

PLD 1992 Lahore 99

Before Sh. Riaz Ahmad Raja Afrasiab Khan
and Malik Muhammad Qayyum, JJ
Mst. SAKINA BIBI-- Petitioner

versus

FEDERATION OF PAKISTAN-- Respondent

Writ Petition No. 26 of 1989, decided on 14th January, 1992.

Per Sh. Riaz Ahmad, J., Raja Afrasiab Khan and Malik Muhammad Qayyum, JJ. agreeing--

(a) Constitution of Pakistan (1973)-

---- Arts. 2-A, 203-A to 203-J, 227, 228, 229 & 230 --- Provisions of Arts. 2-A, 203-A to 203-J, 227, 228, 229 & 230, Constitution of Pakistan (1973) examined.

(b) Legislation--

---- Parliamentary practice --- Preamble is considered when all the clauses and schedules have been agreed to and any clauses or schedules added.

May's Parliamentary Practice, 19th Edn., p.531 ref.

(c) Constitution of Pakistan (1973)-

---- Art. 2-A --- Objectives ' Resolution --- Legislative history --- Objectives Resolution had its own preamble and was neither proposed as preamble to the Constitution nor was tabled as such in March, 1949 before the Constituent Assembly of Pakistan --- Objectives Resolution, in fact, was tabled and debated even much before the drafting of the proposed constitution ---Wording of the preamble of the Constitution itself shows that Objectives Resolution is a mandate given by the people to their representatives to frame a Constitution in the light of the guidelines supplied --- Tenor of the Objectives Resolution is that it is an acknowledged command of the people, directed against their representatives to act in the manner given therein---Objectives resolution is grund norm of Pakistan.

Asma Jillani's case PLD 1972 SC 139 and Benazir Bhutto's case PLD 1988 SC 416 ref,

(d) Constitution of Pakistan (1973)--

---- Arts. 2-A, 30(2) & 227(2) --- Reason that Arts.30(2) & 227(2) of the Constitution made certain laws immune and that no Court could declare them void was no longer there, despite the fact that said Articles had not been repealed and were still intact as before---Such fact amply demonstrated that if some other suitable Constitutional step was taken with regard to the exempted laws also, they could also be dealt with in accord with the amended provision which factually was done when Art.2-A was inserted in the Constitution by Presidential Order 14 of 1985.

(e) Constitution of Pakistan (1973)-

---- Art. 2-A, 30(2) & 227(2)---Objectives Resolution is no longer a mere Preamble and has been incorporated in the Constitution and made an effective part of it exactly in the same words, as suggested by Supreme Court in the case of State v. Zia-ur-Rehman PLD 1972 SC 49 --- If any Court denied that

Objectives Resolution was in control of the Constitution, what to speak of the control of ordinary laws, it may have defied the mandate of the Supreme Court in Zia-ur-Rehman's case and also violated the Constitution.

(1) Constitution---

--- Significance --- 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 --- Non-Constitutional provisions, if incorporated in a Constitution acquire a higher sanctity and stand on the same footing as strictly Constitutional provisions.

Constitution is thought of as an instrument by which a Government can be run and controlled. It generally embodies the fundamental principles upon which the Government should be established and conducted. There is no set pattern or form provided and it may take variety of forms. Of late, a practice has grown up of incorporating within the Constitution itself a declaration of fundamental rights and even basic principles of State Policy. However, one thing is common in all the written Constitutions that it 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. Even non-Constitutional provisions, if incorporated in a Constitution acquire a higher sanctity and stand on the same footing as strictly Constitutional provisions. Anyway, this higher position may make it touchstone for other provisions or laws which may be annulled partially or totally or declared ultra vires of the Constitution or made ineffective.

A Constitution does not normally provide executing machinery separately for every provision. It generally provides only one fully equipped remedial dispensing unit to take care of every defect.

,Stato v. Zia-ur-Rehman PLD 1972 SC 49 ref

(g) Interpretation of Constitution---

--- Court, while interpreting the Constitution has to gather the intention of the Legislature and give meaning and import to every word and provision of the Constitution and let not any word and provision get redundant or superfluous

(h) Constitution of Pakistan (1973)

--- Art. 199 --- Constitutional jurisdiction --- Constitution does not normally provide executing machinery separately for every provision, it generally provides only one fully equipped remedial dispensing unit to take care of every defect as provided in Art.199 of the Constitution of Pakistan (1973).

(1) Constitution of Pakistan (1973)--

--- Arts. 2-A & 203-A to 203-J --- Article 2-A and Arts. 203-A to 203-J of the Constitution of Pakistan (1973), are enforceable provisions in their respective spheres --- Intention of the Legislature behind the Objectives Resolution spotlighted.

Objectives Resolution was meant to fulfil the promise made by the Quaid-e-Azam to the Nation. The Quaid-e-Millat made that speech before the Constituent Assembly. The wording indicative of the fact that it was accepted as the mandate of the representatives.

The Courts of the country, however, could not accept that position as its heading marked was 'preamble' and because of the restrictions laid down in Articles 30(2) and 227(2). Both the objections, stand already vacated by the creation and empowerment of the Federal Shariat Court, and enactment of

Article 2-A. There is thus no further impediment or hurdle to cross, to treat Chapter 3-A of Part VII and Article 2-A of the Constitution as enforceable provisions in their respective spheres.

Manzoor Elahi's case. PLD.1975 SC 66; Federation of Pakistan v. Malik Ghulam Mustafa Khar PLD 1981), SC 26 and Niaz Ahmad Khan's case PLD 1977 Kar. 604 ref.?????????????? ,

amply clear in his the Resolution is people to their

(q) Constitution of Pakistan (1973)--

---- Art. 2-A & Part VII, Chap. 3-A --- Provisions of Art. 2-A & Chap. 3-A, Part VII of the Constitution of Pakistan are enforceable provisions in their respective spheres. .

(k) Interpretation of Constitution-

---- Every word has to be given its plain and natural meaning and no word in a Constitution can be considered redundant or surplus.

(1) Constitution of Pakistan (1973)--

---- Art. 199 --- Superior Courts can interfere in a case when the c is only a provision to do or not to do, without stipulating a consequence.

(m) Interpretation of statutes-

---- Self-operating or self-executing provision is one which has inbuilt machinery.

(n) Constitution of Pakistan (1973)-

---- Art. 199 --- Article 199 of the Constitution of Pakistan (1973), is an? operating or executing provision for Arts. I to 6 and other such Articles.

F.B. Ali v. State PLD 1975 SC 506; Province of East Pakistan Sirajul

Haq Patwari PLD 1966 SC 854; Fazlul Quader Chaudhry v. Muhammad Abdul Haque PLD 1963 SC 486 and Tariq Transport Co. v. Sargodha-Bhcra Bus Service PLD 1958 SC (Pak.) 437 ref.

(o) Constitution of Pakistan (1973)-

---- Arts. 1, 2, 2-A, 3, 5, 6 & 199 --- Article 199 of the Constitution of Pakistan (1973), is an operatin or executing provision for Arts.1 to 6 and other such Articles.

(p) Constitution of Pakistan (1973)-

---- Art. 199 --- Power of the High Court to issue directions, orders and writs is not limited to the writs in the English form but extends to making of order restraining or directing any authority or Government which may be discharging executive functions under a statute.

Tariq Transport Co. v. Sargodha-Bhcra Bus Service PLD t958 SC (Pak.) 437 ref.

(q) Constitution of Pakistan (1973)..

---- Arts. 2-A, 227(2), 30(2), 268(6) & 270-A --- Function of Art.2-A is quite different and distinct from those entrusted to the Federal Shariat Court and the Council of Islamic Ideology --- Legislature by Art.2-A itself has conferred overwhelming position on the law of Allah and has made the man-made law subordinate to it and no Court can refuse to follow that position and Court is under oath to preserve, protect and defend the Constitution --- Provision of Art.270-A, Constitution of Pakistan (1973), equalizes all the Articles of the Constitution, as regards their existence, and enforceability and insists that they all being valid will co-exist with each other but with their own weight and importance and in that situation the application of Art.268(6) of the Constitution of Pakistan (1973) will pose no problem.

