

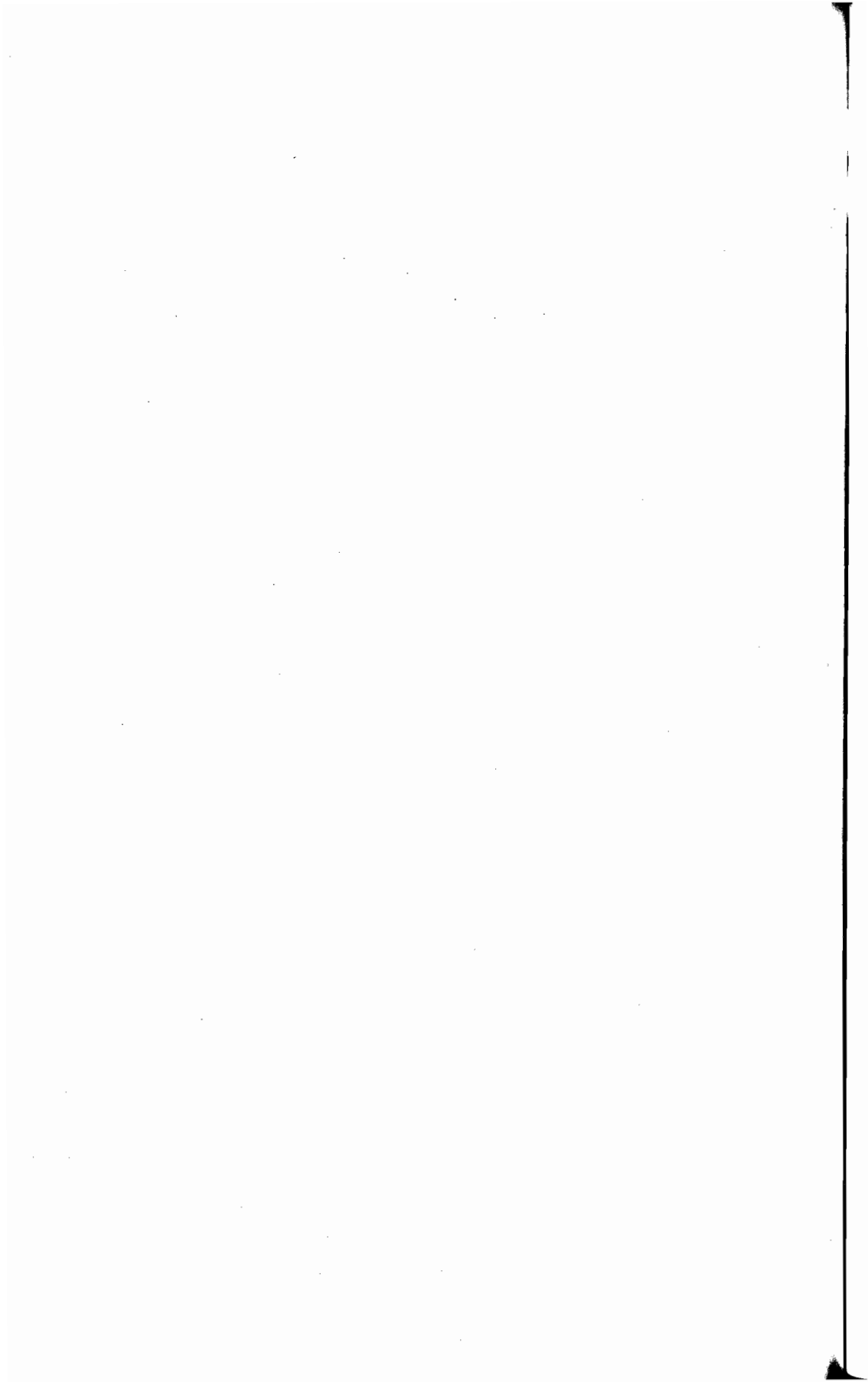
PUNJAB WAS PRIVILEGED BUT IGNORED IN BRITISH RAJ

