Sharia Incorporated

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9 Sharia and national law in Pakistan[1]

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Abstract

The creation of Pakistan in 1947 satisfied the demand of British India's Muslims for a homeland at the end of colonial rule but left unresolved the nature of the newly founded state: had it been founded to enable India's Muslims to live in accordance with Islamic law or was its primary purpose to protect them against the fate of living as a religious minority in a Hindu majority state? Until the mid 1970s, Pakistan's political elites fudged the issue by allocating a largely symbolic role to Islam in the constitutions of 1956, 1962 and 1973 but retaining the colonial legacy of Islamic family law. It was only in 1979 that the military dictator Zia ul-Haq purported to turn Pakistan into an Islamic state by imposing Islamic criminal laws and creating specialist Islamic courts empowered to strike down laws deemed contrary to Islam.

The impact of Zia's measures has been profound: despite the opposition of many of the mainstream political parties to the Zia era Islamic laws and institutions, any proposal for reform triggers popular protests, instigated by small, conservative, Islamic parties. It is mainly the country's higher judiciary which, together with the government, holds attempts at further Islamisation measures in check, and which reforms those areas of law that continue to be governed by Islamic law. The judiciary's ability to counter the forces of Islamisation reflects its growing importance as a check on governmental lawlessness and protector of human rights.

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The independence of British India in 1947, and its subsequent partition, led to the founding of the Islamic Republic of Pakistan, a state which was itself partitioned into two parts, namely West Pakistan and East Pakistan. Following a civil war, East Pakistan declared independence and became Bangladesh in 1971. It is the former western half which retained the name Pakistan and which is the subject of this chapter. Its current population numbers close to 174 million people and is comprised of multiple ethnic groups, the main ones being Pashtun, Punjabi, Sindhi, Baloch, and Muhajir. Pakistanis are nearly all Muslim (97%), the vast majority of which are Sunni (77%) and the remainder Shia (20%). Christians, Hindus, and Parsees belong to religious minority groups (3%). Under the laws of Pakistan, members of the Ahmadiyya community are also considered to be a non-Muslim religious minority. While Urdu is the official language of Pakistan, only eight percent of the population actually speaks it as their first language. In contrast, the Punjabi (44%) and Sindhi (14%) languages are much more widely spoken. The lingua franca of the Pakistani elite and the state apparatus is English.

(Source: Bartleby 2010)

9.1 The period until 1920

From diversity to uniformity

Early history

Pakistan came into existence in 1947 but its laws and legal traditions form part of the wider history of South Asian civilisations and cultures. This history began about 40,000 years ago, when humans migrated from East Africa to North India, expanding their presence gradually to the South (Talbot 1998, Wolpert 2009). The transition from hunter-gatherers to settled communities who relied on farming, growing wheat and barley and keeping goats and sheep, occurred in the hills of Baluchistan, now part of Pakistan, around 8000 BC. Some of the symbols associated with Hinduism can be traced back to these early communities. Clay figurines of mother goddesses and humped bulls as well as phallic symbols made of stone are reminders of the ancient roots of the Hindu religion. Close to these hills, along the fertile valley of the Indus river, emerged the ancient civilisation of Harappa and Mohenjodaru, which lasted from about 2500 to 1600 BC. Covering an area of some five million square miles, with urban centres housing up to 35,000 inhabitants, the Indus valley civilisation was based on irrigated

agriculture and a commercial economy, which was interwoven with regional trade stretching as far as Sumeria (Wolpert 2009: 19).

Changes of the ecology and of the course of the Indus river lead to the decline and eventual disappearance of the Indus valley civilisation. The migration of the Aryan Indo-European people from areas around the Caspian and the Black Sea between 1500 and 1000 BC marks the beginning of the Hindu religion and ancient Hindu law. The Aryans brought to India herds of cattle and domesticated horses, as well as their own language, Sanskrit. The early Aryans did not use bricks, knew no system of writing, and the physical traces they left behind consist mainly of bronze weapons, bows and arrows. Their enduring legacy to Indian culture is their religion. An orally transmitted body of texts, known as the Rig Vedas, the books of knowledge, consisting of Sanskrit hymns, which are addressed to the Aryan gods to solicit their favours, are the oldest ingredients of Hindu religion. The texts, written down for the first time around 600 BC, also testify to the ancient origins of the Hindu caste system and the myths of epic battles, such as the Mahabharata, which continue to be prominent elements of modern Hindu and South Asian culture.

Buddhism and Jainism emerged as religious reforms of Hinduism in the fifth century BC but it took another 1200 years before Islam, South Asia's second most important religion, arrived on the Indian sub-continent. Muslim traders made contact with communities along the West Indian Malabar coast in the early seventh century CE (Engineer, 2006). The first territorial presence of Muslims was established through the conquest of Sindh by Muhammad bin Qasim, who claimed the province of Sindh in present-day Pakistan for the Umayyad Caliphate. In the tenth century Mahmud of Ghazni, in present-day Afghanistan, conquered Punjab and made it part of the Ghaznavid Empire. Another successful invasion from the North, lead by Muhammad of Ghor, lead to the formation of the Delhi Sultanate in the twelfth century. The emergence of Islamic dynasties in the northern parts of India culminated in the establishment of the Mughal empire in the sixteenth century. In the course of two centuries the Mughals created an empire which encompassed most of the northern parts of India and whose administrative structures proved so efficient that many of them were adopted by the East India Company, when in the course of the seventeenth century it displaced, and eventually, in 1857, removed the Mughal dynasty from power.

The impact of colonialism

The arrival of the British, in the shape of the East India Company, in the seventeenth century forms the starting point of any discussion of

modern Indian and Pakistani law. The origins of the system of courts, legal procedures and much of the substantive law of both India and Pakistan can be traced back to British rule. The lasting influence of the legacy of colonialism on the legal systems of India and Pakistan can, however, not obscure the fact, that the colonial legal system emerged in a process of interaction with indigenous laws and cultures. This interaction becomes most visible in Pakistan's family laws, which originated from a colonial attempt to apply Islamic law to its Muslim subjects (Kolff 1992, Menski 1997).

Prior to the arrival of the British, South Asian laws reflected the political, economic, religious and cultural diversity of the Indian sub-continent. The spectrum of political organisations ranged from the centralised system of administration of the Moghul empire, powerful Hindu and Sikh kingdoms and small princely states ruled by Hindu and Muslim dynasties, to small, self-governing communities of hunter-gatherers in India's mountains and jungles. The mainstay of the pre-industrial economies of India was agricultural, carried out under diverse systems of land tenures and holdings and as a result the main revenue of most Indian rulers was derived from imposing tax on land ownership. Regional trade, the production of goods such as cotton, and the presence of highly skilled craftsmen and artisans in India's busy cities meant that in the seventeenth century, India's economies and wealth were on par with that of many European countries.

The legal cultures of pre-colonial India matched the diversity found in all other areas of life. Despite this diversity, it is possible to identify religion as an important element of India's legal traditions. Both Islam and Hinduism contained within themselves a rich body of legal precepts and prescriptions, and equally many rulers defined and legitimised their power with reference to religion. Religion also played an important part in creating and maintaining social order, for instance in the form of the Hindu caste system, or in guiding the conduct of individual believers. Legal culture was also greatly influenced by locality: the further a community was removed from a centre of political power, the weaker the writ of the ruler. The absence of centralised political power or its inability or unwillingness to impose a unified legal system on the populace meant that in many areas, from rural areas to urban communities, localised forms of dispute resolution were the norm rather than the exception. These local fora for dispute resolution could coalesce around religious elements, as for instance in the case of Hindu caste councils and *panchayats*, or around tribal allegiance, such as the *jirgas*, i.e. councils of elders of some of North India's Muslim communities. The rules applied by this diverse mix of legal institutions was equally diverse. Whilst religious norms were important, they were often supplemented by local customs. As a result, the notion of parts of India

governed by Hindu or Islamic law was a colonial invention, never matched by legal reality. Diversity and fluidity were the hallmarks of pre-colonial legal cultures, with religion playing an important but not overriding role (Menski 1997).

The East India Company (EIC) added another element to this rich mix of legal traditions, but in no way displaced them. The persistence of India's legal traditions in the face of conquest was a result of a combination of reasons. First and foremost was the way in which India was conquered: the EIC had began its presence in India as a trading company, establishing trading posts, the so-called 'factories', along India's coastline. Whilst its Charter of 1600 allowed it to make and administer laws in its 'territories', this power was confined to the areas directly controlled and administered by the EIC itself (Ali 2000: 141).[3] As a result, the EIC applied its own laws only to the trading posts themselves, but recognised local laws and cultures outside the so-called presidency towns of Madras, Bombay and Calcutta. The confinement of English and EIC-made laws to these presidencies also had practical reasons. Whilst the EIC was able to establish political control over an ever increasing portion of India's population, it lacked the means to impose its own legal system on them. Indeed, attempting to do so could have endangered its hold over a growing number of subjects as well its ability to generate a profit for its shareholders and employees.

By the beginning of the nineteenth century the EIC controlled about two thirds of India. A trading company had become India's most powerful ruler, administering and governing a vast territory populated by an equally vast diversity of people, cultures, and religions. In this period of conquest, Indian laws had not remained untouched. The EIC primary purpose and function, namely to make money, had a direct impact on two distinct areas of law. Firstly, there was the need to maintain law and order. This was achieved by creating a body of criminal laws, often modelled on English precedents, designed to contain any challenges to its rule (Fisch 1983). Secondly, there was the need to make money. The acquisition of large tracts of land and people changed the economic character of the EIC. No longer was it merely a trading company but also a collector of land revenue, having assumed this power from the rulers it had displaced. The collection of land revenue made it imperative to identify in a legally enforceable manner an individual who was liable to pay tax for a particular piece of land. Equally, the legal system had to be able to adjudicate disputes over the ownership of land. The colonial legal system thus emerged in a piecemeal and disjointed fashion, being propelled by the economic and political concerns of the EIC.

Religion, law and Anglo-Mohammadan law

At least in theory, the EIC left undisturbed the laws and legal institutions which were not of direct interest to its rule. This is reflected in the declaration of Warren Hastings, the first Governor-General of the Bengal Presidency, in 1772, according to which in the courts of the EIC 'in all suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of the Koran with respect to the Mohammedans and those of the shasters with respect to the Gentoos [Hindus] shall invariably adhered to; on all such occasions the Moulvies or Brahmins shall respectively attend to expound the law, and they shall sign the report and assist in passing the decree' (Rudolph, S. and Rudolph, L. 2001). The notion of a mixed legal system, consisting of a unified hierarchy of colonial courts that administered a diverse system of substantive laws, depending on the area of law and the religion of the parties at issue, would, at first glance, suggest that at least in the area of family law, the indigenous laws of India's population would survive the impact of colonialism intact.

In practice, however, the arrival of colonial courts, staffed by British judges and administered by a colonial government, left a deep impact on the many manifestations of India's indigenous family laws. The courts of the EIC were popular with the Indian population, so much so that in the course of the first half of the nineteenth century many were over-burdened with the number of suits filed by the colonial subjects and a system of court fees was introduced to stem the flood of litigation. The popularity of colonial courts for the adjudication of a wide range of disputes, including those concerned with areas of law to be decided in accordance with Hindu or Islamic law, posed a challenge to judges who had no knowledge of either Hindu or Islamic laws and jurisprudence. Until 1864, judges of the EIC courts were assisted by 'experts' in Hindu and Islamic law; invariably locally prominent Hindu priests and Muslims learned in classical Islamic law would render opinions on the applicable religious law. As a result, elements of local, customary law were gradually replaced with a more rigid, orthodox, text-based interpretation of Hindu and Islamic law. This process of replacement was aided by the common law background of the colonial judiciary who were used to a system of binding precedence and as a result relied on previously decided cases whenever questions of indigenous law came before them.

In addition, there was a growing number of translations of treatises on both Hindu and Islamic law, which were increasingly used by judges to determine the 'personal law' applicable to a dispute. By 1864, the availability of a body of case-law and textbooks was judged sufficient to be able to dispense with the services of the indigenous experts of

Hindu and Islamic law: since then judges themselves determined, interpreted and applied the religiously based system of personal laws.

By the middle of the nineteenth century the colonial legal system, which had emerged more by accident than long-term planning, was marked by three distinctive features. Firstly, it was built on a hierarchy of colonial, 'modern', courts, whose judgements were enforced by a powerful state. Secondly, it incorporated two sets of laws, namely religiously based family laws and uniform civil and criminal laws. Lastly, the legal system was overseen by a colonial government, that assumed 'a superior reformist posture within the framework of a "holding operation" to keep the peace' (Dhavan 2001: 308.). The reformist stance of the colonial government was a cautious one, with some practices, such as *sati*[4] and child marriage, being outlawed (Ferguson 2003: 134). The reluctance to interfere with religious beliefs of the indigenous population, and hence with their religiously based family laws, was re-enforced by the uprising of 1857.

The so-called 'mutiny' of 1857 had been preceded by the gradual infusion of Christian missionary zeal in the policies of the EIC. Whilst the eighteenth century had been one of unashamed lust for profit, the first decades of the nineteenth century witnessed the rise of the Evangelical movement in Britain, which would also make its presence felt in the India of the EIC. The policy of non-interference with indigenous religions softened and the ban on Christian missionaries working in India was lifted in 1813. The missionaries's success in converting Indians was limited, but their impact on EIC policy was very visible. Laws were enacted to promote conversions, such as the Caste Disabilities Removal Act 1850, which preserved the rights of inheritance under the personal law that a convert had held prior to conversion, and campaigns against 'barbaric' practices, for instance female infanticide, were prominently pursued. The 1857 uprising, triggered by the refusal of Indian soldiers to bite off the ends of newly introduced cartridges that had been treated with animal fat, was interpreted as a reaction against a British plan to Christianise India.

The end of the 1857 uprising not only spelt the end of the Mughal empire but also that of EIC rule: in 1858 India became a crown colony of British India. The mutineers had proclaimed that they were motivated by a desire to protect Islam and to rid India of infidels. In order to prevent another mutiny, Queen Victoria publicly proclaimed that the crown would 'abstain from all interference with the religious belief or worship of any of our subjects, on pain of our highest displeasure' and 'that generally, in framing and administering the law, due regard be paid to the ancient rights, usages, and customs of India'.[5]

Islamic law and political identity

The official policy of non-interference with the religions and customs of the colonial subjects was accompanied by conscious efforts to modernise the laws of British India. Over the next four decades an all-encompassing codification of all areas of law, except those concerned with the personal laws of the native population, resulted in a set of statutory laws which to this day apply in an almost unchanged form in the successor nations of British India, i.e. Pakistan, India and Bangladesh. First came the Indian Penal Code 1860, followed by the Contract Act 1872 and the Evidence Act 1872. Around the turn of the nineteenth century two acts were enacted governing the procedures to be applied in criminal and civil trials.[6]

The continuation of the system of personal laws, in line with Queen Victoria's proclamation, created not only distinct bodies of Hindu and Islamic law but also contributed to the emergence of distinct Hindu and Muslim political communities. The latter was not just the outcome of unequal legal treatment, but also of a conscious colonial policy of 'divide and rule', meant to prevent a repeat of the rebellion of 1857. Hindus were favoured when it came to employment in the Indian civil service, being regarded as better educated and more willing to cooperate with the colonial state. Muslims, on the other hand, faced a crisis of self-confidence. The defeat of 1857 had resulted in the dismantling of the Mughal empire, the execution or banishment of many prominent members of the *ulama*, and the relegation of Muslims to a community distrusted by its colonial rulers. In its reaction to this crisis, the Muslim community was divided in outlook but united in method: both conservative and progressive saw education as the key to regaining their pre-1857 status. Conservative Muslims founded religious seminaries, chief among them the Deobandi school near Delhi, which used British educational methods, such as a sequential curriculum, organised classes and paid teaching staff, in order to reform the Muslim community. Their objective was not participation in the colonial enterprise but the moral reform of Muslims, encouraging them to shed un-Islamic practices and to adhere to a literal interpretation of the Koran. The liberal elements amongst the Muslim community also addressed the issue of education, but aimed at equipping young Muslims with the means to compete with their Hindu counterparts by acquiring Western knowledge and skills. Sir Sayyid Ahmed Khan's Islamic University in Aligarh, founded in 1874, became the focal point for the modernisation of Islamic thought, educating a generation of young Muslims, who would, in the twentieth century, become ardent supporters of the Indian national movement.