Council of Islamic Ideology is only an advisory body. It cannot make decisions. Its function is to advise and report to the Majlis-e-Shoora, Provincial Assemblies, the President or the Governors, in accord with Article 230, who have only to consider the same and are not obliged to follow the same or act accordingly. Further, the Articles 227(2) and 30(2) placed bars before the Courts to interfere. The result was that the Parliament and the Provincial Assemblies were free to make any law, however un-Islamic it may be and in any manner they liked.

The first check came by the creation of the Federal Shariat Court which could not only declare a law repugnant to Islam but could also make it inoperative from a date of its choice. Some laws, however, still remained beyond the jurisdiction of the Federal Shariat Court and they could either be placed within the ambit of the Federal Shariat Court or placed within the jurisdiction of the general - Courts. Further, the legislature could also assume that the main body of laws has been Islamised and therefore, procedure may be evolved so that the litigants start getting relief also as against the mere prospective declarations as were being dispensed. These objectives were achieved by incorporating Article 2-A. The function of Article 2-A is thus quite different and distinct from those entrusted to the Federal Shariat Court and the Council of Islamic Ideology. There is neither duplicity nor even overlapping.

If we look at Article 2-A, it will appear that the Legislature itself, conferred overwhelming position, on the Law of Allah and has made the man-made law subordinate to it. If that be so, can any Judges refuse to follow that position, as he is under oath to preserve, protect and defend the Constitution? If the Article 2-A is effective and enforceable the sovereignty belongs not to the people or the Parliament, but to Allah. Can then Article 2-A be violated, cried or defeated? It must be appreciated that Article 270-A does equalize all the Articles of the Constitution, as regards their existence and enforceability and insists that they all being valid will co-exist with each other but with their own weight and importance. In that situation the application of Article 268(6) will pose no problem.

(r) Constitution of Pakistan (1973)--

---- Art. 2-A --- Objectives Resolution having been made as part of the Constitution numbered as Art.2-A became the substantive part of the Constitution which would have the effect accordingly --- All measures which conflict with the ideology, aim and final object of the country and nation could be questioned.

Sardar Ali v. Muhammad Ali PLD 1988 SC 287; Federation of Pakistan v. Gul Hasan Khan PLD 1989 SC 633 and 1990 CLC 428 ref.

(s) Constitution of Pakistan (1973)-

---- Art. 2-A --- Provision of Art. 2-A of the Constitution of Pakistan is an effective and operative part of the Constitution and no Court can refuse to enforce it --- High Courts, therefore, shall exercise their jurisdiction with regard to all laws other than those to which the jurisdiction of Federal Shariat Court under Chap. 3-A, Part VII of the Constitution extends and may declare them repugnant to the Injunctions of Islam, as contained in Qur'an and Sunnah of the Holy Prophet (p.b.u.h.) and may also grant relief, as may be called for in the circumstances of the case.

Article 2-A is an effective and operative part of the Constitution and no Court may refuse to enforce it. Consequently the Federal Shariat Court shall exercise its jurisdiction assigned to it under Chap. 3-A, Part VII of the Constitution, whereas the High Courts shall exercise their jurisdiction with regard to all other laws. They may declare them repugnant to the Injunctions of Islam, as contained in Qur'an and Sunnah of the Holy Prophet (p.b.u.h.) and may also grant relief, as may be called for in the circumstances of the case

Habib-ul-Wahab al Khairi and others v. Federation of Pakistan PLD 1991 FSC 236 and Federation of Pakistan v. Muhammad Saifullah Khan PLD 1989 SC 166 ref.

(t) Constitution of Pakistan (1973)-?---- Arts. 45 & 2-A --- Criminal Law (Second Amendment) Ordinance (VII of 1990), Ss.309 & 310 --- President of Pakistan had no power to commute the death sentences awarded in matters of Hudood, Qisas and Diyat --- Power of pardon in such cases only vested with the heirs of the deceased --- President, however, had the power to pardon the offender and that too in public interest if he had been punished by way of Tazir.

In 1988 after the assumption of the Office of the then Prime Minister, the President of Pakistan acting upon the advice of the Prime Minister vide Letter No.8/15/88 Ptns, Islamabad dated the 8th December, 1988 purporting to act under Article 45 of the Constitution of Islamic Republic of Pakistan, issued the following order:--

- (a) to commute all death sentences awarded by the Military or other Courts up to the sixth of December, 1988, to imprisonment for life;
- (b) to grant pardon to all women prisoners, except those convicted for murder who are undergoing imprisonment under sentences awarded by the Military or other Courts;
- (c) to remit the sentences of all persons who have been convicted and sentenced under MLR 31 in absentia; such persons will however have to face trial for the substantive offences for which they may be charged;
- (d) to remit the sentences of convicts who are above sixty years of age and have undergone imprisonment for five years or more under sentences awarded by the Military or other Courts;
- (e) to remit the sentences of all persons, other than members of the Armed Forces convicted and sentenced by Military Courts for offences not involving drugs, smuggling, corruption, embezzlement, bank fraud, robbery, dacoity, murder, rape or unnatural offence; the cases of the Members of the Armed Forces will be reviewed by the -competent authorities of the Armed Forces;
- (f) to grant to all convicts in Pakistan a remission of three months in their sentences, whether awarded by the Military or other Courts;
- (g) to grant remissions from the dates of their imprisonment, to all persons convicted and sentenced by Military Courts to whom remissions have so far been denied; and
- (h) to direct that in computing the total period of imprisonment to be undergone by prisoners convicted and sentenced by Military Courts, the period served as under trial prisoners be included."

Although the order impugned was silent as to the exercise of powers, but there was no other letter of law except Article 45 of the Constitution of Islamic Republic of Pakistan, under which, the said order could have been issued. Para. (a) of the order impugned relates to the commutation of death sentences awarded by the Military or other Courts before 6th of December, 1988 into imprisonment for life. The crucial question falling for determination in the present case was whether regardless of the date on which the punishment was awarded, and the date on which the President of Pakistan issued the order impugned, in view of the provision of Article 2-A of the Constitution of the Islamic Republic of Pakistan, did the President of Pakistan enjoy such powers? The answer to this question in the light of the judgments and the principles of the Holy Book as laid down in the Criminal Law (Second Amendment) Ordinance, 1990 is in negative. The President of Pakistan had no such power to commute the death sentences awarded in matters of Hudood, Qisas and Diyat. In this view of the matter, the power of pardon in such cases only vests with the heirs of the deceased, therefore, the cases in which death sentences had been awarded, the President had no power to commute, remit or pardon such sentences. However, the cases

would be on different footings, if a person had been punished by way of Tazir as in such cases, the Head of the State has the power to pardon the offender and that too in public interest.

As far as para. (b) of the order impugned was concerned, whereby, the President had pardoned the women except those convicted for murder who were undergoing imprisonment under sentences awarded by the Military or other Courts, same was not open to any exception. Same were the views with respect of para. (c) of the impugned order. With regard to para. (d), it was held that in case of the convicts who were above sixty years of age, and had not been convicted under the Hudood, Oisas and Diyat Law, their sentences could be remitted under the order impugned. So far as paras. (e) and (f) of the impugned order were concerned, these were procedural in nature, Thus, the President had the powers to do so. [p. 1231 W

Per Raja Afrasiab Khan, J. agreeing with Sh. Riaz Ahmad, J.--

Provisions of sections 309, 310, Cr.P.C. as amended by Criminal Law (Second Amendment) Ordinance, 1990 do provide that the persons mentioned therein may compound the offences and may also receive the compensation from the convicts by entering into compromise with them. These provisions will run counter to the Presidential powers under the Constitution over the controversy. In this view of the matter, the Islamic injunctions will hold the field as mentioned in Article 2-A.

