Contested Space of the Objectives Resolution in the Constitutional Order of Pakistan

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Abstract

In 1985, when the Objectives Resolution was incorporated in Article 2-A of Pakistan's Constitution, the question of its justiciability re-emerged. Until then, the Resolution was part of the Preamble of the Constitution (1973), and hence non-justiciable. With its incorporation in Article 2-A — or in the substantive part — a number of cases surfaced in the superior courts challenging different laws and even constitutional provisions that appeared contradictory to the Resolution. Thus, its incorporation in the substantive part of the Constitution shook the coherence of its structured organisation. The change also brought back the question of Islam's place in the Constitution. This article engages constitutional theory debate on the structured organisation of Pakistan's Constitution and sheds light on how the Supreme Court responded to the incorporation of the Resolution in the value-neutral or justiciable part.

Key words: Constitution, Justiciability, Objectives Resolution, Pakistan, Religion.

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Introduction

Broadly speaking, there is difference between justiciability of procedural laws and ideological value provisions of a constitution. In constitutional theory, this difference results in a structured conception of the constitution. Not all laws carry similar force of law — legality or legitimacy. From the quantitative principle of democratic constitutionalism, we know that some laws require simple legislative majority, while others require special majority. For instance, in the case of Pakistan, public laws require a simple majority for their enactment, amendment or repeal. While on the other hand, constitutional provisions require 2/3rd majority. Moreover, there are certain provisions in the Constitution whose amendment or repeal might not be practically possible even with 2/3rd majority. For instance, it can be questioned whether the Parliament of Pakistan can repeal or substantially amend fundamental rights, the Objectives Resolution (Article 2-A), Directives Principles of Policy, the form of government (parliamentary), and the independence of judiciary.

Although the hierarchical system of the legal and constitutional order in Pakistan has its roots in colonial history, the Supreme Court's decision in *Dosso* (1958) also opened a theoretical dimension to the constitutional debate in the country.[1] The Supreme Court based its decision in *Dosso* on Hans Kelsen's Theory of Positive Law.[2] In his

[1] Dosso v. State, 533 PLD SC (1958) (Pak.).

[2] For a detailed engagement of Kelsen's theory in Pakistan's Supreme Court's decisions see, Syed Sami Raza, "On the Disruption of Postcolonial Constitutional Order: Hans Kelsen or Carl Schmitt?" *Vienna Journal on International Constitutional Law* 6, no. 3-4 (2012): 441–467; T. K. K. Iyer, "Constitutional Law in Pakistan: Kelsen in the Courts," *The American Journal of Comparative Law* 21, no. 4 (1973): 759–771; Farooq Hassan, "Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d'état in the Common Law," *Stanford Journal of International Law* 20, no. 1 (1984): 191-258; Mahmud Tayyab, "Jurisprudence of Successful Treason: Coup d'état & Common Law, *Cornell International Law Journal*, 27, no. 1 (1994), http://scholarship.law.cornell.edu/cilj/vol27/iss1/2/. For understanding Kelsen's theory in critical light see, Simeon C. R. McIntosh, *Kelsen in the Grenada Court: Essays on Revolutionary Legality* (Kingston: Ian Randle Publishers, 2008) (see especially chapter 1); T.C. Hopton, "Grundnorm and Constitution: The Legitimacy of Politics," *McGill Law Journal* 24 (1978): 72-91; S.A. de Smith, "Constitutional

theory, Kelsen proposed a closed, hierarchical, and structured conception of the positive legal order. According to him, there is a hierarchy of laws within the positive legal order. individual norms are at the lowest rung, above which are statutes. Above the statutes are the constitutional laws, and in fact, the constitution itself. At the top of the hierarchy is a legal-logical constitution, which he called the *grundnorm*. As Pakistan's Supreme Court adjudicated on the basis of Kelsen's theory, the hierarchical conception of legal order gained ground in the juridical debate in the country. For instance, in 1968-69, two cases challenged certain laws and ordinances on the argument that Pakistan's legal order was hierarchical. The petitioners argued that Islamic law was on top in the hierarchy. Below Islamic law was the positive Constitution and further below were the statutes and ordinances.[3] Accordingly, if any lower law did not conform to the higher Islamic law it could be struck down. It is worth noting here that Kelsen in his theory argued that the validity of lower norms is based on the higher norms and that the former could be derived and interpreted from the latter. In the above-mentioned cases, the petitioners' argument came as an inverse corollary of Kelsen's argument: if the basis of the validity of lower laws is not Islamic and they could not be derived from Islamic law, then they could be struck down.

