
Islamic Law in an Islamic Republic

What Role for Parliament?

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Created as a Muslim-majority state in August 1947, Pakistan has struggled with the legal institutionalization of its religious identity. How should Pakistan, as a Muslim homeland, formalize (if at all) the various strains of interpretation that shape Islamic law? And, in the democratic state that Pakistan aspires to be, what is the role of an elected parliament in defining the substance of that law?

Such questions often yield intense debates about the precise wording of constitutional clauses defining the state's religious identity or the degree to which Islamic law should serve as "a" or "the" source of law. But in Pakistan some of the most intense debates focused on the question of *institutional* primacy with respect to interpreting that law. Questions about who defines Islamic law, and the institutional balance between the interpretive authority of the parliament, the executive, and the courts, were a key locus of debate. These debates are the focus of this chapter. In the following sections, I trace these debates through the constitutional texts and amendment processes (1956, 1962–63, 1973) that have characterized Pakistan's constitutional history and discuss (a) the ways in which the preeminence of parliament in the delineation of Islamic law took shape and (b) how this preeminence was contested.

With reference to the classical period of Islamic law, it is common to stress a distinction between non-state muftis and state-based qazis (Hallaq 2004: 243–258; Khadem 2005: 95–142; Alam 2007: 1255–1264). The former, associated with madrasa-based scholars (ulema), interpreted Islamic law and issued opinions (fatwas) set apart from any specific power of enforcement. Qazis, on the other hand, drew on the opinions of prominent muftis to produce judgments coercively enforced by the state. There was no state-based legal monopoly. Even the jurisprudence of Sunni muftis was associated with different "schools" of legal thought

(Hanafi, Maliki, Hanbali, and Shafi'i) – each treated as a legitimate expression of the Islamic tradition competing for adherents. Neither jurisprudence nor state policy was seen as producing “new” law. Instead, muftis and qazis were merely thought to “interpret” divinely inspired norms that were, in some sense, already believed to exist.

In South Asia (and, later, in the Ottoman Middle East), the encroachment of European power did not eliminate mufti-based forms of jurisprudence or fiqh. European officials simply combined the work of local muftis with imperial policy in ways that promoted the legal autonomy of the state (Kugle 2001: 257–313). Working with “advisory” muftis after securing control over the Mughal courts in Bengal, for instance, British agents pressed for a more thoroughly centralized pattern of legal oversight: translating digests of fiqh in order to engage Islamic law more directly; combining the terms of fiqh with European notions of “justice, equity, and good conscience”; promulgating statutes that superseded specific elements of fiqh; and, after 1861, distancing themselves from advisory qazis altogether. The history of Muslim law is filled with patterns of legal centralization in which private muftis and advisory qazis were superseded by the power of the state. The history of Pakistan is similar; here again *the state asserted its power to define the parameters of Islamic law*.

Following in the footsteps of intellectuals like Amir Ali and Mohammad Iqbal, some argue that Islamic law is a work in progress fashioned by “a Muslim people” through the deliberations of their political representatives – including their elected representatives in the case of an Islamic “republic” (Iqbal 1934: section c. regarding *ijma*). Others, however, oppose what they describe as the “arrogance” of legislative power (Coulson 1956: 211–226). They stress the work of judicial qazis and executive caliphs instead. The debate is familiar: Where do the terms of Islamic law in practice come from? And, in an Islamic republic, are Muslim *legislators* in a position to define the substance of Islamic law, or not?

In Pakistan, constitutional debates have generally revolved around such questions (Choudhury 1955: 589–600; Binder 1961; “Democracy” 1963; Rosenthal 1965: 200–235, 250–281; “Constitutional Development” 1969; Rahman 1970: 275–287; Khan 2001; Lau 2006). Muftis continue to issue private fatwas (subject to voluntary compliance). But, with respect to “enforceable” laws, the debate often revolves around specific efforts to combine prevailing forms of *state centralization* with parallel efforts to delineate the power of *parliament*. Religious traditionalists have routinely

GROUP 1 (TRADITIONALIST)	GROUP 2 (NATIONALIST)	GROUP 3 (ISLAMIST)
Autonomous <i>muftis</i>	Autonomous <i>state</i>	“Non-autonomous” <i>state</i>

Figure 1 Who Defines Islamic Law in an Islamic Republic? Three Views

sought to resist the rise of parliament, insisting that Islamic law cannot be “made” by elected Muslims. Military generals and superior court judges have also criticized parliamentary power, hoping to undercut the power of Pakistan’s electorate. But, in the end, I argue that each of these efforts has faltered.

