
SADF WORKING PAPER

11 December 2017

Issue n° 7

ISSN 2506-8202

Islam, democracy and human rights: The case of Pakistan's struggle with the democratic institutions and human rights values

Saira Bano Orakzai

Acknowledgements

I gratefully acknowledge the contribution made by Prof. Howard Brasted and Imran Ahmad to this paper.

Abstract

Islam plays a central role in Pakistan's identity making process. Since the events of 9/11, the significant rise of religious extremism and terrorism in Pakistan has influenced its democratic setup, constitutional process and human rights values. This paper examines the historical evolution of democratic and constitutional process in Pakistan as well as the role of religion in defining the state narratives. This divide between religious extremists and secularists is more acute at the moment primarily because the state is passing legislations influenced by extremist and terrorist narratives. The paper uses interpretive approach in examining the challenge presented by the religious–secular divide and extremist narratives pose to the democratic principles and human rights values in Pakistan.

Introduction

Pakistan, established as an Islamic state since the partition of the Indian sub-continent in 1947, faced the question of combining Islamic-oriented democratic norms with universal human rights values. The Objective Resolution passed in 1948 by the Constituent Assembly of Pakistan was critical in this regard as it laid the foundation for the place of Islam in constitution making, legal provisions, and the development of democratic institutions and human rights issues. This paper examines

South
Asia
Democratic
Forum



Avenue des Arts 19
1210 Brussels

info@sadf.eu
www.sadf.eu

the role Islam plays in the development of democratic institutions in Pakistan. It is written in the context of the nation's struggle with universal human rights values in the wake of the extremist and militant ideologies and narratives of the post-9/11 period. At present Pakistan is facing religious militancy and extremism, which has influenced the nation's self-conceptualization as an Islamic State. The narratives of religious extremists and militants and their demands for establishing *Sharia* law as well as a puritanical form of *Shura* (consultation) as an alternative to democratic institutions have led to a number of legislations challenging democratic principles and human rights values in Pakistan. The conflict in the Malakand-Swat valley in north-west of Pakistan is noteworthy; the militants called for the application of *Sharia* law in the area and the national government actually made special legislations accepting their demands.

The paper addresses the critical question of examining the role of Islam and Islamists in shaping Pakistan's identity, and the challenge posed to the democratic principles and human rights values enshrined in Pakistan's Constitution by the rise of extremism after 9/11. The paper uses interpretive approach for examining the role of Islam in the Constitutional development, the numerous transitions towards democracy characterised by civil-military tussles also depicting religious-secular divide, the questions of women leadership to *Amir ul Momineen* (the leader of the faithful), and the impact of these attacks on democratic principles and human rights values (especially as regards religious freedom, women rights and minorities). These questions are vital and concern the contemporary conflict between extremist, moderate and secularist narratives within Pakistani society.

Islam and constitution making

On 14 August 1947 Pakistan began its life as an independent nation, not as the world's first Islamic state, but as a secular dominion with a Westminster-style constitution inspired in its British colonial past. It was confidently expected that Pakistan would soon replace this transitional arrangement with a self-designed constitution; however, combining democratic constitutional making with the Islamic ideal that had helped rationalise Pakistan's separation from India was not that simple. The nation's first two constitutions - those of 1956 and 1962 – were ripped up; the third, the Constitution of 1973, while still in place, has not maintained its

original form. To date there have been 23 attempts to amend it and two periods when it was not respected, namely during the military dictatorships of Muhammad Zia ul-Haq (1977-1988) and General Pervez Musharraf (1999-2008).

During its 70 years of sovereign existence Pakistan has in fact been governed by military regimes on four separate occasions,¹ General Pervez Musharraf's regime being the last to invoke martial law. Handing down its judgement on 8 November 2012 in the long-running *Asghar Khan* case, the Supreme Court accused the 'army generals in uniform' of attempting to subvert Pakistan's parliamentary system of government by means of Article 58(2b), which had been added to the 1973 Constitution through the 8th amendment of 1985 and the 17th amendment of 2003. Effectively shifting executive power from prime minister to president, Article 58(2b) enabled the latter to dissolve the National and Provincial Assemblies in 1988, 1990, 1993 and 1996 (Waseem, 2005, 44) and suspend parliamentary government at will.

In its detailed verdict the Supreme Court took the opportunity not only to remind the armed services that it was unlawful to interfere in politics - as the former heads of the army and ISI [Inter-Services Intelligence] were adjudged to have done during the 1990 general elections - but also to proclaim that it was the duty of the judiciary to uphold the 'rights of the people of Pakistan' if the state authorities failed to do so. Perhaps in response to this unequivocal challenge to Pakistan's political and military leaders, one of the first acts of Nawaz Sharif's third government was to have Musharraf charged with high treason under Article 6 for setting aside the 1973 Constitution in a coup d'état that overthrew his second government in 1999. Such a charge carries the death penalty. However, the disqualification of Prime Minister Nawaz Sharif over corruption charges on 28 July 2017 has again raised the issue of civil-military tussle, question of citizen rights and the role of judiciary, as none of Pakistan's 15 prime-ministers were ever able to complete their term of office.

The question of the Army's role in politics again came to centre stage in November 2017 with the Islamabad High Court asking the government to clarify the role of the army as a mediator

¹ Led respectively by Ayub Khan (1958-69), Yahya Khan (1968-71), Zia ul-Haq (1977-88) and Pervez Musharraf (1999-2008).

over an agreement reached with right-wing protestors belonging to several religious parties. The agreement was termed ‘unconstitutional’ by the Court. The agreement ended the violent protests and a 21 day sit-in Islamabad by the right-wing religious parties who were challenging the State’s writ, demanding resignation of the Federal Law Minister, and the withdrawal of the changes in the Election Act 2017 pertaining to the finality of Prophethood. All six demands were accepted by the government. This is a watershed agreement in Pakistan’s ‘war on terror’ as the National Action Plan of 2015 and Operation Rudd-ul- Fasaad (removing discord) clearly enunciated action against hate speech, religious extremism and glorification of radical narratives. The question of blasphemy and the finality of Prophethood has become a central issue in Pakistan as any call for change in this law leads to death or threat of death by religious extremists, thus shrinking the space for moderation and debate in Pakistani society.

