for cancellation of bail, but the Court refused to recall the bail order and adjourned the case to the 13th of March 1972.

In the meanwhile, on the 9th of March 1972, Muhammad Mukhtar Rana filed Writ Petition No. 223 of 1972 for challenging the validity of the order directing the hearing of the case by the Special Military Court, and on this Writ Petition the Full Bench stayed proceedings before the Military Court ad interim.

On the 10th of March 1972, the Government of Punjab filed a petition for special leave to appeal in this Court from both the orders of the 6th of March 1972, and the 9th of March 1972. This Court suspended the operation of the stay order of the 9th of March 1972, on an undertaking being given by the learned Advocate-General of Punjab that no final order would be passed by the Military Court during the pendency of the petition in this Court.

On the 13th of March 1972, the Writ Petition No. 223 of 1972, was adjourned by the Full Bench to the 24th of March 1972, to await the decision of this Court fn Criminal Appeal No. 19 of 1972 (Asma Jilani v The Government of Punjab). On this day, Muhammad Mukhtar Rana was arrested on his way back from Court for having allegedly made an objectionable speech at a public meeting at Lyallpur on the 14th of March 1972. He was put up for trial before a Special Military Court which on the 10th of April 1972, convicted him and sentenced him to five years' rigorous imprisonment. Writ Petition No. 625 of 1972 was filed by him to challenge the validity of this conviction.

As already stated, Muhammad Riaz Shahid, who was the Vice-President of the National Progressive Workers Federation, Lyallpur, was also charged with ten others, including Muhammad Mukhtar Rana, for the murderous assault on Abdul Khaliq which resulted in his death in the evening of the 10th of February 1972. Additional charges under Martial Law Regulations Nos. 89 and 16(a) were also levelled against him and his case too was referred for trial to the Special Military Court by the same order of the 19th of February 1972. He challenged this order by Writ Petition No. 335 of 1972.

Writ Petition No. 403 of 1972 was filed by the respondent in Criminal Appeal No. 61 of 1972, who is the Advertisement Manager of the monthly `Urdu Digest' for challenging the arrest anal detention of Altaf Hassan Qureshi, the Editor, his brother, Dr. Ijaz Hassan Qureshi the Printer and Publisher, of the 'Urdu Digest' and Mujib-ur-Rahman Shami, the Editor of the weekly 'Zindagi' also printed and published by Dr. Ijaz Hassan Qureshi. The first two were arrested on the 5th of April 1972, while Mujib-ur-Rahman Shami was arrested on the 6th of April 1972 under Martial Law Regulations Nos. 16(a) and 89. They were produced before a Major on the 6th of April 1972, at the Pipals who remanded them to police custody till the 10th of April 1972. On this day, they were again produced before the sane officer who delivered charge sheets to them. The case against the Editor and the Printer and Publisher of the 'Urdu Digest' was taken up on the 11th of April 1972, and the case against the Editor and the Printer and Publisher of 'Zindagi' was fixed for the 15th of April 1972. On the 11th of April 1972, the Qureshi brothers filed their written statement challenging the jurisdiction of the Military Court to try them and refused to participate in its proceedings. The case was then adjourned to the 14th of April 1972.

The detenus had in the meantime made arrangements through the petitioner in the Writ Petition for a lawyer to defend them as their next friend on the 14th and the 15th of April 1972; but, suddenly, on the 13th of April 1972, without any prior notice or intimation, all the three detenus were produced before the Special Military Court at the Pipals. Learning of this, the petitioner made efforts to meet the detenus at the Pipals, but he was not allowed to do so. Soon after 2-30 p.m., however, he came to learn that the detenus had been tried, convicted and sentenced.

The Writ Petition already filed in the High Court on the 6th of April 1972, was then suitably amended to call in question the convictions and sentences of the detenus. When it was admitted for regular hearing on the 10th of April 1972, the High Court had expressed the hope that the Military Court would not pass any final orders till the 12th of April 1972, to which date the case had been adjourned, at the request of the learned Advocate-General, Punjab, for the appearance of the learned Attorney-General. On the 12th of April 1972, the case was again adjourned to the 20th of April 1972, at the request of the learned Standing Counsel, Government of Pakistan, who too expressed the hope that final orders would not be passed in these cases by the Military Court during the pendency of the petitions in the High Court.

Notwithstanding this, final orders were in fact recorded by the Military Court. The High Court then, on a miscellaneous application, on the 17th of April 1972, suspended the sentences passed by the Military Court by a majority order of the Bench, the interim five learned Judges, with two dissenting from the interim order.

This interim order of the majority was also challenged by a petition for special leave to appeal by the Government, and this Court, on the 19th of April 1972 suspended the operation of the High Court's interim order.

Writ Petition No. 404 of 1972 was filed on the 7th of April 1972, by the wire of Muzaffar Qadir, an ex-C. S. P. Officer, to call in question the detention of one Hussain Naqi and her husband, Muzaffar Qadir, who were arrested on the 5th and 6th of April 1972. respectively. Hussain Naqi Is the Editor and Publisher of the 'Punjab Punch', which is printed at the Packall Printing Press, of Which Muzaffar Qadir is the Manager. Their cases too were referred for hearing to the Military Court. They too were produced before the Military

Court and charge-sheeted on the 10th of April 1972, and their cases were adjourned to the 15th of April 1972; but the date of hearing was subsequently advanced and as fin the other cases they too were produced before the Special Military Court on the 13th of April 1972, convicted and sentenced. Their petition was also amended after their conviction and interim relief was granted to them also on the 17th of April 1972, by the majority, order of the Full Bench. But on a petition for special leave to appeal, the interim order was suspended by this Court on the 19th of April 1972.

All these Writ Petitions were heard together by the Full Bench between the 10th of May 1972 and the 6th of June 1972. Each one of the learned Judges constituting the Full Bench delivered separate and elaborate judgments whereby all the Writ Petitions except Petition No. 625 of 1972 were allowed.

Learned counsel appearing in support of the Writ Petitions in the High Court had challenged not only the validity of the detentions and convictions of the detenus by the Military Court but also challenged the validity of the Interim Constitution and the competence of the National Assembly to frame such a Constitution. They maintained that the regime of General Yahya Khan having been declared by this Court In Asma Jilani's case (PLD1972SC139), as the regime of an usurper the consequence was that the Constitution of 1962 still held the field and the National Assembly, as at present constituted, could not frame any new Constitution.

The competence of the National Assembly was challenged on the ground that, in the absence of the majority of the members from East Pakistan, it was not validly constituted and could not legally function. Alternatively, it was argued that the High Court was entitled to strike down such of the provisions of the Interim Constitution as were violative of the fundamental principles accepted by the Objectives Resolution of the 7th of March 1949.The attempt of the Interim Constitution, therefore, to legalise or validate Martial Law Orders and Regulations which had been declared to have been illegally and incompetently made, was clearly Invalid. The provisions of Article 281 of the interim Constitution were, therefore, of no legal effect and did not debar the High Courts from examining as to whether the Martial Law Orders and Regulations sought to be thereby validated should or should not be condoned on the doctrine of necessity propounded in the case of Asma Jilani. In any event, the power of the superior Courts to examine the validity of such Orders and Regulations or the validity of actions taken under them could not be taken away either by the Interim Constitution or by any other legal Instrument, as has been sought to be done by the Provisions of Article 281 of the Interim Constitution.

As against this, it was argued on behalf of the Government that the National Assembly was validly constituted, and it functioned competently, as it had the necessary quorum. The mere fact that some members from East Pakistan did not choose to attend or could not attend did not invalidate its acts. Notices were duly given to all members to join in the proceedings of the National Assembly and, in fact, two of the elected representatives of the people from East Pakistan did actually participate in its proceedings. There is nothing to show that anyone was prevented from attending these proceedings. The Interim Constitution passed b the National Assembly was, therefore, a valid document. A bad been passed in exercise of the mandate given to it by the people in terms of the Legal Framework Order, the validity of which was conceded in Asma Jilani's case; and since it has framed a new Interim Constitution, it has also impliedly repealed the Constitution of 1962. The Interim Constitution is now the fundamental law of Pakistan and all state functionaries owe their origin to it and derive their powers from it. It has been universally accepted and even the Judges of the

superior Courts have taken oaths to preserve, protect and defend the same. It is not open to the Judges, therefore, to say that they are not bound by the Constitution.

So far as the Objectives Resolution of 1949 is concerned, there is no dispute that it is an important document which proclaims the aims and objectives sought to be attained by the people of Pakistan; but it is not a supra-Constitutional document, nor is It enforceable as such, for, having been incorporated as a preamble it stands on the same footing as a preamble. It may be looked at to remove doubts if the language of any provision of the Constitution Is not clear, but it cannot override or control the clear provisions of the Constitution itself:

The Supreme Court, did not, it was argued, lay down in Asma Jilani's case that the Objectives Resolution was the grundnorm or that it had any supra-Constitutional efficacy. Ali that was said in Asma Jilani's case was that the principle that sovereignty vests in God Almighty alone and that the authority which he had delegated to the State through its people, for being exercised within the limits prescribed by him, is a sacred trust. It was merely pointed out therein that this fundamental principle wag accepted in the Objectives Resolution and its consequence was that all sovereign functions were exercised by those to whom they were entrusted by the Constitution and that these functionaries were accountable to the people for the proper discharge of the functions so entrusted to them. This by itself contemplates that there must be some kind of a legal Instrument by which the functionaries would be defined and their respective functions allocated to each. This legal Instrument would then necessarily have to be some kind of a Constitutional document having somewhat greater efficacy than ordinary laws. This is exactly, it is said, what has been done by the Interim Constitution, as was contemplated by the Objectives Resolution itself. Therefore, it is futile to argue that the Interim Constitution is not a valid document. It has not also in any way departed from any principle adopted in the Objectives Resolution.

It was further contended that there is a clear distinction between judicial power and jurisdiction which must be kept in mind. While it is true that judicial power cannot be taken away, the jurisdiction of the functionaries entrusted with the administration of justice can legitimately be defined by the Constitution. Thus, it is for the Constitution to say what jurisdiction the High Court will exercise and what the Supreme Court. Similarly, the Constitution itself may even prescribe that certain categories or classes of cases shall be decided by Tribunals other than the High Court or the Supreme Court. No objection can be taken to this kind of demarcation of functions. Indeed, if such demarcation is not done, there would be chaos, for, no one would know what are the precise limits of their own respective jurisdictions.