* Samia Khalid

ABSTRACT

This article will bring the readers home to the representative institutions and administrative apparatuses under the aegis of British Raj India when. It envelops representative outfits, voting system, electorate mechanics, and treatment meted out to muslim masses in utter disregard to their due share in political and administrative activities. How British Gurus manipulated and masterminded the long-term engagement and allegiance of influential Landlords, Jagirdars, and Pirs to cash in on the opportunities emanated from Bradri system while retaining the power levers in the hands and control of British officers and Governor General of the province of Punjab like in other provinces which was of significantly critical and of paramount importance to ensure their strong foothold and firm control in Punjab through which they could subjugate the masses with no or little concern for systematic reforms. But Punjab has distinguished feature of participation of Bradries and Pirs in election campaigns who could play the role of opinion leaders and pressure groups the right advantage of which was reaped by British to serve their own agenda.

* Lecturer, Department of History & Pakistan Studies, The Islamia University of Bahawalpur.



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- xviii. Aslam Khaki V. Muhammad Hashim, P.L.D. 2000, S.C. 225.
- xix. Sardar Ali and others v. Muhammad All and others, P.L.D. 1988, S.C. 287.
- xx. Federation of Pakistan v. Mst. Farishta, P.L.D 1981. S.C,120.
- xxi. Muhammad Salahuddin v. Government of Pakistan, P.L.D. 1990 F. S.C., 1
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Habib Bank Limited v Messrs Waheed textile Mills Limited, P.L.D., 1989, Kar. 371.
- xiii Niaz Ahmed v. Province of Sindh P.L.D., 1977. Karachi. 604.
- xiv State v. Zia-ur-Rehman, P.L.D. 1973, S.C. 49.
- xv Sakina Bibi v. Fedeation of Pakistan, P.L.D. 1992, Lahore, 99.

nations come into their own; it is not every day that people stand on the threshold of renaissance; it is not every day that destiny beckons the down-trodden and the subjugated to rise and greet the dawn of a great future. It is the narrow streak of light heralding the brilliance of the full day that we salute in the form of this Resolution. ^{xvii}

same standard for all at all level. Government should plan to own the parallel academic empire run by religious charity organizations all over the country with their participation.

2. Government should constitute a broad based constitution commission to review the constitution in the light of proposals of federating units on all outstanding national issues inclusive of the judgments of courts on Islamization of the system.
3. The Commission should comprise of qualified representative parliamentarians, superior court judges of higher integrity, moderate Islamic scholars of all schools of thought and members of legal fraternity.
4. A coherent scheme of Islamization of laws as prepared by the commission be incorporated in the Constitution replacing the existing one.
5. A Federal Constitutional Court be constituted to examine implementation process of Islamization. The Court should have jurisdiction to resolve intermingling issues of all nature and propose review of its recommendations by the parliament.

With all of these efforts state may succeed in resolving the issue that has delayed accomplishment of structural development of the country. Prime Minister *Liaqat Ali Khan* rightly observed on the occasion of presentation of the Objectives Resolution that "It is not every day that great

RESOLUTION

Islamization of the society is a virtuous national mission. Only a legitimate and representative government would undertake it. At present the nation is politically based beyond August 1947. It happened due to suppression of political process since birth of the society. Outcome for this failure is that nation has no democratically developed constitution as the forefathers desired. We have survived without standard fair general elections in between forty years of our independent life. Therefore no system of representative government has so far emerged in the country. Consequently no durable positive steps have been taken to determine the nature of public legal system. Presently curatives are seen naturally making their place in the society. Fair transparent general elections seem due in near future. Keeping in view the past experience representative government may need to evolve a system free of ambiguities. All pending constitutional issues along with Islamization of the system should be resolved in the following manners.