This paper suggests that Pakistan’s three constitutions, together with the debates and politics that surround them, hold the key to understanding Pakistan’s tortuous journey towards defining a coherent national identity, citizen rights, and the place of Islam in the state and society. It is argued that the roots of much of the conflict Pakistan continues to grapple with are grounded in its constitutional history, as is increasingly evident when one looks at the government’s bowing down to the pressure of demands by religious extremists and effectively enforcing Islamic law in some parts of the country, which stands in contradiction to international human rights norms. The attempt by the first Constituent Assembly to write a constitution was not only inconclusive, but it also sowed the seeds of future ambiguity about the symbols of nationhood and the mechanisms of power. Through a thematic examination of key areas of Pakistan’s constitutional disagreement, it is suggested that the Constituent Assembly’s failed experimentation in nation building was telling. By leaving these issues unresolved Pakistan’s Founding Fathers essentially passed them on as unfinished business to be re-negotiated down the track by military and religious leaders.

Following more than two decades of disputation between Pakistan’s Western and Eastern wings over the distribution of power, the 1st Amendment (4 May 1974) simply redefined the boundaries of Pakistan. With all mention of the former province of East Bengal formally removed, this masked the Centre-Province conflict that had led to a bloody civil war in the first

place and papered over the resultant secession of Bangladesh in 1971 as well as the numerous violations of the rights of small provinces. The 2nd Amendment (7 September 1974), which declared the Ahmadiyya community to be non-Muslim, highlights Pakistan's continuing uncertainty about its Islamic credentials and questions the position of religious freedom as well as the role of minorities in the country. Public calls are now frequently made to declare Shia Pakistanis as non-Muslims; attacks on Christians, Sikhs and Hindu minorities abound. More poignantly, Pakistan remains undecided on whether it is an Islamic state or a secular one. At the very height of Zia ul-Haq's Islamisation Drive Pakistan was unable to gain the necessary support for making *Sharia* the law of the land through the 9th Amendment (1985). Nawaz Sharif likewise failed to achieve this by means of the 15th Amendment (1998). On the other hand, civilian governments have proved equally unable to re-examine, let alone repeal, Haq's signature of the Hudood Ordinances and Blasphemy laws, which are a constant attack on women and minorities' human rights.²

All this points to an inescapable fact that Pakistan has yet to arrive at an agreed legal framework that clearly defines the state, outlines its structure, identifies who can belong to it, determines where power resides, and establishes accepted rules that bind both government and governed. Ethnic and sectarian rivalries continue to threaten the unity of Pakistan; significant disagreement about Islam's place in the constitution remains very far from being settled; and the threat of military intervention is ever present. Even if one considers that Pakistan is not a failed state (Cohen, 2004, 2-4) its history is still certainly that of a conflicted and confused one.

Identity crisis, constitutions and human rights values

Why does Pakistan continue to confront and be confounded by the same critical issues over and over again? Pakistan's identity crisis as a major cause of its past, present and future problems is a common explanation. One of the first to highlight this, Rafiq Zakaria, noted that Pakistan's problems as a nation stem from its ambivalent approach to Islam, an 'ambivalence' that was apparent at the very beginning of its sovereign existence and has served to dodge its footsteps ever since. As a result Pakistan's journey to reach not only an agreed Islamic destination, but also

² Musharraf did attempt to amend the Hudood Ordinances through the Women's Protection Bill of December 2006, though ineffectually according to women's rights advocates.

an all-embracing identity, has remained painfully elusive (Zakaria, 1980, 228-240). A number of scholars have followed similar lines of argument. S. P. Cohen, for example, argues in *The Idea of Pakistan* (2004) that Pakistan's troubles derive from conflicting visions of the state. Farzana Shaikh attributes the primary cause of Pakistan's 'fragility as a nation-state' to 'the underlying uncertainty about its identity - an uncertainty that stems from the lack of consensus over Islam' (Shaikh, 2009, 9).

What is often missing from accounts of the multi-faceted crises Pakistan currently faces – the role of Islam in the state, the growth of ethnic separatism, the omnipresent threat of armed intervention and the continuing struggle to establish the rule of law – is their constitutional connection. It is argued that the failure to lay down the constitutional foundations of Pakistan not only reflected the range of problems Pakistan faced at the time, but proceeded to prolong and indeed add to them the longer they went unresolved.

Islam remains a contested marker of Pakistani identity. The question started with Muhammad Ali Jinnah, who argued the brief for a Pakistan no one clearly understood (Jalal, 1985). Faced with untangling Jinnah's mixed messages regarding how Islam should inform the new state, the Constituent Assembly readily signed off on the general principles to be observed, but was much less resolute when it came to deciding how they might be implemented. Under pressure from the *ulema*, who had been strategically mobilized for the Pakistani cause, and could not be shut out of post-partition discussions about its future, the Constituent Assembly moved slowly to break the deadlock. While it would never have embraced Maulana Abul Ala Maududi's 'Theo-democracy', an ideological state based on *sharia* as its revealed constitution (Adams, 1983, 111-128), at the 11th hour it did manage to cobble together a form of words that all sides in the debate went along with. Although this consensus was never put to the test, owing to the Governor General Ghulam Muhammad's dissolution of the Constituent Assembly in October 1954, it represented about the closest secular and clerical politicians have come to agreeing about the relationship between Pakistan and Islam. This intervention did not put the role of Islam in the state to rest, but it did lead in time to unbounded sectarian interpretations from the *ulema*, and to expedient interpretations from the country's political leadership. To this day, Pakistan's ambivalence towards Islam's role seems as pronounced as ever.

While the creation of Pakistan was neither a widely imagined nor a widely demanded possibility prior to 1937 (Brasted & Bridge, 1994, 104), it was realised within a decade, leaving historians at pains to explain this paradox. Broadly speaking they have differed on the issue of whether Islam primordially led to the separatist movement for Pakistan or whether it simply played an instrumental role in the power ambitions of those who wielded its symbols.³ In particular, they have turned to Muhammad Ali Jinnah's apparent transformation from a conventional Indian politician advocating Hindu-Muslim unity to a communalist one ardently preaching irreconcilable religious and cultural differences between Hindus and Muslims, in line with Syed Ahmed Khan's two-nation theory, as holding the key to Pakistan's creation.