(u) Constitution of Pakistan (1973)-

--- Art. 2-A --- Significance---Objectives Resolution --- Article 2-A, Constitution of Pakistan (1973), stands on a higher pedestal than the other Constitutional provisions --- Courts are duty bound to uphold holy provisions of the Our'an and Sunnah --- Courts of Pakistan in their own sphere would have the jurisdiction and powers to perform their duties by implementing the Objectives Resolution as enshrined in Art.2-A of the Constitution.

Constitution, Law and Pakistan Affairs by Mr. Justice Dr. Nasim Hasan Shah, p.7.; Miss Asma Jilani v. The Government of the Punjab and others PLD 1972 SC 139 and Sardar Ali etc. v. Muhammad Ali etc. PLD 1988 SC 287 ref.

Dr. Abdul Basit for Petitioner.

Aziz A. Munshi, Attorney-General, SA. Manan, DA.-G Maqbool Elahi Malik, A.G., Farooq Bedar, A.A.-G., M. Akhtar, Addl. A.-G., Nazir A.

Ghazi, A. A.-G. assisted by M.M. Saced Beg for Respondent.

Dates of hearing: 10th, 14th, 21st July; 15th, 16th, 19th and 26th October, 1991.

JUDGMENT

SH. RIAZ AHMAD, J.---In 1988 after the assumption of the Office of Prime Minister Benazir Bhutto, the President of Pakistan acting upon the advice of the Prime Minister vide letter No.8/15/88 Ptns, Islamabad dated the 8th December, 1988 purporting to act under Article 45 of the Constitution of Islamic Republic of Pakistan, issued the following order:--

- (a) to commute all death sentences awarded by the Military or other Courts up to the sixth of December, 1988, to imprisonment for life;
- (b) to grant pardon to all women prisoners, except those convicted for murder who are undergoing imprisonment under sentences awarded by the Military or other Courts;
- (c)???? to remit the sentences of all persons who have been convicted and sentenced under MLR 31 in absentia; such persons will however have to face trial for the substantive offences for which they may be charged;
- (d)???? to remit the sentences of convicts who are above sixty years-of age and have undergone imprisonment for five years or more under sentences awarded by the Military or other Courts;
- (e)???? to remit the sentences of all persons, other than members of the Armed Forces convicted and sentenced by Military Courts for offences not involving drugs, smuggling, corruption, embezzlement " bank fraud, robbery, dacoity, murder, rape or unnatural offence; the cases of the Members of the Armed Forces will be reviewed by the competent authorities of the Armed Forces; to grant to all convicts in Pakistan a remission of three months in their sentences, whether awarded by the Military or other Courts;

- (g)??? to grant remissions from the dates of their imprisonment, to all persons convicted and sentenced by Military Courts to whom remissions have so far been denied; and
- (h)??? to direct that in computing the total period of imprisonment to be undergone by prisoners convicted and sentenced by Military Courts, the period served as under trial prisoners be included."

2. Although the order impugned is silent as to the exercise of powers, but there is no other letter of law except Article 45 of the Constitution of Islamic Republic of Pakistan, under which, the said order could have been issued. Para. (a) of the order impugned relates to the commutation of death sentences awarded by the Military or other Courts before 6th of December, -1988 into imprisonment for life. This clause of the order impugned was challenged in a number of writ petitions and the authority of the President of Pakistan was questioned to issue such general order by the complainant side. Such petitions were admitted by this Court and the Notices were issued subsequently to the beneficiary-convicts of the aforesaid order of the President of Pakistan. In a number of cases, wherein death sentences had been awarded by the Sessions Judges or the Additional Sessions Judges and the References had been made to this Court for their confirmation, and which had not been disposed of till the issuance of the questioned order by the President, it was argued that para. (a) of the said order was not applicable in those cases, inasmuch as, if the death sentences awarded by the Sessions Judges or the Additional Sessions Judges are not final, and cannot be executed unless confirmed by this Court, and therefore, para. (a) of the impugned order was not attracted to these cases. However, in cases of death sentences awarded by the Special Courts set up for speedy trial, the position emerging was different, because the death sentences awarded by these Courts did not require their confirmation by two Judges of this Court as envisaged under section 374, Cr.P.C.

3. To consider this question of vital importance involving the interpretation of Article 45 of the Constitution of Islamic Republic of Pakistan and its scope in the light of Article 2-A of the Constitution, the present Full Bench was constituted by our Lord the Chief Justice. Accordingly, we heard the elaborate arguments by both the sides and after having done so, we propose to deliver this judgment.

4. In the first instance, it was argued before us that the order impugned issued by the President of Pakistan had not been considered properly by the President therefore, it was a fake order. To ascertain the factual position, we issued Notice to the learned Attorney-General of Pakistan directing him to produce the original file and the correspondence between the President and the Prime Minister of Pakistan. To ascertain the legality of the aforesaid order, the Attorney-General in response to the Notice produced the file before this Court, and argued that the legality of the order could not be disputed, and in fact, the President of Pakistan had acted upon the advice of the then Prime Minister Benazir? Bhutto. In this view of the matter, this aspect of the case required no further elaboration.

5. On behalf of the convicts, it was vehemently argued that the powers of the President of Pakistan under Article 45 of the Constitution of Islamic Republic of Pakistan could not be questioned, because, as a Head of the State, he had been bestowed with such powers, and the exercise thereof could not be questioned. It was precisely argued that even this Court could not go behind the said order, because it was the absolute power of the President to exercise the aforesaid power in his discretion, and this Court was debarred to go into the jurisdictional aspect and also into the legality of the exercise of the aforesaid power. In this behalf, a number of judgments were cited delivered by the Indian Supreme Court as well as by the Supreme Court of Pakistan and the High Courts. There is no cavil with the proposition, but the precise question is; what is the effect of Article 227 read with Article 2A and the provisions and the dictates for the administration of criminal justice as envisaged by Islam on such powers of President of Pakistan. Precisely, the question of vital importance is whether in those cases, in which, death sentences have been awarded as Hadd, and whether the principles of Qisas are attracted when the President of Pakistan commuted such sentences of his own, because **under the** administration of criminal justice, as envisaged by Islam it is only Walis of the deceased who can waive their right of Qisas and not the Head of the State.

6. To resolve this controversy, we have to examine the provisions of Islam in brief as envisaged by Articles 227, 2A and Part VII Chapter 3-A of the Constitution read with Oisas and Diyat Ordinance and the judgments delivered by the Supreme Court of Pakistan as well as the judgments of the, High Courts of Pakistan. Under Article 227 of the Constitution, it was laid down that the existing laws shall be brought

in conformity with the Injunctions of Islam as provided by the Holy Quran and Sunnah referred to as Injunctions of Islam, and no law can be enacted which is repugnant to such injunctions. In fact, Articles 227 and 230(a) of the Constitution deal with the Islamic provisions. Under Article 228, the Islamic Ideology Council was created. Under Article 229 a Reference by Parliament could be made to such Council for advice as to whether any provision of law was repugnant to the Injunctions of Islam. Under Article 230 various functions of the Islamic Ideology were laid down of Presidential Order 1/80, a new Chapter 3-A for the appointment of Federal Shariat Court was drafted in Part VII of the Constitution of 1973. In this Order, the Court called the Federal Shariat Court was established which was empowered to examine and decide the question whether or not any law enforced in Pakistan was repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (May peace be upon him), and in case if the Federal Shariat Court decides any law or provision of that law to be repugnant to the Injunctions of Islam, it shall set out in its decision the reasons for its holding that opinion, and the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect. Article 203-A further provides that on such pronouncement, the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of those Lists; shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam.