Lastly, it was maintained that what Article 281 of the Interim Constitution had done was to accept the decision of this Court in Asma Jilani's case where it was declared that the Courts could not validate what was ab initio illegal but could only condone certain acts on certain well recognised principles on the ground of necessity, The Legislature felt that this might create an uncertain state of affairs, for, many things had been done by the past regimes affecting the rights and privileges of a large number of persons. They could not be left in an uncertain state to be brought up before the High Court and then by appeal before the Supreme Court for purposes of condo nation. It is for this reason that it was thought that it would be better to give a blanket validation to all laws with a view to preserving those which were considered essential for the ordinary and orderly running of the Government and to repeal the rest. There was nothing unreasonable or unjust in this and, therefore no legitimate complaint could be made with regard to the validity of Article 281.

Even if Article 281 had undone or nullified the effect of the judgment of this Court in Asma Jilani's case, no valid complaint could be made on that account, for it was open to the Legislature, if it felt that the decision of the Court was likely to create difficulties, to pass fresh legislation modifying or even nullifying the effect of the decision.

As for the scope of Article 281, it was contended on behalf of the Government that it had not only validated all Martial Law Orders and Regulations but also barred all legal proceedings of any kind whatsoever in any Court in respect of any order made proceedings taken or acts done even in the purported exercise of powers derived from such Martial Law Orders and Regulations. Therefore, no Court was competent to enquire either into the validity of such Martial Law Orders or Regulations or into the validity of any proceedings taken or action done there under. This exclusion of their jurisdiction was so complete that even acts without jurisdiction or acts done mala fide could not be called into question.

None of the learned Judges in the High Court accepted the contentions of the petitioners regarding the improper constitution of the National Assembly or the invalidity of the Interim Constitution. They held that the Interim Constitution had been validly and competently enacted by a properly constituted body. Four of the learned Judges also repelled the contention that the Constitution of 1962 still held the field even after the 21st of April 1972.

Three of the learned Judges agreed with the contentions advanced on behalf of the Government regarding the legal efficacy of the Objectives Resolution of 1949. They held that it was not in the nature of a supra-Constitutional document, on the basis of which the validity of even the Interim Constitution could be tested. It was said that it merely defined the goals and aims which the people had set before themselves.

The fourth learned Judge **(Ataullah Sajjad, J.)** was of the opinion that it was not a mere "array of hollow shibboleths" bat that some principles thereof were "the Transcendental part of the Constitution which no Constituent Assembly or National Assembly, which comes into being in Pakistan for framing a Constitution, can frame a Constitution in disregard of these precise principles". He found as a fact, however, that in framing the present Interim Constitution the National Assembly had not offended against any of these principles.

The fifth learned Judge **(M. A. Zullah, J.)** held the Objectives Resolution to be "a supra-Constitutional Instrument which is unalterable and immutable and that the present National Assembly has no power to enact any Constitution or law which either directly or indirectly contravenes any of the provisions of the said Resolution", and further that "the Courts in Pakistan being the repository of judicial power, as trustees of the people and the Almighty shall not, and have no jurisdiction to accept any tinkering with it by anybody including any Assembly."

Even so, none of the learned Judges went so far as to say that it was necessary to strike down Article 281 of the Interim Constitution. They all, including the minority which thought that the Judges had a higher power to act as "trustees of the people and the Almighty" in the exercise of their judicial power, confined themselves to interpreting the provisions of Article 281 of the Interim Constitution in order to ascertain its true nature and scope and they all agreed that it did not, and could not, take away the jurisdiction of the

superior Courts to examine the validity of the acts done in the exercise or the purported exercise of the powers claimed under the laws sought to be validated if they were done mala fide or were coram non judice.

All the learned Judges were agreed that acts which were done without jurisdiction or were coram non judice or were performed mala fide, in fact or in law, could be declared unlawful by the superior Courts, notwithstanding the provisions of Article 281. In this view of the matter, three of the learned Judges found that the convictions of the Editors, Printers and Publishers in Writ Petitions Nos. 403 and 404 of 1972 were clearly mala fide and, therefore, without lawful authority and of no legal effect. Similarly, the convictions of Muhammad Mukhtar Rana and Muhammad Rias Shahid, in violation of the undertaking given before the Supreme Court, were held to be illegal and of no legal effect. The result of this was that the criminal case against them was considered to be still pending and had,, in accordance with the provisions of Article 280 of the Interim Constitution, to be now placed before an ordinary criminal Court foil disposal.

Writ Petition No. 625 of 1972 filed by Muhammad Mukhtar Rana to challenge his conviction for certain alleged objectionable speeches said to have been made by him was dismissed by foul of the learned Judges, as in the petition filed to challenge this conviction there was no allegation even of mala fides.

The fourth learned Judge held that the proceedings before the Major at the Pipals in the cases of the editors, printers and publishers of the 'Urdu Digest', the "Zindagi" and the "Punjab Punch" were coram non judice and, therefore, of no legal effect.

The fifth learned Judge was of the view that the Martial Law Regulations for the contravention of which the petitioners had been tried and sentenced, the Martial Law Regulations providing for the constitution of and trials by, Military Courts and their protecting instruments being all ab initio void and not condonable on the basis of State necessity, the detenus were all entitled to be released. Therefore, all proceedings impugned in Writ Petitions Nos. 403, 404 and 625 of 1972 were ab initio void. Similar was the result with regard to Writ Petition 223 of 1972 and, therefore, the criminal proceedings against Muhammad Mukhtar Rana and Muhammad Rinz Shahid were to be deemed to be still pending and should be tried by the ordinary criminal Courts.

It may be mentioned here that so far as the editors, printers and publishers of the 'Urdu Digest', 'Zindagi' and "Punjab Punch" are concerned, the Provincial Government had remitted their sentences of imprisonment during the pendency of their petitions in the High Court and before us the learned Advocate General for the Punjab Province has given an assurance that Government has no intention of realising the fines. Technically, however, in the event of the Government's appeal succeeding in this Court, the convictions would have to be restored. The detenus have been imp leaded as parties in all these petitions at their own request, as they run the risk of having their convictions restored but no separate arguments have been addressed on their behalf.

The learned Attorney-General, appearing on behalf of the, Government of Pakistan, has taken pains to point out that the main object of filing these appeals is to have the law settled with regard to the Constitutional position of the superior Courts in this country, and to have the relationship between the Legislature and the judiciary defined. He has maintained that the judiciary is in no way concerned with questions of policy, nor can it claim the right to strike down any provision of the Constitution itself on the

basis of any other document, however important or sanctified it might be. The Constitution, according to him, is the fundamental and supreme organic law of the country from which all functionaries of the State derive their existence and their powers. Furthermore, the Constitution consists of the substantive provisions thereof and it cannot be controlled by its preamble or even an Objectives Resolution, if any, adopted by the people. The position of such an Objectives Resolution simpliciter in a system in which a Constitution is subsequently framed is no more than what it describes itself to be, namely, that it is an enunciation or declaration of the goals sought to be attained by the people, an expression of their aspirations and the ideal sought to be achieved. Its position is no better than that of a preamble to a statute and it can serve no higher purpose.

The Constitution, it is urged, once framed and adopted by a competent body, becomes the organic law of the State, and there is no power or authority outside the Constitution. The judiciary, like the other organs of the State, is itself a creature of the Constitution and must submit, like all other organs of the State, to the limitations placed upon its jurisdiction by the Constitution.

The learned Attorney-General has sought to support his contentions by canvassing the extreme view of Dicey with regard to the "restricted omnipotence" the utmost authority ascribable to any human institution of the British Parliament, and has quoted passages from Geoffery Wilson's Cases and Materials on Constitutional and Administrative Law, in illustration of the nature of the power of the British Parliament. The first passage (page 191) reads as follows: -

"If a Legislature decided that all blue-eyed babies should be murdered, then the preservation of blue-eyed babies would be illegal."

He has also referred to another passage (page 200) from the same book to show that the Court of Session in Scotland repelled the contention that an Act of Parliament which infringed the Treaty of Union, 1707 could be declared to be unconstitutional. Lord Cooper, the President of the Court, observed in the case of Mac Cormic v Lord Advocate :-

"This at least is plain, that there is neither precedent nor authority of any kind for the view that the domestic Courts of either Scotland or England have jurisdiction to determine whether a governmental act of the type here in controversy is or is not conform to the provisions of a Treaty, least of all when that treaty is one under which both Scotland and England ceased to be independent States and merged their identity in An Incorporating union.

He also relied upon Yardley's Source Book of English Administrative Law (page 2) to show that "an act of a Sovereign Legislature cannot be invalid in the eyes of the Courts." To the same effect he also cited the observations of Garner in his book on Administrative Law (page 14) to support the contention that the British Parliament can pass any law it likes with the reasonable certainty that its edict will be recognised and enforced by the Courts as law and that there is no limit at all on the legislative powers of Parliament.

These observations with regard to the powers of the British Parliament are, however, of little assistance to us, for, there is no written Constitution in Great Britain. So, no question relating to the Constitutional vires of a legislative measure could arise under such a system, in the same fashion as an issue

of constitutional vires would be cognisable by the Supreme Courts of the United States of America or of Australia or India or indeed," any country governed under a written Constitution. As the learned Attorney-General has himself conceded, in the case of a Government set up under a written Constitution, the functions of the State are distributed amongst tire various State functionaries and their respective powers defined by the Constitution. The normal scheme under such a system, with which we are familiar, is to have a trichotomy of powers between the executive, the Legislature and the judiciary. But each of these organs may itself be fashioned in a variety of different shapes and forms. Thus the Legislature may be unicameral or bicameral; the legislative subjects may be divided between the federating units and the federation in a federal system or even the legislative power may be divided between the executive and the Legislature as in our present system. The executive, Legislature takes the Presidential or the Parliamentary form. The judiciary also may consist of various types and grades of Courts with the highest at the apex either as an ultimate Court of Appeal or a Court of Cassation. There may also be other administrative tribunals outside the judicial pyramid.

In all such cases, it will also be the function of the constitution to define the functions of each organ or each branch of ant organ, as also specify the territories in which, the subjects in respect of which and sometimes even the circumstances in which these functions will be exercised by each of these organs or sub-organs. Limitations would, therefore, be inherent under such a system so that one organ or sub-organ may not encroach upon the legitimate field of the other. Thus, under a written Constitution, the Legislature of a federal unit will not be able to legislate in respect of a subject which is within the field of the federal Legislature, nor will a federal Legislature be able to legislate upon a subject which is within the exclusive field of the Legislature of the federating units. It cannot, therefore, be said that a Legislature, under a written Constitution, possesses the same powers of "omnipotence" as the British Parliament. Its powers have necessarily to be derived from, and to be circumscribed within, the four corners of the written Constitution.