The British policy of divide and rule became most visible in the system of separate electorates for Muslims and Hindus, which was a feature of all forms of representative self-government conceded by the colonial government. The policy fostered the conviction of Muslim political elites that they were different and separate from the Hindu subjects of the colony. By the late 1930s, this conviction matured into the belief that the Muslims of British India were not just in terms of religion different from Hindus, but constituted a distinct nation, entitled to establish a country of their own as and when the British granted independence to India.

The grant of very limited rights of self-governance at the local level at the end of the nineteenth century was not sufficient to stem the rising tide of the Indian national movement. From its inception, the movement was divided along religious lines, albeit that the two communities initially joined hands in their campaign for self-government. The Indian National Congress, founded in 1885, was in theory a secular body and open to all of India's creeds and religions. Nevertheless, Hindus formed the vast majority of its members. Founded by intellectuals, lawyers and social reformers, it was transformed into a mass movement under the leadership of Mahatma Gandhi, who joined the Indian National Congress upon his return from South Africa in 1916. In 1906, Muslims followed suit, founding a representative body of their own, the All India Muslim League. Many of the founding members were inspired by the modernistic outlook of Sir Sayyed Ahmed Khan, the founder of the Aligarh Islamic University. Its initial aims were modest: rather than asking for self-government the Muslim League resolved to further 'the protection and advancement of our political rights and interests, but without prejudice to the traditional loyalty of Musalmans to the Government, and goodwill to our Hindu neighbours'. The Muslim League soon became an important mouthpiece of the Muslim community, albeit that it never appealed to British India's conservative *ulama*, who regarded it as a secular organisation, unlikely to promote the cause of Islam.

The first two decades of the Indian national movement were marked by a substantial degree of collaboration between the Muslim League and the Indian National Congress. The two organisations represented different constituencies, with the Indian National Congress managing to transform itself into mass movement representing not only intellectuals but also the largely Hindu peasantry. The Muslim League attracted in the main Muslim professionals, especially those who lived in Hindu majority provinces. The early affinities of the two organisations is best exemplified in the person of Muhammad Ali Jinnah, the founder of Pakistan. Jinnah had started his political career as a member of the Indian National Congress, which he joined in 1886, becoming a

member of the Muslim League only in 1913. Until 1920 he was simultaneously a member of Congress, and, from 1916 onwards, the leader of the Muslim League. Both organisations stood united in their goal of 'home rule' and despite representing different communities, they entered into express alliances to further the cause of self-government. In 1916, the Muslim League and the Indian National Congress entered into the 'Congress-League Joint Scheme of Reforms', better known as the Lucknow Pact and issued a joint statement calling on the British to respect the right to self-determination of the Indian population. Congress and Muslim League agreed to share power in the executive and legislative assemblies according to a formula which gave Hindus two-third and Muslims one-third representation in these bodies. On religious measures, the Lucknow Pact stipulated that they could only be undertaken if they had the support of at least three-fourth of the members of the concerned community. In response, the British conceded some reforms, for instance extending employment opportunities in its civil service and allowing for limited forms of self-government at the local and provincial level. But these initiatives did little to mitigate popular grievances. The basis of the discontent – the colonial domination – remained unchanged.

Political violence in the form of terrorism in the 1910s and 1920s was met by ever harsher measures adopted by the colonial authorities to restore and maintain law and order. The most infamous of these measures was the draconian Rowlatt Act in 1919 which dispensed with many of the procedural safeguards of the criminal law in the case of terror related offences. Muhammad Ali Jinnah resigned from the Imperial Legislative Assembly when the Rowlatt Act was passed by the government majority in the face of the united opposition of its Indian members, who had voted against it.[7] The First World War, in which the British fought against Turkish Muslims, produced the last occasion for Muslim-Hindu unity. Under Gandhi's leadership the Indian National Congress supported the Khilafat (Caliphate) Movement (1919-1925), which campaigned for the protection of the Ottoman empire. The Khilafat movement, concerned with an Islamic cause, also marked the first active participation of the traditional *ulama* in the independence movement, which, for the first time, used Islam as a symbol of political mass communication (Esposito 1998: 93). The Muslim-Hindu entente gave rise to unprecedented manifestations of communal harmony and unity, perhaps best illustrated by an event which occurred on 4 April 1919, when a Hindu, Swami Shraddhanand, was asked by a delegation of Muslims to address about 30,000 Muslim worshippers, who had assembled in the grounds of Delhi's main mosque, the Jama Masjid. He accepted the invitation, recited from the Vedas and received thunderous applause (Singh 2009: 110). The defeat of the Ottoman empire in 1924

and the subsequent abolition of the Caliphate brought the Hindu-Muslim entente to an end.

9.2 The period from 1920 until 1965

The realisation of Islamic nationalism

The demand for Pakistan

The 1920s were marked by an increase of communal tension as well as distrust between the leadership of Congress and Muslim League. In 1920, Jinnah resigned as a member of Congress in protest against Gandhi's civil disobedience movement, which he regarded as a dangerously populist and illegal campaign, likely to lead to anarchy and a breakdown of law and order. Under Jinnah's leadership the Muslim League assumed the role as the sole representative of British India's Muslims in opposition to Congress, which relentlessly pursued the ultimate goal of home rule and independence on the platform of mass action and agitation. The colonial government reacted with a combination of repressive measures, including attempts to silence Congress by imprisoning its leadership, and political concessions, such as the Government of India Act 1935, which granted self-government at provincial level, albeit under the supervision of the central government.

Provincial elections under the 1935 Act spelt the end of any hope for a resumption of the Hindu-Muslim entente: Congress won a resounding victory in the Hindu majority provinces but refused to share power with the Muslim League. To Jinnah, this stance amounted to proof that Congress could not be trusted to share power with Muslims as and when British India was granted independence. From then onwards, the Muslim League's demand for independence was a qualified one: if there was to be self-government, it had to take shape in a form which would protect Muslims against a Hindu majority. By 1940 this objective had matured into the two nation-theory: Hindus and Muslims were so different in character that they could never form one nation. According to Jinnah, the creation of an independent state, to be called Pakistan, was the only way to protect Muslims against the prospect of living under Hindu rule.

The claim that Muslims constituted a separate nation made it imperative for Muslim politicians to create a distinct Muslim political and also legal identity. The latter was threatened by the recognition and application of local customs by British Indian courts in the area of family law. Whilst in principle the large corpus of reported decisions dealing with Islamic family law was based on the application of Quran and Sunnah – in line with the resolutions of Warren Hastings in 1772 and Queen

Victoria in 1858 – in practice the Islamic family law produced by colonial courts was far more amorphous. In many cases, especially those concerned with disputes over land, colonial courts had also recognised local customs as the applicable law. This posed a challenge to the Muslim League: if Muslims were to be governed by local customs, which were by definition determined and proven by reference to the customary usages prevalent in a locality, how could they be distinguished from the non-Muslims of the same area? Did a Muslim loose his identity as a Muslim by ordering his life in accordance with laws which were not in any way connected to his religious identity as Muslim but were frequently based on Hindu legal traditions, such as the exclusion of females from the right to inherit from the estate of the deceased?

Muslim personal law

The demands for an Islamisation of British India's family laws provided the answer to these questions: Muslims had to be governed by Islamic law if they were to form a community which was distinct and separate from their Hindu counterparts (Williams 2006: 83-91). Success came in 1937, when the Muslim members of the Imperial Legislative Assembly passed the Muslim Personal Law (Shariat) Application Act 1937. Section 2 of the Act provides that:

> Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religion endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

The 1937 Act satisfied the aspiration of British India's Muslims to be governed by a body of family laws which was distinctly and recognisably Islamic. However, it was not an unqualified success: any question pertaining to agricultural law was excluded from the application of the Act and hence could, if the parties so desired, be governed by local customs. In practice, this often involved the application of rules of inheritance which departed from the Islamic law of succession in that they excluded females from the inheritance.[8]

A second measure to foster a distinct legal identity of British India's Muslims was the passage of the Dissolution of Muslim Marriages Act 1939. The 1939 Act enumerates the grounds on which a Muslim woman can obtain a decree for the dissolution of her marriage. Viewed from a gender perspective the 1939 Act can be regarded as a measure to improve the legal position of Muslim wives. However, the main purpose of the 1939 Act was a political one, namely to prevent Muslim wives from dissolving their marriage by converting to Hinduism. Section 4 of the 1939 Act provides that 'The renunciation of Islam by a married Muslim woman on her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage'.[9]

The purification of Islamic family law and the creation of a distinct legal identity of Muslims in the closing years of colonial India can be regarded as the first phase of the Islamisation of laws in Pakistan. In 1947, when Pakistan came into existence, the country inherited a body of Muslim personal laws, commonly referred to as Anglo-Mohammadan law, which was in the process of being returned to the principles of classical Islamic law. The birth of Pakistan in 1947 was not the outcome of demand for the creation of an Islamic state, but implicit in the demand for a homeland for British India's Muslims was a promise that Muslims would be governed by Islamic family laws not based on local, and potentially un-Islamic, customs and usages, but the principles of sharia.

From today's perspective somewhat counter-intuitively, the majority of conservative and orthodox Islamic parties and movements refused to join Jinnah's call for the creation of Pakistan, instead aligning themselves with the Indian National Congress or staying out of politics altogether. Although Jinnah himself avoided any firm promise to create an Islamic state, the Muslim League regularly used religious appeals in its provincial elections campaigns during the 1940s, and it also endeavored to bring Islamic scholars into its ranks. However, these attempts were only partially successful. In October 1945 the Muslim League managed to convene a conference in Calcutta of several prominent members of the *ulama*. The outcome of this conference was the founding of the All-India Jamiaat-i Ulema-i Islam, which organised party conferences in support of Pakistan (Pirzada 2000: 10). Its president, Allama Uthmani, later became a member of the Pakistan Constituent Assembly, having run on the Muslim League ticket in the elections of 1946.

1947: The creation of Pakistan

Pakistan emerged as an independent state on 15 August 1947, the same day as its neighbour India.[10] As a matter of law, the new state owed its existence to the provisions of a British act of parliament, the Indian

Independence Act of 1947. This act not only granted independence, but also determined the shape of the new nation's legal system immediately following independence, providing in section 18(3) for the continued validity of all colonial laws. For a British parliament to make provisions for the content of a legal system of an independent state would seem to run counter to the very notion of sovereignty, were it not for section 6 of the same act, which provided in clear terms that 'The legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation'.

Having been granted full powers to pass any law, Pakistan – at least as a matter of law – was a fully independent and sovereign state at the stroke of midnight of 15 August 1947. In actual practice, however, it was section 18(3), rather than section 6, of the Indian Independence Act that would occupy the more prominent role in the development of Pakistan's legal system. For almost ten years, until the adoption of the Constitution of 1956, the country was governed by the provisions of the 1935 Government of India Act, as modified by the Indian Independence Act, and any law passed by the Constituent Assembly,[11] which also acted as the country's legislature during this long period of transition. The odd result was that Pakistan, having come into existence after a long and hard struggle to establish a homeland for India's Muslims, continued to be governed by a legal system that had been adopted with hardly any modifications from its colonial past. There was no *tabula rasa*, with the slate being wiped clean of the vestiges of colonialism at the earliest opportunity following independence, to be replaced by Islamic law, or an Islamic form of government, in whatever shape.

Was the decision to continue to be governed by colonial laws made by default, or had this result been planned by the founders of Pakistan? This question may seem academic, given that Pakistan has been independent for over sixty years, were it not for the fact that there is still no political consensus on the role of Islam in the legal system. The lack of consensus becomes visible in the frictions and controversies that accompany any measure designed to introduce even minor changes to the Islamic criminal laws promulgated in 1979, or in the debates over the introduction of an Islamic banking and finance system. On one side of the spectrum are those who argue that Pakistan had been founded as an 'ideological state', to be governed by Islamic law. From this perspective, any attempt to change this legacy would amount to a denial of the legitimacy of the state itself, a betrayal of those Muslims who had been willing to sacrifice their lives for the creation of an Islamic state. Conversely, there are those who argue that although Pakistan was founded as a homeland for the Muslims of British India, it was conceived as a secular rather than a religious state (Metcalf 2004: 21). Writing in 1955, some eight years after Pakistan gained independence,

G.W. Choudhury observed that the failure to adopt a constitution was due to the fact that 'the framers of the constitution were faced with the problem of producing a document that would be satisfactory to secularists and sectarians alike' (Choudhury 1955: 591).

The framing of Pakistan's constitution: the Objectives Resolution

The Objectives Resolution was the first product of the Constituent Assembly of Pakistan and was meant to guide the drafting of Pakistan's first constitution. In structure and tone it mirrored that of India's Objectives Resolution,[12] but its references to Islam were regarded controversial, especially amongst the non-Muslim members of the Constituent Assembly.[13] From today's perspective, the discussions surrounding the adoption of Objectives Resolution have a certain air of *déjà vu*, given that the principle arguments, and tensions, have remained the same over the past 60 years: is Pakistan's legal order a secular one, with the state taking no interest in the religions of its citizens apart from allowing them to practice them? Or is Pakistan an Islamic state, which gives preferential treatment to its Muslim citizens?