1. In founding base for Islamization of legal structure national movement has to be launched for durable social reforms in the society to upgrade academic and moral standard of general population. State shall provide opportunities of inexpensive education of

inter alia provided that the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed” has been held to be the *grund norm* of Pakistan.^{xxvi} There is active faith in general population to have religious colour in certain matters of their life. This controversy may be resolved on the basis of Islamic principles. The policy of ignorance may continue to result in deviation of constitutional obligations. No nation can afford existing languish situation in the interest of devotion of people of the society in strict compliance of the entire body of legal obligations. There are certain concerns the nation had to focus for explication and are produced here;

1. Islam is an imperative segment of social order which nation cannot keep pending forever without decision on the range of its intermingling in the legal system of the state.
2. The state of irresolution has created current languish situation in social sectors preventing growth of standardized legal / social norms in the society.
3. This is also causing consequent impairment on securing the sagacity of political system in the country.
4. The mode of management of its unconstructive implications in the society has to be determined for development of Islamic representative constitutional and political structure for our country.

system of obligations have to be partitioned facilitating separation of relatively optional fragment. The section of obligations comparatively belonging to personal responsibilities may have been made of no controversy. Islamic popular welfare system of public administration based on joint responsibilities is produced by concrete efforts. Deviations have caused fatal consequences. Nation paid the cost of mishandling implementation of Islamic obligations in the country. The movement of *Nizam-e-Mustafa* in 1977 was hijacked by *Zia-ul-Haq* resulting in revocation of political system for the period of ten years. Society is facing a strong wave of extremism causing imposition of compulsory international aggression on Pakistan. *Talabnization* is deemed a serious menace against breeding Islamic values amongst hesitant members of the society. *Talaban* mainly a conservative student community has turned reactionary and is challenging authority of the governments of the region. Instead of arbitrarily resisting this community belonging to Pakistan, government has to evolve political reforming strategy to bring them in national mainstream.

A considerable majority of Pakistan seems steadfastly affiliated with their socio-religious commitments. Islamic principles have shaped the *grund norms* of the Muslim societies. *Grund norm* is an ideology, aim and final object of the country and nation. The situation in Pakistan has not yet radically altered. The objectives resolution of 1949, which

Ideology. Chairman of Council Dr. *Khalid Masood* has said that the Council did provided valuable suggestions to the government on important issues but most of them went unheard. The Chairman added that during the last three years as many as seventy-two recommendations were sent to the government but only seventeen received the positive response. He also said that the Council has suggested that amendment in all laws enacted from 1977 to 1990 be made consistent with *Quran and Sunnah*. He deplored that the recommendations of Council of Islamic Ideology were not implemented. He proposed to the government to form a committee comprising members of the National Assembly tasked to give practical shape to suggestions of the Council but all in vain.^{xxiv} Same is the situation in financial sector. There is mockery in the name of Islamic Banking. While from January 1, 1985 the interest-based banking has vanished and under the law no interest based banking system exist in Pakistan since July 1, 1985 as per State Bank circulars. Rest of the matters also have the same status. Practically we have not been able to travel much in either of the directions. It is needed to give fell effect to the objectives behind the creation of the state.^{xxv}

Common man has been given a wrong concept of Islamic values. He has been allowed to redeem the adulterated version of Islamic obligations. The two distinct areas of Islam dealing public and private sections of Divine

instinct of humanity. This is practically proved code of life backed by rule of law and system of good governance. It combines each and every phase of human life therefore is consistent and consolidated scheme of law. It is a system of welfare and its implementation demands submission. *Mohammad Ali Jinnah* had exact vision for Islamic political system as system of life derived by realistic, modern and academic deduction excluding customary beliefs and practices of orthodoxy values. *Quaid-e-Azam* in his speech on 19th March 1944 in a meeting of Punjab Muslim Students Federation proclaimed, "Islam is our guide and complete code of our life. We don't want any ism, socialism, communism or National Socialism". *Liaqat Ali Khan* acknowledged it as body of faith, tradition and belief, which has been a part of man's heritage for over thirteen hundred years. He believed that this ideology when applied to statecraft and conduct of human affairs is bound to promote human welfare. He added that we want to follow Islamic ways of life. What we mean is that we could not possibly do otherwise. These are the principles that were embodied in the concept of Pakistan when we fought for it.^{xxiii}

Review of the existing position of law reveals that Articles of the constitution on the subject have no consistency and compatibility with other provisions of the constitution. The status of these Articles seems neglected portion of the Constitution. Nation had high hopes from council of Islamic

head of state to common servant. This has been deviation of legal obligations to evolve a system of reimbursement at time when society was capable not only to contribute adherence but to guard against resistance. It was the occasion of independence of the nation. Rest of the time mostly had been the period of deviations, which has contributed the amount of diversity of thoughts in social sects enough to take equivalent time for its reconciliation.