This takes me to the question as to what is a Constitution c The Constitution, as defined by K. C. Wheare, for countries which have a written Constitution, "is a selection of the legal rules which govern the Government of that country and which have been embodied in a document or collection of documents," It generally embodies the fundamental principles upon which the Government of the Country should be established and conducted but there is no set pattern or form provided for a Constitution. It may take a variety of forms. Some Constitutions endeavour to lay down in detail the whole Governmental structure of the Country while others merely establish the principal institutions of Government and fill in the details by sub-Constitutional laws organising the institutions and regulating to exercise of public power through the organs or institutions s a set up. Of late, the practice has also grown up of incorporating within the Constitution itself a declaration of fundamental rights and even basic principles of State policy. In countries which adopt a detailed Constitution, the Constitution is thought of as an instrument by which Government can be controlled, and it is for this reason that generally some measure of rigidity in the procedure for the amendment of the Constitution is also introduced, and the Constitution is conceived of as a fundamental or an organic or a Supreme law standing in a somewhat higher position than the other laws of the country. It then assumes the position of a law on the basis of which the vires of all other sub-Constitutional laws and the validity of governmental actions can be judged. Thus, even iron-Constitutional provisions, if incorporated in a Constitution, acquire a higher sanctity and stand on the same footing as strictly Constitutional provisions, No differentiation can be read between them, once they have been given a Constitutional status by being incorporated in the Constitution Itself.

It is interesting to note in this connection that in the Constitution of the United States of America as originally enacted the Bill of Rights, which had also been adopted by the founding fathers, had not been incorporated. This caused a certain amount of apprehension and misgivings in the minds of the people and, therefore, subsequently, the provisions of the Bill of Rights, which was, in fact, a declaration of fundamental human rights, which the people of America wanted to be guaranteed, were brought in as amendments and these formed the first ten amendments to the American Constitution. In this way, the Bill of Rights, has now, in America, also acquired a Constitutional status, and since then the same pattern has been followed in almost all the written Constitutions of incorporating a declaration of fundamental rights therein.

Cooley in his Treatise on Constitutional Limitations has defined a Constitution as "the fundamental law of a State, containing the principles upon which the Government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to -be confided, and the manner in which it is to be exercised.

I myself have in my judgment, in the case of Fazlul Quader Chowdhry v. Muhammad Abdul Haque (P L D 1963 S C 486) taken the following view:

"The fundamental principle underlying a written Constitution is that it not only specifies the persons or authorities in whom the sovereign powers of the State are to be vested but also lays down fundamental rules for the selection or appointment of such persons or authorities and above all fixes the limits of the exercise of those powers. Thus the written Constitution is the source from which all governmental power emanates and it defines its scope and ambit so that each functionary should act within his respective sphere. No power can, therefore, be claimed by any functionary which is not to be found within the four corners of the Constitution nor can anyone transgress the limits therein specified.

It is no doubt true that the Courts are not above the Constitution and the source of their jurisdiction as well is the Constitution itself. I do not seek to claim for the Courts any higher jurisdiction, but I would venture to point out that it is a cardinal principle that in every system of Government operating under a written Constitution the function of finally determining its meaning must be located in some body or authority and the organ of Government which is normally considered most competent to exercise this function is the Judiciary. This is, of course, subject to the provisions of the Constitution itself which may well provide otherwise. In such event, however, the contrary provision must be either express or one which can be derived as a necessary implication of the provisions of the Constitution. But such a departure is not to be readily inferred, for, the consistent rule of construction adopted by all Courts is that provisions seeking to oust the jurisdiction of superior Courts are to be construed strictly with a pronounced leaning against ouster."

In the case of Fazlul Quader Chowdhry v. Shah Nawaz (P L D 1966 S C 105) S. A. Rahman, J. (as he then was) in delivering the judgment of this Court observed :-

"The Constitution contains a scheme for the distribution of powers between various organs and authorities of the State, and to the superior judiciary is allotted the very responsible though delicate duty of containing all other authorities within their jurisdiction, by investing the former with powers to intervene whenever any person exceeds his lawful authority. Legal issues of the character raised in this case could only

be resolved in case of doubt or dispute, by the superior Courts exercising judicial review functions, assigned to them by the fundamental law of the land, via., the Constitution which must override all other sub-Constitutional laws. The Judges of the High Court and of this Court are under a solemn oath to "preserve, protect and defend the Constitution" and in the performance of this onerous duty they may be constrained to pass upon the actions of other authorities of the State within the limits set down in the Constitution, not because they arrogate to themselves any claim of infallibility but because the Constitution itself charges them with this necessary function, in the interests of collective security and stability. In this process, extreme and anxious care is invariably taken by the Judges to avoid encroachment on the Constitutional preserves of other functionaries of the State and they are guided by the fullest and keenest sense of responsibility while adjudicating on such a matter."

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

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

In saying this, however, I should make it char that I am making a distinction between "judicial power" and "jurisdiction". In a system where there is a trichotomy of sovereign powers, then ex necessitate rei from the very nature of things the judicial power must be vested in the judiciary. But what is this judicial power. "Judicial Power" has been defined in the Corpus Juris Secundum, Vol. XVI, Paragraph 144, as follows :-

"The judiciary or judicial department is an independent and equal coordinate branch of Government, and is that branch thereof which is intended to interpret, construe, and apply the law, or that department of Government which is charged with the declaration of what the law is, and its construction, so far as it is written law."

This power, it is said, is inherent in the judiciary by reason of the system of division of powers itself under which, as Chief Justice Marshal put it, "the Legislature makes, the executive executes, and the judiciary construes, the law." Thus, the determination of what the existing law is in relation to something already done or happened is the function of the judiciary while the predetermination of what the law shall be for the regulation of all future cases falling under its provisions is the function of the Legislature.

It may well be asked at this stage as to what is meant by "jurisdiction"? How does it differ from "judicial power"? Apart from setting up the organs the Constitution may well provide for a great many other things, such as, the subjects in respect of which that power may be exercised and the manner of, the exercise of that power. Thus it may provide that the Courts) set up will exercise revisional or appellate powers or only

act as a Court of a cessation or oily decide. Constitutional issues. It may demarcate the erritories in which a particular Court shall function and over which its Writs shall run It may specify the persons in respect of whom the judicial power to hear and determine will be exercise able. These are all matters which are commonly comprised in what is called the jurisdiction of the Court. It expresses the concept of the particular res or subject manner over which the judicial power is to be exercised and the manner of its exercise. Jurisdiction is, therefore, a right to adjudicate concerning a particular subject-matter in a given case, as also the authority to exercise in a particular manner the judicial power vested in the Court.

In exercising this power, the judiciary claims no supremacy over other organs of the Government but acts only as the administrator of the public will. Even when it. declares a legislative measure unconstitutional and void, it does not do so, because, the judicial power is superior in degree or dignity to the legislative power; but because the Constitution has vested it with the power to declare what the law is in the cases which come before it. It thus merely enforces the Constitution is a paramount law whenever a legislative enactment comes into conflict; with it because, it is its duty to see that the Constitution prevails. It is only when the Legislature fails to keep within its own Constitutional limits, the judiciary steps in to enforce compliance with the Constitution. This is no doubt a delicate task as pointed out in the case of Fazal-ul-Quader Chaudhary v. Shah Nawaz, which has to be performed with great circumspection but it his nevertheless to be performed as a sacred Constitutional duty when other State functionaries disregard the limitations imposed upon them or claim to exercise power which the people have been careful to withhold from them.

On the other hand it is equally important to remember that it is not the function of the judiciary to legislate or to question the wisdom of the Legislature in making a particular law if it has made it competently without transgressing the limitations of the Constitution. Again if a law has been competently and validly made the judiciary cannot refuse to enforce it even if the result of it be to nullify its own decisions. The Legislature has also every right to change, amend or clarify the law if the judiciary has found that the language uses by the Legislature conveys an intent different from that which was sought to be conveyed by it. The Legislature which establishes a particular Court may also, if it so desires, abolish it.

Having said this much about the constitutional position of the Courts and their relationship with the other equally important organ of the State, namely; the Legislature. It is now necessary to examine as to whether any document other than the Constitution itself can be given a similar or higher status or whether the judiciary can, in the exercise of its judicial power, strike down any provision of the Constitution itself either, because, it is in conflict with the laws of God or of nature or of morality or some other solemn declaration which the people themselves may have adopted for indicating the form of Government wish to be established. I for my part cannot conceive a situation, in which, after a formal written Constitution has been lawfully adooted by a competent body and has been generally accepted by the people including the judiciary as taw Constitution of the country, the judiciary can claim to declare any of its provisions ultra vires or void. This will be no part of its function of interpretation. Therefore, in my view, however solemn or sacrosanct & 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 tire case of any doubt as to the intent of the law-maker, it may be looked at to ascertain the true intent, but it cannot control the substantive provisions thereof. This does not, however, mean that the validity of no Constitutional measure can be tested in the Courts. If a Constitutional measure is adopted in a manner different to that prescribed in the Constitution itself or is passed by a lesser number of votes than those specified in the Constitution then the validity of such a measure may well be questioned and adjudicated upon. This, however, will be possible only in the case of a Constitutional amendment but generally not in the case of a first or a new Constitution, unless the powers of the Constitution-making body itself are limited by some supra-Constitutional document.

It is contended on behalf of the respondents that this Court has, in the case of Asma Jilani v. The Government of the Punjab (P L D 1972 S C 139), already declared that the Objectives Resolution adopted by the first Constituent Assembly of Pakistan on the 7th of March 1949, is the "grund norm" for Pakistan and, therefore, impliedly held-that it stands above even the Interim Constitution or any Constitution that may be framed in the future. I regret to have to point out that this is not correct. All that was said by me in my judgment in that case (page 182) was as follows:-

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

This is an Immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This Resolution has been described by Mr. Brohi as the "cornerstone of Pakistan's legal edifice" and recognised even by the learned Attorney-General himself "as the bond which binds the nation" and as a document from which the Constitution of Pakistan "must draw its inspiration" This has not been abrogated by any one so far, nor has this been departed or deviated fror4 by any regime, military or civil. Indeed, it cannot be, for, it is one of the fundamental principles enshrined in the Holy Quran."

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

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

"Pakistan is an Islamic Republic. Its ideology is enshrined in the Objectives Resolution of the 7th April 1949, which inter alia declares wherein the Muslims shall be enabled to order their lives (n the individual and collective spheres In accordance with the teachings and requirements of Islam as set out in the

Holy Quran and Sunnah. We should, therefore, turn more appropriately to Islamic Jurisprudence for the definition of "law" One method of defining "law" is to know its source. In Shari at laws have divine origin. They are contained in the Holy Quran, and Hadith, namely precepts and actions of the Holy Prophet (peace be upon him). The other sources are ljma Consensus and juristic deductions including Qiyas: Analogy, Istihsan or Juristic Equity, Public Good, Istidlal; Reason and ljtihad; Juristic Exposition. While Juristic Deductions are judge-made laws, Ijma is based on the doctrine of Imam Shafi'i that "the voice of the people is the voice of God", and Is the most fruitful source of law-making in Shari at. In the present day context the Legislative Assemblies comprising of chosen representatives of the people perform this function. Thus, in Islamic Jurisprudence, the will of a sovereign, be he the monarch, the President or the Chief Martial Law Administrator is not the source of law. The people as delegatee of the Sovereignty of the Almighty alone can make laws which are in conformity with the Holy Qur'an and Sunnah."