Ayesha Jalal goes the farthest perhaps in arguing that Jinnah's demand for Pakistan was essentially a 'bargaining counter' and a 'tactical move' (Jalal, 1985, 57). She believes that the Muslim League simply envisaged inheriting the British system of government. Accordingly, what Jinnah really wanted were strong autonomous northern Muslim regions as constituent parts of a relatively weak decentralised India. His endorsement of communalism was therefore a political ploy, not an 'ideological commitment' (Jalal, 1985, 2-4). The trouble was that Jinnah, as the 'sole spokesman' for Pakistan, never confided in anyone about his strategic thinking nor put forward a clear roadmap for the ideological, geographical or political shape of Pakistan. In one breath he could hint at the establishment of a theocratic state by praising the Quran for its wisdom and value as a comprehensive guide to all of man's worldly and other-worldly affairs. Yet in another, he could profess the virtues of popular sovereignty and foreshadow the secular democratic nature of the future state.

The ambiguities of the Pakistani movement before independence created a vehicle for conflicting notions of sovereignty after it. A believer in a trans-national Muslim community, Maulana Abul Ala Maududi, the main spokesman for Islam, had argued up to 1947 that none of the parties struggling for independence were truly Islamic and Indian Muslims should therefore

³ For the instrumental approach to separatism see Paul Brass, *Language, Religion and Politics in North India* London, CUP, 1974. For the primordialist approach see Francis Robinson, 'Nation Formation: The Brass Thesis and Muslim Separatism', in *Journal of Commonwealth and Comparative Politics*, Vol.15, no.3, 1977, pp. 215-30. Brass's defence of his thesis against Francis Robinson features in Paul Brass, 'A Reply to Francis Robinson', in *Journal of Commonwealth and Comparative Politics*, Vol.15, no.3, 1977, pp. 231-4.

abstain from participating in any of them. Rather than placing their faith in some territorially-defined homeland Muslims should instead focus on inculcating Islamic ideals and organising a devoted and disciplined community of believers capable of ushering in a truly Islamic order (Adams, 1983, 105).

Following independence, however, Maududi not only decided to move to Pakistan, but he also changed track. Since Muslims were to have their own state he was determined that Pakistan would function constitutionally as an Islamic one. Sovereignty would belong to God and divine law would be the supreme law of the land. Whoever ruled could only draw their legitimacy from their ability to uphold Islam and implement the divine mandate through the organs of the state. In direct opposition to Jinnah, who proclaimed that 'Islam and its idealism have taught us democracy' (Talbot, 2005, 147), Maududi argued that the sovereignty of the people - the cornerstone of democratic government - was an anathema (Adams, 1983, 103). Getting Pakistan to embrace an Islamic constitution remained his lifelong goal and the Jama'at-i-Islami, the party he formed in 1941, proceeded to provide the most coherent, well-organised and formidable religious opposition to secular governments to date.

While Jalal's interpretation of Jinnah's strategy is testing, her revisionist narrative of the political end game that led to partition clearly shows that he left Pakistan's Founding Fathers with a legacy of ideological contradictions. As Leonard Binder has put it, 'Islamic government, Islamic state, and Islamic constitution' were the slogans that had been generated by the need to mobilise an Islamic constituency in the last years of empire and the first years of independence; but no one was quite sure what they meant' (Binder, 1961, 4). In his famous speech of 11 August 1947 to the Constituent Assembly, Jinnah had seemingly conjured up the vision of a secular, if Muslim-run, Pakistan. The trouble was that he died before he could offer further clarification or have any input into the Objectives Resolution, the principles the Assembly was expected to keep in mind when framing a constitution.

As a declaration of intent, the Objectives Resolution of 12 March 1949, which the first Prime Minister Liaquat Ali hailed as a milestone second only to independence itself, projected Pakistan as a distinct Islamic entity in which sovereignty would be held by God and the principles of

democracy, freedom, equality, tolerance and social justice would be ‘fully observed’ as ‘enunciated’ by Islam. While the *ulema* interpreted the Resolution as requiring *sharia* to be the law of the land, secularists understood that ‘the chosen representatives of the people’ would govern through democratic institutions in line with Islamic values. However, after seven years of constitutional wrangling, the Constituent Assembly was able to produce a draft constitution - described as an Islamic democratic constitution - on the basis of the Objectives Resolution that both religious leaders and secular politicians found ‘acceptable’. While the Jama’at-i-Islami was disappointed insofar as it felt that its Islamic character could have been stronger, it urged the adoption of the draft and proclaimed 22 October 1954 as ‘Islamic constitution day’ (Oldenburg, 2010. 67).

Two days later, the Governor General, Ghulam Muhammad, dismissed the Constituent Assembly and declared a state of emergency. While this decision had more to do with the Assembly’s attempts to limit executive power and the demographic advantage of Bengalis (Jafferlot, 2002, 257) than with questions regarding the primacy of Islam, (Newberg, 1985, 38-42) Iskander Mirza, ‘acting as the chief spokesman for the government’, announced that Pakistan would be a controlled democracy with a secular constitution and that religion would be kept apart from politics (Norman, 1988, 6-8). The decision of the Chief Justice of the Supreme Court, Muhammad Munir, to uphold the Governor General’s action against the legislature paved the way for authoritarian rule and undermined what faith had resided at that time in the legitimacy of political and judicial process.

Constitutionally and politically speaking this was a major turning point in Pakistan’s evolution as a state and possibly a missed opportunity to establish the country on a strong legislative footing. Not only did the 1954 draft constitution represent the closest the ideologically-driven membership ever got to reach an agreement on Pakistan’s Islamic orientation, it took the heat out of the issue most dividing the constitution-makers by conceding East Pakistan’s demand for representation on the basis of population. Parity was also secured in the decision to make Bengali as well as Urdu a national language. Here was a constitution devised largely through democratic deliberation, which offered some chance of public approval.