7. It is pertinent to mention that within six months of the death of the Founder of the Nation late Quaid-i-Azam Muhammad Ali Jinnah, the First Constituent Assembly of Pakistan passed in March, 1949 a Resolution Clause which became the Objectives Resolution, and then this Resolution had appeared as a preamble of the Constitutions of 1956, 1962, the Interim Constitution of April 1972 and the present Constitution of 1973. In the case reported as *Zia-ur-Rehman v. The State* PLD 1972 SC 49, it was argued before the Supreme Court that the Objectives Resolution was the grund norm of Pakistan and was a supra-Constitutional instrument, but this view was rejected, and was laid down that the power under the same Statute or Authority is the operative part of the Constitution itself unless it is incorporated therein and included in its substantive part. In the constitutional history of Pakistan ' the provisions of this Resolution were implemented from time to time by the State to bring the legality or otherwise of the actions taken by the Executive or the other Forces, and despite the fact that the Resolution was described as a cornerstone of the Pakistan's legal edifice in *Asma Jilani v. The Government of Punjab* PLD 1972 SC 139 represented the ideology, aim and the final object of the country and the nation. In the case reported as *Hussain Naqi v. The District Magistrate, Lahore* PLD 1973 Lab. 164, it was not accepted as the supra-Constitutional instrument, as referred to above, and was held to be unjusticiable and preambulatory provision. In the case of *Zia-ur-Rehman v. The State* PLD 1972 SC 49, precisely to quote the words of late Hamood-ur-Rehman, the Chief Justice it was observed as under:---

"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.

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 law-maker, it may be looked at to ascertain the true intent, but it cannot control the substantive provision thereof"

8. Pakistan was intended to be an Islamic State. The history bears testimony to the fact that the entire struggle for achieving this homeland was initiated and carried on in the name of Islam. The only slogan which persuaded the people to support this movement and carried them along was "Pakistan Kg Matlab Ki-a Laa Illah 111allah". The Quaid-i-Azam made this fact clear before the birth of Pakistan and thereafter. He made it clear before the Bar Association, Karachi on 25th January, 1948 when he said that he could not understand a section of the people, who deliberately wanted to create mischief and made

propaganda that the Constitution of Pakistan would not be made on the basis of Shariat. He went on to say "Islam and its idealism have taught democracy, Islam has taught equality, justice and fairplay to everybody. What reason is there for anyone to fear democracy, equality, freedom on the highest standard of integrity and on the basis of fairplay and justice for everybody. Let us make it the future Constitution of Pakistan ?????????????? ?????????????? Islam is not. only a set of rituals, traditions and spiritual doctrines. Islam is also a code for every Muslim which regulates his life and his conduct in even politics and economics and the like. It is based on the highest principles of honour, integrity, fairplay and justice for all. In Islam there is no difference between man and man.

The qualities of equality, liberty and fraternity are the fundamental principles of Islam." The Quaid added that the Holy Prophet (p.b.u.h.) laid the foundation of democracy thirteen hundred years ago.

?9. The speech made by the Quaid-e-Millat in the Constituent Assembly while tabling the Objectives Resolution is also clear on the point. A portion of the same may be reproduced with advantage:-

"Sir, I consider this to be a most important occasion in the life of this country next in importance only to the achievement of independence, because by achieving independence, we only won an opportunity of building up a country and its polity in accordance with our ideals. I would like to remind the House that the Father of the Nation Qaid-i-Azam gave expression to his feelings on this matter on many a ????? and his views were enclosed by the Nation in unmistakable terms. Pakistan was founded because the Muslims this sub-continent wanted to build up their lives, in accordance with the teaching is and traditions of Islam, because they wanted to demonstrate to the world that Islam provides a panacea to many diseases which have crept into the life of human body?... "We as Pakistanis are not ashamed of the fact that we are overwhelmingly Muslims and we believe that it is by adhering to our faith and ideals that we can make genuine contribution to the welfare of the world. Therefore, Sir, you would notice that the preamble of the Resolution deals with the frank and unequivocal recognition of the fact that all authority must be subservient to God . But we the people of Pakistan. have the courage to believe firmly that all authority should be exercised in accordance, with the standards laid down by Islam so that it may not be misused. All authority is a sacred trust, entrusted to us by God for the purpose of being exercised in the service of man so that it does not become an agency for tyranny or selfishness

It may also be noted here that the Objectives Resolution had its **own preamble and was neither** proposed as a Preamble nor was tabled as such in B March, 1949. In fact, it was tabled and debated even much before the drafting of the proposed Constitution, which came about years later. The Preamble however is considered "when all the clauses and schedules have been agreed to and any clauses or schedules -added". It is then that the Chairman puts the question, "That this be the preamble of the bill". See May's Parliamentary Practice, 19th Edition, page 531. The same is the procedure given for Lords at page 478. The record of the Constituent Assembly further shows that there were debates and more particularly, the non-Muslim members criticised it.

10. It may also be of interest to note that before this Resolution was drafted a Team of the most learned of the Ulema of all the sects and the schools of thought were constituted to consider and propose jointly the agreed guidelines on which the Constitution for this Islamic State be based. It was thereafter that the Objectives Resolution was prepared on the basis of the guidelines mentioned above. Even the wording of the Preamble shows that it was a mandate given by the people to its representatives to frame a Constitution in the light of the guidelines supplied. It says:--- Whereas C sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust: And whereas, it is the will of the people of Pakistan to establish an order:" "Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam, shall be fully observed;" "Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah:

????? 11. It will be appreciated that such has never been the language and tenor of a Preamble. The difference is that the preamble gives the objects of the bill as conceived by the author and is put up to the

House after the clauses etc., have been considered. Thereafter, the Preamble may be amended if the objects given therein do not correspond with the amended clauses etc. It is stated in the May's Parliamentary Practice, page 520 that "Amendments to the Preamble and title are also admissible where amendments have been made to the bill which render them necessary". On the other hand, the tenor of the Resolution is that it is an acknowledged command of the people, directed against their representative to, act in the manner given therein. Unfortunately, this distinction was never brought to the notice of the Courts and explained. They took it as a Preamble and interpreted it the way the English precedent allowed.

12. The importance of the Preamble can be judged from the fact that it formed part of each one of the four Constitutions Pakistan had. It was held as the ground norm of Pakistan by all the Judges who sat to decide Asma Jilani's case PLD 1972 SC 139. It may be useful to reproduce a few lines at page 182, from the judgment of Mr. Justice Hamood-ur-Rehman, the then Chief Justice.----

"In any event, if a ground norm is necessary for us, I do not have to look to the western legal theorists to discover one. Our own ground 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

The basic concept underlying this unalterable principle of sovereignty is that the entire body politic becomes a trustee for the discharge of sovereign functions." -

13. A few other observations in the same regard from another judgment of the Supreme Court in Benazir Bhutto's case PLD 1988 SC 416 at p. 522 may be quoted with advantage:---

"The learned Judge further relied on the Preambles of the four Constitutions which were an eloquent testimony of the affirmation of Pakistan ideology, therefore, there cannot be any doubt that the ideology of Pakistan is based on Muslim nationhood and includes Islamic ideology which in clear terms in the Constitution means Injunctions of Holy Quran and Sunnah, and was the principal factor in the concept of Muslim nationhood

This is in my view an affirmation of a two-nation theory. The concept of Islamic ideology is interwoven with the ideology of Pakistan and is inseparable as it is the foundation of two-nation theory. Therefore, "integrity of Pakistan" not only includes ideology of Pakistan but also Islamic ideology. Any invasion of integrity of Pakistan will inevitably lead to an invasion of its sovereignty and vice versa."