Within Pakistan, questions regarding the role of parliament vis-à-vis the specification of what might be called “statutory shari‘a” dominate contemporary debates regarding Islam and democracy. The preeminence of parliament was not a foregone conclusion when Pakistan was formed in 1947; it emerged over several years (including numerous periods of martial law during which key features of the Constitution itself were suspended). In fact the consolidation of parliamentary power vis-à-vis the delineation of Islamic law remains uncertain. Still, I argue that the specification of a constitutional formula in which *an enforceable Islamic law* was entrusted to the work of *an elected Muslim legislature* must be seen as a defining feature of Pakistan’s constitutional history so far.

The Cast of Characters

An appreciation for the constitutional status of Pakistan’s parliament vis-à-vis the delineation of Islamic law requires some familiarity with three broad sets of actors – each defined by its ideas about the treatment of Islamic law within the modern state.¹

The first pertains to “traditionalist” muftis affiliated with various schools of Islamic jurisprudence or *fiqh* (see Figure 1: Group 1). This group is composed of madrasa-based ulema bound together by a firm commitment to the official autonomy of their fatwas. The irony, of course, lies in the fact that this commitment (favoring autonomy from the “corrupting” influence of the state) is often tied to the work of political *parties* like the Jamiat-i Ulema-i Islam or JUI (Party of Islamic

¹ Binder focuses on the “traditionalist” ulema (Group 1), the “modernist” politicians (with occasional references to “secularist” soldiers and bureaucrats) (Group 2), and the “fundamentalist” Jama‘at-e-Islami (Group 3).

Ulema) and the Jamiat-i Ulema-i Pakistan or JUP (Party of Pakistani Ulema) – parties that criticize the expanding reach of the very state they seek to control.

The remaining two groups are less suspicious of the state. Viewing the ulema as riven by doctrinal rivalries, they stress the “unifying” work of the state while, at the same time, disagreeing about the reach of that state with respect to its legislative power (See Figure 1: Groups 2 and 3).

Group 2 combines an appreciation for the unifying work of the state with an appreciation for the “dynamism” of shari‘a (emphasizing the value of “advisory” qazis working alongside a state with *unfettered* legislative power). In Pakistan, this group includes progressive religious ideologues like Mohammad Iqbal, who combined an appreciation for the dynamic quality of Islam with that of an elected legislature, alongside “nationalist” politicians like Mohammad Ali Jinnah. It also includes lay religious actors like Ghulam Ahmad Parwez and modernist religious philosophers like Fazlur Rahman working alongside dictators like General Mohammad Ayub Khan. Together, these figures formed a pragmatic religious-cum-political clique bound together by their view that the historical evolution of Islamic law could be channelled *through* the creative potential of the state (Brown 1996: 68–72, 102–107, 134–141; Qasmi 2010: 1197–1253). Whereas nationalist figures like Jinnah and Iqbal focused on the dynamic legislative power of an unfettered *parliament*, however, Parwez, Rahman, and Ayub Khan stressed the unfettered power of the *executive*.

The third and final group is less convinced that Islamic law lends itself to a dynamic process of “legislation.” In fact this group views the power of the state through lenses crafted by a famous Islamist ideologue named Abu’l ala Maududi, stressing the unifying power of a shari‘a-focused state with *very little* legislative autonomy. Here, Islamic law is not generalized as mere “principles” guiding an otherwise unfettered legislature (Group 2). Nor is it buried beneath scholarly and sectarian debates (Group 1). On the contrary, Group 3 insists that, far from defining shari‘a, the state merely enforces it as a set of historically inflexible provisions. Legislation is, thus, for Group 3, broadly seen as anathema even as state-based *enforcement* is generally seen as indispensable.²

² For a discussion of Maududi’s views regarding “legislation” (in light of the prophetic example and the wisdom of the ulema) – developed in contrast to the views of those Binder describes as Pakistan’s “ijma modernists” (e.g. Ghulam Ahmad Parwez) – see Brown (1996: 74–80, 112, 126–128); Binder (1961: 90–104).