Faithfulness of the governments for Islamization of laws out of existing emaciated provisions remained question mark. The governments instead of making consolidated efforts rather applied the provisions for discretionary appointment/transfer of Judges to get rid of judges upholding independence of judiciary. The president under the law had unusual, inequitable powers under sub-Article 4-B of Article 203. The President may at any time modify the term of appointment of a Judge; assign a Judge to any other office and require a Judge to perform such other functions as the President may deem fit. He may still pass such other orders, as he may consider appropriate. Thus, a constitutional Court constituted for Islamization of laws in Pakistan became a dumping ground for the serving Judges who were considered to be undesirable by the President or Prime Minister of Pakistan.^{xxii}

System of *Sharia* is not man made system. Its foundations are in Divine commands combined with juristic

Representation of the peoples Act 1976 and the Houses of the Parliament and Provincial Assemblies Election Order, 1977 should accordingly be amended.^{xxi} The provisions of the constitution are prevented to operate for mutual benefits of aspiring parliamentarians of all sides. The situation is maintained almost the same except when these are made to operate for personal reasons. Recent move against *Imran Khan* of *Tehrik Insaf* is example of that. *Majlis-e-Shoora* as major contributory of enactment and promulgation of laws in conformity with the Injunctions of Islam needed to be reformed in the light of judgment referred above. Review of scrutiny record reveals that public representatives so far have not realized to comply with those terms and failed to honour the oath taken under the constitution for implementation of the Islamic Obligations.

Maintainability of Islamic provisions was ensured but practicality remained unattended. The society not only failed to implement Islamic share of constitution in the country, it failed to implement rests of social obligations in material terms and has yet to establish any other system free of impurities. Islamic social / political system equally demands constitutionalism. The state system influenced as a result requires enforcement of Fundamental Rights, efficiently functioning judiciary, guardianship of the needy and elimination of poverty etc. Islam also stresses simplicity of public functionaries and impartial system of accountability of

the founding fathers of Pakistan. It was argued that the entire election campaign is mounted on the pattern of a carnival or a circus. The first priority of each candidate is self-projection and the character assassination of the rival candidate. Shrouded in a cloak of hypocrisy and deceit candidate contrary to Islamic concept, chases the voters from door to door bagging and boasting offering allurements, threats and false promises to bag as many votes as possible etc.

The Court *inter alia*, observed that the spirit of the *Qur'anic* Injunctions has been embodied in Articles 62 and 63 of the Constitution and identified number of problems contaminating the process of electioneering. The Court made number of suggestions for reforming the electoral process bringing the system of state close to Islamic values and required proper scrutiny of the candidates for determining suitability of their contribution for legislation. The Court desired screening committee for dealing complaints by members of the constituency on malpractice, unethical conduct committed by the members. The court disapproved general trends of the candidates using excessive resources during the campaign. The court ruled that Sections 13,14,49,50,52 of Representation of Peoples Act are against the *Holy Qur-an and Sunnah* and section 38 (4) (c) (ii) excluding from the count otherwise valid vote merely because the voter has disregarded the rule of secrecy is also repugnant to *Qur'an and Sunnah*. The Court observed that the

representatives must believe in equality, tolerance, and social justice as enunciated by Islam. It means they themselves must have required knowledge of Islam. Public representatives must first enable themselves to order their lives in accordance with teachings of Islam. Article 62-63 on qualifications of the members of parliament seems good addition to ensure induction of qualified parliamentarians who have to initiate the noble cause of reforming the existing as well as fresh provisions of Islamic obligations. Parliament and executive organ mainly comprising of unqualified members have resisted implementation of this stipulation of constitution. Resultantly as emerging beneficiary of the running system they do not seem to care about implementing provision on qualifications.