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

"Our grund norms are derived from our Islamic faith, which is not merely a religion but is a way of life. These grund norms are unchangeable and are inseparable from our polity. These are epitomised in the Objectives Resolution passed by Constituent Assembly of Pakistan on 7.3-1949, and were incorporated in the first Constitution of the Islamic Republic of Pakistan of 1956 and repeated again in the Constitution of 1962. Its basic postulates are that sovereignty belongs to Allah Almighty which is delegated to the people of Pakistan who have to exercise the State powers and authority through their chosen representatives on the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam wherein the fundamental human rights are to be respected and the independence of the judiciary is to be fully secured. Can it be argued that any adventurer, who may usurp control of the State power in Pakistan, can violate all these norms and create a new norm of his own in derogation of the same? The State of Pakistan was created in perpetuity based on Islamic Ideology and has to be run and governed on all the basic norms of that ideology, unless the body politic of Pakistan as a whole, God forbid, is re-constituted on an un-Islamic pattern, which will, of course, mean total destruction of its original concept The Objectives Resolution is not just a conventional preface. It embodies the spirit and the fundamental norms of the constitutional concept of Pakistan."

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

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

There is no mention in these observations either of the Objectives Resolution being the "grund norm" for Pakistan. The "grund norm" referred to by us was something even above the Objectives) Resolution which as Sajjad Ahmad Jan, J. put it "embodies the spirit and the fundamental norms of the constitutional concept of Pakistan". It was expected by the Objectives Resolution) itself to be translated into the Constitution. Even those that adopted the Objectives Resolution did not envisage that it would be document above the Constitution. It Is incorrect, therefore, to say that it was held by this Court that the Objectives

Resolution of the 7th of March 1949, stands on a higher pedestal than the Constitution itself. The views of the minority of the learned Judges in the High Court, in so far as they have sought to read into the judgments of this Court some thing which is not there, cannot, therefore, be supported.

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

The next question that arises for consideration is as to whether the Interim Constitution is itself a valid document and whether it has been framed by a competent body. The first attack on the validity of the Interim Constitution is on the ground a that the National Assembly, as now constituted, was an illegal body, because, the majority of its members, namely, 160 out of 300 elected from East Pakistan, had not participated in its proceedings. Alternatively, it is contended that even if this truncated body is allowed to function under the doctrine of necessity, it can function only within a limited field and for a limited purpose. It cannot, as at present constituted, claim the right to frame a Constitution for Pakistan, because, it would only be a Constitution framed by a minority of the members for a part of the Country. It could, therefore, at best function as a National Assembly under the Constitution of 1962 and perhaps only make amendments to that Constitution in the manner laid down therein, because, the Legal Framework Order of 1970 (President's Order No. 2 of 1970), being an act of an usurper, has no existence in the eye of the law. It cannot even be condoned, because, an usurper cannot arrogate to himself the right to give to the country a legal Constitution. As a result furthermore of the decision of this Court, in Asma Jilani's case, the Constitution of 1962 must, therefore, be held to be still holding the field, and, thus even if the election of the members of the National Assembly is condoned on the basis of necessity, they can only function within the framework of the 1962-Constitution.

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

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

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

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

An indication of this altered situation was also given in the judgment of this Court in the judgment of this Court in Asma Jilani's case at page 208 where it was pointed out that the fact that since the preparation of the judgment in that case the National Assembly had met and ratified the assumption of power by the present President, who is an elected representative of the people and the leader of the majority party in the National Assembly, as now constituted, as also ratified in Interim Constitution, may well have radically altered the situation. I did not then indicate how the situation was altered which I do now by holding that the National Assembly was validly constituted and it validly ratified the Interim Constitution and the assumption of power by the present President. The validity of these acts, as was conceded then by Mr. Manzoor Qadir, was "derived from the will of the body, politic. If the body politic gives an express answer, that answer is

valid and it does not matter who puts the question." It was on the basis of this argument that my learned brother Yaqub All, J. too held that "the legality of the elections to the National and Provincial Assemblies under the Legal Framework Order cannot, therefore, be doubted on the ground that Yahya had no legal authority to promulgate this order".

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

This does not, however, mean that the body having the power of framing a Constitution is "omnipotent" or that it can disregard the mandate given to it by the people for framing a Constitution or can frame a Constitution which does not fulfil the aspirations of the people or achieve their cherished objectives political, social or economic. These limitations on its power, however, are political limitations and not justiciable by the judiciary. If a Constituent Assembly or National Assembly so acts in disregard of the wishes of the people, it is the people who have the right to correct it. The judiciary cannot declare any provision of the Constitution to be invalid or repugnant on the ground that it goes beyond the mandate given to the Assembly concerned or that it does not fulfil the aspirations or objectives of the people. To endeavour to do so would amount to entering into the political arena which should be scrupulously avoided by the judiciary. With political decisions or decisions on questions of policy, the judiciary is not concerned. Its function is to enforce the Constitution and to see that the other organs of the State confine themselves within the limitations prescribed therein; but in doing so it must remember that it given too is subservient to the Constitution and its power to hear and determine is subject to the limitations contained therein and can be exercised only with regard to the subjects over which it is given jurisdiction and in the manner prescribed. By virtue of tae fact teat it has been set up as that organ of the State which is to adjudicate upon disputes, it has the right to exercise its "judicial power" to hear and determine even in cases where its own jurisdiction is in question. If there is a dispute on the point as to whether it has or has not jurisdiction over a certain subject-matter, it can certainly hear and determine that dispute, even if the result be that it had to hold that it has no jurisdiction.

In implementing either the Constitution or the law, it has also the right to interpret as to what the law means or what the Constitution says. The learned Attorney-General does not dispute that the judiciary has this right of interpretation but he nevertheless maintains that the interpretation put upon Article 281 by even the majority of the Judges in the High Court is incorrect, because, if the provisions of this Article have taken away the jurisdiction of the High Courts to question the validity either of the Martial Law Orders and Regulations validated thereby or of the acts done or purported to be done in exercise of the powers given under such Martial Law Orders and Regulations, then even questions of mala fides or absence of jurisdiction become irrelevant. If there is ouster of jurisdiction, the ouster is complete and no exceptions can be made to it.

This brings me to the question of interpretation of Article 281 which is in these terms :-

"281.-(1.) All Proclamations, President's Orders, Martial Law Regulations, Martial Law Orders, and all other laws made as from the twenty-fifth day of March 1969, are hereby declared, notwithstanding any judgment of any Court, to have been validly made by competent authority, and shall not be called in question in any Court.

(2) All orders made, proceedings taken and acts done by any authority, or by any person, which were made, taken or done, or purported to have been made, taken or done, on or after the twenty-fifth day of March 1969, in exercise of the powers derived from any President" Orders, Martial Law Regulations, Martial Law Orders, enactments, notification, rules, orders or bye-laws, or in execution of any orders made or sentences passed by any authority in the exercise or purported exercise of powers as aforesaid, shall be deemed to be and always to have been validly made, taken or done.

(3) No suit or other legal proceedings shall lie in any Court against any authority or any person for or on account of or in respect of any order made, proceedings taken or act done, whether in the exercise or purported exercise of powers referred to in clause (2), or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers.

The learned Attorney-General points out that, because this Court had in Asma Jilani's case, declared General Muhammad Yahya Khan to be an usurper all legislative measures promulgated by him became void ab initio and could not be validated by the Courts, the National Assembly wanted to remove this difficulty as a number of important measures had been introduced in the interests of restoring a democratic Government by the chosen representatives of the people, maintaining the integrity of the Country and for bringing about social and economic reforms. Confusion and uncertainty could not be allowed to prevail. This Court had decided that the Courts would only be in a position to condone, on the basis of the doctrine of necessity, some of these acts, legislative or otherwise, but such condonation would necessarily entail bringing up of specific cases before the Courts according to their established procedure, and this would have taken a great deal of time. Hence, since the only authority which could validate the laws was the Constitution-making body, it decided firstly to rive a blanket validation to all such legislative measures, "notwithstanding any judgment of any Court" and also provided that such measures shall not be "called in question in any Court" on the ground that they had not been validly made by a competent authority.

Next by clause (2), similar validation was conferred on everything done or even purported to have been done" in exercise of powers derived from the measures validated under sub-Article (1) or in execution of any orders or sentences passed by any authority in the exercise of or even the purported exercise of the powers derived from the aforesaid measures. This time the validation was with retrospective effect for such things were to be deemed to be and always to have been validly made, taken or done.

Lastly by clause (3), complete immunity from legal proceedings of any kind whatsoever in any Court was given to all manner of authorities and persons in respect of anything done by them, whether in the exercise of the powers referred to in the earlier clause or even the purported exercise of such powers.

These Constitutional provisions, according to the learned Attorney-General, completely ousted the jurisdiction of all Courts to question the validity of such acts, orders and proceedings and all sentences passed by any authority in exercise or even the purported exercise of powers given under these measures. There was no scope, after such a complete ouster of jurisdiction, to assert that any Court still had the jurisdiction to examine the validity of any act done in exercise of such powers even if it was coram non judice or without jurisdiction or tainted with mala fides.

Reference in this connection was also made to Stroud's Judicial Dictionary to show that "when validity is given to anything 'purporting' to be done in pursuance of a power, a thing done under it may have validity though done at a time when the power would not be really exercisable." Similarly, it is pointed out, that according to Stroud, "when a thing is to be deemed" to be something else, It is to be "treated as that something else with the attendant consequences", even though it is not that something else.

The decision of the Federal Court in the case of The Punjab Province v. Malik Khizar Hayat Khan Tiwana (P L V 1956 F C 200) is also relied upon to show that the Federal Court of Pakistan too had upheld that a declaration of such retrospective validity could be competently given by a Constituent Assembly to laws passed in excess of legislative authority. The Federal Court there held : -

"Where a law is invalid on the ground that it is in excess of the powers of the Legislature passing it, its validation by a constituent authority must ex-hypothesi be deemed to be Constitutional legislation, and any objection to the manner in which such validation is effected is an objection to the form of that legislation and not to the power of the validating authority.

A constituent authority, like the Constituent Assembly, with no limitations on its powers may at any time encroach upon the sphere of a Legislature which is subject to its constituent authority, and all such encroachments, whether they take the form or validation of the laws of, or the making of laws for that Legislature are in substance provisions as to the Constitution of the State.