Several years later in *Jilani* (1972), the Supreme Court declared that the *grundnorm* of Pakistan's Constitution is contained in the Objectives Resolution—a Resolution that provides for the Islamic value provisions.[4] With this decision emerged the possibility of raising the Islamic law, or more generally Islamic value provisions, above the positive Constitution of the country. Furthermore, the Court's use of Kelsen's concept of the *grundnorm* to explain the constitutional status of the Objectives Resolution left certain crucial questions unanswered. First, Kelsen regards

Lawyers in Revolutionary Situations," *Western Ontario Law Review* 7 *(*1968): 93-110. Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge: Harvard University Press, 1945); and ——, *Pure Theory of Law*, 2nd ed., trans. Max Knight (Berkeley: University of California Press, 1967).

3 Labour Federation of Pakistan v. Pakistan and Another, 188 PLD HC (1969) (Pak.). In this case, the petitioner challenged certain laws relating to trade unions.

4 Asma Jilani v. Government of Punjab, 139 PLD SC (1972) (Pak.).

the *grundnorm* as a destructible legal-logical constitution. Accordingly, a question arose whether the Objectives Resolution, or in general the Islamic value provisions, were destructible (or amendable)? This question carried consequences for the nature of different constitutional provisions as well as for quantitative legislative principles. Second, after elevating the Objectives Resolution to the status of the *grundnorm*, what was its new relationship with the positive Constitution?[5]

From the juridical point of view, one of the major consequences of the decision in *Jilani* was that the Court gave substantive meaning to sociological and religious elements in the constitutional and legal order that the decision in *Dosso*, following Kelsen's theory, withdrew. It is worth noting that a contemporary of Kelsen, Carl Schmitt, had pointed out that the basic flaw in Kelsen's theory was that it aimed at eliminating the sociological elements, including the religious one, from the legal order to give some semblance of an analytical and scientific system. To address Kelsen's legal positivist challenge, Schmitt developed his own theory by drawing on John Austin, Thomas Hobbes, J.J. Rousseau and Max Weber.[6]

[5] The timing of the decision in *Jilani* was crucial. It came a year after the civil war in East Pakistan, which had spiralled into war with India. Defeat in the war and separation of the eastern wing put enormous pressure on the Pakistani state. It was hoped that the decision in *Jilani* and assertion of the Objectives Resolution as the new *grundnorm*, would give the state its lost strength, just like it did after independence. For those who sought and struggled for the implementation of *Shari'ah* in the country, the decision in *Jilani* was a landmark achievement, especially since it came after a decade of secularism under President Ayub Khan.

[6] This article follows Schmitt's work based on his following texts: Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge: MIT Press, 1923); ———, *Constitutional Theory*, trans., and ed. Jeffrey Seitzer (Durham: Duke University Press, 2008); ———, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans., and ed. George Schwab (Chicago: University of Chicago Press, 2005); ———, *Legality and Legitimacy*, trans., and ed. Jeffrey Seitzer (Durham: Duke University Press, 2004); ———, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 2007). Literature on Schmitt thought defies citation. Here are some texts that have been further consulted: George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*, 2nd ed. (Westport, CT: Greenwood Press, 1989); John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1997); David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford:

Schmitt's critique of legal positivism and liberalism, as well as his Constitutional Theory, is quite relevant for the present analysis of Pakistan's structured constitution. Therefore, the article engages his critique in the subsequent discussion.

Schmitt sheds light on how the sociological and religious elements entail a structured conception of the constitution. In *Legality and Legitimacy*, a critical treatise on modern democratic constitutionalism, he writes:

> The Weimar Constitution is literally split between the value neutrality of its first and the value plenitude of its second component.[7]

With this argument, Schmitt renders a 'theoretical splitting' of the Weimar Constitution into two parts, violable and inviolable, temporal and indefinite, essential and non-essential or value-plenitude and value-neutral.[8] The first part prescribed the procedural organisation of popular sovereignty, and the second the bourgeois and Christian core values—the rights, principles, goals, and social demands. Schmitt goes to the extent of declaring the second part as 'a second, heterogeneous constitution.'[9] For him, the second part, or the value plenitude component, carried higher 'substantive legal guarantees.' However, by virtue of this higher legal status, the guarantees 'constitute a structural contradiction with the value neutrality of the First Principal Part.'[10] He provided a simple example: on the one hand, the German constitution establishes:

Oxford University Press, 1997); Jeffrey Seitzer, *Comparative History and Legal Theory: Carl Schmitt in the First German Democracy* (Westport, CT: Greenwood Press, 2001); and Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004).