14. The protection to the laws made or to be made, from being struck down, as having been repugnant to the Injunctions of Islam was removed by the enactment of Chapter 3-A of the Constitution (P.O. 3 of 1979) with effect from 7th of February, 1979 by creating Sharia Benches in the High Courts. They were however repealed later by new Court namely Federal Shariat Court which was created in 1980 vide P.O. 1 of 1980. Both the Courts were empowered to strike down any law, as defined, and declare it inoperative from a given date, if it was repugnant to the Injunctions of Islam as contained in the Holy Quran and Sunnah of the Holy Prophet (p.b.u.h.). The only limitation placed was that a few laws were exempted from the jurisdiction of this new Court. This Court has been exercising its jurisdiction and has in fact struck down numerous laws. In any case the reason that the Articles 30(2) and 227(2) make the laws immune and that no Court can declare them void is no longer there, despite the fact that those two Articles have not been repealed and are still intact, as before.

15. This fact should amply demonstrate that if some other suitable constitutional step was taken with regard to the exempted laws also, they could also be dealt with in accord with the amended provision. This was factually done on 2nd March, 1985 (P.O. 14 of 1985), when Article 2-A was inserted in the Constitution, it reads as follows:---

"The principles and provisions set out in the Objectives Resolution reproduced in the Annex. are hereby made substantive part of the Constitution, and shall have effect accordingly."

16. This Article was later passed in the 8th Amendment also. The result is that the Objectives Resolution is no longer a mere preamble and has been incorporated in the Constitution and made an effective part of it, exactly in the same words, as suggested in the case of Zia-ur-Rehman referred to above. In this situation, apparently, if any Court denied that it was in control of the Constitution, what to speak of the control of ordinary laws, it may have defied the mandate of the Supreme Court in Zia-ur-Rehman case and also violated the Constitution. However, there has been serious difference of opinion in various Benches of the High Courts and the Supreme Court did not give its final verdict on any one of these cases. There, thus prevailed an atmoslipere of uncertainty, which must be set at rest.

17. We are aware that some learned Judges have taken the view, that Article 2A is not self-operative, and self-executory and when functions in respect of the Islamisation of Laws in Pakistan have been expressly restricted by the Constitution to the Council of Islamic Ideology (Art. 227(2) or the Federal Shariat Court (Art.203-B) cannot be invoked. Can one Article of the Constitution be superior to another?

18. Before going into the above reasons, it must be borne in mind that Constitution is thought of as an instrument by which a Government can be run and controlled. It generally embodies the fundamental principles upon which the Government should be established and conducted. There is no set pattern or form provided and it may take variety of forms. Of late, a practice has grown up of incorporating within the Constitution itself a declaration Of fundamental rights and even basic principles of State policy. However, one? thing is common in all the written Constitutions that it 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. Even non-Constitutional provisions, if incorporated in a Constitution acquire a higher sanctity and stand on the same footing as strictly constitutional provisions. Anyway, this higher position may make it touchstone for other provisions or laws which may be annulled partially or totally or declared ultra vires of the Constitution or made ineffective. Reference may be made to the case of State v. **Zia-ur-Rehman** PLD 1972 SC 49 at pages 66-67.

19. Further a Constitution does not normally provide executing machinery separately for every provision. It generally provides only one fully equipped L remedy dispensing unit to take care of every defect. Reference may be made to Article 199 in our 1973 Constitution. It is also the duty of every Court to gather the intention of the Legislature and give meaning and import to every word and provision of the Constitution and let not any word and provision get redundant or superfluous. All this having been said let us find out the intention of the Legislature behind the Objectives Resolution. It has been said above that it was meant to fulfil the promise made by the Quaid-i-Azarn to the Nation. The Quaid-e-Millat made that amply clear in his speech before the Constituent Assembly, the relevant provisions of which have also been reproduced. The wording of the Resolution, it has been shown above, is indicative of the fact that it was accepted as the mandate of the people to its representatives.

20. The Courts of the country, however, could not accept that position as its heading marked was 'preamble' and because of the restrictions laid down in Articles 30(2) and 227(2). Both the objections, as explained above, stand already vacated by the creation and empowerment of the Federal Shariat Court and enactment of Article 2A. There is thus no further impediment or hurdle to cross, to treat Chapter 3A and Article 2A as enforceable provisions in their espective spheres.

21. Anyway, in order to see the depth and weight of the first objection, let us consider the very Part 1 of the Constitution, which inclucs, the Objectives Resolution. It is now incorporated and made a part of the Constitution as Article 2A but is in no case self-operative, as suggested in the objection. Article 1 is named as the Islamic Republic of Pakistan. Suppose some agency of

Government or a department or even Government drops the word Islamic, can any citizen of Pakistan challenge the same and where"? Again, God forbid, a Government intends to alienate a part of the territories mentioned in Article 1(2), can any patriot citizen have a grievance and challenge to stop it? Article 4 is also included in the same part and is neither self-operating nor self-executing. However, the Courts particularly, the Supreme Court has given monumental judgments on it. Did it act beyond its authority in doing that? Reference be made to the cases of Manzoor Ilahi PLD 1975 SC 66 and Federation of Pakistan v. Malik Ghulam. Mustafa Khar PLD SC 26 for the purpose.

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22. In the same part, there is Article 6. It is also not a self-operating and self-executing provision. Can it be said that it is merely symbolic and ornamental and one is free to commit treason without any fear of a penalty? It is to be noted that in Niaz Ahmad Khan PLD 1977 Kar. 604, it was held that Article 2 which states that Islam shall be the State religion of Pakistan means that in its outer manifestation the State and its Government shall carry an Islamic symbol. If that be so, why are not all the Articles from 1-6 just declaratory and symbolic? The correct view, it is submitted with profound respect, is that every word has to be given its plain and natural meaning and no word in a Constitution can be considered redundant or surplus. As against that 10 no Court has ever declared as ostensibly secular constitution as symbolic or ornamental, though, in practice it may be so. Rather, under such constitutions, the Courts have disallowed expenditure on religious items and compelled the Governments to stick to secularism. Reference be made to American and Indian Constitutions.

23. Undoubtedly, Article 8 of the Constitution, as referred to by our learned brother Mamoon Kazi, J., in Habib Bank Ltd. v. Waheed Textile Mills Ltd. **PLD 1989 Kar. 371**, declares that any law or any custom or usage having the force of law, in so far as it is inconsistent with the fundamental rights shall, to the extent of inconsistency be void. The clause (2) further restrains the Government from making such a law, otherwise, that shall also be void. This is what has, to our mind, been termed as self-executing or self-operating. Firstly, it is submitted with respect, that it is a misnomer. A self-operating or self-executing provision is one which has a complete inbuilt machinery in it but that is not the case here. Article 8 only gives a declaratory result or consequence, if a law of that nature was there made. However, it must be appreciated, that the superior Courts have interfered in innumerable cases where there was only a provision to do or not to do, without stipulating a consequence. In English law parlance, they have been termed as writs of mandamus, certiorari and prohibition and the concepts have been followed in this country also. I am sure no authority may be needed in support, as the annals of law are full of that and the High Courts are day in and day out passing such orders. ??????????

24. Here, we may refer to Articles 141 and 142 of the 1972 Constitution and those pari materia in the earlier Constitutions, which are neither self-operating nor self-executing, like Article 8, yet the Courts have always been enforcing them. These Articles stipulate the territorial and the subject-matter fields, the Provincial and the Federal Legislatures, without saying that if they step out of their respective fields or trespass into other areas, the laws made by them shall be void. However, the Courts did declare that it has the power to do so when a violation of the nature was proved. See F.B. Ali v. State PLD 1975

SC 506, Province of East Pakistan v. Sirajul Haq Patwari PLD 1966 SC 854 and Fazlul Quader Chowdhry v. Muhammad Abdul Haque PLD 1963 SC 486.