Since the formation of Pakistan in 1947, the traditionalists and the Islamists in Groups 1 and 3 have teamed up to *oppose* the “unfettered” legislative power articulated by the nationalists in Group 2. The most energetic battles, however, have often unfolded *within* Group 2. Scholars like Charles Kennedy and Martin Lau, for instance, note that, in the ongoing tussle between Pakistan’s executive (including the army) and its parliament, appeals to the judiciary became so common that, ultimately, it was neither the executive nor parliament but the judiciary that actually reigned supreme. Moving away from any specific interest in ideology, in other words, Kennedy and Lau stress the role of *institutions* (and, especially, the role of institutional frictions) in defining Pakistan’s constitutional relationship with Islam (Kennedy 1992: 769–787; Lau 2006). Whereas Kennedy and Lau arrive at an appreciation for the autonomous power of the judiciary, however, I maintain that it was not the judiciary but *parliament* (with its traditionalist, nationalist, and Islamist political parties) that emerged as constitutionally supreme.

What follows is an effort to recount this emerging supremacy of parliament in three parts. The first begins with the independence of Pakistan in 1947 and ends with the promulgation of Pakistan’s first Constitution in 1956; the second ends with the promulgation of Pakistan’s second Constitution in 1962; the third ends with the Constitution of 1973. Typically, 1973 is regarded as the pinnacle of Pakistan’s twentieth-century constitutional history. But, with respect to Islamic law and the parameters of Pakistan’s Islamic state, I argue that the Constitution of 1956 (as reflected in the Constitution of 1962 and, especially, its amendment in 1963) is actually more important. Before 1963 Pakistani traditionalists, nationalists, and Islamists battled one another to determine who would define the terms of Islamic law; after 1963 this debate was clarified in ways that favored *an unfettered state dominated by Pakistani nationalists*. Subsequent refinements were vigorously contested; but, after 1963, the institutional configuration that defined Pakistan’s approach to Islamic law was stable. The irony lay in the fact that this configuration, stressing the power of *parliament*, took shape in a Constitution promulgated by a military dictator. A deeper understanding of this outcome requires an appreciation, not only for the debates that shaped each of Pakistan’s three Constitutions (1956, 1962–63, 1973) but also for the debates that preceded and followed each document.

“Constitutionalizing” Islamic Law (1947–62)

Constitutional Debates (1947–52)

After the independence of Pakistan in 1947, the members of Pakistan’s Constituent Assembly – more than 70 percent of whom belonged to the (nationalist) Pakistan Muslim League led by Governor-General Mohammad Ali Jinnah – were indirectly elected. They were indirectly elected, following the colonial election of 1946, by Provincial Assemblies in East Bengal and, more than 1,000 miles away, in Sindh, West Punjab, Balochistan, and Pakistan’s Northwest Frontier Province.³

Building on the work of a group known as the Pakistan Educational Conference, chaired by Fazlur Rahman of East Bengal (which, in late 1947, endorsed an “Ideology of Pakistan” devoted to the inculcation of Islamic values in a push to counter the threat of “provincialism” in Pakistan’s public schools), the Constituent Assembly began with a landmark resolution known as the Objectives Resolution in March 1949 (Conrad 1997: 122–151). This resolution set Pakistani constitutionalism (and Muslim nationalism) apart from the secular language adopted by India while, at the same time, seeking to stress “the cohesive potential of Islam”:

Whereas sovereignty over the entire universe belongs to God almighty alone, and [whereas] 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; wherein the state shall exercise its power and authority through the chosen representatives of the people; . . . [and wherein] Muslims shall be enabled to order their lives . . . in accordance with the teachings and requirements of Islam as set out in the Qur’an and the sunnah . . . etc.