7 Schmitt, *Legality and Legitimacy*, 50.

8 Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000), 157. Weimar Constitution was adopted on August 11, 1919 after World War I. It introduced first parliamentary democracy in the country.

9 Schmitt, *Legality and Legitimacy*, 40.

10 Ibid., 45; Schmitt, *Constitutional Theory*, 83.

> ….sacred institutions and entitlements, such as marriage (Article 119) and exercise of religion (Article 135), which should stand under the protection of the constitution itself.

On the other, these institutions are left at the mercy of quantitative legislative principles, which could be brought to serve 'the elimination of just these sacred objects.'[11]

The splitting of the constitution also highlights the inherent gaps and antinomies between the two parts:

> A gap is a grey area in the Constitution, a point at which the Constitution avoids specifying how a particular conflict should be resolved, and leaves it open to interpretation, which in the absence of a norm invariably becomes political.[12]

Furthermore, 'emergency situations are like X-ray flashes which suddenly reveal the antinomies of legal reason.'[13] To Schmitt, the gaps and antinomies between the two parts of the Weimar Constitution were stark, and to his dismay, politics in the republic only exacerbated them:

> Schmitt had claimed as far back as *Verfassungslehre* that the constitutional *Rechtstaat* [legal state] lacked a coordinating principle [and/or institution] between the section which organised political will of the community and the section which limited it in the name of individual freedoms: in simple terms, was the validity of the law based on the legislative will

[11] Schmitt, *Legality and Legitimacy*, 46. With the ascendance of the quantitative legislative principle in the democratic Weimar, Schmitt observes a risky relinquishing of morality in favour of legality. He writes, "And it is an inadequate, indeed, an immoral excuse, when one declares that the elimination of marriage or of churches is legally quite possible, but that it would hopefully not come to a simple or two-thirds majority, which would abolish marriage or establish an atheistic or a secular state. When the legality of such a possibility is recognised, and it is self-evident for the dominant functionalism of the concept of law and of constitutional law, then all the declarations of the Second Part of the Constitution are actually 'hollow,' sacred relics."

[12] Balakrishnan, *The Enemy*, 46.

[13] Ibid., 45.

> organised in the first section, or in the bundle of rights and goals laid out in the second?[14]

Broadly speaking, many constitutions of the world might show such a split between their value-neutral and value-plenitude parts. This split is often quite prominent in the constitutions of Islamic states. Pakistan's Constitution presents a good example of this split. In the value-plenitude part, the Constitution provides for religious values and social goals. In the value-neutral part, it provides for secular democratic institutions, their powers, functions and election procedures. Much of the former is non-justiciable, while the latter is justiciable. Just as Schmitt theoretically elevated the value-plenitude part of the constitution to a separate heterogeneous constitution in itself, similarly there is also possibility in Pakistani constitutional order to elevate the Islamic value-plenitude part (specifically the Objectives Resolution) to a superior heterogeneous constitution. *Jilani* (1972) takes a step in that direction as it gives the Islamic value-plenitude part a higher substantive legal guarantee. In doing so, the Court indirectly provided legitimacy to the value-neutral part of the positive Constitution through its value-plenitude part.

On the other hand, just as Schmitt expressed irony and shock over the democratic constitutional procedure, which leaves the value-plenitude provisions at the mercy of a quantitative principle, there also exists fear in Pakistan that the Islamic value provisions might be left at the mercy of quantitative legislation. For instance, marriage between man and woman is considered a sacred Islamic institution and a constitutionally guaranteed social goal for the state to achieve, propagate, and maintain. Hence, the possibility that a constitutional guarantee can be legislated upon and amended or repealed comes as a fear. As certain Western states—to name a few, the United States, Britain, France, Norway, Netherland, Spain, and Canada—have recently legislated on the question of same-sex marriage, in Pakistan such legislation can make the entire democratic legislative system questionable.