. 25. In the Constitution of 1973, Article 199 provides remedies to the aggrieved persons and others. The clause (1)(a)(i) of this Article reads as under:---

"(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law---

(a) on the application of an aggrieved party make an order---

(i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do or to do anything he is required by law to do;

The question is, can this be an operating or executing provision for Articles I to 6 and other such Articles? Answer has to be in affirmative, as the Courts have not lagged behind or hesitated whenever it was shown that a case was covered by it. It was held in *Tariq Transport Co. v. Sargodha Bhera Bus Service* PLD 1958 SC (Pak.) 437 that the power of the High Court to issue directions, orders and writs is not limited to writs in the English form but extends to making of orders restraining or directing any authority or Government which may be discharging executive functions under a statute

. 26. Now we deal with the reason (b) mentioned above. It means, can Article 2A override the functions of Islamisation entrusted to the Council of Islamic **Ideology and the** Federal Shariat Court? It is to be **noted that the** Council of Islamic Ideology is only an advisory body. It cannot make decisions. Its function is to advise and report to the Majlis-e-Shoora, Provincial Assemblies, the President or the Governors, in accord with Article 230, who have only to consider the same and are not obliged to follow the same or act accordingly. Further, as said above, the Articles 227(2) and 30(2) placed bars before the Courts to interfere. The result was that the Parliament and the Provincial Assemblies were free to make any law, howsoever un-Islamic it may be and in any manner they liked.

27. The first check came by the creation of the Federal Shariat Court which could not only declare a law repugnant to Islam but could also make it inoperative from a date of its choice. Some laws, however, still remained beyond the jurisdiction of the Federal Shariat Court and they could either be placed within the ambit of the Federal Shariat Court or placed within the jurisdiction of the general Courts. Further, the Legislature could also assume that the main body of laws has been Islamised and therefore, procedure may be evolved so that the litigants start getting relief also as against the mere prospective declarations as were being dispensed. These objectives were achieved by incorporating Article 2A. The function of Article 2A is thus quite different and distinct from those entrusted to the Federal Shariat Court and the Council of Islamic Ideology. There is neither duplicity nor even overlapping.

28. If we look at Article 2A, it will appear that the legislature itself, conferred overwhelming position, on the Law of Allah and has made the man-made law subordinate to it. if that be so, can any Judge refuse to follow that position, as he is under oath to preserve, protect and defend the Constitution? If the Article 2A is effective and enforceable the sovereignty belongs not to the people or the Parliament, but Allah. Can then Article 2-A be violated, defied or defeated? It must be appreciated that Article 270-A does equalize all the Articles of the Constitution, as regards their existence and enforceability and insists that they all being valid will co-exist with each other but with their own weight and importance. In that situation the application of Article 268(6) will pose no problem.

29. While reviving the Constitution of 1973 by virtue of the Revival of the Constitutional Order (P.O. 14 of 1985) a magnificent turn took place towards the fulfilment of the goal of the citizens of Pakistan to lead their lives in accordance with the Injunctions of Islam as laid down in Holy Quran and Sunnah. Thus, the Objectives Resolution was made as part of the Constitution numbered as Article 2A and then it became the substantive part of the Constitution, and shall have the effect accordingly. The Objectives Resolution ceased to be a simple preamble of the test laid down by the Supreme Court in *Zia-ur-Rehman's* case was satisfied, and therefore, all measures which conflict with the ideology, aim and final object of the country and nation could be questioned. To further emphasize the importance of the Objectives Resolution, my Lord Mr. Justice Muhammad Afzal Zullah, the Chief Justice of Pakistan in his illuminating judgment reported as *Sardar Ali v. Muhammad Ali* PLD 1988 SC 287 touched this aspect of the case, and while commenting upon it using phraseology as laid down in *Asma Jilani's* case, it was remarked that much more would be said about its contents, value and importance as the repository of very high principles of Constitutional and ideological importance, for example, the sovereignty of Allah was given concrete meaning and applied as such in that case. It was further observed by my Lord the Chief

Justice that while reaffirming these ideals and the resolve to achieve them, the immediate implementation of the Resolution in all our formal, Constitutional and legal instruments. It was also observed that compensation of the lost is not in mere speed but in a measured speed. The worthy Chief Justice further observed that the Courts in their own sphere of jurisdiction and power would in due course perform their duty by implementing the aforesaid Resolution.

30. Another development towards the corpus juris of the administration of criminal justice in Pakistan as enshrined in the Holy Quran and Sunnah is the case decided by the Shariat Appellate Bench of the Supreme Court presided by my Lord Mr. Justice Muhamihad Afzal Zullah, Chief Justice of Pakistan in the case reported as Federation of Pakistan v. Gul Hasan Khan PLD 1989 SC 633. In this case provisions of sections 299 to 338, P.P.C. were considered and declared to be repugnant to the Injunctions of Islam, as it failed to cater for the fundamental principles laid down in the administration of criminal justice of Islam. It was enumerated by the Federal Shariat Court as under:--

Sections 299 to 338 of the Pakistan Penal Code, 1860 which deal with offences against human body are repugnant to the Injunctions of Islam, as they---

- (a)???? do not provide for the Qisas in cases of Qatl-al-Amd (deliberate murder) and Jurooh-al-Amd (deliberately causing hurt) as is prescribed in the Holy Quran and Sunnah;
- (b)??? do not provide for Diyat in cases of Shib-ul-Amd and Khata of both Oad (murder) and Jur (hurt) as prescribed in the Holy Qur'an and Sunnah;
- (c)???? do not provide for compromise between the parties on agreed compensation when they make Sulh (compromise) in cases of Oad and Jurh;
- (d)??? do not provide that the offender may be pardoned by the victim in cases of Jurh (hurt) and by the heirs of the victim in cases of Qatl (murder) whereby the Court can only award him a sentence of imprisonment by way of Ta'zir which may not extend to imprisonment for life;
- (c)???? do not exempt a non-puberty and an insane offender from the sentence of death in cases of murder; and
- (f)???? do not define the different kinds of Qatl and Jurh (murder and hurt) in accordance with their respective punishments prescribed in the Holy Qur'an and Sunnah (pp. 641, 642) A & G".

31. In this context, the observations made by our learned brother Mr. Justice Wajih-ud-Din of the Sindh High Court are very apt in the case reported as 1990 CLC 428. Our learned brother observed that all the principles and provisions embodied in the Objectives Resolution are no longer a pious wish in the Preamble of the Constitution but are a substantive part of the Constitution and are enforceable. Objectives Resolution can be termed as the ground norm which embodies the conscience of body politic of Pakistan and provides the firm foundation for raising the sublime edifice of an Islamic Society. If any organ of the State goes beyond the limits of principles of Objectives Resolution, its action can be declared to be without lawful authority on the touchstone of limits prescribed by Allah and requirements of Islam as set out in Holy Qur'an and Sunnah. Even if the laws protected under Article 270-A of the Constitution are found repugnant to the Holy Qur'an and Sunnah, the Courts in Pakistan would be bound to ignore and overstep such a provision, as the same does not conform to the Supreme Law of Almighty Allah.