In such matters the Courts are not to question the motives or policy of the Legislature or to refuse to give effect to legislation merely because it appears to be harsh or unreasonable or vindictive. Their plain duty is to ascertain the intention of the Legislature and to carry it out irrespective of the consequence that may ensue to a particular party."

Reliance has also been placed on a decision of this Court in the case of Mian Iftikhar-ud- Din v. Muhammad Sarfraz (P L D 1961 S C 585) to show that where any action expressed or purported to have been taken under a Statute has been protected from being questioned in a Court of Law by excluding the jurisdiction of all Courts to question the validity of such action, as was done by Martial Law Regulation No. 72 of 1959, then such an action cannot be made "the subject-matter of any proceedings in a Court of Law".

Reliance is also placed on another decision of this Court in the case of Muhammad Khan v. The Border Allotment Committee (P L D 1965 S C 62) where the main judgment was delivered by me; to point out that where the jurisdiction of the Courts was validly ousted, in that case, by the Border Area Regulation, the attack on the action of the Border Allotment Committee, even on the ground of mala fides, it was held, would not restore the jurisdiction of the Courts.

The learned Advocate-General for Punjab Province has also referred to a decision of the House of Lords in Great Britain in the case of Smith v. East Elloe Rural District Council (1956) 1 All E R 855) where the Court being called upon to interpret a similar ouster clause prohibiting the Courts from questioning an order for compulsory purchase under the Acquisition of Land (Authorisation Procedure), 1946, repelled the contention that the words "Compulsory purchase order" must be read as meaning "a compulsory purchase order made in good faith". The Court held that it would have, in view of the wide language used in the ouster clause no justification for the introduction of limit in words such as, if made in good faith".

" But I notice that the same learned Judges then went on to say that he was "reluctant to express a final opinion" on the question as to whether the words "is not empowered" were capable of permitting a challenge not only on the ground of "vires" but also on the ground of "bad faith" or on any other ground which would justify a Court in setting aside a purported exercise of a statutory power.

These decisions do indicate that where the jurisdiction of the Courts to judicially review any executive act has been competently taken away, then the Court will not be able to assert Its jurisdiction to do so under any circumstances but this must, in my opinion, depend upon the nature of the jurisdiction sought to be ousted and the nature and extent of the ouster itself. If the language used is such that it leaves no room for doubt as to the intention of the Legislature to oust the jurisdiction of the Courts in all circumstances, then that will have to be given effect and even acts performed without jurisdiction or mala fides will not be open to judicial scrutiny. But the Courts having the right to interpret the law will in each given case decide the precise nature of the ouster clause and the extent to which the jurisdiction of the Courts has been ousted, keeping in mind the principles consistently affirmed by all Courts that provisions seeking to oust the jurisdiction of superior Courts are to be construed strictly with a pronounced leaning against ouster.

As a general rule it is unthinkable that any Legislature consisting of civilised persons would in normal circumstances seek to perpetrate a manifest injustice by validating acts done in excess of jurisdiction or In abuse of jurisdiction or clearly in bad faith and it is for this reason that the Courts, out of respect for the Legislature, start with the presumption that the Legislature has to be imputed a just intention unless the words of ouster used are either so express or so unequivocal that it must come to the contrary conclusion. The Legislature, however, even in abnormal circumstances, does not use such express or clear words or words which would necessarily imply such an unfair or unjust intent but resorts to legislative devices of incorporating "deeming' state clause or extending the validity to even acts "purported" to tae done in exercise of statutory powers and then to add a clause saying that no Court shall call in question such acts.

It is in the latter case that difficulties arise. What meaning are the Courts to give to these words? How are they to be interpreted? Should they proceed on the well recognised assumption, firmly established by a long line of decisions, that a Legislature always intends what is just, fair and equitable in the circumstances of the abnormal situation it was called upon to provide for or should they cast this principle to the winds?-If the Legislature for a beneficial public purpose makes provision for depriving a citizen of his property in certain circumstances and adds to the statute such an ouster clause together with a protection for acts learned to be done or purported to be done in exercise of the powers given by that statute should the Courts say that they are powerless even if a public functionary maliciously deprives a citizen of his property for the

functionary's private aggrandisement merely because he says that he acts in exercise of his powers under that statute?

This is the difficult task which the Courts have, unfortunately to undertake as a part of the Constitutional duty imposed upon them to hear and determine disputes. In the case of the High Courts this duty is more onerous and more difficult because Article 201 of the Interim Constitution itself further charges them to keep an aggrieved citizen protected from unlawful executive acts. I am not unmindful of the fact that this power itself is subject to other provisions of the Interim Constitution and it has been claimed that Article 281 crakes such other provision. I shall presently examine how far tats claim is justified and whether it extends to tae extent suggested by the learned Attorney-General and Advocate-General but at this stage I only wish to highlight the very delicate nature of the task, which the superior Courts are called upon to undertake, of maintaining a just and fair balance between the rights of the citizen and those of the Legislature both conferred by the same Constitution. If it is possible to interpret the Constitution so as to preserve both then that should be done, for, that would be the roost desirable solution. If not then which one should prevail and to what extent?

This is the task which I now propose to undertake and to becomes necessary, for this purpose, to examine the provisions of Article 281 of the Interim Constitution with greater care in order to understand as to what exactly it seeks to achieve and to what extent the words used in this Article have ousted the jurisdiction of the Courts and in respect of what matters.

As I read the provisions of Article 281, it seems to me that it was designed to achieve a three-fold purpose. The first clause thereof was intended to give a blanket validation to all legislative measures enacted on and from the 25th day of March 1969, when General Yahya Khan usurped power to the 21st of April 1972, when the Interim Constitution came Into force this clause not only validates all such measures but also nullifies the effect of the judgment of this Court in Asma Jilani’s case by using the words "notwithstanding any judgment of any Court" and further completely ousts the jurisdiction of the Courts to question either the validity of these measures or the competence of the authorities enacting them. As a result of this clause, it is no longer possible for any Court to declare any legislative measure enacted or promulgated between the 25th day of March 1969 to the 21st of April 1972, to be void or invalid, on account of it having been made or enacted by a person or authority having no power to dose.

By clause (2) validation has been given to all manner of acts done, proceedings taken or executive, ministerial or judicial orders issued either in exercise of the powers derived from the legislative measures validated under clause (1) or in the 'purported' exercise of such powers or in execution of any orders made or sentences passed in the exercise of or in the 'purported' exercise of the powers derived from such legislative measures. It is significant, however, that in this clause the law-maker did not choose to use any specific words for ousting the jurisdiction of the Courts as in clause (1) or for validating such acts `notwithstanding any judgment of any Court".

The law-maker must be presumed, therefore, to be aware of the exact import of the words of ouster which it had Itself employed in clause (1) to oust the jurisdiction of the Courts and, gas such, one is legitimately entitled to ask as to why were these words consciously omitted from clause (2)? The general rule is that if words are used in one clause of a statute to convey one particular sense then if those same words or

words having the same import are not used in another clause then the intention of the law-maker is to make a departure. Thus if mere words of validation in clause (1) were not considered sufficient to oust the jurisdiction of the Courts then why should such words by them selves be sufficient in clause (2) to achieve the same purpose? Are we not by reason of such conscious omission then entitled legitimately to infer that the Legislature's intention was not to give the same measure of protection to the acts, proceedings, orders or sentences as were being given to the legislative measures themselves under which these acts, proceedings, orders, sentences were done, made or passed or purported or deemed to be so done, made, passed or issued?

It is a well-established rule that we have to gather the intention of the law-maker from the words used by it; and if it has in two clauses of the same Article used different words, then it y follows that its intention is not the same, particularly, where such a conclusion also appears to be in consonance with reason and justice. There can be nothing unreasonable in the law-maker feeling that, while the legislative measures themselves must be protected from challenge, scope must still be left to a citizen to seek appropriate remedy, where any person or authority vested with powers under these legislative measures had acted in excess of or abuse of his powers or for purposes collateral to the purposes of the legislative measures themselves. It seems only fair that the subject should have a right to obtain relief and should not be made to suffer injustice where the acts of injustice committed cannot be justified on the basis of the legislative measures validated by clause (1). Surely the Legislature cannot be imputed an intention to perpetuate a patent or manifest injustice.

The learned Attorney-General for Pakistan and the learned Advocate-General for the Province of Punjab, however contend that, since the validation has also been given to things "purported to have been made, taken or done", It is sufficient to indicate that, even actions which were not protected or covered by the legislative measures themselves but were merely done In the pretended exercise of powers given by those measures were also validated and, therefore they could not be called in question. Therefore, even mala fide acts or acts done without jurisdiction must be deemed to be valid.

I will revert to this question later, but, for the present, it will be sufficient for me to point out that clause (2) does not, in view of the conscious omission to incorporate an ouster clause therein, oust the jurisdiction of the Courts to judicially review the orders made, proceedings taken or acts done or orders or sentences passed in exercise of the powers derived from the legislative measures validated by clause (11 or in execution of orders and sentences passed in exercise of such powers. It cannot, therefore, be said that the Court has no jurisdiction to examine this question at all. To what extent it will give validity to such orders, etc. is a different question, which will, of course, depend upon the exact meaning to be attached to the words "in the exercise or the purported exercise of powers". With this I shall deal later.

Clause (3) of this Article, in my view, is in the nature of an indemnity clause which protects all persons or authorities from legal proceedings or legal libility in respect of acts validated by clause (2).

The result, therefore, that has, in my view, been achieved by Article 281 Is that the legislative measures themselves have been validated and Courts have been debarred from questioning their validity. Similarly, persons or authorities acting in the exercise of or the purported exercise of powers given by these measures have been protected from legal proceedings, but the acts done, proceedings taken or orders made in the exercise or purported exercise of powers derived from those measures have only been validated without ousting the jurisdiction of the Courts.

Even the blanket validation given by clause (1) to the legislative measures enacted during the relevant period, is only of a formal nature, because, in my view, clause (1) of Article 281 should be read along with clauses (2) and (3) of Article 280. These clauses are in these terms :-

208—(1) ……

(2) The Proclamation made on the twenty-fifth day of March 1969, is revoked with effect as from the commencing day, and the Orders specified in the Sixth Schedule and any Orders amending those Orders are repealed with effect as from that day, but this clause shall not affect any existing laws made under those Orders:

(3) All Martial Law Regulations and Martial Law Orders, except the Martial Law Regulations and the Martial Law Orders specified in the Seventh Schedule, are repealed with effect as from the commencing day, and on that day each Martial Law Regulation and the Martial Law Orders so specified shall be deemed to have become an Act of the appropriate Legistature and shall, with the necessary adaptations, have effect as such:

Provided that no Bill to amend or to repeal any of the Martial Law Regulations or the Martial Law Orders specified as aforesaid shall be introduced or moved without the previous sanction of the President.