[14] Ibid., 161.

While legislation to redefine the institution of marriage seems a remote possibility in Pakistan, in the Red Mosque incident in 2007, one saw another Islamic institution under debate—the mosque.[15] After the Government demolished certain unlicensed mosques in the capital city of Islamabad, resulting in confrontation between the state and the mosque authorities, a debate began in official, media, and popular circles on whether government can demolish a mosque. This debate relates to another, more theological question: whether a mosque can be demolished at all? These are politically sensitive questions in Pakistan and any debate on them can easily spiral into violence. Curiously enough, the constitutional position on the former question is not evident. Article 31 (2c) provides that 'the state shall endeavor…to secure the proper organisation of *zakat, ushr, aukaf* and mosques.'[16] The term 'organisation', however, is not explained. Seemingly, under the constitutional sanction provided by Article 31 (2c), the Government in 2002 and 2005 passed ordinances for the 'registration' of mosques and seminaries. However, the Government's efforts at registration faced tough resistance and eventually came to a halt. On the juridical level, the question is whether registration and demolition are within the scope of the phrase 'to secure the proper organisation.' This question becomes critically important given the concerns of city planning. Islamabad's 'capital territory', as it is officially called, is fully planned. Any construction - even a map or design of a house or building outside the city plan guidelines is considered unlicensed and illegal. Accordingly, the concerns and principles of modern urban planning come in conflict with the long-standing practice of independently building mosques by individuals.

It remains to be seen how the judiciary will interpret the phrase, 'to secure the proper organisation' if a case is brought to it. However, on the matter of proper organisation of *aukaf*, another Islamic institution provided for in the same article, the Court had held the matter as non-

[15] For debate on the Red Mosque incident see Faisal Devji, "Red Mosque," *Public Culture* 20, no. 1 (2008): 19–26.

[16] *Zakat* is wealth tax, *Ushr* is tax on farm produce, and *aukaf* (plural of *wakf*) is endowment of property to be held in trust and used for a charitable or religious purpose.

justiciable. In 1968, the Supreme Court was petitioned to decide on Government's order to appropriate *wakf* (plural *aukaf*) property. The petitioner relied on the supremacy of Islamic law over Government's legislation. Since Islamic law allowed the petitioner to retain *wakf* property, he asked the Court to strike down the Government order. However, the Court declined the plea and held:

> Such a plea is, however, not justiciable in Courts under the present Constitution. The responsibility has been laid on the Legislature to see that no law repugnant to the Islamic law, is brought on the statute book. The grievance, if any, therefore should be ventilated in a different forum and not in this Court.[17]

Struggle for Precedence between Two Parts of the Structured Constitution

Historically speaking, the structured conception of the Constitution in Pakistan, or splitting of the Constitution into value-neutral and value-plenitude parts, sparked the question of which part would take precedence over the other, if at all. In fact, this question was a modest juridical corollary of the crucial post-independence political question of whether the Pakistani state should adopt the Islamic (*Shari'ah*) or Westminster political system. Although the Pakistani state adopted the latter, Islamic parties and movements did not give up their struggle for the implementation of *Shari'ah*. There also began legal struggle in courts for achieving the precedence of *Shari'ah* law over secular law from within the constitutional and legal order of the state. The legal struggle resulted in decades of heated debate in courts, particularly around the value provisions contained in the Objectives Resolution. For instance, in 1991, commenting on this heated debate, the Supreme Court observed:

[17] Chaudhary Tanbir Ahmad Siddiky v. The Province of East Pakistan and Others, 185 PLD SC (1968) (Pak.), 203-205.