The 1956 Constitution that replaced it had much less prospect of achieving this. Delivered in little over a year by a second, also indirectly elected Constituent Assembly, it was immediately condemned by the *ulema* as a betrayal of Islam. Although it declared Pakistan to be an Islamic Republic and included the Objectives Resolution in its preamble, the 1956 Constitution was based on the secular provisions of the 1935 Government of India Act (Brasted, 2005, 111). It was thus for ‘all practical purposes as secular’ as that of India (Zakaria, 1988, 230). With Islam also not being made the official religion of the state, religion and politics were effectively separated. While the constitution was not stripped bare of Islamic principles, these were not legally binding and did not compel governments to observe or enforce them (Lau, 2006, 7).

One important result of this ambiguity regarding national identity was seen in the 1953 Ahmaddiya riots in Punjab depicting the first show of curbing religious freedom of the sects together with the resentment towards Hindus and Christians since partition in 1947. The Jama’at-e-Islami led the Tehrik-e-Tahafuz-e-Khatm-e-Nabuwat (Movement for the Protection of the finality of the Prophet Muhammad) to declare Ahmadi sect as non-Muslims. The Sunnis, Barelvis, Shais and Ahmadi sect Muslims were all actively involved in the Pakistani movement; however, after the creation of Pakistan, Muslims of the Deobandi sect played a critical role in defining the identity of the state, religious freedom and rights of the minorities. In the 1953 riots, more than 2000 Ahmadis were killed and prominent Jama’at leaders such as Maududi were given death sentence; these sentences however were not carried out (Ispahani, 2017, 46-48).

Dictatorships and the religious-secular divide

When Governor General Iskander Mirza declared martial law on 7 October 1958 by , he was undoubtedly right in stating that ‘the vast majority of the people’ had lost all confidence in ‘the present system of government’ (Newberg, 1985, 271). But if he and General Ayub Khan, the Martial Law Administrator who deposed Mirza a few weeks later, thought that popular support could be regained by turning Pakistan into a bureaucratised militarised state, they were mistaken. Lacking any popular mandate, the 1962 Constitution introduced a system of presidential dictatorship that curtailed civil liberties, circumscribed the ability of the judiciary to challenge executive actions and placed sizeable roadblocks in the way towards Islamisation. For any

Islamic legislation to be considered by government, the unanimity of different schools of Islam was first required; in the opinion of former Chief Justice Munir an unlikely prospect (Kiyani&Munir Report, 1953, 259).⁴ Ayub, in the face of public pressure, did waver sufficiently to amend the constitution so as to re-accommodate the 'repugnancy' clause⁵, and set up an Advisory Council of Islamic ideology to advise the government on possible breaches. But no attempt was made to rename Pakistan in the constitution as an Islamic Republic. Under 'basic' democracy it was just a republic.

The restoration of civilian government under Zulfikar Ali Bhutto seemingly presaged a full retreat from executive dictatorship and a reiteration of Islamic identity. His Pakistan People's Party (PPP) had campaigned under the slogan 'Islam is our faith' inspiring confidence in the *ulema* that an all-party committee would endow Pakistan's third constitution with the core features of an Islamic state. Unanimously signed off on by all elected representatives, the 1973 Constitution in post-Bangladesh Pakistan again declared the nation to be an Islamic republic, made Islam the official religion of the state for the first time, and stipulated that 'all existing laws shall be brought in conformity with the injunctions of Islam' (Zakaria, 1988, 234).

In actual practice, however, Bhutto's model of 'Islamic Socialism' was characterised more by continuing authoritarianism and the reservation of all powers to the prime minister than in delivering an Islamic state. Facing growing criticism from the religious parties, Bhutto, the most westernised of all Pakistan's rulers, went on to ban alcohol, horse racing and gambling, shut down night clubs, made Friday rather than Sunday the official weekly public holiday, and amended the constitution so as to declare the Ahmadis non-Muslim. Unimpressed, the Jama'at-i-Islami led a campaign against the PPP government under the slogan '*Nizam-i Mustafa*' or 'Administration of Muhammad', describing the current struggle as one between secularism and Islam. (Nasr, 2001, 80) Engineering a coup d'état in support of an Islamic Pakistan (Ziring, 2004, 157-160), General Zia ul-Haq deposed Bhutto in 1977, and carried out his execution two years later.

⁴ In Chief Justice Munir's opinion religious leaders could reach no agreement about working definitions of Islam, an Islamic state, or who was in fact a Muslim. See Justice M. R. Kayani and Justice Muhammad Munir, 'Report of The Court of Inquiry constituted under Punjab Act II OF 1954 to enquire into the Punjab Disturbances of 1953', p. 259. http://www.proceedings1974.org/wp-content/uploads/2013/02/report_1953.pdf.

⁵ This stipulated that no law deemed repugnant to the Quran and the *Sunnah* could be enacted.

The periods of rule by military dictators also sharpened the religious-secular divide in the state. With General Ayub Khan and General Yahya Khan as secular dictators, General Zia ul-Haq Islamization and later on General Musharraf's enlightened moderation all defined the divergent paths that the nation took during different eras. This not only had an impact on the national identity of the state but violated of rights and freedoms of people under the dictatorial rule. In 1977, with General Zia as the self-styled 'soldier of Islam' in the driver's seat and with the 1973 Constitution suspended, Pakistan veered sharply towards Islamisation.

Taking advice from Maududi, Zia used his power under martial law to introduce a number of measures in line with the *Nizam-i-Mustafa* program. Among them, corporal punishment for drinking was imposed on Muslims, and the Hudood Ordinances of 1979 promulgated penalties for adultery (*zina*) and rape (*zina-bil-jibr*) that rendered women vulnerable to patriarchal control and abuse. Zakat was made compulsory and interest (*riba*) was banned. Later, in a direct attack on secular government, Zia abolished political parties as un-Islamic, and brought the *ulema* into his administration through the Quranic mechanism of *shura*. On the international front, General Zia's Islamisation was supported by the call for *Jihad* in the next-door neighbour Afghanistan. Pakistan was to host Afghan Mujahedeen and refugees as well as fighting the cause of Islam against the communist Soviet Union for the next one decade. The period witnessed an increase in the number of *Madrassahs* (religious seminaries), role of religious parties in politics and Islamisation of social norms. This patronising of the clergy class had far-reaching impact on the politics of Pakistan in the years to come. This was clearly observed in the aftermath of 9/11 with the rise of the Taliban and other religiously-inspired militant organisations. The use of religious issues to influence the government through the November 2017 sit-in by the right wing religious clergies in Islamabad was another consequence.