It will thus be seen that, even though clause (1) of Article 281 has validated all those legislative measures enacted during the period beginning from the twenty-fifth day of March 1969, clause (2) of Article 280 has actually revoked the proclamation of the 25th of March 1969, itself and all Orders specified in the Sixth Schedule to the Interim Constitution including all orders amending those orders. Similarly clause (3) of Article 280 has repealed all Martial Law Regulations and Martial Law Orders except those specified in the Seventh Schedule to the Interim Constitution and even those so specified have been kept alive merely as acts of the appropriate Legislatures and are to have effect as such. Therefore, notwithstanding the blanket validation given by clause (1) of Article 281, the net result, if the provisions of this clause are read together with the provisions of clauses (2) and (3) of Article 280, is that the proclamation of the 25th of March 1969, under which General Yahya Khan assumed powers, and the orders specified in the Sixth Schedule stand repealed and all Martial Law Orders and Regulations are repealed except the few specified in the Seventh Schedule. Even those so preserved are to take effect only as sub-constitutional legislative measures and not as supra-Constitutional measures.

The consequence of the repeal is to attraot the provisions of Article 295 of Interim Constitution itself which- provides as follows :-

"295. Where a law (including a President's Order, a Martial Law Regulation or a Martial Law Order) is repealed, or is deemed to have been repealed, by, under, or by virtue of this Constitution, the repeal shall not, except as otherwise provided in this Constitution,-

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of the law or anything duly done or suffered under the law;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the law;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the law; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; or

(f) affect the continuance of any body or authority constituted by or under such law 1 and any such investigation, legal proceeding or remedy may be instituted, continued or en forced, and any such penalty, forfeiture or punishment may be imposed, and such body or authority continued as if the law had not been repealed."

Reading these provisions together, as we are entitled to do, for, the Constitution has to be construed like any other document 7 reading it as a whole and giving to every part thereof a meaning consistent with the other provisions of the Constitution, the net result of clause (1) of Article 281 is merely to bring about a notional validation, for, immediately clause (1) of Article 281 came into effect, clauses (2) and (3) of Article 280 also became operative simultaneously. As a result thereof, in respect of the Martial Law Regulations and Martial Law Orders repealed by Article 280(3) the provisions of Article 295 became attracted, and even the few Martial Law Regulations and Martial Law Orders, specified in the Seventh Schedule, which are to continue, have to be treated as and to have effect as sub-constitutional gislative measures which will be open to the judicial scrutiny of the Courts, for, their validity will always be open to scrutiny and capable of being tested on the basis of the provisions of the Constitution itself, the Supreme or Organic Law.

I propose now to consider the effect produced or achieved by the use of the words "done or purported to have been done" in exercise of the powers or "in the purported exercise" of powers given by the legislative measures validated by clause (1) of Article 281. There can be no manner of doubt as to the meaning of the words "acts done" in exercise of the powers given by the said measures. These must necessarily refer to acts validly done in the due or proper exercise of the powers. But so far as the words "purporting to be done" and "in the purported exercise of powers" are concerned, there is, as pointed out by the High Court, some difference of judicial opinion as to their scope and meaning. While some Courts have held that these words are limited to acts done "negligently or inadvertently" and do no extend to acts done mala fide, there are other decisions which seem to take the wider view that acts done, whether in good faith or not, would be covered, if they are such as are ordinarily done by the person concerned in the course of his duties and he desired that other persons should believe that he was so acting.

The latter view appears at first sight to find some support from the observations of the Privy Council in the case of Bhagchand v. Secretary of State (54 I A 338-A I R 1927 P C 176) but a more careful reading of the decision reveals that the exact meaning of the word "purported" did not arise there for consideration at all. What was considered in that case was the validity of the contention that is a suit for an injunction no notice under section 80, C. P. C was necessary.

Be that as it may, however wide a meaning is given to the word "purporting", it appears that no Court has extended it to cover an act done which the person doing it had no jurisdiction at all to do or which was clearly outside the sphere of his activities. Thus, if an act can be done only by a Chief Martial Law Administrator then if the same act is done by a Sub-Area Martial Law Administrator, he cannot possibly claim that he purported to act as the Chief Martial Law Administrator. Similarly, if a trial can be held only by a Special Military Court, then a Summary Military Court cannot hold the trial and yet claim that it purported to act as a Special Military Court. It is in this sense that it has also been held that public officials using defamatory language, assaulting others or seizing properties which they have no authority to seize, cannot claim that they were doing something purporting to act in their official capacity.

Thus in the case of Naryan Hajri v. Yashwant Raoji (A UR-'1928 Bom: 352) a Full Bench of the Bombay High Court held that a police officer assaulting a witness in the course of recording his statement cannot claim that he was acting "under colour or in excess of" his duty of recording the statement within the meaning of the Bombay District Police Act, 1890.

This would seem to indicate that acts which are wholly unauthorised by the legislative measure under which the officer pretends to act can also not be described as acts done in the purported exercise of the powers given by that measure.

"Purport", according to its dictionary meaning, means "be intended to seem" but merely so showing will not be sufficient if the act done cannot be one within the scope of that officer's official capacity. In other words, only when a person or authority having jurisdiction to do a certain thing in exercise of that jurisdiction does that thing wrongly or irregularly, can he claim to be purporting to act in exercise of the powers given to him. It follows, therefore, that an act, which is clearly without jurisdiction, or in the case of a judicial or quasi judicial act, which is coram non judice, the use of the words "purported exercise" in the validating clause will not give that act the protection which the learned Attorney-General of Pakistan and the learned Advocate-General for the Province of Punjab contend for.

Now the next question is as to whether acts which are done mala fide are protected by these words. There are some decisions of the British Indian High Courts, which have been referred to in the impugned judgments of the High Court, where it has been held that, if an act within the jurisdiction of a public officer is done mala fide in exercise of that jurisdiction it can be said that it is an act "purported" to be done by that officer in his public capacity. But so far as this Court is concerned, it has, in several cases, laid done that mala fide acts are not exempt from judicial scrutiny.

In the case of Zafar-ul-Ahsan v. The Republic of Pakistan (P L D 1960 S C 113.), while considering the ouster clause in clause (5) of Article 6 of the Laws (Continuance in Force) Order, 1958, which expressly said that an order of the authority mentioned in clause (3) of that order "shall not be called in question in any Court", Munir, C. J. observed :-

"If a statute provides that an order made by an authority acting under it shall not be called in question in any Court, all that is necessary to oust the jurisdiction of the Courts is that the authority should have been constituted as required by the statute, the person proceeded against should be subject to the jurisdiction of the

authority, the ground on which action is taken should be within the grounds stated by the statute, and the order made should be such as could have been made under the statute. These conditions being satisfied, the ouster is complete even though in following the statutory procedure some omission or irregularity might have been committed by the authority. If an appellate authority is provided by the statute, the omissions or irregularity alleged will be a matter for that authority, and not, as rightly observed by the High Court, for a Court of law. Of course where the proceedings are taken mala fide and the statute Is used merely as a cloak to cover an act which in fact is not taken though it purports to have been taken under the statute, the order will not, in accordance with a long line of decisions in England and in this sub-continent,, be treated as an order under the statute."

It will be observed that this too was a case of an ouster of jurisdiction of the Courts by express words contained in a supra-Constitutional document. Nevertheless, the learned Chief Justice pointed out with great clarity the conditions under which the ouster would be operative and he in no uncertain terms excluded there from proceedings taken mala fide or cases in which the statute was merely being used as a cloak to cover an act which, in fact, is not taken, even though it purports to have been taken under the statute.

This again emphasises the same point that if the statute is 'being used merely as a cloak for a purpose which is not covered by the statute, then, even the ouster clause, will not operate to exclude the jurisdiction of the Courts to review the official act concerned in exercise of the power conferred by the Constitution itself e.g. by Article 201.

It has also been held by this Court that an act done mala fid is an act without jurisdiction. Thus, in the case of Abdul Rauf v. Abdul Hamid Khan (PLD1965SC671), Kaikaus, J., while delivering the unanimous judgment of the Court, observed :-

"A mala fide act is by its nature an act without jurisdiction. No Legislature when it grants power to take action or pass an order contemplates a mala fide exercise of power. A mala fide order is a fraud on the statute. It may be explained that a male fide order means one which is passed not for the purpose contemplated by the enactment granting the power to pass the order, but for some other collateral or ulterior purposes."

Again, in the judgment of the Court in the case of Mohammed Jamil Asghar v. The Improvement Trust (PLD1965SC698), the same learned Judge observed:

"However, with respect to mala fides the jurisdiction of the civil Court can never b,, taken away for a mala fide act is in Its very nature an illegal and void act and the civil Court can always pronounce an act to be mala fide and therefore void."

I have myself, in the case of the Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14), where too the question of ouster of jurisdiction of the High Court was raised, held that, in the discharge of its duties under Article 98 of the Constitution of 1962, corresponding to Article 201 of the Interim Constitution, the High Court would have the right to determine the circumstances in which a detention could be said to be detention in an unlawful manner and that in so doing the High Court would be

entitled to go into the question of male fides or colourable exercise of power, for, such exercise of power is not regarded to be action in accordance with law.

It will thus be seen that, so far as this Court is concerned, it has consistently held the view that a mala fide act stands in the same position as an act done without jurisdiction, because, no Legislature when granting a power to do an act can possibly contemplate the perpetration of injustice by permitting the doing of that act mala fide. I am, therefore, of the opinion that the words "purported to be done or done In the purported exercise of powers" cannot cover acts which were not done by persons empowered under the statute or the legislative measure to so act or were clearly beyond the scope of the powers given by the statute or were done male fide or by practising a fraud upon the statute for a colourable purpose. I, therefore, agree with the majority view which prevailed in the High Court that clause (2) of Article 281 of the Interim Constitution does not validate acts which are coram non judice or without jurisdiction or done mala fide.

The reference by the learned Attorney-General to the decisions of this Court in the cases of Muhammad Khan v. The Border Allotment Committee (P L D 1965 S C 623) and Mian Iftikhar-ud-Din v. Muhammad Sarfraz are of no assistance on this point, because, in both those cases, the legislative measure under consideration had, by express words, ousted the jurisdiction of the Court and were legislative measures of a supra-Constitutional nature which could not be challenged in any way by reason of the ruling given in the case of State v. Dosso (P L D 1958 S C (Pak.) 533). After the coming into force of the 1962-Constitution, a number of decisions of the Border Allotment Committee have in fact been scrutinised and even set aside by the High Courts in exercise of their powers under Article 98 of the Constitution of 1962 and such orders have been maintained by this Court in appeal.