> …in our *milieu* it has given rise to a controversy and a debate which has had no parallel, shaken the very Constitutional foundations of the country, made the express mandatory words of the Constitutional instrument yield to nebulous, undefined, controversial juristic concepts of Islamic *fiqh* [jurisprudence]. It has enthused individuals, groups and institutions to ignore, subordinate and even strike down at their will the various Articles of the Constitution by a test of what they consider the supreme Divine Law, whose supremacy has been recognised by the Constitution itself.[18]

On the other hand, in constitutional theory, the question of precedence between the value-plenitude and value-neutral parts is far from settled. For instance, Schmitt (who effectively demonstrated the split between the two parts of the constitution) remained torn as to which part, if any, should take precedence. In *Constitutional Theory* (1928), he argued that the procedural part should take precedence over the value part, but in *Legality and Legitimacy* (1932), he reversed his position.[19] In the early 1930s, Schmitt expressed his fear that given the democratic procedure of the Weimar Constitution, any political party or class could come to power and amend or destroy the established bourgeois and Christian values. At this critical time in German history, for Schmitt it was the values that conferred legitimacy on the Constitution - not any other principle or institution. He conceptualised them as the 'genuine fundamental principles' or the 'original mandate,' which provided legitimacy and foundation to the constitutional system of Weimar. The possibility of disrupting or displacing the original mandate came across to him as a paradox of the government by popular will, in fact of democracy. In order to defend the value part of the Constitution, Schmitt went one step further, 'over to some new principle.'[20] First, he advocated that 'one must exempt these interests from [mathematical-statistical legislative method] and

[18] Hakim Khan v. Government of Pakistan, 595 PLD SC (1992) (Pak.), 629.
[19] In 1928, the German constitutional order was relatively safe from any grave threats. However, by 1932 National Socialism threatened not only to suspend the Constitution, but also to abolish the core bourgeois and Christian values contained in it.
[20] Schmitt, *Legality and Legitimacy*, 45.

privilege them in the democratic process.'[21] Second, he aimed to accord the value part, the force of 'supralegal dignity.'

> These fundamental principles contain a supralegal dignity, which raises them above every regulation of an organisational and constitutional type facilitating their preservation as well as over any individual regulations of a substantive law variety. As an outstanding French public law specialist, Maurice Hauriou puts it, these principles have a '*superlegalite constitutionelle'* that raises them not only above routine, simple statutes, but also over the laws of the written constitution and rules out their elimination through statutes amending the constitution. [22]

In Pakistan's constitutional context, the question of which part of the Constitution should take precedence over the other, if at all, has been a matter of debate in the constituent assemblies and judiciary. For instance, in the first Constituent Assembly, the place of Islam in the Constitution became one of the most contentious questions. In this regard, it needs to be noticed that constitution-makers framed the Constitution on the pattern of the British India Acts of 1935 and 1947. Thus, the value-neutral part of the Constitution was already available. It was the value-plenitude part that they had to draft and incorporate. To do that, they had to ensure that the value-plenitude part reconciled with the value-neutral or the positive democratic procedural part. However, the very act of introduction of the value-plenitude part, or the Islamic value-provisions in the positive constitutional mechanism, at the same time also entailed a schism, a gap, an antinomy in the constitutional structure at least from the theoretical point of view.[23]

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[21] Ibid.

[22] Ibid., 58.

[23] It is worth noting that Islamic law was confined to family law during the Raj. After independence, the Objectives Resolution stipulated that such laws should not be passed that conflict with Islamic teachings, but until 1968 no serious challenge was posed to any (secular) law on the touchstone of conflict with Islamic teachings. The first of these challenges came in Chaudhary Tanbir Ahmad Siddiky v. The Province of East Pakistan

Accordingly in 1949, the Constituent Assembly took the first step in the constitution-making process and passed the Objectives Resolution to stipulate the aims and objectives of the future Constitution.[24] Apparently, the Resolution was to become the Islamic touchstone for determining the Islamic legitimacy of the democratic and positive constitutional provisions of the Constitution as well as all the legislation later made under it. Because Pakistan was to frame its constitutional democracy on the British pattern, the Objectives Resolution provided the test as to which democratic institutions and procedures passed the Islamic test. In this way, it not only came to take a place above the secular political institutions, but also practically assumed supralegality.

For Pakistan's founding fathers, passage of the Objectives Resolution was neither renewed faith in the political agency of the tenets of Islam, nor an ambivalent and idiosyncratic experiment. It was, in fact, a practical political situation they faced relating to the place of religion in the positive constitutional order. Religion, they knew well, could not be left outside the constitutional order. Moreover, they were cognizant of the identity crisis faced by the state, a crisis that came as an epiphenomenon of the Partition, which was based on the communal doctrine of the Two-Nation Theory. Pakistan's founding fathers saw a void at the heart of the newly born Pakistani state - just as Schmitt had seen it in the case of a

and Others; and Labour Federation of Pakistan v. Pakistan and Another, 188 PLD HC (1969) (Pak.). However, the courts declined to apply the touchstone on the ground that the Objectives Resolution was the Preamble of the Constitution and hence not justiciable.