Approved by Prime Minister Liaquat Ali Khan, who migrated to Pakistan from East Punjab after the Partition of India, as well as Governor-General Khwaja Nazimuddin from East Bengal, who succeeded Jinnah after his death in September 1948, this resolution sought to balance the

³ In 1947, India’s Constituent Assembly was divided in two, with each Assembly serving, simultaneously, as an interim national legislature. (Delegates from Bengal and Punjab were also divided between their “Indian” and “Pakistani” constituencies.) In Pakistan, after several adjustments to accommodate representatives for Muslim refugees from India and various princely states, East Bengal held 44 seats, Punjab 17 (plus 5 for refugees), Sindh 4 (plus 1 for refugees), Balochistan 1, NWFP 3, and the princely states / tribal areas 4 (Callard 1957: 78–85; Binder 1961: 121–123).

sovereignty of God (in keeping with the rhetorical position adopted by many Islamists) with the sovereignty of the postcolonial state (in keeping with the terms of South Asian Muslim nationalism). At the same time, however, it went out of its way to avoid any reference to Sunni *fiqh* – clearly marginalizing the (traditionalist) *ulema*. The state-oriented views of Groups 2 and 3, in other words, were recognized at the expense of those commonly associated with Group 1.⁴

The Constituent Assembly went on to establish a 25-member Basic Principles Committee (BPC), dominated by members of the Muslim League, as well as (a) various subcommittees to address the federal distribution of power and (b) a special panel of religious experts known as the Talimat-e-Islamia Board (the “Teachings of Islam” Board) to examine the constitutional status of Islamic law.⁵

Unfortunately, the first report of this BPC (1950), known as its “interim” report, failed to satisfy two core constituencies, namely (a) the traditionalist *ulema* and (b) the residents of East Bengal.⁶ First, the report noted that the Objectives Resolution, highlighting the sovereignty of “God almighty” and “the limits prescribed by Him,” should be incorporated within the Constitution as a *nonbinding* “directive principle of state policy” (subordinated to binding commitments like the enforcement of fundamental rights). Second, the BPC recommended Urdu as the national language as well as an upper house in which each province would enjoy equal representation (ignoring the fact that Pakistan’s demographic majority lived in Bengali-speaking East Bengal). The ensuing dissent was so vigorous – particularly in East Bengal – that the Constituent Assembly was adjourned to revise its interim report (Binder 1961: 200–207).

Intervening Debates (1947–52)

Responding to the first BPC report, which had rejected the views of the Talimat-e-Islamia Board, 31 religious scholars – both traditionalists

⁴ Hindu members, expressing concerns about the special status of Islam in the Objectives Resolution, recommended several amendments, but in the end these were rejected along communal lines.

⁵ The final membership of the BPC differed from its original membership. The sole Ahmadi member resigned, leaving 24 who signed the final report: three were Hindus and five were brought in at various points to replace four who died and one – the chief minister of Sindh – who was replaced by an official from the Sindh High Court after his party fell short in the provincial election of 1953.

⁶ For the composition of the Talimat-e-Islamia Board, as well as the BPC’s rejection of its views, see Binder (1961: 156–158, 166–177, 180–181).

(Group 1) and Islamists (Group 3) – met in Karachi (1951) to re-articulate their demands.⁷ This meeting included Abu'l ala Maududi and at least four members of the Talimat-e-Islamia Board itself, all of whom noted that, as a Muslim homeland, Pakistan should be tied to a clear Islamic ideology. Stressing 22 key points, for instance, they insisted that Pakistan's head of state should be a pious male Muslim advised by a Legislative Council regarding matters not already "settled" by the terms of shari'a and, above all, that a special committee of religious experts should be created to ensure that any law passed by the Legislative Council would not contravene the Qur'an or the sunna as interpreted by the jurisprudential "schools" prevailing amongst the ulema (Binder 1961: 215–219; Rosenthal 1965: 215, 222–223). In fact, claiming pride of place with reference to the delineation and specification of Pakistan's "Muslim" identity, the traditionalists went on to insist that the role of the ulema should be enhanced via "provision[s] for Islamic education in accordance with . . . the various . . . schools of . . . [traditionalist] thought" as well as "the administration of [Muslim law] by judges . . . belonging to th[ose] . . . schools" (Maududi 1955 [1969]: 321–322).