Restoration of democracy and the impact of Zia's Islamic project

On restoring the 1973 Constitution Zia proposed the 9th Amendment of 1986, which, had it passed, would have made *sharia* the law of the land and turned the Federal Shariat Court – set up in 1980 to review legal compliance with Islam – into Pakistan's supreme judicial body (Newburg,

1985, 196). This is as far as Pakistan has gone along the path of becoming an Islamic state; Zia himself was killed in a plane accident in 1988 before he could take it any further. Well before this the gloss had substantially worn off Zia's brand of Islamisation, and even the Jama'at-i-Islami distanced itself from his religious policies and joined in the clamour for the restoration of democratic government (Nasr, 1993, 277). Muhammad Khan Junejo, the elected prime minister in the 1985 non-party based election, was removed by General Zia, and later in the decade between 1988 and 1999 democratic governments were elected and Benazir Bhutto and Nawaz Sharif alternated as Prime Ministers. But neither of them found themselves able to backtrack on Zia's Islamic project. Vowing to undo Zia's policies (Malik et al, 2013, 56), Benazir was unable to repeal even the anti-female elements of Zia's laws during her first term as woman's leadership was declared un-Islamic by the *ulema* of the era. Within 20 months she was harried out of office on corruption charges and as an enemy of Islam.

Needing the support of the *ulema* to lend legitimacy to his government, Nawaz Sharif came closer in fact to ratifying Zia's Islamising legacy than rejecting it. His 'Enforcement of Shariat' Act of 1991 went some way towards making the 1973 Constitution sharia-compliant by 'insulating Islamic injunction from civil purview' (Newburg, 1985, 220-221) and paving the way towards the status of 'Amir ul Momineen' (the leader of the believers). The 15th Amendment of 1998, which passed by the National Assembly but not the Senate, would have given the Prime Minister of the day the power to interpret and enforce the *sharia*. Sharif did manage, however, through the 13th Amendment, to strip the President of the reserve power necessary to dissolve the National Assembly. He followed this up a few months later with the 14th Amendment, which eliminated the possibility that a vote of no confidence could unseat a Prime Minister. Though Pakistan swung back and forth between a presidential and a prime ministerial system of government, this democratic 'interlude' changed very little in the situation. No government got any closer to clarifying Pakistan's Islamic status or its constitutional shape. In short, Islamisation was neither reversed nor advanced.

On the grounds that Pakistan had reached 'the point of no return' and had to sort out its ideological basis once and for all, General Musharraf ousted the Sharif government in 1999 in a bloodless coup. Riding roughshod over the 1973 Constitution, which he later justified on the

grounds that it was not a valid constitution since it had not been passed by a valid Constituent Assembly, he unilaterally amended it on 21 August 2002 so as to give himself more control over the democratic process. He followed this up with the 17th Amendment on December 2003, which nullified the 13th Amendment by once again granting the President of Pakistan with the authority to dissolve Parliament and dismiss the Prime Minister of the day.

Democracy, religious extremism and human rights

Judging from his public statements and much criticised memoirs, the identity Musharraf wished to create for Pakistan was one that put Pakistan ‘first’ in relation to Islam. A ‘strong and powerful’ Pakistan would be the best safeguard for the protection of Islam, particularly an Islam that was ‘enlightened, progressive, and moderate’ (Musharraf, 2008, 279). Hostile towards what he called ‘intolerant’ forms of Islam, Musharraf did not hesitate to ban Islamic parties - such as *Sipah-e-Sahaba*⁶ and *Lashkar-e-Jhangvi* – which he believed were committed to the overthrow of his government.

In the end Musharraf’s ‘moderate-modernist Islam’ (New York Times, 2003) was overtaken by the ‘war on terror’ and the epidemic of religious violence that accompanied it (South Asia Terrorism Portal, 2003-2013). Like every power-holder that preceded him, Musharraf discovered that while religious parties were electorally weak, they possessed a street power capable of fomenting civil and sectarian violence. The last two years of his nine-year rule were marked by over 10,000 deaths from bombings, suicide attacks and assassinations, including that of Benazir Bhutto in December 2007. Pursued by Chief Justice Iftikhar Muhammad Chaudhry for breaches of the 1973 Constitution, Musharraf fled to a self-imposed exile in London and Dubai in 2008.

Against the backdrop of Musharraf’s subversion of democracy his successor as President, Bhutto’s widower, Asif Ali Zardari, was able to pass the famous 18th Amendment, which overhauled the 1973 Constitution and for a third time re-established Pakistan as a prime-ministerial republic. But his PPP coalition-led government never had sufficient strength to answer the call for the re-examination of the Hudood Ordinances and Blasphemy Laws that Zia had installed. The PPP regime had earlier placed its faith in a popular, folk-oriented Sufi Barelvi

⁶ Created as an anti-Shia organization by Zia.

interpretation of Islam as an answer to Pakistani Taliban-inspired violence that threatened to engulf the country (Khan, 53). However, the assassination in 2011 of Salman Taseer, the PPP Governor of Punjab, by a Barelvi for describing the latter as a ‘Black Law’, demonstrated the danger of opposing even the most dubious of Zia’s Islamising measures (Siddiqui, 2011).