In order to reform electoral process in the light of prescribed qualification constitutional petitions were filed under Article 203 of the Constitution for seeking a declaration that the entire electoral system of Pakistan is un-Islamic, against the *Sharia* and repugnant to the concept of society visualized in *Holy Qur'an and Sunnah*. It was contended that formation of political parties, election campaign, the method of canvassing for winning support, the adult franchise, and the legislative organ created through the above process are totally un-Islamic. The entire system should be completely eliminated and replaced by a new system in accord with 'Objectives Resolution', which is cornerstone of state laid by

permanent Muslim Judges of the Court and two *Ulama* who were to be appointed as Ad-hoc members of the Bench. The provisions of Chapter 3-A were given an overriding effect. However, defining the term law under clause (c) of Article 203-B, it was provided that for purposes of this chapter, it would not include the Constitution of Pakistan 1973, Muslim Personal Law, any law relating to the procedure of any court or tribunal or, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure.^{xix} The entire body of law and constitution needing drastic reforms was placed out of the jurisdiction of the court. Petitioners seeking remedial control invoked jurisdiction of the court on number of issues. The court examined questions relating to succession, Muslim personal laws and Muslim family laws ordinance etc. and delivered judgments. The Government filed appeal in *Shariat* Appellate Bench of the Supreme Court, which set aside the judgments holding that the Federal *Shariat* Court had no jurisdiction in the matters.^{xx} The court could hardly perform the function for it was constituted and has remained unsuccessful. This move was political had political consequences for further development of the Islamic system.

Most of the obligations for Islamization of the legal system are to be executed by parliamentarians. Chosen public representatives/ trustees have to exercise delegated authority within the limits prescribed as sacred trust. These

STATE OMISSIONS

There is no doubt that only legitimate representative government shall accomplish process of Islamization. Abuse of political process by extra constitutional ruling of the country reduced the strength of political parties as much that they felt no hesitation to beg *Islamization* from the government of *Zia-ul-Haq*. His regime exploiting the same demand prolonged his rule for a decade. Besieged by prolongation of the cause religious parties made several frivolous attempts for Islamization. One of their move succeeded in 1980 when a Superior Constitutional Court 'Federal *Shariat* Court' under Article 203-C was created. The Court has unique procedure to follow and has the jurisdiction to examine and decide the question whether or not any law is repugnant to the injunction of Islam. By virtue of relevant law, Federal *Shariat* Court under the procedure could exercise jurisdiction *suo moto*, or on petition of a citizen or governments. When it decided that any law or its provision is repugnant to the Injunctions of Islam, it was necessary to specify the day on which the decision shall take effect. An appeal from the decision of the Court was provided to the Supreme Court. For that purpose, under clause (3) of Article 203-F, a Bench known as *Shariat* Appellate Bench of the Supreme Court was created. The Bench consists of three

initiate process to amend the law suitably as required in the judgment.^{xviii} Indian courts have held the same view regarding implications of the preamble inside the provisions of the Indian constitution.

Another share of the constitution that should have played effective role on the subject is implementations of principles of policy. Under the provisions state institutions shall enable the Muslims of Pakistan individually and collectively to order their lives in accordance with the fundamental principles and basic concepts of Islam as described in Holy *Qur'an and Sunnah*. Nevertheless the responsibility of deciding whether any action of an organ or authority of the state or person performing functions on behalf of an organ or authority of the state is in accordance with the Principles of Policy is that of the organ or authority of the state or of the person concerned to determine. Moreover the validity of an action or of any law shall not be called in question on the ground that it is not in accordance with the Principles of Policy. No action under the constitution shall lie against the state any organ or authority of the state or any person on such ground. In the absence of judicial check cum institutional responsibility such obligation are not supposed to be carried out faithfully by anyone.

Judgments of the superior courts do not seem to have created constraints against Islamization of the system of laws. Judicial organ maintaining independence of judiciary refrained from entering in the area of Parliament. This option of the judiciary has ensured two imperative obligations.