The main concern for non-Muslims was not the promise that Muslims should be enabled to order their lives in accordance with Islam – after all this had been the colonial practice as visible in the system of personal laws for both Muslims and Hindus – but the Objectives Resolution's opening sentence which provided that: 'Whereas sovereignty over the entire universe belongs to God 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; This Constituent Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent State of Pakistan.' The non-Muslim members of the Constituent Assembly claimed that the Objectives Resolution envisaged the creation of an Islam state and was in breach of the promises made by the founder of Pakistan, Mohammed Ali Jinnah, who had died prematurely on 11 September 1948 and who had taken no part in the drafting of the Resolution. His vision, they charged, had been to create a secular state in which religion was to be regarded as an entirely private matter. The leader of Pakistan's Congress Party, Chattopadhaya, referred to his heritage as follows:

> Now what will be the result of this Resolution? I sadly remind myself of the great words of the Quaid-i-Azam that in state affairs the Hindu will cease to be a Hindu; the Muslim shall cease to be a Muslim. But alas, so soon after his demise what you do is that you virtually declare a State religion! You are determined

> to create a *Herrenvolk*. It was perhaps bound to be so, when unlike the Quaid-i-Azam—with whom I was privileged to be associated for a great many years in the Indian National Congress—you felt your incapacity to separate politics from religion, which the modern world so universally does. You could not get over the old world way of thinking. What I hear in this Resolution is not the voice of the great creator of Pakistan, the Quaid-i-Azam (may his soul rest in peace), nor even that of the Prime Minister of Pakistan, the Honourable Mr. Liaquat Ali Khan, but of the *Ulemas* of the land.[14]

The concerns of the Hindu members of the Constituent Assembly were to prove entirely correct, albeit that the erosion of the rights of minorities and the creation of an Islamic state took place over a long period of time. Pakistan's first constitution was only completed and adopted in 1956. Until then, the laws inherited from British India served as a temporary constitution and constituted the bulk of the new country's substantive laws.[15]

The Constitution of 1956

Having adopted the Objectives Resolution against the wishes of its minority members, the Constituent Assembly embarked on the task of drafting the constitution. It turned out to be an arduous and controversial undertaking. In the period from 1949 and 1956 no less than three draft constitutions were prepared and the Constituent Assembly itself was dismissed and re-constituted on a different basis in 1954. The demarcation of the role of Islam in the new constitutional order was one reason for the slowness, but a more important cause of the delay was the difficulty to unite West and East Pakistan. The two units of Pakistan were separated by more than one thousand miles – by ship it was quicker to get from Karachi to Marseille than to Chittagong – and the physical divide was matched by differences in culture, language, customs, and economic conditions.

A first draft constitution was produced in September 1950. Its Islamic provisions were purely symbolic: the Objectives Resolution was to serve as a preamble, and there was to be 'compulsory teaching of the Holy Quran to the Muslims' (Choudhury 1967: 34). Under pressure from an increasingly vociferous Islamic opposition the subsequent drafts of the constitution incorporated the principle that the laws of Pakistan should be in accordance with Islam. Two possible models emerged to fulfill this requirement. Firstly, the creation of a mechanism of judicial review which would allow the higher courts to strike down laws deemed not to be in accordance with Islam. In the alternative, the

obligation to make the body of substantive laws conform with Islam could be imposed on the law-makers themselves, i.e. parliament.[16]

The second draft constitution, presented to the Pakistani public in December 1952 adopted the latter approach. Its Islamic provisions were elaborate: a chapter on 'Directive Principles of State Policy' enjoined the state to eliminate *riba*,[17] to prohibit 'drinking, gambling and prostitution in all their various forms', to promote and maintain Islamic moral standards, to promote the understanding of Islam, and to bring 'the existing laws into conformity with the Islamic principles' (Choudhry 1967: 27). None of these directives could be enforced in a court of law, but the draft constitution provided in a separate chapter, headed 'Procedure for Preventing Legislation Repugnant to the Quran and the Sunnah', a mechanism to ensure that all legislation was in accordance with Islam. This mechanism envisaged the setting up of a 'Board consisting of not more than five persons well versed in Islamic Laws' (Choudhry 1967: 27), which would examine a law on the basis of Islam. Its recommendations could be overturned by a simple majority of a joint sitting of the two houses of parliament. Thus, the Islamic repugnancy clause only applied to prospective laws but left the legacy of colonial laws undisturbed.

While these provisions satisfied the Islamists, the second draft constitution sparked protests from West Pakistan, which took objection to the parity envisaged by the draft. The controversies and disputes surrounding the delicate matter of the Islamic character of the newly founded state were matched by an equally serious disagreement about the relations between East and West Pakistan. The former was the more populous of the two units, and if ever there were national elections based on an adult franchise, East Pakistan's politicians would in all likelihood be in control of the government of Pakistan.[18] The attempts to reconcile the conflicting interests and jealousies between East and West Pakistan in a constitutional document proved to be a major stumbling block on the road towards a constitution. A third draft constitution was framed by the Constituent Assembly in the course of 1953 and 1954. Intensely watched by the world press, the Constituent Assembly reconvened on 7 October 1953, and a month later, on 7 November 1953, the first legally binding decision was taken, though in the absence of the Hindu members, who had walked out in protest: Pakistan became an 'Islamic Republic'. A year later, on 6 October 1954, the Constituent Assembly adopted the third draft constitution. It retained the requirement that the legislature should not 'enact any law which is repugnant to the Holy Quran and the Sunnah' (Choudhury 1967: 199) but provided that 'the Supreme Court alone should have jurisdiction for determining whether or not a particular law is repugnant to the Holy Quran and the Sunnah'. The third draft constitution was favourably received by the

Pakistani press, and even the Jamaat-i Islami, the main Islamic party, approved of it as being in accordance with Islam. On 24 October 1954, just days before the Constituent Assembly was to reconvene, Governor General Ghulam Muhammad announced its dissolution, stating that 'the Constituent Assembly as at present constituted had lost the confidence of the people and could no longer function' (Binder 1961: 361).

A second Constituent Assembly, whose members were elected from the existing provincial legislative assemblies, approved a fourth draft constitution on 8 January 1956. This constitution was promulgated on 23 March 1956. The 1956 Constitution adopted some of the Islamic features of the first draft constitution. The Objectives Resolution became the preamble, and the Islamic provisions contained in the Directive Principles of State Policy remained largely unchanged. The same applied to the qualifications of the head of state, who had to be a Muslim, and to the repugnancy clause. The latter, however, had become wider, providing that no law should be enacted that was contrary to Islam, but also that existing legislation should be brought into conformity with the injunctions of Islam. This seemingly stringent provision was, however, rendered legally ineffective because it could not be enforced by a court. Instead, it was to be implemented by a board of experts who would report their recommendations to the National Assembly within five years. There was no obligation on the National Assembly to adopt these recommendations. This rather tame Islamisation measure, rather oddly, was approved by the religious parties, including the Jamaat-i Islami, which had by then become wary of the Supreme Court being given jurisdiction to carry out this exercise (Binder 1961: 372). Chief Justice Muhammad Munir had shown his secular credentials in his Report on the Punjab Disturbances, issued in 1954, which had roundly condemned Islamic extremism.[19]

The Constitution of 1962

The life of the 1956 Constitution ended abruptly on 7 October 1958, following a *coup d'état* instigated by General Ayub Khan, who was declared chief martial law administrator by President Iskander Mirza. None of its Islamic provisions had been implemented. The 1956 Constitution was replaced by a Laws (Continuance in Force) Order, 1958, which in turn was replaced by the Basic Democracies Order, promulgated on 27 October 1959. After four years of martial law a new constitution came into force on 1 March 1962.

The Islamic provisions of the 1962 Constitution were largely modeled on the pattern of its 1956 predecessor, but there were important differences in that many references to Islam had been omitted. Most glaring was the change in the official name of the country: Pakistan had

become simply the Republic of Pakistan.[20] In the text of the Objectives Resolution as incorporated in the 1962 Constitution, the original provision that 'the authority exercisable by the people within the limits prescribed by Him is a sacred trust', was shortened to 'the authority exercisable by the people is a sacred trust', thereby removing any limitation on the legislative powers of the people. Pressure from Islamists, represented by the Jaamat-i-Islami and the Jamiat Ulema-i-Islam, forced Ayub Khan's government to pass the Constitution (First Amendment) Act 1963 which restored the original wording of the Objectives Resolution and renamed the country as 'Islamic Republic of Pakistan'.[21] Like its 1956 predecessor the 1962 Constitution made the constitutional provision that all laws should be in accordance with Islam unenforceable. Along with other Islamic provisions, it was contained in a chapter on 'Principles of Policy' and thus unenforceable. An Advisory Council of Islamic Ideology was to prepare annual reports on the Islamic legitimacy of new and existing laws, but such advice was not binding on parliament.[22] In addition, the 1962 Constitution provided for the setting up of an Islamic Research Institute,[23] which was to 'undertake Islamic research and instruction in Islam for the purpose of assisting in the reconstruction of Muslim society on a truly Islamic basis'.[24] The establishment of the Islamic Research Institute was part of a deliberate attempt to wrestle from the Islamists, chiefly Mawlana Mawdudi's Jamaat-i-Islami, the monopoly over the interpretation of Islam. Headed by Fazlur Rahman, an internationally known and respected scholar of Islam, the Islamic Research Institute propagated a modernist, rational interpretation of Islam (Rahman 1970). Ayub Khan's attempt to inculcate a modern vision of Islam was accompanied by reforms of Muslim personal law[25] and the imposition of government control over Islamic charitable trusts (Malik 1990). Throughout his tenure, Ayub Khan was locked in battle with the Jamaat-i-Islami, imprisoning its leader Mawdudi several times and attempting to dissolve the party altogether.

The period of 1962 until 1971 was marked by the war with India in 1965 over the disputed territory of Kashmir and the secession of East Pakistan. As anticipated in the purely advisory provisions of the 1962 Constitution, there was no serious attempt to implement the constitutional requirement to make all laws conform with Islam. In contrast , the 1962 Constitution protected against judicial review the most significant reform of Islamic family law ever witnessed in the Indian sub-continent, namely the Muslim Family Laws Ordinance 1961 (MFLO) (see 9.6).

The MFLO has its origins in the recommendations of the Commission on Marriage and Reform, established in 1955, which contained wide-ranging proposals to reform Muslim personal law. The MFLO reformed the law governing divorce, marriage and inheritance.

Under section 7 of the MFLO a divorce is only valid if the husband notifies both his wife and the Union Council, a local government body, of the divorce and if at the expiration of 90 days after receipt of the divorce the couple has not been reconciled. The Union Council is asked to constitute an arbitration council to assist with the efforts to prevent the dissolution of the marriage. Non-compliance with these requirements renders a divorce invalid. In respect of polygamous marriages, the MFLO requires a husband who wants to marry a second wife to obtain the permission of his first wife as well as that of the Union Council. Failure to do so does not render the polygamous marriage invalid but exposes the offender to penal sanctions and allows his first wife to obtain a divorce. In respect of inheritance law, section 4 of the MFLO allows an orphaned grandchild to inherit from his or her grandfather. All three reform measures were opposed by Islamists but given that the MFLO was promulgated in the form of an ordinance during the period of martial law, their protests were futile.

The Muslim Personal Law (Shariat) Act 1962 was the only other law passed during the Ayub Khan era which concerned Islamic law. As discussed above, this Act extended the application of the 1937 Act to agricultural land. Legislation reforming the management of Islamic trust properties in the form of the West Pakistan Auqaf Properties Ordinance 1959 was meant to weaken the influence of traditional elites and the *ulama* (Braibanti 1965: 87).

The period occupied by the 1962 Constitution also witnessed the emergence of an increasingly assertive judiciary, which insisted on its right to review the constitutional validity of all laws. However, this emphasis on the power of judicial review was not as yet linked with any programme of Islamisation but concerned the rights of the judiciary to enforce fundamental rights.[26]

9.3 The period from 1965 until 1985

The birth of Bangladesh and the Islamisation of Pakistan

The partition of Pakistan

While managing to keep the upper hand against the Islamists, Ayub Khan was not so successful in the conflict with India over the disputed territory of Kashmir. Pakistan's attempt to gain control over the Indian state of Jammu and Kashmir in the summer of 1965 quickly escalated into a full-blown war with India, which saw both countries' forces entering each other's territory. The short war, which started on 6 September 1965, and ended about two weeks later with a ceasefire, marked the beginning of the end of Ayub Khan's regime. His opponents saw in the

ceasefire a humiliating defeat for Pakistan, and long-held grievances erupted in civil unrest, especially in East Pakistan. The founding of the Pakistan People's Party in 1967 served to unite popular opposition to the regime in West Pakistan, but failed to unite the country. In East Pakistan, Mujibur Rahman's Awami League dominated the political landscape with an increasingly insistent demand for provincial autonomy. On 25 March 1969, Ayub Khan resigned from office and handed over power to the army chief of staff, General Yahya Khan. The handover was in direct violation of Ayub Khan's 1962 Constitution. Yahya Khan was to rule Pakistan until December 1971. By then, East Pakistan had seceded from Pakistan in a bloody civil war to become the independent nation of Bangladesh, and Zulfikar Ali Bhutto and his Pakistan People's Party had emerged as the main political force in West Pakistan.

The Constitution 1973

Because of his party's success in West Pakistan in the 1970 elections, Zulfikar Ali was able to build political consensus for the drafting of a new constitution. In April 1972 an interim constitution was introduced, and on 14 August 1973, following an occasionally acrimonious debate, the National Assembly in its capacity as Constituent Assembly adopted a new constitution - hence referred to as 'Constitution 1973' - for what remained of Pakistan. The Jaamat-i-Islami reluctantly approved the new constitution, conceding that they did not have the means to stop its passage (Pirzada 2000: 79). At first glance the Constitution 1973 replicated the approach taken by its predecessors. The basic structure of non-justiciable constitutional provisions urging the state to bring all laws into conformity with Islam and a provision for the setting up of an advisory body on Islamic law was retained and like its predecessors the new constitution contained a separate chapter headed 'Islamic Provisions' that provided for the setting up of a Council of Islamic Ideology.[27] In line with constitutional precedent, the council had an advisory role and enjoyed no inherent jurisdiction to ensure that its recommendations were acted upon by parliament. Similarly, no law could be challenged by way of judicial review on the ground that it had been found to be repugnant to Islam by the Council of Islamic Ideology. However, the increasing influence of Islamic parties is visible in the constitution's additional references to Islam, which had been missing from the previous constitutions. Both the Prime Minister and the President had to be Muslims but the oath to be taken by them included a statement to the effect that they believed in 'the Prophethood of Muhammad (peace be upon him) as the last of the Prophets and that there can be no Prophet after him, ...'.[28] This provision was intended to prevent Ahmadis from assuming

these offices. In a further affirmation of the religious foundation of the constitutional order Islam was declared the state religion.[29]

Using Islam: The Ahmadis

The Constitution 1973 shared the fate of the Constitution of 1962 in that shortly after coming into force it was amended as a result of pressure from Islamic parties. This time, however, the amendments were more than just symbolic measures of appeasement but involved the declaration of the members of the Ahmadiyya community as non-Muslims. Under the Constitution (Second Amendment) Act 1974 Ahmadis were included in the list of non-minorities for the purposes of representation in the provincial assemblies[30] and an amendment to Article 260 of the Constitution 1973 defined a Muslim as:

> A person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon Him), the last of the Prophets or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon Him), or recognises such a claimant as a prophet or a religious reformer, is not a Muslim for the purposes of the Constitution or Law.[31]

This constitutional amendment relegating the members of the Ahmadi community to the status of non-Muslims is evidence of two connected developments: firstly, the increasing strength of conservative Islamic parties which enabled them to control the streets under the banner of Islam and instigate large scale disturbances whenever they declared Islam to be under threat. Secondly, they reveal the growing influence of international Islamic movements in Pakistan. Additionally, the amendment also gives credence to the claim that Bhutto and his PPP exploited appeals to Islam to bolster flagging support whenever it was expedient to do so (Nasr 1994: 181-182). At first glance, the re-definition of Ahmadis as non-Muslims brought to a conclusion a demand made by Islamic parties since before independence. The use of the phrase 'finality of the Prophethood' in the new article 260 (3) was of significance, since it mirrored the name of the Council for Protecting the Finality of Prophethood (*Tahaffuz-i-Khtam-i-Nabuwawat Tehrik*), formed as early as 1952 to demand the removal of Ahmadis from the fold of Islam (Pirzada 2000: 21). Viewed from this perspective the amendment in 1974 marked the destination of a development which had been pushed by Islamic parties for two decades.