[24] The Resolution is a one-page document of about 324 words. The preamble declares, "Sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust." One of the declarations provides, "Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed." Another provides, "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 the Sunnah." Yet another provides, "Wherein shall be guaranteed fundamental rights… subject to law and public morality." Two other declarations reduce some sections of the populace to the status of permanent minorities on the basis of their religions. One of these declarations says, "Wherein adequate provisions shall be made to safeguard the legitimate interests of minorities and backward and depressed classes."

modern European state in the early 1920s. As he put it, this void was an absence of legitimating ideology and was at the heart of the modern European state,[25] which made it vulnerable to tendencies of instability. Moreover, just as Schmitt thought it 'both possible and politically imperative to uncover the theological thought forms once used to imagine, build and defend the European state,'[26] Pakistan's founding fathers similarly thought that Islamic thought could fill the void, provide a legitimating ideology (or 'myth'), and *esprit de corps* for the constitutional order.

Liberal ideologues in Pakistan often complain that the Objectives Resolution is related to the problem of religiosity and religious anomie in the country. However, such complaining discounts the ingenuity of the formula of the founding fathers that captures the religiosity (or exception) resident in the Resolution by incorporating it in the Constitution's structured organisation. In other words, this formula contains the Resolution in the non-substantive and non-justiciable part of the Constitution. What they could not address, however, was the resulting schism, gap and/or exception.

This matter subsequently came to the Supreme Court. In *Jilani* (1972), the Court first held that inasmuch as the *grundnorm* of the juridical order had to be furnished, it was located in the Objectives Resolution. One of the constitutional theoretical consequence of the decision was that it gave the Resolution the status of supra-legality. The decision, therefore, initiated the debate, which generated heat and urgency by 1985 when it was incorporated in Article 2 of the 1973 Constitution. In other words, the Resolution was moved from the Preamble—a non-justiciable part—to the justiciable part of the Constitution. However, this incorporation resulted in the confusion as to whether the Resolution was still the *grundnorm* and at the same time, a positive norm. For the Court, the confusion lay in how to give effect to the legal consequences of both statuses of the Resolution. Chief Justice Hamood ur Rehman in *Jilani* had predicted that if the Resolution 'is not incorporated in the Constitution or

[25] Balakrishnan, *The Enemy*, 59.
[26] Ibid., 48.

does not form part of the Constitution it cannot control the Constitution.' His words came true: the Objectives Resolution began to control the substantive part of the Constitution after its incorporation in the justiciable part. The balance between the *grundnorm* and the positive norm, the Islamic basis and the positive structure, which the founding fathers had managed to inscribe in the Constitution, was tipped. As a result, several petitions and suits came to the courts challenging almost every positive provision and aspect of the Constitution.[27]

In the early 1990s, first in *Hakim Khan* (1992) and then in *Kaneez Fatima* (1993), the Supreme Court eventually decided on whether the Objectives Resolution and Islamic social values and goals could be a touchstone for striking down secular constitutional and statute law.[28] The Court's decision was careful: first, it argued that because courts were creatures of the Constitution, they couldn't strike down any part of it. Second, the Objectives Resolution should be given effect as a directive principle and not as the basis for challenging other provisions. Third, the Court expressed its willingness to 'harmonise' the two parts of the Constitution. In *Kaneez Fatima*, however, the Court also observed that administrative orders given under any law could be invalidated on the basis of the Objectives Resolutions.

[27] Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden: Koninklijke Brill, 2006), 48. According to Martin Lau, "Between 1985 and 1992[…] at least 30 cases involving a consideration of the effects of Article 2-A were decided by the four High Courts and the Federal Shariat Court." He further makes a point in the backdrop of a Supreme Court's observation: "a sense of doom, of country in the grip and at the mercy of nebulous, undefined and controversial concepts of Islamic *fiqh*. No longer was Islamic law seen as a benevolent additional source of judicial power to advance principles of justice and democracy…It had become a danger to the very foundations of the state…" Lau makes a compelling point. However, the doom and danger should be seen as partial, threatening the positive structure and not the Islamic provisions or value-plenitude part of the Constitution.