32. In Gul Hassan's case besides holding the provisions of sections 299 to 338, P.P.C. and sections 54 and 109, P.P.C. as repugnant to the injunctions of Islam, provisions of sections 401, 402, 402-A, 402-B, 345, 381, 337 to 339-A of the Criminal Procedure Code were also examined, and the Shariat Appellate Bench also held these provisions to be repugnant to Islamic Injunctions, and thus, the Federal Government had to amend the law to bring the same in accord with the Injunctions of Holy Qur'an and Sunnah. In the aforesaid judgment, it was also held that the judgment had to become effective with effect

from 23rd of March, 1990. The Attorney-General of Pakistan filed a Review Petition stating therein that by the enforcement of the judgment of the Shariat Appellate Court, Qisas and Diyat Ordinance had been enacted, and would be implemented by 5th of September, 1990, and would become effective with effect from 12th of Rabi-ul-Awwal 1411 AH. The review petition filed by the Federation of Pakistan against the judgment delivered in Gul Hasan's case was thus rendered infructuous. The Shariat Appellate Court presided by our Lord Mr. Justice Muhammad Afzal Zullah the Chief Justice of Pakistan further observed that in case the required law was enacted by 12th of Rabi-ul-Awwal or if the Ordinance lapses; the provisions held to be repugnant would cease to have effect on the 12th of Rabi-ul-Awwal, and in such state of vacuum vis-a-vis the said law on the subject, common Islamic Law/Injunctions of Islam as contained in the Holy Qur'an and Sunnah relevant to the offence of Qatl, Jurh (hurt) shall be deemed to be the law on the subject, and the Courts while hearing and deciding the case of Qatl, Jurh (hurt) in accordance with the common Islamic Law of Islam as contained in Qur'an and Sunnah, and may also seek guidance from the provisions and Articles having once been enforced had lapsed or otherwise had become unenforceable.

33. . Subsequent thereto, Qisas and Diyat Ordinance was promulgated and enforced, but the Ordinance was not placed before the National Assembly of Pakistan, and thus it lapsed. It is now well settled that the Courts have to look for guidance from the provisions contained in the Ordinance which is nothing but embodiment of the principles of Islamic common law. It may be stated here that the aforesaid Islamic common law was rightly introduced keeping in view our heritage in Islam.

34. The next development takes place when a case reported as Habib-ul-Wahab al Khan and others v. Federation of Pakistan PLD 1991 FSC 236 decided by the Federal Shariat Court, and provisions of sections 401, 402 and 402-A, Cr.P.C. were held to be repugnant to the Injunctions of Islam, and it was laid down that Ulul Amr in Islamic polity are in the modern terminology, the Head of State, President or his Agent say Governor as the authority to **pardon an accused or remit the sentence** of a convict who has been punished for an offence liable to Tazir in public interest. He has no such powers in their matter of Hudood, Qisas and Diyat. It was also laid down, that no power of commutation of death sentence vests in the Head of an Islamic State, if their punishment has been awarded under the Qisas and Diyat Ordinance, because; such powers only vest in the hands of the heirs of the deceased or the victims i., who suffered bodily injuries. Section 401/402/402-A, Cr.P.C read as under:--

"Section 401:

When any person has been sentenced to punishment for an offence the Provincial Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(1) Whenever an application is made to the Provincial Government it **for the suspension or** remission of a sentence, the Provincial Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion (and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists).

(3) If any condition on which a sentence has been suspended or remitted is in the (opinion of the Provincial Government) not fulfilled, the Provincial Government may cancel the suspension or remission and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4A) The provisions of the above subsection shall also apply to any order passed by Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(5) Nothing herein contained shall be deemed to interfere with the right of the President or of the Central Government when such right is delegated to it to grant pardon, reprieves, respites or remissions of punishment.

(5A) Where a conditional pardon is granted by the President or in virtue of any powers delegated to it by the Central Government, any condition thereby imposed of whatever nature, shall be deemed to have been imposed by a sentence of competent Court under this Code, and shall be enforceable accordingly.

(6) The Provincial Government may by general rules or special orders give directions as to the suspended of sentences and the conditions on which petitions should be presented and dealt with.

402. The Provincial Government may without the consent of the person sentenced, commute any of the following sentences for any other mentioned after it:-

Death, (imprisonment for life)*** rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) Nothing in this section shall affect the provisions of section 54 or 55 of the Pakistan Penal Code.

402-A. The powers conferred by section 401 or 402 upon the Provincial Government may in the case of sentences of death also be exercised by the President."

These powers only vest in the heirs of a person while Article.45 of the Constitution brings such powers on the President of Pakistan, which reads as under:-

"President's power to grant pardon etc.-- The President shall have power to grant pardon, reprieve and respite and to remit, suspend or commute any sentence passed by any court, Tribunal or other Authority."

35. There is yet another very weighty argument in this behalf The Supreme Court has firmly established the view that the rules of natural justice (meaning thereby law of Allah) shall be deemed to have been incorporated in every statute and violation of the same shall render the proceedings null and void. In this view of the matter, we see no reason why the entire law of Allah should not be deemed to be the super law and any law or action in violation of the same should not be void. Further, the Supreme Court in a recent case gave preference to the "national interest" as against an action in accordance with the Constitution. Will it not amount to saying that the laws of Allah are not in national interest, if we do not treat them as supreme law, despite the constitutional requirement (see PLD 1989 SC 166, Federation of Pakistan v. Muhammad Saifullah Khan.

36. In view of the above, our humble view is that Article 2-A, is an effective and operative part of the Constitution and no Court may refuse to enforce it. Consequently the Federal Shariat Court shall exercise its jurisdiction assigned to it under Chap. 3-A of the Constitution, whereas, the High Courts shall exercise their jurisdiction with regard to all other laws. They may declare them repugnant to the Injunctions of Islam, as contained in Qur'an and Sunnah of the Holy Prophet (p.b.u.h.) and may also grant relief, as may be called for in the circumstances of the case.

37. The crucial question falling for determination before this Bench is whether regardless of the date ' on which the punishment was awarded, and the date on which the President of Pakistan issued the order impugned, in view of the provision of Article 2-A of the Constitution of the Islamic Republic of Pakistan,

does the President of Pakistan enjoy such powers? Our answer to this question in the light of the judgments and the principles of the Holy Book as laid down in the Qisas and Diyat Ordinance is in negative. The President Of Pakistan had no such power to commute the death sentences awarded in matters of Hudood, Oisas and Diyat Ordinance, In this view of the matter, we are of the considered view that the power of pardon in such cases only vests with the heirs of the deceased, therefore, the cases in which death sentences have been awarded, the President had no power to commute, remit or pardon such sentences, However, the cases would be, on different footings, if a person has been punished by way of Tazir as in such cases, the Head of the State has the power to pardon the offender and that too in public interest,

38. As far as para. (b) of the order impugned is concerned, whereby, the President has pardoned the women except those convicted for murder who are undergoing imprisonment under sentences awarded by the Military or other Courts is not open to any exception. Same are the views with respect to para. (c) of the impugned order. With regard to para. (d), we hold that in case of the convicts who are above sixty years of age, and have not been convicted under the Hudood, Qisas and Diyat Ordinance, their sentences can be remitted under the order impugned. So far as paras. (e) and (1) of the impugned order are concerned, these are procedural in nature, and the same were not seriously disputed before us. Thus, we hold that the President had the powers to do so. Consequently, this petition is allowed, and it is declared that the death sentence awarded to the respondents could not be commuted to life imprisonment by the President.

(Sd.)

(RIAZAHMAD)

JUDGE

(Sd.)

(RAJA AFRASIAB KHAN) JUDGE

(Sd.)

(MALIK MUHAMMAD QAYYUM) JUDGE

RAJA AFRASIAB KHAN, J.--I have the privilege of reading the leading judgment, proposed to be delivered by my learned brother, Sh. Riaz Ahmad, J over the controversy referred to this Full Bench for its decision. His Lordship has given exhaustive reasons in the judgment and has also made extensive references to the decided cases on the questions involved in all these matters. However, in view of great public importance of the questions raised and argued in the petitions, I would like to give a short note of my own.