Constitutional Debates (Revisited)

In 1952, the BPC reconvened to draft a "revised" report addressing these traditionalist/Islamist suggestions (Callard 1957: 94–96). Led by Khwaja Nazimuddin – who resigned as Pakistan's governor-general to become Pakistan's prime minister following the assassination of Liaquat Ali Khan in 1951 – this second report noted that the head of state must be a Muslim while, at the same time, continuing to embrace the Objectives Resolution as a *nonbinding* constitutional preamble. It also added greater specificity to the overall allocation of parliamentary seats, noting that Pakistan's eastern and western wings should enjoy exactly equal numbers (Binder 1961: 245–247).⁸

Intervening Debates (Revisited)

Again, the pattern of dissent was twofold. While appreciating the principle that Pakistan's parliamentary seats should be divided equally

⁷ For an account of earlier initiatives, including a 1948 proposal from Constituent Assembly member Maulana Shibbir Ahmad Usmani (JUI) for a Ministry of Religious Affairs to oversee the work of the government (without any formal accountability to the legislature), see Binder (1961: 33, 98).

⁸ For additional proposals (e.g. equal numbers for *East* and *West* Pakistan in the lower house and equal numbers for each *province* in the upper house), see Binder (1961: 311–312).

between its eastern and western wings (notwithstanding East Pakistan's overall majority), western provinces like the Punjab opposed the distribution of seats *within* West Pakistan itself. And, somewhat predictably, the "religious" lobby representing Groups 1 and 3 insisted that their advice regarding the "Islamic" status of state-based laws should be binding.

Prime Minister Nazimuddin responded to the concerns articulated by Groups 1 and 3 with a proposal stating that the head of state should constitute an "advisory" board of ulema to rule on the repugnancy of individual laws (with the unanimous vote of this board forcing impugned laws back to the legislature for amendment) (Binder 1961: 230–232, 257, 270, 274–276).⁹ But, eventually, the Constituent Assembly decided to reject this idea, turning instead to a proposal in which declarations of repugnancy were left with the Supreme Court alone (Choudhury 1955: 591).¹⁰

*A Constitution Deferred (I): Traditionalists and Islamists
versus Nationalists (1952–56)*

The frustration of traditionalist and Islamist religious scholars, having been denied any exclusive or binding authority over the Islamization of existing laws, was partially offset by the long-term prospect of installing like-minded allies within the country's highest court. Still, they resented ongoing efforts to promote the notion of institutional power-sharing vis-à-vis the issue of "repugnancy." In effect, they saw this push for the separation of powers as a deliberate effort to diminish their assumed supremacy in matters of religious identity. And, beginning in 1952, extralegal methods were used to assert the strength of their collective demands.

In comments prepared for the second BPC meeting in 1952, Islamist ideologue Abu'l ala Maududi argued that a religious group known as the Ahmadiyya should be relegated to a separate "non-Muslim" electorate

⁹ Note that, in Pakistan, the role of religious experts was "advisory," whereas in Israel these experts succeeded in preserving various forms of exclusive jurisdiction (see Hanna Lerner's chapter in this book).

¹⁰ For additional proposals regarding the jurisdiction of the Supreme Court, see Rosenthal (1965: 208, 214–215, 220); Binder (1961: 104–108, 238, 265–266, 319, 324–325). For Group 1 views favoring an "advisory" Board of Ulema (or selected ulema on the Supreme Court itself), see Binder (1961: 223–224, 280–281, 289–291, 326–327, 358). Note that scholars like Mohammad Asad had long stressed a significant role for the Supreme Court in adjudicating matters of repugnancy; Maududi simply hoped to see a Court dominated by Islamist judges (Binder 1961: 336).

(Binder 1961: 272, 286). (The Ahmadiyya were regarded by many Muslims as heretics owing to their description of a late nineteenth-century spiritual leader named Mirza Ghulam Ahmed as a “prophet.” This description was said to reject the notion that Mohammad was the last and final prophet of Islam.) In fact, shortly after Maududi argued that the Ahmadiyya should be assigned to a separate electorate, he joined a small number of traditionalist parties like the JUI in a series of protests that rapidly spilled out onto the streets.¹¹

Pakistan’s governor-general Ghulam Mohammad (who took over as governor-general when Khwaja Nazimuddin became prime minister in 1951) was appalled by this turn to rioting as a form of political pressure – a form of pressure seeking to rally public support behind the constitutional demands of those claiming to “defend” Islam. The army was eventually called in to restore order. But, just a few weeks later, Prime Minister Nazimuddin intervened to remove the chief minister of the Punjab for failing to prevent the riots. This was a controversial move. In fact, Governor-General Ghulam Mohammad stepped in shortly thereafter to dismiss Nazimuddin for ousting Punjab’s chief minister. According to Ghulam Mohammad, this was an act that only he was legally entitled to perform.