[28] Hakim Khan v. Government of Pakistan, 595 PLD SC (1992) (Pak.); Kaneez Fatima v. Wali Muhammad, 901 PLD SC (1993) (Pak.).

Structured Constitution and Doctrine of Harmony

One of the dynamics of Kelsen's legal positivism that might have left a lasting impression on Chief Justice M. Munir (1954-1960), as he introduced Kelsen's theory into Pakistan's constitutional debate, is the special role that judges assume in making the hierarchical, positive legal order a dynamic system. Kelsen proposes that there are two factors that can make a positive legal order a dynamic system: a) the interpretation by judges, and b) the availability of higher positive norms. With these factors, the *sovereign machine* of the positive legal order can run itself.

Despite Kelsen's proposed role of the superior judiciary and superior norms, Schmitt predicted that a legal order could not encompass exception (all the time). According to his theory of state of exception, law aims not to leave outside its sphere any subject that matters to it or to the state.[29] His restoration of sociological and religious elements in the positive legal order was in one way an attempt to explain this attitude of the law and state. In this connection, what better explanation can be presented than the laws enacted by the colonial state in India, which ranged from the organisation of the administrative state to such petty issues as nuisance?[30] These laws, and especially the British legal attitude, were later adopted by the postcolonial state of Pakistan.

As Agamben effectively extrapolates Schmitt's understanding of the state of exception, even as law wishes to exclude or downplay any subject, it does so by way of its incorporation inside the law. Agamben calls this 'included-exclusion.'[31] However, for Schmitt, law could not completely exclude or downplay the included subject, which will always exist in its factual form (as distinct from its normative form). Hence, the included subject will augur a state of exception, which will 'break through the crust of a mechanism that has become torpid by repetition.'[32]

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[29] Schmitt, *Political Theology*; Giorgio Agamben, *State of Exception*, trans. Kevin Attel (Chicago: University of Chicago Press, 2005).
[30] Section 268 of Indian Penal Code 1860, dealt with public nuisance.
[31] Agamben, *State of Exception*.
[32] Schmitt, *Political Theology*, 24.

While liberal and conservative ideologues would find it difficult to agree on the place of Islam in the Constitutional order, constitution-makers (of all the three constitutions (1956, 1962, and 1973) arrived at a workable solution and incorporated the Objectives Resolution and other Islamic value provisions in the non-justiciable part of the Constitution. Then, they provided for certain institutions that ensured coordination and reconciliation between the two parts. Those institutions are the Islamic Ideology Council (IIC), the Federal *Shariat* Court (FSC) with Islamic judicial review power, and the Supreme Court with general judicial review power. However, they made sure that these institutions only played the role of coordination and reconciliation, and not be allowed to strike down constitutional provisions on the touchstone of Islamic value provisions and goals. Accordingly, the IIC was made an advisory body, making recommendations to the legislature and executive, and preparing annual advisory reports to conform secular law to Islamic injunctions.[33] On the other hand, the FSC was endowed with much more effective power of Islamic judicial review, but it could not strike down constitutional law and statutes.

While the FSC was clearly denied jurisdiction over constitutional provisions, it remains unclear in the Constitution whether the Supreme Court had such jurisdiction. In its own opinion, which remained more or less consistent, the Supreme Court has said that striking down constitutional provisions was beyond its jurisdiction. However, it needs to

[33] One of the meritorious achievements that the IIC claims is the Enforcement of *Shari'ah* Act 1991. The Act declared Islamic injunctions the supreme law of the land. Accordingly, many directive principles of policy have been introduced, such as teaching Islamic courses at educational institutions, to Islamise the economy and to Islamise society by eliminating obscenity and moral vices. However, Section 3(2) exempts the political system. It provides that "the present political system, including the *Majlis-e-Shoora* [Parliament] and Provincial Assemblies and the existing system of Government, shall not be challenged in any Court, including Supreme Court, the Federal *Shariat* Court or any authority or tribunal." Similarly, the section also exempts the erstwhile economic system. The *Shari'ah* Act, therefore, did little to change the structured constitutional order. In 1992, the Lahore High Court hearing a case under the Act lamented that the Act suffered from 'some of its apparent infirmities in the form of certain vague and exclusionary provisions aiming at saving the present political and economic system which is being perpetuated by a particular class to safeguard its own vested interest in violation of the basic concept of *Shari'ah.*" 45 PLD HC (1992), 51.