1. It is the parliament that commands delegated authority to enact or correct inconsistency or deficiency in the provisions of the constitution.
2. There should be authentic harmonious inclination in provisions of the constitution enabling unambiguous performance of Islamic obligations.

The interpretations of courts retain genuine piece of guidance for attainment of the object. These observations have neither blocked the introduction of the process of Islamization nor have imposed their own version to reform the corpus of law. Rather courts have found appropriate forum for remedial supremacy of representative institution. Every law to be framed by the Parliament has to conform to the Injunctions of Islam as contained in Holy *Qur'an and Sunnah*. If any such law is found to be repugnant to the Injunctions of Islam, the Federal *Shariat* Court as well as the *Shariat* Appellate Bench of the Supreme Court has the power to scrutinize the said law on the touchstone of Islamic injunctions and make necessary declaration as contemplated in Article 203-D of the Constitution. Federal Government or provincial Governments, as the case may be, shall have to

Supreme Court in *Hakim Khan* case^{xvi} seeking conciliation of conflicting position of Article 2-A and 45 accepted the appeal against the judgment of Lahore High Court. The Court observed that court was not the proper forum to rule as such. If the High Court considered that the provision of Article 2-A and 45 of the Constitution were mutually conflicting, it should have referred the proposition for consideration of the Parliament. On finding incompatibility parliament was competent to amend the Constitution bringing the impugned provision in conformity with injunctions of Islam. The court ruled that a provision of the constitution couldn't be tested on the touchstone of Article 2-A of the Constitution. The provision if found repugnant, could not be struck down by the court.

The proposition if seen in broader view, Superior Courts of Pakistan have held consistent views that on the basis of Article 2-A, no law or provision of the Constitution could be struck down. The task may appropriately be performed by the Parliament. In this context guidance may be inferred from Article 8, which has enabling analogy for the object. It clearly declares that no law can exist or be made in contravention of Fundamental Rights. Nevertheless, in the present case superior courts are unanimous in holding that for interpretation of the provision of constitution and all other laws provisions of Article 2-A are to be kept in mind and applied as 'yardstick wherever necessary.'^{xvii}

argument that Islamic laws are to be enforced in their entirety by virtue of Article 2 itself.^{xiii}

There is also difference of opinion on reading substance of objectives resolution inside all Articles of the Constitution. Article 2-A declares Objectives Resolution an effective part of the constitution. The background of introduction of this Article seems to bring compatibility amongst provisions of constitution. Whereas in *State v. Zia-ur-Rahman* case Chief Justice *Hamoodur Rahman* observed that Objectives Resolution 1949, even though is a document which has generally been accepted never repealed or renounced, will not have the same status or authority as constitution itself, until its principles are incorporated within its provisions.^{xiv} Despite the fact that inclusion of Article 2-A within articulated body of the constitution was deemed enough to implement Islamic obligations enshrined in the objectives resolution. But status of the issue remained unresolved. Practicality of Article 2-A came up for consideration in several petitions before the High Courts of the provinces. The Lahore High Court in a case *Sakina Bibi v. Federation of Pakistan*^{xv} had to resolve command of the Article over rest of the provisions of the constitution. The court answered in affirmative. The issue resolved was that Article 45 of the Constitution empowering the President of Pakistan to grant pardons etc. contravenes Islam, could be struck down as repugnant to Islamic injunctions. The

IMPLEMENTATION

There are two viewpoints amongst academic circles regarding adequacy of provisions in the constitution for implementation of *Sharia* in the country. Article 2 is midpoint of attention. In Article 2 Constitution provides that Islam shall be the state religion. One side see the provision possessing the potential to influence rest of the body of the constitution. The other side holds it an introductory article and mere continuation of this not enough to islamise the system of law. The provision came to be interpreted in the courts of law in reference to certain petitions needing its implementation in letter and spirit. Courts held liberal interpretation of the Article. A Full Bench of *Sindh* High Court held that: Article 2 is incorporated in the introductory part of the constitution and as far as its language is concerned, it merely conveys a declaration of the state. Court observed that question arises as to the intention of the makers of the constitution by declaring that 'Islam shall be the state religion of Pakistan'. Apparently, what the Article means is that in its outer manifestation the state and its government shall carry on Islamic symbol. This Article does not even profess that by its force, it makes Islamic law to be the law of the land. The Court further observed, "There is, therefore, no scope for the