However, a closer look reveals that the country-wide agitation and disturbances of early 1974 had a new quality. The Ahmadi issue had been

dormant and sitting in 'cold storage' ever since 1954 and for the preceding twenty years there had been no agitation for the exclusion of Ahmadis from the pale of Islam (Kaushik 1996: 37). However, the return of democracy in the early 1970s gave fresh impetus to Islamic parties, who were by now receiving buoyancy from the emergence of the international Islamic 'awakening'. The agitation to declare Ahmadis non-Muslims which gripped Pakistan in the first half of 1974 had been preceded by the Islamic Summit, held in Lahore in February 1974, in the course of which King Faisal promised Bhutto economic aid in return for resolving the Ahmadiyya issue. Leaders of the Jaamat-i-Islami and the Majlis-i-Ahrar had called on Saudi Arabia to put pressure on the Bhutto government to address the Ahmadi issue (Kaushik 1996: 43). A new round of disturbances erupted in 1974, leading to the formation of the 'All Parties Khatm-i-Nubuwwat Action Committee', which represented not only Islamic parties but also other opposition parties, and a country-wide strike on 14 June 1974. Bhutto initially rejected the demands of the Action Committee but on 30 June 1974 agreed to form a Special Committee of parliament to discuss the issue and allowed PPP members a free vote on the issue. On 7 September 1974 the bill to amend the Constitution 1973 was unanimously passed by the National Assembly, with Bhutto declaring that 'the first principle of the PPP was "Islam is our Faith"' (Pirzada 2000: 124). The internationalisation of the Islamic movement during the Bhutto era continued with the holding of the International Seerat Conference in March 1976, sponsored by the Pakistani government. In his opening address, Bhutto stressed the importance of the concept of the finality of Prophethood (Kaushik 1996: 53). The banning of the drinking of alcohol and the declaration of Friday as a holiday instead of Sunday followed in 1977.

Despite his promises to improve the conditions of Pakistan's poor, Bhutto had disappointed them. There were no meaningful land reforms and Bhutto was unable to reduce the power of the military, the bureaucracy and the landed oligarchy, which had dominated Pakistani politics ever since independence. His appeals to religion were therefore part of a 'balancing act between various interest groups' which left the state paralysed and enabled religious parties, which had done badly in the 1970 elections, to gain greater visibility and importance (Nasr 1994: 76). In preparation for the 1977 elections opposition parties formed the Pakistan National Alliance, which included also Islamic parties such as the Jamaat-i-Islami, and which campaigned against Bhutto using appeals to Islam and blaming the loss of East Pakistan on Bhutto's secularism and his personal moral turpitude.

Bhutto's PPP won the elections but the victory was short-lived. Allegations of vote-rigging ended in popular unrest and riots. Negotiations between Bhutto and the Pakistan National Alliance,

mediated by Saudi Arabia, were however cut short. On 5 July 1977, Bhutto was removed from power by a *coup d'état* led by General Zia ul-Haq.

Islam and martial law: the Zia era

Zia's declaration of martial law and the subsequent introduction of a wide range of legal measures marked the beginning of the first serious attempt by a government to Islamise the legal system of Pakistan. The motivation behind Zia's relentless drive to make Pakistan an Islamic state, were two-fold. Firstly, it provided a justification for his coup and his failure to hold elections: according to Zia, successive governments had failed to make Pakistan an Islamic state. Assuming the role as the saviour of Pakistan's destiny, Zia resolved to return the country to democracy only as and when it had been turned into a truly Islamic state. Secondly, by taking command of the Islamisation project, Zia was able to sideline Islamic parties and take control of the Islamic discourse. By adopting the agenda of the Islamists, Zia effectively silenced them.

Islamisation became the primary instrument of state formation and a means to destroy the popular appeal of the PPP, whose leader Zulfikar Ali Bhutto was executed in 1979, following a murder conviction. International isolation turned into support for Zia's regime when the Soviet Union invaded neighbouring Afghanistan in 1979, turning Zia's regime into an important ally of the United States. Zia's Islamisation project, in the first two years used for purely domestic purposes, now became a potent weapon in the fight against communism in neighbouring Afghanistan. Pakistan not only provided shelter to millions of Afghan refugees, but also a staging ground for the Mujahedin, who, secretly financed and armed by the United States, fought the communist enemy in the name of Islam.

Initially, Islamisation proceeded tentatively. The first concrete measure was the creation of separate electorates for non-Muslims in September 1978. This was followed by the promulgation of the Hudood Ordinances in 1979 and the Zakat and Ushr Ordinance in 1980. The promulgation of the Hudood Ordinances introduced Islamic criminal law for the first time since it had been gradually displaced during British colonial rule in favour of English criminal law. The Islamisation of the legal system was accompanied by a concerted effort to Islamise Pakistani society, culture and economy. Islamic symbolism, public floggings, the enforcement of fasting and prayer, the building of mosques and financial support for private, religious schools, known as *madrasas*, were some of the many measures taken by Zia's regime to control the minds and hearts of the people.

Challenges to Zia's regime emerged in the early 1980s when the theme of Islamic solidarity showed the first strains. With its foundations firmly in Sunni Islam, the Islamisation measures strained the relationship between Sunni and Shias, contributing to sectarian strive between the two communities which continues to the present. Ethnic divisions, especially those between Punjab and Sindh, fuelled the Movement for the Restoration of Democracy, founded in 1983 by Benazir Bhutto, who while in exile had succeeded her father Zulfikar Ali Bhutto as the leader of the PPP. In 1984 Zia held a referendum to show public support for his Islamisation measures and to confirm him as President. Elections on a non-party basis followed in 1985, with the new parliament protecting his position by passing the Constitution (Eighth) Amendment Act 1985. The constitutional amendment protected all Islamisation measures introduced by Zia against judicial review and secured his position as President by introducing a constitutional provision which allowed the President to dismiss a government.[32] The elections were won by the Pakistan Muslim League (PML), a party with a strong basis amongst the landholding classes of Punjab. In 1988, Zia dismissed the PML government, following disagreement over the introduction of further Islamisation measures. Shortly after the promulgation of the Shariat Ordinance 1988, Zia died in an aircrash in August 1988. The Zia era had ended, but the effects of his Islamisation measures continue to be felt today.

The period of 1977 to 1988 is most visibly associated with the suppression of the rights of women, in particular in the form of the Zina (Enforcement of Hudood) Ordinance 1979, and of religious minorities. Ahmadis, who had already been declared non-Muslims in 1974, were now made subject to an Ahmadi specific criminal law, which made it a criminal offence for Ahmadis to 'pose' as Muslims.[33] Less visible, but equally important, was the Islamisation of the judiciary and the legal discourse.

Islam and Pakistan's judiciary

Until Zia's coup in 1977 a self-contained, professional and socially conservative judiciary with deep educational roots in the English common law had administered a legal system that despite frequent constitutional breakdowns and political upheavals had retained its colonial shape. At the time of independence the entire colonial legal system had been adopted by Pakistan and its main elements, the Anglo-Indian codes, had continued in force with hardly any changes. Constitutional provisions asking the state to bring all laws into conformity with Islam had been unenforceable and the judiciary itself only rarely left the safety of the colonial legacy to explore the landscape of Islamic law. On the few

occasions when they did, judges engaged in the reform of family law, for instance by extending the right of Muslim women to seek a judicial divorce of their marriage,[34] or referred to Islam in order to assert democracy and constitutionalism[35] or applied Islamic law to areas of law not covered by statutory laws.[36] Neither the use of Islam in support of state building in the 1950s nor Bhutto's Islamic populism in the 1970s had affected the basic structure of the legal system or the composition of its higher judiciary.

The year 1977, however, also constitutes a watershed for Pakistan's judiciary. Implementing his totalitarian enterprise of Islamisation Zia endeavoured to bring the judiciary in line with his policies. Judges reluctant to endorse his rule were removed from the benches of the four high courts and the Supreme Court in 1977 and in 1981 and their power of judicial review curtailed. The weakening of the power of the higher judiciary was compounded by the creation of the Federal Shariat Court in 1980.[37] The new court was given the jurisdiction to review the validity of laws, either on its own motion or by being petitioned to do so by a member of the general public, on the basis of Islam. Excluded from its jurisdiction were the constitution, Muslim personal law and any law relating to the procedure of any court or tribunal.[38]

9.4 The period from 1985 until the present

The rise and fall of democracy

New orientations of judicial Islamisation

The Federal Shariat Court proceeded to review the Islamic vires of the entire body of Pakistan's codified law. Whilst the vast majority of laws survived the examination intact, there were nevertheless important exceptions. The most important relate to criminal law and banking law. In respect of the former, the Federal Shariat Court held that provisions covering the offences of murder and assault were contrary to Islam, forcing the government to base this area of law on Islamic principles.[39] The charging of interest was declared repugnant to Islam in 1992.[40] In addition, the FSC formulated several Islamic fundamental rights, amongst them 'the right to justice' and 'the right to be heard', which were used as a basis for the judicial review of laws.

In a parallel development, some judges in the 'secular' high courts also began to engage in an Islamisation drive of their own and began to review laws on the basis of Islam. Chief among them was Justice Tanzil-ur-Rahman, a justice of the Karachi High Court and former chairman of the Council of Islamic Ideology, who in a series of decisions invalidated parts of the MFLO[41] and declared the charging of

interest un-Islamic.[42] The basis for these decisions was article 2A of the Constitution 1973. Introduced as part of the Eighth Amendment in 1985, article 2A incorporated the provisions of the Objectives Resolution into the main body of the constitution. According to Justice Tanzil-ur-Rahman:

> [....] the Courts in Pakistan are bound by the Constitution, and any law repugnant to the Constitution is void. The principles and provisions of the Objectives Resolution, by virtue of Article 2-A, are now part of the Constitution and justiciable. Any provision of the Constitution or law, found repugnant to them, may be declared by a superior Court as void [...].[43]

If allowed to continue, the newly found jurisdiction could have fundamentally changed the legal system of Pakistan because unlike the FSC there were no limitations imposed on the self-arrogated powers of judicial review. By the early 1990s there were serious concerns that the legal system might unravel if judges like Justice Tanzil-ur-Rahman were allowed to continue to invalidate laws on the basis of Islam. The Supreme Court decided to intervene, observing that the unrestrained judicial review in the name of Islam could lead to a situation where 'the very basis on which the Constitution is founded [...] could be challenged'.[44] In 1992, the Supreme Court ruled that apart from the FSC no other court had the power to invalidate laws, or indeed the Constitution 1973 on the basis of Islam.[45]

References to Islam nevertheless began to permeate the judgements of Pakistan's higher courts in relation to the emergence of public interest litigation. The term 'public interest litigation' denotes human rights cases which are brought in the public interest and not by a petitioner asking for the adjudication of a personal claim. Public interest litigation first started in India in the mid-1980s, but by the early 1990s it was being adopted by Pakistan's higher judiciary. What makes Pakistani public interest litigation cases unique is their frequent reliance on Islamic law, principally to widen the scope of constitutionally guaranteed fundamental rights. There is hardly any case concerned with the enforcement of fundamental rights in the 1990s which does not refer to Islam in some way. Justice Afazal Zullah can be singled out as one of the most outspoken and active proponents of this 'indigenisation' of Pakistan's constitutional law. In 1990 he introduced the higher judiciary's 'Scheme for the Protection of Human Rights of All Classes of Society in the Country', declaring that

> [the] Superior Judiciary has clearly emphasised the need for a genuine effort for the reconstruction of the Islamic concepts in

> this field [ie protection of human rights] and for evolving steps in an indigenous manner for guiding and motivating the citizens and the State for asserting, promoting and enforcing the legal rights of citizens guaranteed by Islam, the Constitution and the Law.[46]

On the whole the infusion of Islam into the human rights' jurisprudence was beneficial, but there was one important exception. In a case concerning the constitutional validity of the criminal law which made it an offence for members of Ahmadi to 'pose' as Muslims, the Supreme Court declared that the constitutionally guaranteed right to freedom of religion could be restricted in order to protect Islam.[47]

Islam and democracy

The death of Zia in 1988 ushered in a period of democracy which was to last until 1999, when General Pervaiz Musharraf staged a *coup d'état*. The decade of democracy was marked by the inability of the two main political parties, Benazir Bhutto's PPP and Nawaz Sharif's PML, to create stable and lasting governments. The PPP won the elections in 1988 but a dismissal of Benazir Bhutto's government by the President in 1990 enabled the PML to return to power. In 1993, it was the Nawaz Sharif's government's turn to be dismissed. In subsequent elections the PPP emerged with a slim majority. Benazir Bhutto's government lasted until 1996, when following another dismissal, Nawaz Sharif formed a government, albeit it for the last time. Perhaps unsurprisingly, Musharraf's coup in 1999 was largely unopposed by a population which had become disillusioned with the realties of a fragile democracy.

Of the two parties, it was only Nawaz Sharif's PML which sought to continue Zia's Islamisation policies. However, in practical terms the only legal change his regime brought about was in the form of section 4 of the Enforcement of Shari'ah Act 1991, which mandated judges to apply Islamic law to those areas not covered by statute (see 9.5). The other Islamisation measure, namely the introduction of Islamic criminal law relating to murder, in the form of the Criminal Law (Amendment) Act, 1997, constituted a significant change in the criminal law, but was not a result of any policy of Nawaz Sharif's government (see 9.7). The amendment had been required as a result of a decision of the Federal Shariat Court.

Whilst Nawaz Sharif was not able to follow with actions his repeated promises to make further progress with Islamisation, Benazir Bhutto was unable to fulfil her promise to remove some of these measures. Neither the laws discriminating against religious minorities nor the

controversial Hudood Ordinances were in any way amended, leave alone repealed, under her two governments.

The end of democracy: Musharraf's rule

In October 1999, the army deposed Nawaz Sharif through a *coup d'état* and General Pervez Musharraf, the then Chief of Army Staff, took over power. He immediately suspended the Constitution 1973 and through a decree made all existing legislation 'subject to the Orders of the Chief Executive'. As was the case with previous coups, the constitutional validity of Musharraf's actions was immediately challenged before the Supreme Court. Anticipating defeat, Musharraf promulgated the Oath of Judges Order 2000, requiring all judges of superior courts to take a fresh oath of office thereby swearing allegiance to the military and vowing not to challenge decisions taken under the military rule.[48] Those who refused to take the new oath were dismissed, leaving behind a judiciary that was purged of any dissent. The newly constituted Supreme Court duly endorsed the constitutional validity of Musharraf's coup, granting him three years before holding fresh national elections and allowing him to amend the constitution.[49] Until 2002, the provincial assemblies and the National Assembly were dissolved and Musharraf ruled through executive order. On 20 June 2001, Musharraf assumed the position of President of Pakistan. A year later, on 30 April 2002, he held and won a referendum, thus legitimising and extending his presidency for five years.

Suspended from the Commonwealth and internationally isolated, Musharraf's fortunes improved with the terrorist attacks in the United States on 11 September 2001: he immediately declared his support for the U.S. in its fight against global terrorism, pledging Pakistani support for the fight against the Taliban and Al Qaeda.