As I have already pointed out, clause (2) of Article 281 of the Interim Constitution contains no express words ousting the jurisdiction of the Courts similar to those contained in clause (1) of the same Article and it is for this reason that it has been contended that the validation given by the said clause to even acts purported to be done In exercise of powers given by the legislative measures validated by clause (1) or in the purported exercise of these powers, amounts to the validation not only of acts lawfully done but also of acts done without jurisdiction or mala fide. The decisions relied upon, however, only indicate that where jurisdiction is in fact ousted, then an allegation of male fides will not restore jurisdiction. This is not the case here. Those decisions, therefore, have no application, because, in my view, the jurisdiction of the Courts has not been ousted by clause (2) of Article 281 either by express words or by necessary implication.

There is yet another reason which impels me to come to the same conclusion. As I have already indicated earlier in this judgment, the validation given by clause (1) to the legislative measures themselves which were enacted between the 26th of March 1969, and the 21st of April 1972, was of a national character, because, reading Article 281 along with Article 280 of the Interim Constitution, I find that the legislative measures validated by clause (1) of Article 281 have, in fact, been divided into two parts; a few mentioned in the Seventh Schedule to the Interim Constitution only are retained and the rest have been repealed. Those retained are to have effect only as legislative measures enacted under the Interim Constitution, but nothing has been said with regard to those repealed, because. in the case of those repealed, the provisions of Article 295, laying down the consequences of a repeal, become automatically attracted from the moment of the repeal.

It is a well-established rule of interpretation that where in a statute there are both general provisions as well as special provisions for meeting a particular situation, then it is the special provisions which must be applied to that particular case or situation instead of the general provisions. Applying this principle of generalia specialibus non derogant, the provisions of Article 295 will have to be applied to the repealed legislative measures and there under it is significant that only acts "duly done" or things "suffered under the law" are protected. Acts done male fide or without jurisdiction or acts which are coram non judice would clearly not be acts "duly done" and, therefore, the protection would not extend to such acts.

In either view of the matter, therefore, the conclusion to which I have arrived is that the validity given by clause (2) of Article 281 of the Interim Constitution to acts done o purported to be done in exercise of the powers given by Martial Law Regulations and Orders since repealed or even in the purported exercise of those powers do not have the effect of validating acts done coram non judice or without jurisdiction or male fide. Such an interpretation, in my view, not only gives full effect to the provisions of the Interim Constitution but also administers the will of the Law-maker as far as it can be gathered from a harmonious reading of the provisions of clause (2) of Article 281 along with some of the other provisions of the same Constitution without departing from the well-recognized principle that the Legislature should not be imputed the intention of perpetuating or perpetrating an injustice.

Having determined the scope and nature of the validation granted by clause (2) of Article 281, I now propose to c insider whether the acts complained of in the present cases come within the mischief of any of the categories of un validated acts mentioned above.

I will first take up the cases of Ijaz Hassan Qureshi, Altaf Hassan Qureshi and Mujib-ur-Rahman Shami, the added respondents in Criminal Appeals Nos. 61 and 62 of 1972. Ijaz Hassan Qureshi is the Printer and Publisher of the monthly `Urdu Digest' and the weekly `Zindagi', both publications of the Urdu Digest Publications Ltd. Altaf Hassan Qureshi is the Editor of the monthly 'Urdu Digest' while Mujib-ur-Rahman Shami Is the Editor of the weekly `Zindagi'. Ijaz Hassan Qureshi and Altaf Hassan Qureshi, who are brothers, were arrested on the 5th of April 1972, from their respective homes. Mujib-ur-Rahman Shami was arrested on the 6th of April 1972, from the office of his learned counsel. On the same day, all three of them were produced before a Major at the Pipals (Sub-Martial Law Administrator's Headquarters), who remanded them to Police custody till the 10th of April 1972.

A Writ Petition, being No. 402 of 1972, was filed in the Lahore High Court on their behalf on the 6th of April 1972, challenging the validity of the detention and the proposed trial by a Summary Military Court. This petition was admitted for hearing on the 10th of April 1972, by a Full Bench of the High Court which, while admitting the petition, conveyed its "hope and desire" to the Standing counsel for the Government of Pakistan that no final orders will be passed by the Summary Military Court during the pendency of the petition in the High Court.

On the 10th of April 1972, the three detenus were again produced before the Major at the Pipals and charge-sheets were delivered indicting them with offences under Martial Law Regulations Nos. 16(a) and 89. They orally lodged protests against the validity of the trial, the Martial Law Regulations themselves and the jurisdiction of the Military Court to try them. They also refused to participate in its proceedings.

The cases of the Publisher and Editor of the 'Urdu Digest' were then adjourned to the 11th of April 1972, and the cases .of the Publisher and Editor of the 'Zindagi' were adjourned to the 15th of April 1972. On the 11th of April 1972, the cases of the Publisher and Editor of the 'Urdu Digest' were taken up, evidence recorded, arguments heard and trial concluded. The accused filed written statements reiterating their oral protests and refused to participate in the proceedings.

The accused were, however, directed to be put up on the 14th of April 1972, for passing of orders in their presence.

The Major, who presided over the Court, was examined in the High Court and he described the proceedings conducted by him as follows :-

"The accused were present before the Court but they were not accompanied by a friend. I had told them that they were entitled to have a friend and they could appoint one. The accused stated that as they did not consider me to be a Court and they did not like to participate in the proceedings, they would not appoint a friend. Thereafter, I completed the hearing of the case on the 11th. What I mean by hearing of the case and completion thereof is that I recorded the prosecution evidence which concluded that day. While recording the prosecution evidence, I granted opportunity to the accused to cross-examine the P. Ws. but they declined to do so. After having recorded the, evidence of the prosecution I asked the accused if they wanted to produce defence in the case. They again declined to do so saying that they had already expressed their feelings in this regard and they would not participate in the trial. The written statements produced by them were entertained and placed on the record."

The date for the pronouncement of orders was, however, accelerated by a day and all the three detenus were directed to be produced before the Military Court on the 13th of April 1972. On this day, the case of the Publisher and Editor of the 'Zindagi', which had not been heard on the 11th, was taken up and prosecution evidence was recorded. It appears that Mujib-ur-Rahman Shami, although he too had filed a written statement refusing to participate in the proceedings, did himself cross examine one of the prosecution witnesses under protest. Thereafter, the judgment of the Court was announced. They were all convicted and sentenced to one year's rigorous Imprisonment each on each count and to a fine of Rs. 1,00,000 each on each count.

The Major, when questioned as to why he had advanced the date from the 14th and the 15th, stated as follows :-

"I accelerated the hearing of this case (Zindagi case) from the 15th to the 13th April for the reasons that on the 11th I had observed that the accused persons had not put up any defence. They had not stated anything. They had not participated. And as I said there was no cross-examination, I felt that if the same thing is to be repeated on the 15th it will be possible for me to take up the case of 15th on 13th April and complete it but in case there is any defence put up by the accused persons of second case then 1 will postpone it to any date once I complete the second case."

The facts of the case against Muzaffar Qadir and Hussar Naqi are, however, different. Muzaffar Qadir, is the manage of the printing press run under the name and style of "Packal Printers" where the weekly

'Punjab Punch' is printed. Hussain Naqi is the Editor and Publisher of the said Weekly. They were alto arrested on the 5th and 6th of April 1972, for alleged offences under Martial Law Regulations Nos. 16(a) and 89(1)(c). On their behalf too, a Writ Petition, being No. 404 of 1972, was filed on the 7th of April 1972 and it was admitted for regular hearing on the 10th of April 1972. They too were produced before the Major at the Pipals who remanded them to Police custody till the 10th of April 1972. On the latter date, they were again produced before the Summary Military Court and charge-sheets were delivered to theta. They too challenged the jurisdiction of the Court and refused to participate in its proceedings. Their case was then adjourned to the 13th of April 1972.

As directed, they were produced before the Military Court on the 13th of April 1972, and the prosecution evidence was recorded. As they too refused to cross-examine, the hearing was concluded and they were convicted and sentenced.

The Police Inspector, who was examined in the High Court, states that when he produced Muzaffar Qadir and Hussain Naqi on the 13th as directed on the 10th of April 1972, the Presiding Officer of the Military Court also asked him to produce the other accused persons. He then rang up the Emergency Staff posted in the Civil Lines Police Station and directed them to produce the other detenus in Court.

It will be observed that in the above-mentioned cases the main allegations against the Summary Military Court were as follows :-

(a) That the trial conducted by the Military Court was a farce and no trial at all, as it did not conform even with the procedure prescribed by the Army Act and the rules framed there under;

(b) that the acceleration of the date was to present the High Court with fait accompli;

(c) that the acceleration of the date was mala fide, as it was bound to take the detenus by surprise and to prevent them from having access to a qualified legal practitioner.

The validity of the proceedings before the Military Court was, of course, challenged on the ground that the Martial Law Regulations said to have been violated were of no legal effect at all being the acts of an usurper and that they had not been protected even by the provisions of Article 281 of the Interim Constitution. With that aspect of the question I have already dealt with earlier in this judgment, and the only question that now remains to be considered is as to whether the trial was coram non judice or mala fide.

Applying the principles which I have endeavored to enunciate earlier in this judgment to the facts stated above. I find it difficult to say that the Military Court had no jurisdiction to try these offences at the time it did or that the procedure followed by it was a farce or that the acceleration of the date of announcement of the order was mala fide.

It will be observed that the judgment in the case of Asma Jilliani v. The Government of the Punjab had not been announced up to this date and the law, as lard down in the case of 8, The State v. Dosso still held the field. Therefore, the Martial Law Regulations and Orders were on that date, still operative and effective, according to the law then prevailing in this Country.

The procedure adopted by the Court was also the summary procedure which was made still more summary by the non participation of the detenus themselves who refused to participate, Actually, there was no acceleration of any dale of hearing in the cases of the Printers and Publishers of the 'Urdu Digest' and the Punjab Punch'. The only acceleration of the date of hearing, which can be complained of, was in the case of the Publisher and Editor of the weekly 'Zindagi'. But in this case, too, I find myself unable to say that the acceleration of the date of hearing rendered the proceeding coram non judice or mala fide.

As already pointed out, each of detenus had filed long statements challenging not only the authority of the Military Court but even the validity of the Martial Law Regulations and refused to participate in such proceedings. They had been given the liberty to appoint a friend to defend them, to cross-examine the witnesses produced on behalf of the prosecution and to adduce defence witnesses if they so desired; but they had all declined to do so on the ground that they did not recognise the Court or its proceedings. It does not, in the circumstances, lie in their mouths now to complain that they had been deprived of any valuable right or that the Military Court had In the circumstances acted 1n such a manner as to render its proceedings a farce.