repugnant to such injunctions. Council of Islamic Ideology can make recommendations for bringing existing laws into conformity with injunctions of Islam and advise on any question referred to it, whether a proposed law is or is not repugnant to the Injunctions of Islam. It is also pertinent to refer to chapter 3-A, which has now been inserted in Part VII of the constitution whereby Article 203-A to Article 203 J have been added thereto. Federal *Shariat* Court has been constituted under Article 302-C, which has been empowered either of its own motion or on a petition by a citizen or the federal government or a provincial government, to examine and decide the question, whether or not any law or provision of law is repugnant to the injunctions of Islam.^{xii}

appropriation of authority so to do amounts to usurpation. It would indeed be so when the amplitude of power reserved for the Parliament, in the same constitutional instrument is kept in view.^{ix}

The Constitution of 1973 provides following contributors / forums in the matter of Islamization of laws of Pakistan. These are (i) Parliament and Provincial Assemblies (ii) Council of Islamic Ideology (iii) Federal *Shariat* Court, (iv) President of Pakistan and Governors of Provinces, and (v) the Courts, Tribunals and authorities required to enforce law.^x Arts. 1- 5, 8- 40 and 227 to 231, contain a scheme and procedure for *Islamization* of laws and lays down guiding principles and methods to be adopted in this regard.^{xi} Article 2 of the Constitution declares that Islam shall be the state religion. Article 29 in chapter 2, Part II of the Constitution declares that the "Principles of Policy set out in Articles 29 to 40, shall be followed by each organ or authority of the state. Article 31 of the Constitution, requires the state to enable Muslims of Pakistan, individually and collectively to order their lives in accordance with fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy *Qur'an* and *Sunnah*. Besides, Article 227(I) in part IX provides that all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy *Qur'an* and *Sunnah*. No law shall be enacted which is

JUDICIAL ANALYSIS

As resolved earlier objectives resolution has central place for Islamization of laws in Pakistan. Article 2, and 2-A of the Constitution have increased its practical implications. Superior Courts examining its contents have analysed its three separate distinct components. The first is purely structural feature that sovereignty of Almighty descending on the people of Pakistan constituting state is to be exercised through their chosen representatives. The second is its qualitative feature. The sovereignty shared or enjoyed is delegated capable of further delegation, is by its very nature a sacred trust and has to be exercised within limits prescribed by the Almighty Allah. The third is its normative feature. The norms, the goals, the ideals, mostly mundane in nature are spelt out with particularity, which has to be achieved through the constituent assembly by the process of framing a constitution. Nowhere in the Objectives Resolution, either expressly or impliedly one finds either a test of repugnancy or of contrariety, or empowering of an individual or of an institution or authority or even a court to invoke, apply and declare Divine limits, and go on striking everything that comes in conflict with it by reference to Article 2A. Such an interpretation of Article 2-A of the Constitution and

separation between religion and political affairs is so frequently propagated by people ignorant of Islamic teachings that the idea has obtained wide recognition. In spite of reservations overwhelming majority adopted the resolution. It was introduced as preamble of 1956 Constitution. The Objectives Resolution was also made Preamble of 1962 Constitution. Again when 1973 Constitution was framed, the Objectives Resolution was incorporated as Preamble of the Constitution. In 1985, a further development took place: the Objectives Resolution was made operative part of the Constitution by adding Article 2-A in the Constitution. Function of a preamble is to explain certain fundamental facts, necessary to be explained before the enactments contained in the Act can be understood. The preamble is the key to the mind of the Constitution makers.^{viii} In order to understand complex situation of our legal system the contents of resolution can link our present with our commitments resolved during the course of freedom movement for realization of our responsibilities.