In 2009, the enforcement of Nizam-e-Adl Act (System of Justice Act) in the Malakand region of north-west Pakistan is of critical significance regarding extremist narratives and its inroads into Pakistan’s constitutional system. This is a very important Act as the ‘war on terror’, which started with the US-led intervention in Afghanistan in 2001, resulted in the rise of extremism and militancy within Pakistan. Although Al Qaeda and Taliban leadership mostly moved to the semi-autonomous tribal areas of Pakistan, the first insurgency by religious extremists occurred in the Swat valley. This time the clear aim was the enforcement of *Shariah* or Islamic laws. The *Tehreek-e-Nifaz-e-Shariati Muhammadi* (Movement for the enforcement of *Sharia* of Muhammad which first emerged in 1994 during Benazir Bhutto’s second term of office) started a militant insurgency supported by the local Taliban and which culminated in a ceasefire agreement with the government.

The agreement resulted in the enforcement by the federal government of Nizam-e-Adl Act 2009 in the Malakand region as was demanded by the militant-extremists. This was the first time State writ was challenged and shows the extent of the extremist narratives and their influence over State institutions. Again in 2011, the killing of Punjab’s Governor Salman Taseer over blasphemy allegations by his body guard Mumtaz Qadri revealed the same dilemma of the State’s incapacity to deal with extremist narratives, counter hate speech or amend the Blasphemy law. It took five years for the courts to give a death sentence to the accused. Later, he was given a public burial and his grave turned into a shrine. The 2013 general elections were held under the influence of terrorism and extremism in Pakistan, clearly suggesting that the secular–Islamic dividing line is as far apart as ever. Not only were there Taliban attacks against the election campaign of the secular parties ANP, PPP and MQM, but also these attacks actually helped their conservative rivals – the Muslim League (N), the Tehreek-i-Insaf and the Jama’at-i-Islami - in their election campaign; all made substantial gains.

The parliament of Pakistan passed the 21st amendment to the constitution in January 2015 following the attack on the Army public school in Peshawar in December 2014, which killed 152 people including children. The amendment provided the establishment of speedy military courts for trial of terrorist offences, waging war against Pakistan, and acts against the security of the country. This amendment was termed necessary due to extraordinary number of terrorist attacks; however, it came with a sunset clause of expiry after a period of two years on 7 January 2017 which was renewed by the Parliament in March 2017. In this amendment, the military was given extraordinary powers to deal with terrorists who use religious or sectarian beliefs as justification for carrying out terrorist activity. Under the 23 amendment, parliament extended to re-establish the military courts till January 2019.

The two main religious parties, Jamiet-e-Ulema-e-Islam (Fazul-ur-Rehman group) and Jamat-e-Islami, abstained from voting in the Parliament. The amendment was a result of a National Action Plan (NAP) agreed upon by the All Parties' Conference held after the APS attack. This is one of the first amendments in the constitution which directly addressed religiously-inspired terrorist activities and strongly countered the narratives of extremism and militancy in Pakistan while also providing a constitutional cover for action to be undertaken regarding the issue. However, the NAP contained provisions - including lifting a 7-year moratorium over death penalty, protection of minorities, cracking down on hate speech, the deportation of Afghan refugees (in December 2016 almost 55,000 refugees were deported to Afghanistan), and the rehabilitation of displaced persons - which are all yet to materialise. In another instance, the launching of Milli Muslim League in August 2017 by Hafiz Saeed Ahmad, the leader of banned Jamaat-ud Dawah (JuD) terrorist/charity organisation, and his release from prison in November 2017 pose a serious challenge to the National Action Plan. It provides inroads for terrorists and extremists within the political system of Pakistan.

Since 9/11, Pakistan's north-western province of Khyber Pakhtunkhwa and adjoining tribal areas are facing serious challenges regarding the role of religion in the state as well as the legal-constitutional norms that are to be adopted in dealing with religious extremism. The constitutional status of the tribal areas - the Federally Administered Tribal Areas (FATA) of Pakistan - came to the centre stage with the rise of terrorism and extremism in the post 9/11

period. The death of over 100,000 people since 2001 and the killing of school children by the Taliban on 16 December 2014 in Peshawar have brought the issue of human rights and terrorism to the forefront. In the tribal areas, the use of religion, Pakistan's strategic depth policy toward Afghanistan, the autonomous constitutional character of the tribal areas, and the post-9/11 period terror and violence perpetuated this conflict. Since the events of 9/11, FATA is considered to be the breeding ground for Islamists and terrorists and a home to supporters of al Qaeda, the Taliban, Dash and the Islamic State. The Taliban promoted an extremist interpretation of Islam. The restriction on women education, work and movement, excluding women from the public sphere; destruction of minority religions, and non-recognition of minority rights; the killing of political opponents, the control of social norms through acts such as compulsory dress code and religious practice are but a few examples of violation of these rights.

FATA reforms were initiated in November 2015. The government of Pakistan constituted a five member committee headed by Satrap Aziz, advisor to the Prime Minister on foreign affairs. The committee issued its eighty-page-long report, which included a number of constitutional and administrative measures for mainstreaming the semi-autonomous status of the tribal areas in the state of Pakistan, in August 2016. The conflict in FATA has resulted in the people of the tribal areas plunging into a spiral of violence, extremism and militancy. The government of Pakistan has suggested replacing the Frontier Crimes Regulation (FCR) (1901) with a proposed Riway Act (traditional customary practice) in FATA on the 'Malakand Model' ('Nizam-e-Adal' is in place in Malakand since the end of insurgency in 2009). The presence of three conflicting forms of constitutional/legal systems - the constitution of 1973, proposed Riway Act replacing FCR and the Nizam-e-Adl Act - within one and the same province poses a challenge to human rights and to the constitutional-legal system in the region.

Similarly, the Alternative Dispute Resolution (ADR) bill passed by the Parliament on 3 February 2017 calls for settlement of disputes without formal litigation through a 'panchayat' or 'Jirga' system or neutral panel and according to an indigenous approach system which is to be used to deal with 23 types of cases. However, Raza Rumi termed the ADR as a regressive law not contemplating representation of women and providing a medieval system of arbitration, which,

considering the record of violations by Jirga and panchayats in Pakistan, can result in human rights violations. This has serious implications for the delivery of justice to citizens and the re-enforcing of a patriarchal system within Pakistani society (Rumi, 2017).