Even in ordinary criminal Court, if an accused refuses to take part in the proceedings, does the Court become powerless to proceed against hire or to decide on the basis of such evidences as the prosecution is able to produce? -I think not. All that is necessary in such cases is to see that the accused had a fair opportunity of producing his defence and cross-examining the prosecution witnesses. This opportunity was in the cases under consideration amply afforded to the accused, but they, of their own free will, declined to avail of them. In these circumstances, the averment of the petitioner in the High Court, who was not present before the Military Court, that he had bee making arrangements to engage counsel to appear on behalf of the detenus is wholly besides the point. The detenus themselves, having already filed written statements questioning in legality of the whole proceeding and refusing to participate to it, would not have accepted such assistance. There was no question therefore, of their being denied any opportunity of either defending themselves or adducing any defence evidence.

It is idle also to contend that the Military Court should first have decided the question of its own jurisdiction raised in the written statements of the accused. It could not do so being a Court of Special jurisdiction itself.

I am not unmindful of the fact that, at the time of the admission of the Writ Petitions, the High Court had conveyed to the learned Standing counsel for the Government of Pakistan its "hope and desire " that the Military Court would not take any final decision in these cases while the Writ Petitions were pending in the High Court. Even though it was only a "hope and desire" on the part of the High Court without any corresponding commitment from the learned Standing Counsel we have it from the Major on oath that this was not conveyed to him. I do not know who is responsible for not conveying the wish of the High Court to the Military Court concerned; but, since there is nothing to controvert the statement on oath of the Major I am not in a position to say that he acted maliciously or designedly to present the High Court with a fait accompli.

In these circumstances, I am of the view that the proceedings before the Military Court were neither without jurisdiction nor coram non judice nor vitiated by malice either in fact or in law. Upon this conclusion I would have allowed Criminal Appeals Nos. 61 and 62 of 1972, and recalled the writs issued by the High

Court but, since the learned Advocate-General for the Province of Punjab has in no uncertain terms made it clear to this Court that the Government seeks no relief against these respondents and has no intention of even collecting the fines which had been imposed by the Military Court the best course to adopt would be to dismiss these two appeals on the ground that they have become infructuous.

It may be mentioned here that so far as the sentences of imprisonment were concerned, they were remitted by the Government during the pendency of the proceedings in the High Court.

I come now to the cases of Muhammad Mukhtar Rana and his co-accused Muhammad Riaz Shahid which form the subject-matter of Criminal Appeals Nos. 63, 64 and 69 of 1972. Criminal Appeals Nos. 63 and 64 of 1972 arise out of Writ Petitions Nos. 223 and 335 of 1972 which were filed by Muhammad Mukhtar Rana and Muhammad Riaz Shahid respectively to challenge the validity of an order referring their cases for trial to a Special Military Court.

Both these detenus, it appears, were sought to be arrested as accused in respect of offences under sections 307/452 and 148 of the Pakistan Penal Code on the basis of an F. I. R. lodged on the 10th February 1972 alleging offences of rioting and murderous assault on one Abdul Khaliq, a mill-Owner of Lyallpur. Muhammad Mukhtar Rana obtained an order of anticipatory bail from a learned Single Judge of the High Court of Lahore on the 17th of February 1972. Thereafter, a charge for the violation of Martial Law Regulation No. 16 (a) was also added against each of them and their cases were referred for trial to a Special Military Court.

On the 6th of March 1972, the Advocate-General for the Province of Punjab applied for the cancellation of the bail before the High Court, but this application was refused. Writ Petition No. 223 of 1972 was then filed, after the cancellation of bail was refused, and the High Court stayed the proceedings before the Military Court. The Government of Punjab, however, filed a petition for special leave in this Court and obtained an order for the suspension of the operation of the order of the High Court upon an undertaking given by the learned Advocate General for the Province of Punjab that "no final order would be passed by the Military Court during the pendency of the petition in this Court."

Muhammad Mukhtar Rana was, nevertheless, taken into custody on the 14th of March 1972, upon the allegation that he had made, other objectionable speech at a public meeting at Layallpur which came within the mischief of Martial Law Regulations Nos. 16 (a) and 89. He was then put up for trial before a Special Military Court upon this new charge and on the 10th of April 1972, he was convicted and sentenced to five years' rigorous imprisonment. He filed Writ Petition No. 625 of 1972 to challenge the validity of this conviction. This Writ petition has been dismissed by the High Court and hence he has filed an appeal in this Court being Criminal Appeal No. 69 of 1972.

Muhammad Riaz Shahid was a co-accused in the case under sections 307/452 and 148, P. P. C. Additional charges under Martial Law Regulations Nos. 16(a) and 89 were also levelled against him and his case too was referred for trial by a Special Military Court. He challenged the validity of this order by Writ Petition No. 335 of 1972.

So far as Criminal Appeal No. 69 of 1972 which arises out of Writ Petition No. 625 of 1972 is concerned, it has been dismissed by the High Court on the ground that in the Writ Petition there is no allegation even of any mala fides and, therefore, it cannot be said that the trial of Muhammad Mukhtar Rana for the offences under Martial Law Regulations recorded by the Special Military Court on the 10th of April 1972, was not protected by clause (2) of Article 281 of the Interim Constitution.

We have examined the grounds set out in the Writ Petition and are in agreement with the High Court that Writ Petition No. 625 of 1972 was rightly dismissed. We, accordingly, dismiss Criminal Appeal No. 69 of 1972.

With regard to the offences arising out of the F. I. R. of the 10th February 1972, the respondents Muhammad Mukhtar Rana and Muhammad Riaz Shahid. It appears, were in spite of the undertaking given by the learned Advocate-General for the Province of Punjab in this Court on the 10th of March 1972, tried and on the 4th of April 1972, the Special Military Court convicted the respondents Muhammad Mukhtar Rana and Muhammad Riaz Shahid only under Martial Law Regulation No. 16(a) and sentenced them to suffer rigorous imprisonment for five years and three years respectively.

The High Court has taken the view that the sentence recorded by the Special Military Court was a "final order" so far as the Military Court was concerned and, therefore, it was an order in clear violation of the undertaking given by the learned Advocate General for the Province of Punjab in this Court. In the circumstances, the order has not only been made illegally but also mala fide in order to harass the respondents concerned and present the Court with a fait accompli. Such an order, in the view of the High Court, was not protected by clause (2) of Article 281 of the Interim Constitution and was, therefore, set aside.

The learned Advocate-General for the Province of Punjab has, firstly, contended that there has been no breach of the undertaking given to this Court, as the order passed by the Special Military Court is not a "final order", because, the sentences awarded by a Military Court have to be confirmed and then promulgated, and until that is done, the order is not final. These are all essential ingredients of a trial by a Special Military Court and, therefore, it cannot be said that any "final order" had been passed or any breach of the undertaking committed. In support of this contention, reliance is also placed on a decision of this Court in the case of Ex-Captain Muhammad Akram Khan v. Islamic Republic of Pakistan (P L D 1969 S C 174).

This argument found favour with one of the learned Judges in the High Court, but I regret my inability to accept it. So far as the Special Military Court was concerned, it had certainly recorded a "final order" in accordance with the rules of its own procedure. After recording its finding and sentence the Military Court became functus officio and unless its finding and sentence were sent back for revision under section 126 of the Pakistan Army Act, 1952, the Special Military Court could not re-assemble. The promulgation of the sentence was not necessarily required to be done by the Special Military Court for, under rule 58 of the Rules framed under the Pakistan Army Act, the promulgation after confirmation of the sentence had to be made "in a manner as the confirming authority may direct and if no direction is given according to the custom of the service". In the present case since the accused did not belong to any service the promulgation would have had to be made in the manner directed by the confirming authority.

The last sentence of this rule is also significant for, it shows that the promulgation, though necessary for the completion of the confirmation was not a necessary part of the sentence. This reads as follows :-

"Until promulgation has been effected, confirmation is not complete and the finding and sentence shall not be held to have been confirmed until they have been promulgated."

This clearly indicates that promulgation is necessary for the completion of the act of the confirming authority but not of the Y Military Court. Therefore, the work of the Military Court end with the recording of the finding and the sentence, and so far as that Court is concerned, that is the "final order" It cannot, therefore, be said that no "final order" was passed in this case by the Military Court.

The learned counsel appearing for Muhammad Mukhtar Rana has also drawn our attention to other violations committed by the Military Court by referring us to rules 25, 41, 137 and 145 to show that undue haste was displayed by the Military Court in producing an order of conviction. The procedure adopted by the Military Court clearly suggested that it was out to flout the undertaking given to this Court. It could not have honestly committed so many mistakes. The High Court was therefore, right in taking the view that the conviction and sentence recorded by the Summary Military Court were tainted by mala fades.

I have given my anxious consideration to these arguments and am inclined to agree with the majority view in the High Court that the Military Court acted with improper haste in this matter not only in clear disregard of the undertaking given to this Court but also in disregard of the rules of procedure prescribed under the Pakistan Army Act. It gave no notice of its intention to try all the accused jointly nor did it enquire of any of the accused if he had any objection to such joint trial nor did it go into the plea of jurisdiction raised by the accused nor did it before recording sentence receive any evidence as to previous convictions and character. The contention that the Military Court was out to flout the undertaking is not without substance.

The next contention advanced by the learned Advocate General is that even assuming that there has been a breach of the undertaking the act done by the Military Court, though punishable as a contempt, is not a nullity. This contention tough ingenious is not tenable. A party committing an intentional breach of his undertaking, which is tantamount to a stay order, cannot be allowed to take advantage of his own wrong. In such cases, in addition to punishing the defaulter, the Court is duty bound to put back the suffering party in the position where he would have stood if the breach had not been committed. On this principle too the position will be that the Courts will, in the present case, treat the finding and sentence as not having been recorded, as if the undertaking has not been violated.

Lastly the learned Advocate-General contended in the alternative that the finding and sentence having been recorded by the Military Court this had become a past and closed transaction and the liability thereby incurred cannot now be affected by reason of the provisions of Article 295 of the Interim Constitution. The short answer to this argument is that the finding and sentence were neither duly recorded nor can they be treated as having been recorded at all upon the principle referred to in the proceeding paragraph. In any view of the matter, therefore, this order of the Special Military Court cannot be maintained.

I would, as such, uphold the order of the High Court so far as this order of the Special Military Court is concerned and dismiss Criminal Appeal No. 63 of 1972.

Since the case of Muhammad Riaz Shahid stands on the same footing, I would also dismiss Criminal Appeal No. 64 of 1972. The result of this will be, as pointed out by the High Court, that their cases will now, under paragraph 3 of President's Order No. 14 of 1972, stand transferred to a Criminal Court which would have had jurisdiction to try the offences under the ordinary law.

For the reasons given above all these appeals are hereby dismissed.

K.B.A. Appeals dismissed.