Musharraf's next hurdle appeared when in 2002 the three year period granted to him by the Supreme Court came to an end and he faced the prospect of having to hold elections. In order to remain in office, wide-ranging amendments to the Constitution 1973 were required, especially in respect of the powers of the President to dismiss an unruly parliament. On 21 August 2002, Musharraf promulgated the Legal Framework Order 2002 (LFO). The LFO contained numerous amendments to the Constitution 1973, widely regarded as 'undermining the parliamentary system of government and provincial autonomy' (Khan 2009: 660). The LFO revived the controversial Article 58(2)(b) of the Constitution 1973, allowing the President to dissolve the National Assembly at his discretion, introduced a National Security Council consisting of members of the armed forces,[50] and validated all laws made by the Musharraf regime.[51]

National Assembly elections followed in October 2002, resulting in a thin victory of a splinter party of the Muslim League, the PML-Quaid-e-Azam (PML-Q), which was supporting Musharraf. Pakistan's two leading politicians, Nawaz Sharif of the PML, now called the PML-Nawaz, and Benazir Bhutto of the PPP, were prevented from contesting the elections. Following a criminal conviction for the attempted hijacking of Musharraf's plane, Sharif was allowed to escape imprisonment and to settle in Saudi Arabia, on the condition that he would not return to the country for a period of ten years and would not participate in Pakistani politics. By this time, Benazir Bhutto had left Pakistan in order to avoid having to answer charges of corruption. Despite Bhutto's absence, the PPP came second. A new alliance of religious parties, which had united under the name of Muttahidda Majlis-e-Amal (MMA), came in third. Whilst trailing in the national elections, the MMA scored resounding victories in the relatively sparsely populated province of Baluchistan and in the North-West Frontier Province (NWFP). This victory was attributed to the anger in the tribal areas over Pakistani aid to the American-led operation against the Taliban in Afghanistan, as well as to resistance against the autocratic rule of Musharraf and the often harsh methods employed by the Pakistani army in fighting Islamist insurgents (Hilton 2002). The MMA won an absolute majority in the NWFP and immediately attempted to introduce provincial legislation to locally implement the sharia.

The unexpectedly strong showing of the parties opposed to Musharraf led to an impasse in the National Assembly, because they refused to take an oath under the provisions of the LFO. For over a year no business could be conducted, until December 2003 when an alliance of the MMA and the PML-Q passed the Constitution (Seventeenth) Amendment Act 2003. This amendment incorporated the provisions of the LFO into the Constitution 1973.

However, the support of the MMA in getting the Seventeenth Amendment passed had been made conditional on General Musharraf resigning as Chief of Army Staff at the end of 2004, thereby honouring the constitutional prohibition on the President holding any other office of profit.[52] Musharraf reneged on his promise, with political parties close to him passing the President to Hold Another Office Act 2004 on 14 October 2004.

The decline of President Musharraf's fortunes began in 2005 when the government's attempt to privatise one of the largest nationalised industrial enterprises, the Pakistan Steel Mills Corporation, was declared unconstitutional by the Supreme Court.[53] This was the first time in seven years that the Supreme Court had taken a stance against an action of the government. The case was heard by a nine-member bench of the Supreme Court, which included the Chief Justice Ifthikar Chaudhry,

who had assumed this position on 30 June 2005. Other cases followed, with the Supreme Court and some of the high courts taking up cases of alleged human rights violation *suo moto*, i.e. on their own motion.

The ebbing away of judicial support for his regime posed a problem for Musharraf whose tenure as President was coming to an end in 2007. He needed the Supreme Court's support if he was to be allowed to seek re-election whilst retaining the position of Chief of Army Staff. Musharraf decided to act against the Chief Justice on 9 March 2007, when he ordered him to resign or face proceedings for misconduct. When the Chief Justice refused to resign, the government commenced proceedings against Chaudhry before the Supreme Judicial Council. Musharraf had, however, underestimated the public reaction against the suspension of the Chief Justice. Nationwide protests and a sustained media campaign for his reinstatement commenced. Meanwhile, the Supreme Court stayed the proceedings of the Supreme Judicial Council on 7 May 2007. Two months later, on 20 July 2007, the Supreme Court issued an order setting aside the reference against Chaudhry and restoring him to the position of Chief Justice.[54]

Musharraf's position had been weakened by the reinstatement of the Chief Justice and during the summer of 2007 Pakistan saw the first stirrings of political change. By the end of 2007 both Musharraf's term as President would come to an end, and national and provincial assembly elections were due to be held. There were indications that the two politicians who had dominated Pakistani politics in the 1990s, former Prime Ministers Benazir Bhutto and Nawaz Sharif, were preparing themselves to return to Pakistan in order to participate in the parliamentary elections scheduled for January 2008. In August 2007, Musharraf began secret consultations with Benazir Bhutto on a possible power-sharing deal. In the meantime, Nawaz Sharif began to prepare the ground for his return to Pakistan by challenging the legality of his exile.[55] The Supreme Court allowed his petition, holding that 'no constraint can be placed on a Pakistani citizen to return to his country under Article 15 of the Constitution'.[56]

Towards the end of 2007, Musharraf's position seemed to improve. On 28 September 2007, the Supreme Court dismissed a petition that had challenged the legality of Musharraf running for re-election as President whilst retaining his post as head of the armed forces. The path was now clear for him to seek re-election. On 6 October 2007, he won the vote of the country's legislators with an overwhelming majority and commenced his second term as President.

However, the victory was flawed by the fact that the two main opposition parties had boycotted his re-election. Furthermore, on 17 October 2007 the Supreme Court began hearings on the constitutionality of Musharraf's re-election. The political uncertainty was compounded by

the return of Benazir Bhutto from exile on 19 October 2007. Her return had been made possible by the promulgation of the National Reconciliation Ordinance 2007 on 5 October 2007, which provided her, and other politicians, with immunity from prosecution for corruption-related offences between 1986 and 1999 (Lau 2009).

On 3 November 2007 President Musharraf, faced with the real possibility that the Supreme Court might block his attempt to assume office as re-elected President, staged a second *coup d'état*, this time directed not against a democratically-elected government but against the country's higher judiciary.[57] With three short orders he imposed a state of emergency, suspended the constitution, and removed a large number of judges from the benches of the four high courts and the Supreme Court. On the same day, Musharraf issued the Provisional Constitution Order No. 1/ 2007, which resurrected the Constitution 1973 in a modified form. The Oath of Office (Judges) Order 2007 dismissed the entire higher judiciary but allowed those judges who, after having been invited to do so, agreed to take the new oath contained in a schedule of the Order to resume their functions. The new oath enjoined a judge to perform his or her functions in accordance with the Proclamation of Emergency and the Provisional Constitutional Order 2007. Of the judges of the Supreme Court, only five took the new oath. Chief Justice Chaudhry was not among them. An attempt to declare the Proclamation of Emergency unconstitutional in the form of a short order passed towards the end of the day on 3 November by a seven-member bench of the Supreme Court ended with the storming of the Supreme Court by armed forces and Chaudhry being placed under house arrest. Out of 95 judges of superior courts, only 32 took the new oath.[58] Musharraf's actions were challenged before the Supreme Court, but predictably, given that its members had taken the new oath, none of the claims was successful.

On 18 November 2007, President Musharraf resigned as Chief of Army Staff. The emergency was lifted on 15 December 2007[59] and with both Benazir Bhutto and Nawaz Sharif having returned to the country the election campaign for the parliamentary elections, scheduled for 8 January 2008, began. The impression of a return to normality was brutally shattered on 27 December 2007, when Benazir Bhutto was killed in a suicide bomb attack.

Postponed to 18 February 2008, the elections resulted in a clear victory of the two opposition parties, the PPP and the PML(N), with the PPP now being headed by Asif Zardari, the widower of Benazir Bhutto. The two parties entered into a power-sharing agreement and formed a coalition government. An agreed goal of the coalition was the restoration of the judiciary to its state before the proclamation of the November 2007 emergency. This agreement was, however, not adhered

to, and on 12 May 2008, the PML(N) left the coalition government. Three months later, on 18 August 2008, Musharraf, faced with impeachment proceedings, resigned as President. Presidential elections, held on 6 September 2008, resulted in a comfortable victory of Asif Zardari of the PPP.

The beginning of 2009 saw more political drama. Pakistan's legal profession had launched a national Lawyer's Movement, demanding the reinstatement of Chief Justice Chaudhry. Demonstrations at the end of February 2009 forced the PPP government to issue an executive order allowing Chief Justice Chaudhry to resume his office on 23 March 2009.

The gradual normalisation of public life is, however, far from complete. Attempts to broker a peace deal with the Taliban in the Swat valley broke down at the end of April 2009, prompting the government to attempt to dislodge them from Swat with military force.[60] Operations began in the beginning of May 2009, with an estimated 15,000 Pakistani troops deployed in the Swat valley. Military operations in Swat have been followed by an on-going military campaign against the Taliban to regain control of the tribal areas bordering Afghanistan.

In sharp contrast to the rise of the Taliban in remote areas of the country, in the first decade of 2000 Pakistan's elites have increasingly turned against the wave of Islamisation measures of both the 1980s and 1990s. An attempt by the MMA to introduce an Islamic ombudsman system in the North West Frontier Province was stopped in its tracks by the Supreme Court, who declared the bill to be unconstitutional.[61] The infamous Zina Ordinance 1979 was reformed in 2006 when the Protection of Women's Rights Act came into force. At the beginning of 2010 neither the government nor the main opposition party has expressed any desire to initiate measures to resume the Islamisation of the legal system. Instead, private media channels and national newspapers have began to engage with the topic of secularism, inspired by the decision of the Bangladeshi government to remove references to Islam from the Constitution of Bangladesh at the end of February 2010.[62]

9.5 Constitutional law

State ideology and constitution

The current constitution dates back to 1973. It has since been amended so many times that one can hardly refer to it as still being the same constitution as it was at its inception (Mehdi 1994: 71). However, despite many changes,[63] it has retained some of the basic features shared by all of Pakistan's constitutions. Most importantly, the Constitution

1973 is evidence of the partial success, and survival, of Jinnah's two nation-theory. The success must be described as partial since the Constitution 1973 marks the beginning of a re-constituted, smaller Pakistan, following the creation of Bangladesh in 1971. Nevertheless, it reflects the state ideology of Pakistan, denoting it as an Islamic republic and naming Islam as the state religion. At the root of the Constitution 1973 is, in the official terminology, Islam as the state ideology, which is founded on the historic wish of the Muslims of British India to form their own nation.

While having been created in the name of Islam, Pakistan has found it difficult to define the precise of role of Islam in the life of the nation. Was Pakistan a state created to enable Muslims to live in accordance with Islamic law, or was it to be a state which enabled Muslims not to live in a Hindu theocracy? In the case of the former, Pakistan's legal system would have to become an Islamic one. In case of the latter, no particular prescriptions or conditions for the role of Islam in the newly-founded state existed. Since the statements of Jinnah, the 'sole spokesman' of India's Muslims, on this issue were ambiguous, it is the country's own historical experience that has determined which role Islam was to play in the project of nation building.

Like any other state, Pakistan calls in its constitution for obedience to its laws. Throughout its history Pakistan has been facing challenges to its legitimacy from Islamic groups who have claimed that the principle duty of a Muslim is not to the state, or a constitution, but his religion. The difficulties and problems inherent in the attempts to demarcate and define of the role of Islam in Pakistan have led to a balancing act, with the state and its elites trying to control the Islamic discourse and to use it to their own advantage.

Controlling Islam and harnessing the forces of Islam for their own purpose has been problematic. In respect of law, the first of these problems concerns the normative foundation of the legal system. Should this foundation be based on the principles of Islam even if the constitution itself limits the role of Islam? Or is the fundamental norm located in the constitution itself, which provides for the basic powers of the state and primary rights of the citizens? The Pakistani state and its citizens have not been able to build a sustainable consensus about a formula which reconciles the secular and the religious elements within its constitutional order. Throughout the nation's history, appeals to Islam have been used to foster state formation and national unity. At the same time, the forces of Islamic radicalism, be it in the shape of Islamic parties or of Islamic insurgents like the Taliban, have been able to take advantage of the state's reliance on Islam: if Pakistan was founded in the name of Islam, then how could Pakistan's largely secular legal order be justified?

At present, it can be stated that the pendulum has swung decisively towards a more secular definition of the state. Gone are calls for Islamisation, and instead there is debate about human rights, the powers of the president and the future of the state itself, which is being destabilised by almost daily terrorist attacks, all committed in the name of Islam.

In 2010 it is the Constitution 1973 and not an ambiguous reliance on an Islamic state which holds the nation together. But it cannot be forgotten that within the Constitution 1973 there are numerous references to Islam, many of them constituting possible avenues for another wave of Islamisation, should the state and its leaders decide that that Islam needs to be resurrected for the survival of the nation.

The constitution and the rule of law

According to article 5(1) of the Constitution 1973, loyalty to the state is the basic duty of every citizen, article 5(2) stipulates that 'Obedience to the Constitution and the law is the inviolable obligation of every citizen. [...]', and article 6(1) provides that 'Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.' This set of provisions is concluded with article 6(2) which provides that 'Any person aiding or abetting acts mentioned in clause 1 shall likewise be guilty of high treason.'

The provisions calling for constitutional obedience are accompanied by Part II of the Constitution 1973, which contains constitutionally guaranteed fundamental rights. The most basic and important of these fundamental rights of the citizens are the ones to life and liberty (article 9), to equality before the law (article 25), to freedom of expression (article 19) and to freedom of religion (article 20). Importantly, the Constitution 1973 contains express provisions for the enforcement of these rights. Article 8(1) provides that 'Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.' Articles 184 and 199 respectively grant the Supreme Court and the provincial high courts the jurisdiction to declare laws and decisions null and void if they are judged to violate fundamental rights. The importance and reality of these two provisions is evidenced in the large number of public interest cases for the enforcement of these rights which have been brought before the higher courts. Interestingly, while these cases are based on fundamental rights, which appear in the Constitution 1973 without any reference to Islam, they often 'endorse Islamic principles of justice' (Lau 2006: 95-119). In many of these public interest litigation

cases, references to Islam and Islamic principles of justice fulfil the role that was previously played by 'principles of natural justice'. References to Islam have even been used to create new fundamental rights, such as the right of justice and an absolute right to be heard. The jurisprudence of Pakistan's higher judiciary demonstrates that a harmonic interplay between Islamic principles and human rights is possible, and that references to Islam do not as of necessity result in a violation of basic freedoms.

Islamic precepts as a basic norm

The dual character of the Constitution 1973 is revealed in its Islamic provisions, which establish the Islamic foundation of the nation and suggest that the precepts of Islam constitute the basic norm of the Constitution. Article 1, stating that Pakistan is an Islamic republic and that Islam is the state religion, is of a declaratory nature and has had little legal effect in the development of Pakistan's legal system. However, as could be seen further above, Article 2A, added to the Constitution in 1985, has been used extensively by Pakistan courts in the context of constitutional cases. Article 2A stipulates that '[t]he principles and provisions set out in the Objectives Resolution are reproduced in the Annex and hereby made substantial part of the Constitution and to have effect accordingly.' The Objectives Resolution 1949 was the first constitutional document passed by Pakistan's Constituent Assembly (see 9.2). Once incorporated into the main body of the Constitution 1973 the Objectives Resolution's provision that 'Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah' was taken up by judges in order to review the validity of laws on the basis of Islam, and, throughout the 1990s, to justify an expansive interpretation of the constitutionally guaranteed fundamental rights.