Reiterating Pakistan's Islamic identity, Article 62-63 of the constitution bears the Islamic stamps of Zia's in its demands to prove the 'honesty'(Ameen) and 'truthfulness'(Sadiqi) of parliamentarians; the use of judgments about the moral character of public office holders was employed to disqualify two Prime Ministers. The disqualification for life of Prime Minister Nawaz Sharif in July 2017 on charges of corruption was justified by the Supreme Court of Pakistan through the employment of the infamous Article 62-63. Aqil Shah points out that Pakistan's judiciary has previously legalised all three military coups (1958, 1977 and 1999) in the country through the doctrine of necessity, thus undermining the fundamental rights of the people. The rise of a populist judiciary and its disqualification of two Prime ministers (Yousaf Reza Gilani in 2012 and Nawaz Shairf 2017) is a dangerous judicial precedent (Shah, 2017).

Since the creation of Pakistan, all 18 prime ministers have been removed from office before completion of the term. Noted human rights lawyer Asma Jahangir commented that it is very critical for Pakistan to restore the 1973 constitution to its original form, restore fundamental rights and freedom of speech as provided by the constitution, address the issue of human rights (especially as regards the action of intelligence agencies in missing persons' cases) The Art. 62-63 and Art 184(3) must also be reviewed insofar as these articles, which are supposed to be used by the judiciary to restore fundamental rights of the marginal communities, are instead being used to dismiss elected governments. Jahangir further called for extending fundamental rights to the people of the tribal areas and solve the issue of the constitutional status of tribal areas within the federation of Pakistan politically. Jahangir observed that the judiciary has given verdict against the sitting prime minister but is yet to give verdict in the cases involving military dictators (Jahangir, 2017).

Pakistan's experience offers pertinent and instructive insights into the importance of constitutional design and constitutional politics. With the exception, in some respects, of the draft 1954 constitution, all three of Pakistan's substantive Constitutions fall very short of many

of the concrete functions they are intended to perform. Pakistan's first short-lived 1956 Constitution, for instance, failed to mark a break with its colonial past or establish a new coherent national identity. The 1962 Constitution did not even make such attempt.

The 1973 Constitution arose from the ashes following the loss of East Pakistan and the collapse of the first two military dictatorships of Ayub Khan and Yahya Khan. The 18th Amendment attempted in some measure to restore Pakistan's 1973 Constitution by erasing the imprint of its last two military dictatorships. It did so by undoing Zia's 8th and Musharraf's 17th Amendments respectively. In addition, it added more impediments to executive power, returned to the parliamentary form of government, gave added protection to judicial independence, and enhanced provincial autonomy. The challenge at present is to undo the Article 62-63 of the constitution in order to prevent its misuse as an instrument for the dismissal of future prime ministers based on a loose interpretation of Islamic injunctions applied at the discretion of the judiciary.

How far has Pakistan moved to solve the issues relating to Islam, identity, and human rights violations that over-shadowed the nation ever since the first Constituent Assembly struggled to draw up the country's first constitution? It appears that the ambiguities and debates on the definition, place and function of Islam in the state have remained essentially the same since independence. Pakistan has continued its ambivalence towards Islam and remains undecided about whether it should be an Islamic state or a secular one; or something in between. All of this has implications for the standard of human rights to be adopted by the state. Unable to either reconcile or separate religion and politics, Pakistan has found itself stuck; it can neither progress Islamisation nor apparently undo it. This ambivalence is more apparent in the wake of the rise of extremism and terrorism as the state finds itself under the pressure of religious narratives and organisations acting for it to legislate in contrary to the established laws and constitution of Pakistan.

Essentially, the question of sovereignty, raised by Maududi in the years before partition, remains unresolved. Shahidullah Shahid, a spokesman for the Pakistani Taliban, recently justified his group's armed rebellion exactly on this issue. Shahid argued that the problem is not the

constitution but its contradictions. In his opinion, the document still fails to settle whether divine or popular-majoritarian laws should be supreme (Hassan, 2013). The typical response of the Pakistani leadership has been to deflect critical questions such as those relating to sovereignty by promulgating expedient interpretations of Islam. Instead of one Islam agreed on by all have different kinds of Islam been proffered at different times so as to serve different political interests? A number of ‘contesting’ Islams have thus emerged in turn: the ‘liberal-modernist Islam’ of the early rulers, Ayub Khan’s ‘developmental Islam’, Yahya Khan’s ‘nationalist Islam’, Bhutto’s ‘socialist-populist Islam’, Zia’s ‘revivalist-fundamentalist Islam’ (Khan, 199, 181), Nawaz Sharif’s ‘civil theocratic Islam’, and Musharraf’s ‘moderate-modernist Islam’. Benazir’s ‘Reconciliatory Islam’ and Zardari’s ‘popular-folk Islam’ have been the latest in this sequence.

Conclusion

To sum up, with no agreement in sight on the role and place of Islam in the state, Pakistan’s national identity continues to defy agreement. Moreover, unlike India, civilian government in Pakistan has no oversight over the budget of the military (Cookman, 2010) and little control over its setting of the national security and foreign policy agenda (Riedel, 2008, 41). If Stephen Cohen’s seven constitutional futures for Pakistan are any guide, the 18th and 21st Amendment has in fact finalised nothing. In his speculation, the ‘most likely’ outcome for Pakistan is to ‘muddle’ through’ via an ‘establishment-dominated’ system of rule, followed by the emergence of ‘parallel Pakistans,’ where ‘discontented provinces’ stop short of ‘breaking away’ from Pakistan altogether but are able to govern in their own way. The total breakup of Pakistan, while not ruled out, is deemed most unlikely, as is the ‘consolidation’ of democracy. ‘Much more plausible’, he believes, would be a further ‘slide’ into ‘authoritarianism’ – whether of a civil, military or Islamist kind (Cohen, 2011, 47-53). That these scenarios continue to face Pakistan, as they did 70 years ago, points up to the salience not only regarding Pakistan’s past constitutional failures, but also regarding its continuing constitutional ambivalence and identity crisis.