2. The learned counsel for the petitioners in these Constitutional petitions have assailed the vires of an order dated 8-12-1988 of the President of Pakistan issued on the advice of the then Prime minister. By means of the aforesaid order, the President commuted the death sentences of the convicts, awarded to them by Military or other Courts up to 6-12-1988, to life imprisonments. He granted pardon to all the women prisoners except those who were convicted for the murders and were undergoing sentences awarded to them by the Courts. The President also remitted the sentences of all the accused who were convicted and sentenced under MLR-31 in absentia by various Special Military Courts in Pakistan. It was, however, directed that such persons shall be tried afresh for the substantive offences for which they were charged. The sentences of the convicts who were above the age of 60 years and were undergoing their sentences for the last five years were ordered to be remitted. The sentences of the persons, other than the members of the armed forces, convicted and sentenced by the Military Courts, for the offences which did not involve, drugs, smuggling- corruption, embezzlement, bank fraud, robbery dacoity, murder, rape or unnatural offence were remitted with a direction that the cases of the members of the Armed forces shall be reviewed by the competent authorities of the Armed Forces. The President also proceeded to give a remission of three months each to all the convicts in Pakistan, in their sentences, whether awarded by the Military or other Courts. It was clarified by the President that remission shall be given to all the convicts from the dates of their imprisonments. It was also ordered that the period for which the convicts remained in jail during their trial shall be included towards the computation of their total period of imprisonments.

3. The principal argument of learned counsel for the petitioners in all these petitions is that in view of the provisions of Article 2-A of the Constitution of the Islamic Republic of Pakistan, 1973, the President was not at all competent to pass the aforesaid order commuting the death sentences of the convicts, awarded to them by various competent Courts of Pakistan. The argument is that right to pardon a convict has specifically been given under the Islamic Injunctions to the Walis of the deceased and that certainly such powers cannot be exercised by the President under Article 45 of the Constitution in the given circumstances of these cases. Learned counsel argue forcefully that the Objectives Resolution was adopted unanimously by the Constituent Assembly of Pakistan on 7-3-1949 and was accordingly made an integral part of the Constitution of 1973. In other words, the Objectives Resolution which was earlier incorporated only as a preamble to the Constitutions of 19-50, 1962 and 1972 had ultimately been incorporated as a substantive part of the Constitution of 1973 in 1985 and as such it had to be acted upon accordingly. In pith and substance, Article 2-A is that Allah Almighty alone is the Supreme Sovereign of the entire universe and the authority to rule the people within the limits prescribed by Him is a sacred trust. This sacred trust has to be discharged through the elected representatives of the people of Pakistan. It was ordained that the principles of democracy, freedom, equality, tolerance and social Justice as enunciated by the Holy Injunctions of Islam shall be fully observed in letter and spirit. It was set down that the Muslims shall be enabled to lead their lives individually and collectively in accordance with the teachings of the Holy Qur'an and the Sunnah of the Holy Prophet (peace be upon him). It was provided in the Article that sufficient provisions shall also be made to enable the minorities to practise their religions and develop their cultures, according to the dictates of their religions. Similarly, it was laid down that fundamental rights, including equality of - status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief faith, worship shall be guaranteed to the citizens without any reservations. It was provided that in the Islamic set-up, judiciary shall be wholly independent. It was provided that special provisions shall be made for uplifting the backward and depressed classes of the society. The interests of the minorities shall be safeguarded. A resume of the Objectives Resolution was given by Mr. Justice Dr. Nasim. Hasan Shah in his celebrated Book, namely, CONSTITUTION, LAW AND PAKISTAN AFFAIRS at page 7 in the following words:-

"The Objectives Resolution affirmed that sovereignty over the entire Universe belonged to God Almighty alone and the authority **which He had delegated to the State** of Pakistan through its people for being exercised within the limits prescribed by Him was a sacred trust. It further envisaged a Federal State governed by the elected representatives of the people, with an independent judiciary, Fundamental rights were to be guaranteed. The interests of the minorities and backward classes were to be safeguarded. It also upheld democracy, equality, freedom, tolerance and social justice as enunciated by Islam."

The close scrutiny of aforesaid provision of Article 2-A demonstrates beyond doubt that the very foundation of the Polity of Pakistan shall be based on the commands of Allah Almighty as revealed in the Holy Qur'an for the benefits of people of Pakistan and the humanity at large. It was also specifically highlighted that adequate provisions shall be made for uplifting the down-trodden, backward and depressed classes of Pakistan. In other words, it shall mean that the deprived classes who are a backbone of Pakistan shall be uplifted socially, economically and politically so as to rehabilitate them in the economic life of Pakistan. In my considered view, the Objectives Resolution as contained in Article 2-A of the Constitution is based upon the holy principles of Islam which are immutable and unchangeable. Thus, I venture to say that this Article stands on a higher pedestal than the other Constitutional provisions. In this view of the matter, the Courts are duty bound to uphold these holy provisions of the Qur'an and Sunnah. This point had continuously been agitated before the superior Courts of the country soon after the creation of Pakistan in appropriate cases brought before them. In *Miss Asma Jilani v. The Government of the Punjab and others* (PLD 1972 SC 139) the argument was that the aforesaid Objectives Resolution is the grund norm for Pakistan and, therefore, it stood even above the Interim Constitution and any Constitution that may be framed in future. This argument was not entertained by the Hon'able Supreme Court with the following observation:-

"If any event, if a ground norm is necessary, Pakistan need not have to look to the Western legal theorists to discover it. Pakistan's own ground norm is enshrined in its 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."

"...if it is not incorporated in the Constitution or does not form a part thereof it cannot control the Constitution ?????????????? 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"

From the above judgment it is evident that the importance of the Objectives Resolution was highlighted by the Hon'ble Supreme Court but at the same time it was held that no such document could be accepted as a supreme law unless it was made a substantive part of the Constitution. Thus, the difficulty which was clearly pointed out earlier by the learned Supreme Court in Asma Jilani's case was removed by the legislature itself by making the Objectives Resolution as a substantive part of the Constitution of 1973 by means of Presidential Order No. 14 of 1984 dated 2nd March, 1985. This change in the Constitution was noted by the Hon'ble Supreme Court in a historic judgment given in Sardar Ali etc. v. Muhammad Ali etc. (PLD 1988 SC 287). The principle laid down in the aforesaid authority is that Courts of **Pakistan in their own sphere would now have the jurisdiction and Dowers to Z** perform their duties by implementing the Objectives Resolution as enshrined in Article 2-A of the Constitution.

In this view of the matter, the question as raised and argued by the learned counsel can certainly be scrutinized and determined in the light of commands of Holy Qur'an and the Sunnah. There is yet another significant development in the promulgation of Islamic Laws which is the 'Enforcement of Shariah Act, 1991,' promulgated on 18-6-1991. Section 3 of the above Act says

that the injunctions of 'Islam as laid down in the Holy Qur'an and Sunnah shall be the supreme law of Pakistan. Similarly, on 24-8-1991, substantial changes were introduced in Pakistan Penal Code, 1860, and the Code of Criminal Procedure, 1898 by means of Criminal Law (Second Amendment) Ordinance, 1990, in order to bring them in line with the injunctions of Holy Qur'an and Sunnah. Sections 309 and 310 of the said Ordinance provide compounding of Qisas. Both the sections are reproduced below for further elaboration of the argument:--

"309. Waiver-Afw of Oisas in Qatl-i-Amd:

(1) In the case of Qatl-i-Amd an adult sane Wali may, at any time and without any compensation waive his right of Qisas;"

"310. Compounding of Oisas (Sulh) in Qatl-i-Amd:-

(1) In the case of Qatl-i-Amd, an adult sane Wali may, at any time on accepting Badal-i-Sulh, compound his right of Qisas;"

In short, the above provisions do provide that the persons mentioned therein may compound the offences and may also receive the compensation from the convicts by entering into compromise with them. To my mind these provisions will run counter to the Presidential powers under the Constitution over the controversy. In this view of the matter, the Islamic injunctions will hold the field as mentioned in Article 2-A. With these observations, I respectfully proceed to agree with the conclusions arrived at in the judgment proposed to be delivered by my learned brother Mr. Justice Sh. Riaz Ahmad.

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M.B.A./S.61/1, order accordingly.