In addition to Article 2A, references to Islam also appear in Chapter 2, entitled 'Principles of Policy'. Article 29 provides that these principles cannot be enforced in any court, unlike the fundamental rights, but that it is the responsibility of the state 'to act in accordance with those Principles in so far as they relate to the functions of the [state]'. Article 31 of Chapter 2 repeats the duty of the state to enable Muslims to order their lives in accordance with Islam, but adds more detail to this duty: the state is asked to encourage Quranic studies and the teaching of the Arabic language. Article 37 (h) enjoins the state to prohibit the drinking of alcohol, with non-Muslims being exempted from this provision as long as they consume alcohol for religious purposes. Article 40 requires the state to 'endeavour to preserve and strengthen

fraternal relations' with other Muslim countries. Article 41(2)(a) specifies that the president must be a Muslim.

Finally, Part 9 of the Constitution 1973, entitled 'Islamic Provisions', contains Article 227(1), the famed 'repugnancy' article, which provides that 'All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunna [...] and no law shall be enacted which is repugnant to such Injunctions.' Similar to the approach adopted in the Constitutions of 1956 and 1962, Article 227(1) could initially not be enforced in any court when the Constitution 1973 was adopted. This changed in 1980 when the Federal Shariat Court was created by Zia ul-Haq in order to review existing and new legislation on the basis of Islam.

The Federal Shariat Court and the Council of Islamic Ideology

According to Article 203C, the Federal Shariat Court (FSC) consists of not more than eight members, including a Chief Justice, not more than four judges who should have the same qualification as a high court judge, and a maximum of three religious scholars (*ulama*). Article 203D(1) provides that:

> The Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet.

In addition, Article 203DD, establishes the FSC as the court of appeal in all cases involving the Hudood Ordinances 1979. The seemingly sweeping powers of the FSC are restricted by Articles 203B-C, which exclude several important areas of law from the power of judicial review by the FSC, in particular, the constitution, procedural law, and Islamic personal status and family law. Its decisions are appealable to the Shariat Appellate Bench of the Supreme Court. The Shariat Appellate Bench of the Supreme Court is the highest and final court of appeal and consists of five members: three Supreme Court judges and two *ulama* appointed by the president (Art. 203F(3)). It must be emphasised that the *ulama* constitute a numerical minority in both courts, and legally qualified judges the majority.

Article 228 deals with the Council of Islamic Ideology (CII). Its members, whose number may not exceed twenty, are appointed on the basis of their 'knowledge of [...] Islam, or their understanding of the economic, political, legal or administrative problems of Pakistan'. The CII has

an advisory function, namely to make recommendations to the legislative and the executive on the manner in which the Islamisation of social life may be realised. It can also advise on whether or not a law conflicts with the injunctions of Islam and propose ways to restore conformity. Finally, the Council is meant to identify those injunctions of Islam that can be enacted as official legislation.

The position of the Council was strengthened by the establishment of the FSC (Lau 2006: 32). Whenever the FSC declared a law to be in conflict with the injunctions of Islam, the Council assumed the task of drafting an Islamic alternative, which in turn could be used by the legislature. This was, for example, the case with the drafting and eventual implementation of the Islamic criminal law on murder and assault in the form of the Criminal Law (Amendment) Act, 1997. In the 1980s and 1990s the CII was an important driver in the Islamisation of the legal system, but with the appointment of Mohammad Khalid Masud in June 2004, the CII, which used to have a reputation of being rather conservative, has developed a more moderate and progressive character. Following amendments to the Zina Ordinance in 2006, the Jamaat-e-Islami accused the Masud's CII as being a 'rubber stamp' for the abolition of *hadd* punishments and other Islamic laws. (Imran 2006).

The judiciary and the Islamisation of laws

The FSC and the Supreme Court have ensured that stonings and amputations, punishments authorised under the Hudood Ordinances 1979, have never been executed in Pakistan. After 1985, Islamists attempted to use Article 2A in order to review the Islamic *vires* of laws and of the constitution itself, not just before the FSC, whose jurisdiction was limited to certain areas of law, but also before the country's high courts, whose jurisdiction was, as they argued, unlimited in scope. Some high court judges responded positively to these suits, invalidating even laws that were expressly protected against amendment or judicial review by the constitution itself, like the Muslim Family Laws Ordinance 1961. Other judges refused, arguing that it was only the FSC that had the power to review laws on the basis of Islam.

However, judicial activism in the name of Islam was considered controversial within Pakistan's higher judiciary. As discussed in section 9.4, between 1985 and 1992 judges like Justice Tanzil-ur-Rahman invalidated a number of laws on the basis of Islam. In the process, they often embarked on personal campaigns to purify the legal system from un-Islamic elements (Lau 2003: 200). This 'golden period' of unfettered Islamisation lasted until 1992 when the Supreme Court intervened, declaring that article 2A could not be used as the basis for a review of legislation.[64] In the cases of *Kaneez Fatima vs. Wali Muhammad* (Lau

2002: 205) and *Hakim Khan vs. Government of Pakistan* (Lau 2003: 197-202) the Supreme Court ruled that Article 2A may only be used in order to interpret legislation and the Constitution but that the Islamisation of the legal system itself was the duty of the legislature, and not that of the courts. As a result of these decisions, a judicial review of existing laws on the basis of Islam can only be undertaken by the FSC. With these precedents, the period of judicial experimentation with regards to the Islamisation of laws on the basis of Article 2A came to an unambiguous end (Lau 2003: 202).

The politics of Islamisation

Since the late 1990s, legislators, judges, the FSC, and the Council of Islamic Ideology have reached a common understanding as to the pace and the direction of Islamisation: without exception, all efforts in this regard have aimed at making existing Islamic laws more gender-sensitive by reducing their negative impact on the position of women and to produce interpretations of Islam that are in harmony with constitutionally-guaranteed fundamental rights. Many human rights violations were committed during the reign of Musharraf from 1999 until August 2008. However, on the whole, they were perpetrated not in the name of Islam, but rather in the fight against Islamic extremism, regional separatist movements and political opponents. This does not make these rights violations any less serious, but the change is nevertheless significant because it signals the end of the period of radical Islamisation that marked the Zia years and also parts of the 1990s.

The Enforcement of Shari'ah Act 1991, which was passed under Nawaz Sharif's government, bears the traces of a fundamental political compromise. The 1991 Act has a primarily declaratory character, restating provisions from the constitution and its preamble. The seemingly stringent provision contained in section 3(1) that 'The Shari'ah, that is to say the injunctions of Islam, as laid down in the Holy Quran and Sunnah, shall be the supreme Law of Pakistan' is followed by section 3 (2) which stipulates that the legal position of the current political system, including the national parliament and the provincial parliaments and the existing administrative system, may not become the subject of review by any judicial body. In other words, rather than promoting Islamisation through the courts, section 3(2) essentially protects the political system from potential judicial interference in the name of Islamisation.

Other political compromises were needed with respect to the attempt at Islamisation undertaken by the MMA government of the NWFP (see 9.4). Its Hisba Bill, which sought to set up an Islamic ombudsman system, was not even allowed to make an appearance on the statute book,

the bill itself having been declared unconstitutional before the provincial governor could give his assent.[65]

Despite the overall slowing of the pace of Islamisation, there remain in Pakistan significant areas that are governed by a mixture of customary and Islamic law, occasionally supplemented by Pakistani statutes extended to these areas. Entitled the Federally Administered Tribal Areas (FATA), a belt of territories straddling the land along the Afghan and Pakistani border, these areas have never been fully included in the law of the land but instead have been governed directly by Islamabad under special laws and constitutional provisions, such as the Frontier Crimes Regulation 1901. The FATAs are directly ruled by a representative of the government, the so-called 'political agent', who, in the manner of a quasi-colonial 'indirect rule regime', leaves matters of local administration and conflict resolution to traditional councils. Important aspects of national and provincial legislation thus do not apply here.

A surge of Taliban activities in the tribal areas of Pakistan in 2008 and the beginning of 2009, with several areas, such as the Swat valley near Islamabad, falling effectively under the control of the Taliban, has left the government of Pakistan in a difficult position. Should the armed forces fight the insurgents or should they be appeased, primarily by giving in to the Taliban's main demand, namely the introduction of Islamic law and courts? In April 2009, the government chose the former, issuing the Sharia Nizam-e-Adl Regulation 2009 (SNA)[66] as part of a peace deal with the Taliban. In return, the Taliban promised to stop all fighting, though they were not asked to disarm or disband.

At least on paper, the SNA aims to address the Taliban's two main criticisms of Swat's legal system, namely the absence of Islamic law and institutions and the long delays experienced by litigants and complainants in the disposal of cases. With respect to the former, the SNA provides for two measures. Firstly, it re-establishes the existing court structures by providing for three tiers of courts, with *Qazi* courts at the trial level, followed by an appeal court called a *Zillah* court, and an apex court by the name of *Dar-ul-Qaza*. Secondly, the SNA provides that the judges of these courts have to be judicial officers of the NWFP, but as an additional qualification they also need to have completed a sharia course from a recognised institution, defined as 'the Shariah Academy established under the International Islamic University Ordinance 1985 or any other institution imparting training in Uloom-e-Sharia and recognised as such by the government' (Section 2(e) of the SNA).

The government is also empowered to appoint executive magistrates who enjoy exclusive jurisdiction over the trial of criminal offences contained in the Pakistan Penal Code (1860) and carrying a punishment of up to three years. However, in practice their jurisdiction goes well beyond the offences contained in the Pakistan Penal Code because they

can also try an individual for any offence under the established principles of sharia. What these offences are remains unspecified in the SNA and seems to rest on the individual interpretation of the executive magistrate. Is the flying of kites or the shaving of beards against the established principles of the sharia? In a similar vein, the SNA introduces Islamic law as new substantive law for the area, providing in Section 19 (2) that:

> Notwithstanding anything contained in any law for the time being in force all cases [...] shall be decided by the courts concerned in accordance with Sharia'h: provided that cases of non-Muslims in matters of adoption, divorce, dower, inheritance, marriage, usages and wills shall be conducted and decided in accordance with their respective personal laws.

The SNA also lists a number of laws which continue to apply to the Swat region, but even these laws can be ignored by a judge if in his opinion they are not in accordance with the 'Sharia'h'. The SNA also aims to tackle delays by imposing strict time limits on the hearing and disposition of cases as well as encouraging out-of-court settlements. With the Pakistani army having stepped up military operations against the Taliban in Swat, on the ground that the peace deal had been breached by them, there must be doubts about the future of the SNA, which has also been criticised by the media and human rights organisations as well as the international community. In addition, it appears that the Taliban themselves have circumvented the system of official courts and is at present enforcing their own interpretation of Islamic law through commanders on the ground.

9.6 Family and inheritance law

The Muslim Family Laws Ordinance 1961

The main legislation in the area of family law is the Muslim Family Laws Ordinance 1961 (MFLO). It represents a moderate interpretation of Muslim family law, most importantly, restricting the rights of men in the area of divorce and polygamy. Section 6 of the MFLO provides that a husband who wants to marry a second wife needs to obtain the permission of the Union Council, which then assesses whether the proposed extra marriage is 'necessary and just' (MFLO, section 6(3)). Valid reasons for a second wife include 'sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of a decree for restitution of conjugal rights, or insanity on the part of the existing wife' (Mehdi 1994: 164). If the husband enters into a polygamous marriage

without the permission of the Union Council, the first wife can seek a divorce and the husband is liable to be punished with a fine or prison sentence (MFLO, sections 5(a), 5(b)).

The MFLO also restricts the right of a Muslim husband to repudiate his wife. Section 7(1) MFLO recognises the traditional unilateral repudiation (*talaq*) by the husband, but subjects a man using this kind of divorce to a compulsory procedure which, if not followed strictly, will invalidate his *talaq*. The repudiation only becomes legally valid ninety days after the mandatory notification thereof to the Union Council, or similar body of the local government, and to his wife. Failure to abide by this obligation is punishable by a prison sentence of up to one year or a fine of 5,000 rupees (approximately 44 Euros). After notification of the divorce, the Union Council forms a mediation commission that is tasked with attempting to bring about reconciliation between the husband and his wife. The divorce only becomes valid after the expiry of the ninety days, if no reconciliation of husband and wife is possible within this period. In the absence of notification of the divorce to the Union Council or the wife, the divorce is regarded as invalid.

Section 8 of the MFLO confirms that the husband can, at the time of the marriage, delegate the right of divorce by repudiation to his wife.[67] In addition to section 8 of the MFLO, there is also recent case law which has extended the right of Muslim women to seek a judicial dissolution of their marriage. Women are now able to procure a divorce solely on the basis of their own testimony to the effect that their marriage has broken down and that they can no longer live with their husbands 'within the limits of Allah'.

The criminalisation of adultery and fornication as a result of the Zina Ordinance 1979, however, had an unintended effect on the umbrella of procedures initially designed to offer some protection of women's rights. After the passing of the law, abandoned wives who had since remarried were unexpectedly accused of adultery by their former husbands, the latter claiming that because they had not followed the procedures contained in Section 7 of the MFLO, they had never validly been divorced, and hence were guilty of adultery. In order to protect the women involved, judges dealing with these cases often decided that the divorce had been valid, despite non-compliance with the MFLO, thereby weakening the obligatory character of the mandatory notification. Consequently, some have claimed that men's right to repudiation is once again governed by the classical sharia rather than the MFLO (Menski 1997: 30-31), but an analysis of recent legal rulings shows that Section 7 is being upheld in cases concerning purely family, not criminal law, matters. The Protection of Women Act 2006 has finally put the matter to rest by providing that it is sufficient for a woman to believe herself to be validly married to avoid a charge of adultery. Thus,

even if the divorce preceding her re-marriage turns out to be invalid, she will not face charges as long as she can convince the court that she had reasons to believe that the divorce and her subsequent marriage were valid (Lau 2007).

Inheritance law

Save for one reform brought about by the MFLO, which introduces into Pakistani law a rule of Maliki law,[68] inheritance law remains governed by classical sharia regulations on this subject, although these norms have never actually been codified into legislation or legal codes. Whilst being discriminatory towards women, who as a general rule inherit only half of what is due to a man, the Islamic law of inheritance was nevertheless a significant improvement on pre-Islamic tribal customs, under which women inherited little or nothing at all. To this day, many women in Pakistan are deprived of their inheritance rights under Islamic law because families prefer to follow customary laws, which often exclude women from inheriting. In many regions of Pakistan, women are still completely excluded from the inheritance.[69]

In 2003, the Justice and Law Commission of Pakistan argued for a better monitoring of the implementation of Islamic inheritance law. In its report, the commission observed that women and children were often robbed of the inheritance to which they were entitled under Quranic law by a multitude of tricks and false promises. Islamic inheritance law, the commission claimed, was a command coming directly from God and a legal obligation that had to be abided by in letter and in spirit. It, therefore, asked its secretary to devise an effective plan of action aimed at achieving compliance with inheritance law, especially regarding the rights of women and children.[70] To date, no such action plan has been launched.

9.7 Criminal law

The legal codes introduced by the British form the basis of Pakistani criminal law. The codes in question are the Pakistan Penal Code 1860, the Code of Criminal Procedure 1898, and the Evidence Act 1872. These laws were substantially amended as a result of Islamisation measures. This applies to the area of blasphemy, where amendments to the Pakistan Penal Code took place in 1980, 1982, and 1986, the Ahmadiyya-specific amendments in the Pakistan Penal Code (1984), and the incorporation of Islamic law on murder and assault in 1997. With the exception of the Zina Ordinance 1979, which was substantially amended by the Protection of Women Act 2006, the Hudood Ordinances of 1979 remain in force.