be noticed that in the late 1960s, the Court adopted the same opinion based on a different doctrine, that of the non-justiciability. For instance, in the case of the Objectives Resolution, the Court said that because it was part of the Preamble, therefore like other value provisions provided in the directive principles of policy, it was not justiciable. Similarly, in 1976, when a retired judge filed a petition that on the touchstone of Islamic value provisions, the entire Constitution of 1973 and the legal order of the country were un-Islamic, the Lahore High Court repeated this doctrine of non-justiciability (i.e., that the value part can not be interpreted to strike down value neutral part).[34] Later, on an appeal in the same case, the Supreme Court in 1980 upheld the High Court's ruling.[35]

However, in 1985, when the Objectives Resolution was removed from the Preamble and incorporated in the justiciable part of the Constitution (the Article 2-A), it became difficult for the Supreme Court to defend its earlier non-justiciability doctrine. Therefore, in *Hakim Khan* (1992), the Court reviewed the legal history of the Resolution and the previous judicial doctrine. The Court pointed out that while introducing the Resolution in the justiciable part of the Constitution the intention of the Government was not to allow the Resolution to strike down other constitutional provisions. The Court held that 'according to the well-established rule of interpretation that a Constitution has to be read as a whole, any repugnancy between different constitutional provisions had to be harmonised by the courts if at all possible.' [36] Justice Nasim Hassan Shah writing for the majority held:

> And even if Article 2-A really meant that after its introduction it is to become in control of the other provisions of the Constitution, then most of the Articles of the existing Constitution will become questionable on the ground of their alleged inconsistency with the provisions of the Objectives Resolution… Thus, the law regarding political parties, mode of election, the entire structure of Government as embodied in

[34] Badi-uz-Zaman Kaikus v. President of Pakistan, 1608 PLD HC (1976).
[35] B. Z. Kaikus v. President of Pakistan, 160 PLD SC (1980).
[36] Lau, *The Role of Islam in the Legal System of Pakistan*, 66.

> the Constitution, the powers and privileges of the President and other functionaries of the Government will be open to question…Thus, instead of making the 1973 Constitution more purposeful, such an interpretation of Article 2-A, namely that it is in control of all the other provisions of the Constitution would result in undermining it and pave the way for its eventual destruction or at least its continuance in its present form.[37]

The decision in *Hakim Khan* (1992) entailed that the courts were given the task of harmonising the various parts and provisions of the Constitution. Another important consequence of the decision in *Hakim Khan*, and later in *Kaneez Fatima* (1993) was not to allow the Objectives Resolution or Islamic provisions supremacy over the positive Constitution. With this, the Court finally settled the matter of stability or harmony in the structured Constitution.

Conclusion

Since the earliest efforts at constitution-making, constitution-makers and courts have faced the demand for implementation of *Shari'ah* in Pakistan. They had two choices: a) leave the demand for *Shari'ah* outside the positive constitutional order that they were framing, and/or b) to include it inside the Constitution, and thereby, open the door for implementation of *Shari'ah* law. While the first choice was not so easy to adopt, they devised a unique formula: they thought that in a structured constitution the religious provisions could be carefully incorporated in the non-justiciable part, and later in the justiciable part (as it happened) but with the understanding that they would be read as value-plenitude and non-justiciable. With this formula, they thought they could incorporate religious and value provisions in the constitutional law as well as avoid conflict, anomie and disharmony.

Nevertheless, with the incorporation of religion within the constitutional order, the possibility of implementation of *Shari'ah* law was

[37] Hakim Khan v. Government of Pakistan, 595 PLD SC (1992) (Pak.), 617.

constitutionally internalised. Moreover, there emerged the possibility of constitutional struggle for precedence of Islamic law over positive law, which was vigorously pursued in courts. Cases of individual positive laws conflicting with the Islamic law also became a matter of keen interest. Courts either struck down such laws or referred them to the Parliament to make necessary changes. However, on the matter of constitutional law, the courts carefully and consistently declined to strike them down. They maintained that it was beyond their jurisdiction, and actually defended the Constitution by harmonising its positive and Islamic provisions.■