Constitutionally, the riots of 1952–53 were pivotal. First and foremost, they prompted a brief period of martial law, raising numerous questions about the relative powers of parliament (Prime Minister Nazimuddin) and the executive (Governor-General Ghulam Mohammad). Even more importantly, however, with reference to Pakistan’s religious identity, they prompted an official inquiry that culminated in a famous report authored by the chief justice of the Lahore High Court, Mohammad Munir, and his colleague, Malik Rustom Kayani (Qasmi 2014). This report, commonly known as the Munir Report, argued that, whether or not parliament was supreme, the state should always avoid declaring who was (and who was not) a Muslim. “It does not require much imagination,” Munir explained, “to judge the consequences” of a fratricidal process in which each group seeking to control the religious identity of the country sought to define every other group as “apostates” (subject to death) (“Report of the Court” 1954: 219). In fact pushing back against Groups 1 and 3, Munir insisted

¹¹ Maududi and the JUI were late arrivals in the anti-Ahmadiyya “direct action” of 1952–53. This mobilization was initiated by a group of religious activists known as the Ahrar; it accelerated after an All-Pakistan Muslim Parties Convention was held in Karachi in January 1953. (For the link between these riots and Pakistan’s Constituent Assembly, see Binder (1961: 259–272, 281–296.)

that any state-based enforcement of a zero-sum religious identity was *categorically incompatible with public order*. The terms of Islam, he noted, must be defined, neither by the totalitarian views of Maududi nor by rival ulema, but rather by an unfettered (national) state committed to ongoing legislation within the constitutional parameters of what might be described as “intra-Muslim nonestablishment.”

Munir was not convinced that the power of the state should be dominated by parliament (particularly insofar as Pakistan’s elected representatives had revealed their vulnerability to the power of religious populism). In fact, *within* Group 2, Munir’s own loyalties did not lay with a “nationalist” parliament; they lay with the consolidation of a powerful executive.

*A Constitution Deferred (II): Executive versus
Parliamentary Primacy (1952–56)*

Munir’s critique of the religious traditionalists and Islamists in Groups 1 and 3 clearly influenced the work of Pakistan’s Constituent Assembly, where, in the wake of the anti-Ahmadiyya riots that engulfed the Punjab in 1952–53, state-based attempts to enforce a static expression of Islamic law – as defined by the ulema or Maududi – were rejected (Collins 1988: 511–584, 552). In fact the intensity of the intra-Muslim competition unfolding both within Group 1 and between Groups 1 and 3 was routinely cited to overrule any agreement those groups might have stressed regarding the allocation of the Ahmadiyya to a separate electorate.

Amongst the nationalists within Group 2, however, an overarching constitutional consensus regarding the distribution of power between the executive, the judiciary, and the legislature proved elusive. Some insisted that efforts to delineate the terms of Islamic law should remain in the hands of the legislature: “[I]n many respects the mutable part of the [shari’a] requires considerable overhauling, and the immutable bases (e.g. the Qur’an) need a new interpretation,” wrote Education Minister I.H. Qureshi (echoing the views of Mohammad Iqbal), asking: “Who will do this work of . . . interpretation?” “It is obvious,” he noted, “that the only place where [such a] discussion can take place is the legislature, because, as the supreme representative of the people, the legislature alone can . . . [determine] what seems rational and proper” (Binder 1961: 191; Rosenthal 1965: 236; Choudhury 1969: 51).

Others, however, doubted the extent to which autonomous legislators could rise above populist forms of bigotry. “[W]e are prompted by

something they call human conscience,” Justice Munir explained, to ask “whether . . . the problem of law and order [should] not be divorced from [that] democratic bed-fellow called ministerial government which is so remorselessly haunted by . . . political nightmares” (“Report of the Court” 1954: 387; Lombardi 2010: 660).¹² Clearly, Munir maintained, the institutionalization of Islamic law should not be left to the legislature. As a question of law and order, he argued, its natural home was the executive.