Bibliography

- Adams, J. Charles, 'Mawdudi and the Islamic State,' in John L. Esposito (ed.), *Voices of Resurgent Islam*, Oxford, OUP, 1983.
- Binder, Leonard, *Religion and Politics in Pakistan*, Los Angeles, University of California Press, 1961.
- Brass, Paul, 'A Reply to Francis Robinson', in *Journal of Commonwealth and Comparative Politics*, Vol.15, no.3, 1977.
- Brasted, V Howard, 'Islam and identity in South Asia: At the Crossroads of Confusion and Confrontation', in *Islam in World Politics*, Routledge, 105-126, 2005.
- Brasted. V. Howard and Carl Bridge, 'The Transfer of Power in South Asia: An Historiographical Review', *South Asia*, Vol.17, no.1, 1994.
- Civil and Military Gazette*, 8 Oct. 1958, p.1, quoted in Newberg, *Judging the State*,
- Cohen, P. Stephen, *The Idea of Pakistan*, Washington, Brooking Institution, 2004.
- Cohen, S.R., *The Future of Pakistan*, Washington D.C, The Brooking Institute, January 2011. www.brookings.edu/~media/pakistan/01_pakistan_cohen.pdf
- Cookman, Colin, *The 18th Amendment and Pakistan Political Transition*, Centre for American Progress, April 19, 2010.
<http://www.americanprogress.org/issues/security/news/2010/04/19/7587/the-18th-amendment-and-pakistans-political-transitions/>
- Dawn*, 9 November 2012. <https://www.dawn.com/news/1349491>
- Hassan, Ahmad, 'TTP sole guarantor of peace: spokesman', *The News*, October 04, 2013, <http://www.thenews.com.pk/Todays-News-13-25852-TTP-sole-guarantor-of-peace-spokesman>
- Ispahani, Farahnaz, *Purifying the Land of the Pure: A History of Pakistan's Religious Minorities*, New York: Oxford University Press, 2017.
- Jafferlot, Christophe, 'India and Pakistan: Interpreting the Divergence of Two Political Trajectories', *Cambridge Review of International Affairs*, 2002, Vol. 15, no.2.
- Jalal, Ayesha, *The Sole Spokesman. Jinnah, the Muslim League and the Demand for Pakistan*, Cambridge, CUP, 1985.
- Junaidi, Ikram, Jahangir, Asma, 'lashes out at the powers that be', *DAWN*, August 4, 2017.

Justice M. R. Kayani and Justice Muhammad Munir, 'Report of The Court of Inquiry constituted under Punjab Act II OF 1954 to enquire into the Punjab Disturbances of 1953'.
http://www.proceedings1974.org/wp-content/uploads/2013/02/report_1953.pdf

Khan, Adeel, 'Ethnicity, Islam and national identity in Pakistan', *Journal of South Asian Studies*, 22, 1999.

Khan, Ismail, 'The Assertion of Barelvi Extremism'.
http://www.hudson.org/content/researchattachments/attachment/1283/kahn_vol12.pdf

Lau, Martin, *The Role of Islam in the Legal System of Pakistan*, Leiden, Nijhoff, 2006.

Malik, K. Yogendra. Robert C. Oberst, Charles Kennedy, Ashok Kapur, Mahendra Lawoti, Syedur Rahman, Ahrar Ahmad, *Government and Politics in South Asia*. Boulder, Col. : Westview Press, 2013

Musharraf, Parvez, *In the Line of Fire: A Memoir*, New York, Free Press, 2008.

Nasr, Sayyed V. R. *Islamic Leviathan: Islam and the Making of State Power, Religion and Global Politics*: New York, OUP, 2001.

Nasr, Seyyed V. R, 'Islamic Opposition to the Islamic State: The Jamaat-i-Islami 1977-88', *International Journal of Middle East Studies*, 25, 1993.

New York Times, 11 June 2003.

Newberg, Paula, R. *Judging the State: Courts and Constitutional Politics in Pakistan*, Cambridge: Cambridge University Press, 2002.

Norman, O. *The Political Economy of Pakistan 1947-85*, London, Keegan Paul, 1988.

Oldenburg, Philip, *India, Pakistan and Democracy: Solving the Puzzle of Divergent Paths*, Routledge, 2010.

Riedel, Bruce, 'Pakistan and Terror: The Eye of the Storm,' *Annals of the American Academy of Political and Social Science*, Vol. 618, 2008.

Robinson, Francis, 'Nation Formation: The Brass Thesis and Muslim Separatism', in *Journal of Commonwealth and Comparative Politics*, Vol.15, no.3, 1977.

Rumi, Raza, NA legalises Panchayat System, *The Nation*, 4 February 2017,
<http://nation.com.pk/national/04-Feb-2017/na-legalises-panchayat-system>

Shah, Aqil, Pakistan's Court sets a dangerous precedent, *The New York Times*, 28 July 2017.
<https://www.nytimes.com/2017/07/28/opinion/why-ousting-nawaz-sharif-sets-a-dangerous-precedent-for-pakistan.html>

Shaikh, Farzana, *Making Sense of Pakistan*, London, Hurst, 2009.

Siddiqui, Salman, 'Hardline Stance: Religious bloc condones murder', *The Express Tribune*, 5 January, 2011, <http://tribune.com.pk/story/99313/hardline-stance-religious-bloc-condones-murder/>

South Asia Terrorism Portal, *Fatalities in Terrorist Violence in Pakistan 2003-2013*, <http://www.satp.org/satporgtp/countries/pakistan/database/casualties.htm>

Talbot, Ian, 'Understanding religious violence in contemporary Pakistan: themes and theories', in Ravinder Kaur (ed.), *Religion, Violence, and Political mobilisation in South Asia*, New Delhi, SAGE, 2005.

Waseem, Mohammad, 'Causes of Democratic Downslide', in Veena Kukreja & M. P. Singh (Eds), *Pakistan: Democracy, Development and Security Issues*, New Delhi, SAGE, 2005.

Zakaria, Rafique, *the Struggle within Islam. The Conflict between Religion and Politics*, London, Penguin, 1988.

Ziring, Lawrence, *Pakistan: At the Crosscurrent of History*, Lahore, Oneworld Publications, 2004.

21 Amendment Constitution of Pakistan 1973,
http://www.na.gov.pk/uploads/documents/1420547178_142.pdf