The Hudood Ordinances and the Women's Protection Bill

The socalled Hudood Ordinances, promulgated by Zia ul-Haq in 1979, actually consist of four separate ordinances, namely the Offences against Property (Enforcement of Hudood) Ordinance 1979, the Offence of Zina (Enforcement of Hudood) Ordinance 1979, the Offence of Qazf (Enforcement of Hadd) Ordinance 1979, and the Prohibition (Enforcement of Hadd) Order 1979. Collectively known as the 'Hudood Ordinances', they were meant to Islamise Pakistan's corpus of criminal law. The Hudood Ordinances 1979 provide for corporal punishments for offences falling under the five *hadd* crimes. These punishments include the amputation of limbs, death by stoning, and flogging; the most severe of these *hadd* punishments, namely death by stoning, has never actually been executed in Pakistan. Higher judicial authorities have blocked executions by stoning (see below) as they have also consistently prevented amputations from being executed. Flogging, either in public or inside prisons, however, was executed on a regular basis during the 1980s. Corporal punishments can also be imposed for the *hadd* offences of drinking of alcohol and false accusations of illegal sexual relations, which are punishable by eighty lashes.

About half of the criminal cases brought before the courts under the Hudood Ordinances were concerned with the Zina Ordinance (Chadbourne 1999: 3). Prior to its amendment in 2006, the Zina Ordiance made any sexual intercourse outside a valid marriage a criminal offence. If the guilty party was married at the time of the offence or had been married previously, the punishment was death by stoning, as long as four male, adult, Muslim witnesses of the highest moral standing had witnessed the illicit congress. In all other cases, *zina* was punishable by lashes or imprisonment, or both.

In many cases, the punishments awarded by trial courts were reduced on appeal, or the accused acquitted. The Zina Ordinance itself was reviewed on the basis of Islam by the Federal Shariat Court in 1981. In its decision, the Federal Shariat Court ruled 4 to 1 that death by stoning was against the principles of Islam and that hundred lashes was the correct punishment for the offence of adultery (Khan 2001: 641). Zia managed to get the decision overturned after replacing the judges of the FSC with more compliant ones. In 1982, a newly constituted Federal Shariat Court overruled its own previous decision, finding punishment of stoning to death in accordance with Islam. Despite this decision, both the Supreme Court and the Federal Shariat Court have maintained their overall reticent attitude with regard to severe corporal punishments.

With the amendment of the Zina Ordinance in 2006, its adverse impact on women's rights is much reduced. As a result of the Protection

of Women Act 2006 rape and fornication are no longer treated as Islamic *hadd* crimes, but are governed by the Pakistan Penal Code, thus removing them from the jurisdiction of the Federal Shariat Court. The Zina Ordinance as it currently stands only deals with the *hadd* offence of adultery, but the procedural and evidential hurdles to be surmounted before a woman can even be charged with the crime are such that it is unlikely that there will be many, if any, convictions. The passing of the bill led to much political upheaval and clearly illustrated the profound dichotomy permeating the Pakistani political scene. The bill was supported in the National Assembly by Benazir Bhutto's opposition party PPP as well as President Musharraf's party and the other parties in his governing coalition. In fact, the PPP, along with other liberal-minded parties and individuals, continues to call for a complete repeal of all Hudood Ordinances. In contrast, the MMA and other Islamic parties voiced their strong criticism of the bill, calling it un-Islamic. MMA's general secretary Maulana Fazlur Rehman, for example, warned that the bill would 'make Pakistan a free sex zone'.[71]

The blasphemy laws

Since 1980, Section 298A of the Pakistan Penal Code stipulates that:

> Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, directly or indirectly, defiles the sacred name of any wife (Ummul Mumineen), or members of the family (Ahle-bait), of the Holy Prophet (peace be upon him), or any of the righteous Caliphs (Khulafa-e-Rashideen) or companions (Sahaaba) of the Holy Prophet (peace be upon him) shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.[72]

Blasphemous words, spoken or written, and visual representations are punishable.[73] Since 1982, imprisonment for life has been stipulated for the wilful damaging, defaming, abusing, denunciation, and improper use of a copy of the Quran (S. 295B). In 1991, the punishment for blasphemy was enhanced to the death sentence as a result of a ruling of the Federal Shariat Court, which held that the alternative punishment of imprisonment for life was contrary to Islam[74]. An appeal against the decision was rejected by the Shariat Appellate Bench of the Supreme Court in 2009[75]. Following the religiously motivated murder of eight Christians in the Punjabi village of Gojra in July 2009, Pakistan Minister for Minorities announced that the government would review the blasphemy laws because "This law is being misused. People have

been extrajudicially killed and falsely implicated and are now behind bars."[76]

The Ahmadi-specific criminal laws of 1984

Under these laws, members of the Ahmadiyya community face a prison sentence of up to three years when they refer to themselves as Muslims or attempt to propagate their faith (PPC, S. 298B). The same punishment is applicable whenever they undertake any public act that may 'outrage' the religious beliefs of Muslims in any possible way (PPC, S. 298C).

Islamic criminal law of murder and assault

Starting in 1980, Pakistan's Federal Shariat Court decided in a number of cases that the law on murder and bodily harm, as contained in the Pakistan Penal Code, was un-Islamic because it did not allow the victim of an assault, or, in the case of murder, his heir, to determine how the offender should be treated. Classical Islamic law allows the victim or his heirs three options: firstly, they can demand monetary compensation from the perpetrator of the crime; secondly, they can insist on him being punished; and lastly, they can pardon him. As a result, the degree of punishment – retribution, financial compensation ('blood money'), or pardon – is in principle decided upon by the victim or the victim's family. When and if the victim dies, the family can demand the death penalty. In cases of physical injury the victim may also demand retribution. This could mean that the perpetrator of the crime has to face a mutilating punishment in accordance with the principle of 'an eye for an eye, a tooth for a tooth'. In 1997 this Islamic criminal law of murder and assault was incorporated into the Pakistan Penal Code under the provisions of the Criminal Law (Amendment) Act (1997). In recent years, complaints have been raised against the practice of 'buying off' punishments for murder through the payment of blood money, but as yet the law has not been amended in response to these criticisms, save for the area of honour crimes, which are now punishable by twenty years' imprisonment, irrespective of any compromise with the family of the victim or pardon by them (Wasti 2009).

9.8 Other areas of law

A number of laws are aimed at the creation of an Islamic economy and social welfare system. The Constitution of 1973 contains directives that enjoin the state to abolish interest (*riba*), to set up a tax to support the poor (*zakat*), and to maintain religious trusts (*waqf*) and mosques. The

Enforcement of Sharia Act 1991 provides that the state must establish an Islamic economy and calls for the establishment of a supervisory commission to oversee the 'total elimination of *riba*'. Islamic taxation or *zakat* is enforced through the Zakat and Ushr Ordinance 1980.

Despite these attempts, the present legal situation is not very different from the situation at the beginning of the Islamisation process under Zia in 1977. During the 1980s, a number of judges declared the charging or payment of interest to be 'un-Islamic', and hence unlawful. In 2000, however, the Shariat Appellate Bench of the Supreme Court found that the previous decisions had been procedurally flawed and sent the matter back to the Federal Shariat Court for a complete retrial. To this day, the matter remains unresolved, with the case pending before the FSC and no indication as to when it is going to be heard. In the meantime, there have been several commissions which have investigated the viability of a financial and economic system based on Islam.

The principle of *zakat* forms an Islamic contribution to the concept of social justice and redistribution. The Zakat and Ushr Ordinance has introduced to Pakistan some features of an Islamic welfare state, in that the rich are asked to pay a tax on their wealth, which in turn is distributed to the poor.[77] Under the Zakat and Ushr Ordinance, a 2.5 per cent tax is imposed on the estate of every Muslim, which is then used to provide maintenance for the poor and needy. Local *zakat* commissions decide who is entitled to receive such public support. These commissions are also responsible for collecting the money, under the supervision of the Bureau of Zakat and Ushr of the Ministry of Religious Affairs (Shamim 2004). Following protests, Zia exempted Shias from the payment of *zakat*. *Ushr*, the religious tax on agricultural proceeds, is also covered by the 1980 Ordinance.

9.9 International treaty obligations and human rights

Compared with other Muslim countries, Pakistan has been slow in acceding to international human rights treaties. In the 1990s, under the two governments of Benazir Bhutto, Pakistan acceded to the Convention on the Rights of the Child CRC) in 1990, and to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1996. In respect of the latter, Pakistan stated that its ratification '[...] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan'. However, in recent years Pakistan has shown more commitment to international human rights treaties. In April 2008 Pakistan signed the International Covenant on Civil and Political Rights and the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and ratified the International Covenant on Economic, Social and Cultural Rights.

The elements of legally-implemented sharia in Pakistan conflict on a number of points with the corpus of internationally accepted human rights. Execution by stoning, amputation, the potential application of the rules of retribution, and flogging, for instance, all conflict with the international prohibition on torture or cruel, inhuman, or degrading treatment or punishment. In addition, a number of conflicts exist with the principle of equality, namely the unequal treatment of men and women and of Muslims and non-Muslims. This is the case with personal status, family and inheritance laws, and criminal law, both from a theoretical and a practical perspective. The sharia codes also tread a fine line with regards to the principle of freedom of religion. Although apostasy is not formally made punishable through the *Hudood* Ordinances, it does constitute an integral part of the classical doctrine and, as such, has an impact upon the legal status of people. Muslims who change their religion risk losing their civil rights; an apostate, for example, may not marry or acquire real estate. Blasphemy laws contravene the right to freedom of expression. And finally, the *Hudood* Ordinances appear in some cases to contravene the 1989 CRC agreement. According to classical sharia, adulthood begins with puberty. This means that young teens can, in principle, be tried as adults and may face *hadd* punishments.

In many areas of Pakistan, an atmosphere of religious intolerance prevails. Communities of religious minorities, such as Ahmadis, Hindus, and Christians, are sometimes the victims of physical violence and intimidation. Formal constitutional recognition of rights such as freedom of religion and the principle of equality have done little to abate this.

Amnesty International and other human rights groups and institutions such as the Human Rights Commission of Pakistan, regularly report on a wide range of human rights violations. It should be noted, however, that the vast majority of these rights violations are not directly, or even tangentially, related to sharia or sharia-based legislation. Rather, these violations have more to do with a culture of governmental lawlessness and impunity. Torture is a widespread phenomenon at police stations and in prisons. It is also of great concern that hundreds of people have been arrested in connection with the global war on terror and summarily handed over to the United States without even the pretence of first having received a trial in Pakistan. Every year, hundreds of women become the victim of tribal honour killings. There is frequent sectarian violence between Sunnis and Shias. The most oppressive aspect of Islamic criminal law is seen in the application of the blasphemy laws. Sometimes people are imprisoned on the basis of false accusations of blasphemy.

9.10 Conclusion

Pakistan, created as a result of the partition of British India into two independent states had a difficult start as a modern state. While the country consists mostly of Sunni Muslims, it is strongly divided along ethnic, socio-economic, and political lines. Issues of security, the army, and the police occupy a central place in Pakistani state policy due to decades of ongoing conflict, in Kashmir, in Afghanistan and its Pakistani borderlands, as well as the permanent state of tension with India. Poverty is large-scale and widespread. Women often face particularly difficult circumstances in this patriarchal and traditional society, as do religious minorities.

Pakistan has inherited a colonial legal system marked by the legal values, procedures, and laws of Great Britain. This means that private property law, civil and administrative law, criminal law, criminal and civil procedure, as well as most other areas of law continue to have a distinctly British character. Family and inheritance law are no exception: although many sharia rules apply to these legal areas, many aspects of these particular regulations have been codified using British legal terminology.

Following Pakistan's independence, the question whether or not sharia should play a larger role quickly gained prominence. The Pakistani national identity as 'the state for Muslims' has been an enduringly central issue for politicians and jurists. The tension between modernists and conservatives in how this identity should be formally and practically implemented has had a significant impact on political and legal developments. In the constitutions of 1956, 1962, and 1973, enacted under Prime Minister Zulfikar Ali Bhutto, Islam was allotted a central, but largely symbolic, role.

This changed in 1977, however, when Zia ul-Haq embarked on a policy of Islamisation, which included not just the promulgation of Islamic criminal laws, but also profound changes to the Constitution 1973, including the creation of the Federal Shariat Court in 1980. In order to Islamise the economy, in 1983 the collection and payment of interest was prohibited. And in 1985, a constitutional amendment was introduced granting Islam an even more central and pivotal role in the constitution. Islamisation could gain steam, in part due to the rise of political Islam in other countries.

Zia ul-Haq eagerly presented himself as the saviour of Islam, opted for a strict, conservative interpretation of Islam, and indeed made this interpretation the backbone of his political leadership. Many historians retrospectively see Zia's policy as an ill-disguised attempt at legitimising his *coup d'état* and subverting the democratic forces. It must be noted that the fundamentalist parties, on whose ideologies Zia based his

political thinking, have consistently received few votes in successive elections.

Between 1985 and 1992, the judiciary played an increasingly activist role pertaining to the Islamisation of the legal system. Initially, judges contradicted one another freely, and legal insecurity increased. It was only in 1992 the highest judicial authorities proved themselves unwilling to allow the rule of law to be subjugated to exceedingly conservative interpretations of the sharia (Lau 2003, 2006).

Even in the 1990s, however, some Islamisation legislation was introduced, such as the Enforcement of Shari'ah Act in 1991, and the 1997 criminal legislation on retribution and blood money, whereas in North-Western Province in 2003 a provincial by-law was enacted on the enforcement of the sharia.[78]

Nonetheless, the tentative outcome of the Islamisation project has not at all yielded a favourable balance to the fundamentalists' advantage. The relatively liberal family legislation of 1961 has remained untouched, and the opportunities for women to independently obtain a divorce have been significantly expanded. The heaviest corporal punishments such as stoning and amputation have never been applied in Pakistan because the highest judicial authorities have consistently been opposed to their execution. The prohibition on interest is also not upheld by these same judges, and on this point, 'progress' for the conservatives has been limited to the establishment of a commission in 2002 to study the Islamisation of the economy in other Muslim countries. The 2003 NWFP Hisba Bill remained still-borne and, thus, without actual legal consequence. All in all, the Islamisation project has lost much of its former momentum.

The fate of the Zina Ordinance 1979 underscores this point. In the years following its promulgation, resistance to the Ordinance did not lessen. This was all the more so because of the tendency of ill-disposed men, sometimes with the help of the authorities, to use the law as a tool to harass wives they had abandoned or women who had been raped. In the majority of these cases the accused women were acquitted on appeal to the Federal Shariat Court because there was insufficient evidence for a conviction. However, until then many of the women charged under the Zina Ordinance had spent many years in jail, awaiting the outcome of their appeals. In November 2006, the Protection of Women Act was passed. This law improved the legal position of women in rape and adultery cases.

Islamisation of laws has also had unexpectedly positive effects with respect to the rule of law. After all, while the judicial authorities were grappling with the issue of Islamisation, another conflict continuously simmered in the background, one of no less importance to the judges: the battle against authoritarian government leaders and for the

judiciary's own independence, for the rule of law, and for democracy. In this struggle existing legislation did not offer the judges much help because laws were under the control of the government and the government-dominated parliament. So, judges often called upon fundamental legal principles and began using Islamic concepts such as 'Islamic justice' and 'public interest' (Lau 2003). As is the case in India, a series of 'public interest' cases has also arisen in Pakistan. Unlike the secular system of India, however, this progressive development in Pakistan owes much to liberal interpretations of the sharia.

The process of establishing a truly democratic constitutional state and true enforcement of human rights still has a long way to go in Pakistan. From the *coup d'état* in 1999 until August 2008, Pakistan was ruled by Pervez Musharraf, an authoritarian military leader following a pro-American course, who had a moderate image as far as the sharia is concerned. He saw himself confronted with large socio-economic and political problems, as well as strong opposition from both democratic parties and fundamentalist groups. His aid in the American 'war on terror' was rewarded with much economic and military help for Pakistan. Nonetheless, this led – in addition to his persistent authoritarian leadership – to much criticism and discontent among the Pakistani population. This was reflected in the 2002 elections by the growth of protest votes cast for the conservative religious MMA alliance, although this coalition's share of the vote fell again in the 2005 local elections. Musharraf's reign came to an end in August 2008, when he was forced to resign or face impeachment proceedings to be brought by the government of the PPP, which ultimately emerged victorious in the 2008 national elections.

How the position and role of classical sharia will be further developed in Pakistan's national legal system will depend largely on the political choices to be made by the PPP, choices pertaining to socio-economic development, electoral results, political stability, relations with the West, Iran and China, and last but not least, to the Pakistani judicial authorities. At present, faced with the violent attacks carried out by Islamic extremists not just in the tribal areas but in the very hearts of Pakistan's cities, politicians seem to have lost any interest in pursuing a policy of Islamisation.

Notes

1 This chapter is a thorough rewrite, at the request of the editor of this book, of a chapter by M.G. Barends and J.M. Otto in a Dutch research publication prepared for the Scientific Council for Government Policy (WRR) in the Netherlands, published in Otto, Dekker & van Soest-Zuurdeeg (red.) 2006: 235-267.

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3 The East India Company had been granted the exclusive right to conduct business with and in India by the British Crown in successive Charters, the first dating back to 1600. This system came to an end in 1958 when the areas controlled by East India Company became the crown colony of British India.

4 Sati is the Sanskrit term to describe the practice of a Hindu widow to burn herself on the funeral pyre of her dead husband. The practice was outlawed in 1929, see the Sati Abolition Act, 1929.

5 'Proclamation by the Queen in Council to the Princes, Chiefs, and People of India' of 1 November 1858, British Library, BL/MSS Eur D620. A copy of the original text of the Proclamation of 1858 can be accessed on the website of the British Library at http://www.movinghere.org.uk/deliveryfiles/BL/Mss_Eur_D620/0/1.pdf (accessed February 2010).

6 The Code of Criminal Procedure 1898 and the Code of Civil Procedure 1908.

7 Khan (2001: 20) has the following to say about this: 'This Act provided for speedy trial of offences by a special court consisting of three High Court Judges. This Court could meet in camera to take into consideration evidence not otherwise admissible under the Evidence Act. No appeal was provided against the decision of the court. Provincial governments were also given wide powers in matters of arrest, searches and seizures, confinement of suspects, censorship, and so on.'

8 In Pakistan, the exclusion of agricultural land from the 1937 Act was only removed in 1962, see the West Pakistan Muslim Personal Law (Shariat) Application Act 1962. In India, the exclusion of agricultural land continues to apply in most states, thereby excluding preventing women from inheriting agricultural land (Agarwal 2005).

9 Hindu politicians only agreed to support the passage of the 1939 Act on the condition that it did not apply to Muslim wives who had converted to Islam prior to their marriage. In the 1930s there were concerns that Muslim mobs forced Hindu women to convert to Islam and to marry Muslim men against their will. As a result the 1939 Act contains a provision that section 4 of the Act does not 'apply to a woman converted to Islam from some other faith who re-embraces her former faith.' Hence, a Hindu woman who had converted to Islam continues to be able to dissolve her Muslim marriage simply by re-embracing Hinduism without any recourse to a court of law being required.

10 Section 7 of the Indian Independence Act of 1947 provided that 'As from the appointed day [August 15], His Majesty's Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India;...'

11 The Government of India Act, 1935, as adopted by the Pakistan (Provisional Constitution) Order, 1947.

12 The first Constituent Assembly to be convened was supposed to frame a constitution for the whole of British India. However, the Muslim League boycotted it on the ground that there should be two assemblies, drafting the constitutions of Pakistan and India. India's Constituent Assembly had adopted an Objectives Resolution on 22 January 1947 and its Constitution on 26 November 1949. By comparison, Pakistan's Constituent Assembly was created on the basis of a Notification of the Government of India on 26 July 1947, less than three weeks before independence, and convened for the first time on 10 August 1947. The Constituent Assembly adopted the Objectives Resolution on 12 March 1949 and its first Constitution on 2 March 1956.

13 The members of Pakistan's first Constituent Assembly had been determined through provincial elections in 1946-47. All Muslim seats except one were held by members of the Muslim League. The Muslim League was only open to Muslims. The twelve

million Hindus who remained in Pakistan after partition were represented by twelve members of the Congress Party, while the Schedules Castes (low-caste Hindus) were represented by three members of the Congress Party and one representative of the Schedules Castes Federation. Christians and Parsees did not have any representation in the Constituent Assembly. The number of non-Muslim citizens of Pakistan was much larger in 1947 than it is now: in East Pakistan at least one quarter of the population belonged to the Hindu religion. See Symonds 1950: 97-99.

14 Speech by S. C. Chattopadhaya, the leader of the Congress Party, see Choudhury 1967: 970.

15 The Government of India Act, 1935 as amended by the India Independence Act, 1947 and subsequent Pakistani amendments.

16 The Constituent Assembly had formed a Basic Principles Committee on 12 March 1949. The latter included a Board of Islamic Teachings (*Talimat-i-Islamiyah*) charged with giving advice on Islamic matters. Its recommendations were largely ignored by the Basic Principles Committee leading to the formation of a coalition of Islamic parties which agreed 22 fundamental principles of an Islamic state (Pirzada 2000: 18-19). The text of the principles is contained as Appendix B in Hassan 1985: 263-284.

17 *Riba* denotes the charging of interest in a financial transaction, such as a loan. The precise translation and indeed meaning of the term *riba* is, however, considered controversial. In Pakistan, the campaign to ban *riba* has been highly visible but largely unsuccessful. See Hassan, P. and Azfar, A. 2001.

18 Following independence, the Muslim League's hold over East Pakistan's politics became increasingly tenuous. In April 1954, provincial elections in East Bengal removed the Muslim League almost completely from the provincial legislative assembly, which was now dominated by a coalition of Bengali parties united under the slogan 'Bengal for the Bengalis'. After a spate of violence around Dacca, the provincial government was dismissed and East Bengal was ruled directly from Karachi. See Burks 1954: 544.

19 Report of the Court of Inquiry Constituted under Punjab Act II of 1954 to Enquire into the Punjab Disturbances of 1953.

20 In fact, the name had already been changed by presidential order to a simple 'Pakistan' shortly after the *coup d'état*, on October 11, 1958. Ibid: 195.

21 Apart from appeasing the Islamists, the first amendment to the 1962 Constitution also aimed to silence the legal community which had demanded that the fundamental rights were made justiciable, see Articles 30 and 98(2) of the 1962 Constitution. See Braibanti 1965: 81. However, the Islamic parties failed in their demand for a repeal of the MFLO 1961, see Pirzada 2000: 26.

22 See part 10, chap. 1, 1962 Constitution.

23 Since 1980, the Islamic Research Institute has been part of the International Islamic University, Islamabad.

24 Article 207, 1962 Constitution.

25 The most significant legal intervention came in the form of the Muslim Family Laws Ordinance of 1961, which reformed some aspects of Islamic family law, principally to improve the legal position of women. See Jahangir 1998.

26 See for instance *Mr Fazlul Quader Chowdhury v. Mr. Mohammed Abdul Haque* PLD 1963 SC 486.

27 See articles 227 to 231, Constitution 1973.

28 3rd Schedule, Constitution 1973.

29 Article 2, Constitution 1973.

30 See Article 106 (3) of the Constitution 1973. Article 106 (3) was amended in 2002 under the provisions of the Legal Framework Order 2002 and the Constitution (Seventeenth) Amendment Act 2003, removing any direct reference to who is

regarded as a non-Muslim for the purpose of seats reserved for non-Muslim minorities.

31 The definition of who is and who is not a Muslim was further refined in 1985 when the following text was added to Article 260(3) (b): '(b) "non-Muslim" means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Budhhist or Parsi community, a person of the Quadiani Group or the Lahori Group (who call themselves "Ahmadis" or by any other name), or a Bahai, and a person belonging to any of the scheduled castes'. See section 6 of the Constitution (Third) Amendment Order 1985 as incorporated by section 19 of the Constitution (Eighth) Amendment Act 1985.

32 Article 58(2) b, Constitution 1973.

33 Ordinance XX of 1985, inserting new sections 298A and 298B to the Pakistan Penal Code 1860.

34 *Khurshid Bibi v. Muhammad Amin* PLD 1967 SC 97.

35 See for instance *Asma Jilani v. The Government of Punjab* 1972 SC 139 where the Supreme Court relied on Islamic principles of democracy to declare the *coup d'état* of Yahya Khan in 1969 unconstitutional.

36 See for instance *Nizam Khan v. Additional District Judge, Lyallpur* PLD 1976 Lahore 930.

37 The Constitution (Amendment) Order 1980.

38 See article 203B(c), Constitution 1973. For the first ten years, fiscal and banking laws were excluded from the jurisdiction of the Federal Shariat Court. This temporary bar came to an end in 1990.

39 See the Criminal Law (Amendment) Act 1997. Under this law the heirs of a murder victim determine the fate of the murderer and have the right to decide whether he should be punished, pardoned or be ordered to pay monetary compensation.

40 *Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law* PLD 1992 FSC 1.

41 *Mirza Qamar Raza v. Tahira Begum* PLD 1988 Kar 169.

42 *Irashad H. Khan v. Parveen Ajaz* PLD 1987 Kar 466.

43 *Bank of Oman Ltd v. East Trading Co. Ltd.* PLD 1987 Kar 404, p. 445.

44 *Hakim Khan v. Government of Pakistan* PLD 1992 SC 595, at p. 617.

45 *Hakim Khan v. Government of Pakistan* PLD 1992 SC 595 and *Mst Kaneez Fatima v. Wali Muhammad* PLD 1993 SC 909.

46 Reproduced in PLD 1991 J 1, at p. 142.

47 *Zaheeruddin v. The State* 1993 SCMR 1718.

48 The Oath of Judges Order 2000 was promulgated just one week before the Supreme Court was due to hear a case challenging the legitimacy of the military takeover.

49 See *Zafar Ali Shah v. General Pervez Musharraf*, PLD 2000 SC 869.

50 New Article 152A, Constitution 1973.

51 New Article 270 AAA, Constitution 1973.

52 Article 63, Constitution 1973.

53 *Watan Party vs. Federation of Pakistan*, PLD 2006 SC 697.

54 *Mr Justice Iftikhar Muhammad Chaudhry vs. President of Pakistan*, PLD 2007 SC 578.

55 *Pakistan Muslim League (N) v. Federation of Pakistan*, PLD 2007 SC 642.

56 *Pakistan Muslim League (N) v. Federation of Pakistan*, PLD 2007 SC 642, p. 673.

57 For a detailed analysis of these developments see Lau 2009.

58 The significance of the 3 November 2007 Order only became apparent two years later, when the Supreme Court ruled that the actions of Musharraf had been unconstitutional. See *Sindh High Court Bar Association vs. Federation of Pakistan*, 31 July 2009, judgment available on the website of the Supreme Court of Pakistan: http://www.supremecourt.gov.pk/web/user_files/File/const.p.9&8of2009.pdf, last accessed on 25 February 2010.

59 See the Revocation of Proclamation of Emergency Order 2007, Repeal of Provisional Constitution Order, Revival of Constitutional Order, Establishment of Islamabad High Court Order and grant of pension benefits to judges who had either refused or had not been invited by the government to take the oath under the PCO.
60 On the conflict about introduction of sharia law in the Swat valley see 9.5, subsection on the politics of Islamisation.
61 See BBC News, '"Taliban law" blocked in Pakistan': http://news.bbc.co.uk/2/hi/south_asia/6182395.stm, dated 25 September 2006.
62 See 'Bangladesh to return to its secular roots', Reuters News: http://in.reuters.com/article/southAsiaNews/idINIndia-46335820100221, dated 21 February 2010.
63 At the time of writing this chapter, Pakistan's parliament is debating the 18th amendment to the Constitution, which is supposed the Constitution 1973 to its original form, at least as far as the powers of the president are concerned. Changes to the Islamic additions effected under Zia's rule are not on the agenda.
64 Speaking about this period, the Pakistan Supreme Court commented in one of its judgments in 1991 that the 1990s had been 'a time of controversy and debate without precedence' (Lau 2003: 175).
65 See BBC, 'Taliban Law Blocked in Pakistan', 15 December 2006, at: http://news.bbc.co.uk/1/hi/world/south_asia/6182395.stm, accessed 25 March 2010.
66 The text of the SNA is available on a number of websites, see for instance Associated Press of Pakistan at: http://www.app.com.pk/en_/index.php?option=com_content&task=view&id=73492&Itemid=2, accessed April 2009.
67 According to Menski (1997), a number of noteworthy jurisprudential developments have occurred during the last decades. The most important of these developments is perhaps that the possibilities for women to have their marriage annulled under Article 8 have been significantly expanded upon. This has been the case since the landmark judgment in the *Khurshid Bibi* trial of 1967.
68 See Section 4 of the Muslim Family Laws Ordinance 1961.
69 See Pakistan Observer (2004), 'Majida urges provinces to name members for NCSW', http://pakobserver.net/200411/01/news/lahore03.asp, dated 1 November.
70 Dawn (2003), 'Law Commission seeks proposals: Effective inheritance law enforcement', *Dawn: The Internet Edition*, see http://www.dawn.com/2003/01/02/top11.htm, dated 2 January 2003.
71 *Daily Times*, dated 16 November 2006.
72 Inserted by Pakistan Penal Code (Second Amendment) Ordinance, XLIV of 1980.
73 See Section 295C of the Pakistan Penal Code (1860), inserted by the Criminal Law (Amendment) Act, III of 1986.
74 Muhammad Ismail Qureshi v. Pakistan PLD 1991 FSC 10.
75 The decision has not been reported as yet but see 'Pak SC rejects petition challenging death as the only punishment for blasphemy', Pakistan News Net, 22 April 2009, at http://www.pakistannews.net/story/492878.
76 'Pakistan reviews blasphemy law', The National, 5 September 2009, http://www.thenational.ae/apps/pbcs.dll/article?AID=/20090906/FOREIGN/709059901/1002.
77 Zingel (1998) argues that the central collection of *zakat* was used by the military regime in order to take over control from the religious establishment.
78 In 2003, the NWFP border province made headlines when the MMA-coalition that won the provincial elections decided to implement its own version of the law on the enforcement of the sharia. However, this attempt was blocked by the Supreme Court, which declared the bill to be unconstitutional, see In Re: Reference No. 1 of 2006 2007 SCMR 817.

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