In the end, however, fearing the possibility of an ever-expanding executive, the Constituent Assembly sided with I.H. Qureshi, noting that any law deemed “repugnant” to the terms of Islam (by the Supreme Court) should be referred back to the legislature for amendment – although, having said this, the assembly went on to ask whether this arrangement could be put into practice if, owing to the martial law regime imposed during the riots of 1953, the Constituent Assembly was still, technically speaking, suspended. Indeed, even as Justice Munir and Justice Kayani were drafting their response to the riots in Lahore, the Constituent Assembly was drafting several amendments designed to rein in Pakistan’s executive.¹³ In particular, recalling the governor-general’s dismissal of Prime Minister Nazimuddin, the assembly sought to introduce a special amendment preventing the executive from dissolving the legislature – full stop (Choudhury 1963: 48).

These amendments were introduced for debate in September 1954. But, less than a month later, Governor-General Ghulam Mohammad dissolved the Constituent Assembly – a move quickly challenged by the president of the assembly in a famous case known as *Tamizuddin Khan v. Federation of Pakistan* (1955). Initially, the courts rejected the governor-general’s position that the Constituent Assembly’s amendments seeking to restrict his powers were not “law” because they had not yet received his consent. But, in March 1955, the Federal Court led by Mohammad Munir (recently elevated to the post of Chief Justice) *accepted* the governor-general’s arguments. Of course the implications of this decision were far-reaching, throwing several laws already enacted by the assembly without the governor-general’s consent (because the

¹² Munir’s deputy, Justice M.R. Kayani, opposed military authoritarianism.

¹³ For an account of the political circumstances surrounding these amendments, with particular reference to the politics of East Bengal – including Muslim League efforts to battle new forms of cooperation between (a) dissident Bengali politicians (who, as a newly formed United Front, prevailed in Bengal’s 1954 provincial elections) and (b) religious leaders affiliated with Groups 1 and 3 – see Binder (1961: 352–359).

assembly believed it was “sovereign”) into question (Callard 1957: 86). But Munir did not fail to see the constitutional crisis he had been unleashed. In fact, within a few months, he issued a countervailing opinion declaring that it *was*, actually, the assembly – as opposed to the governor-general acting in a state of emergency – through which any constitutional provision must be drafted (*Usif Patel v. The Crown* 1955).

Shortly after this countervailing opinion was issued, 40 members from each “half” of Pakistan – distributed amongst the parties that had participated in provincial elections after 1946 (e.g. Punjab 1951, Bengal 1954, and so on) – came together as Pakistan’s Second Constituent Assembly. This second assembly was charged with promulgating the country’s first Constitution.¹⁴

Pakistan’s First Constitution: A False Start (1956)

Ratified in March 1956, Pakistan’s first Constitution was notable for its emphasis on parliamentary primacy: a unicameral parliament consisting of 310 members equally divided between East and West Pakistan.¹⁵ The name of the country became The Islamic Republic of Pakistan and the Objectives Resolution (1949) was incorporated as a *nonbinding* constitutional preamble. More detailed religious provisions, including compulsory teaching of the Qur’an for Muslims, were set forth in a series of *nonjusticiable* articles known as the “Directive Principles of State Policy.” And, finally, the crucial issue of “repugnancy” was taken up in Articles 197–198, where it was noted that, while the president was expected to appoint both (a) an organization devoted to Islamic research and (b) an “advisory” commission charged with making recommendations for the Islamization of existing laws (while protecting the Constitution and the sectarian diversity within “Muslim personal law” from the specific encroachments of this process), any *final* decision regarding the correction of ostensibly “repugnant” laws would be made, not by the Supreme Court, but rather by the *National Assembly* (Binder 1961: 371–374; Choudhury 1963: 183, 185; Wheeler 1970: 99).

In practice, however, the president delayed any appointments to the advisory commission spelled out in Articles 197 and 198 for nearly two years. Throughout this period, the country was preoccupied with the

¹⁴ For an account of the events that preceded the formation of the Second Constituent Assembly, particularly in East Bengal, see Qasmi (2014); Binder (1961: 367–369); Callard (1957: 31, 118–123).

¹⁵ For Maududi’s response to the 1956 Constitution, see Maududi (1955 [1969]: 355–377).

political instability flowing from a rapid succession of prime ministers: Chaudhury Mohammad Ali (1955–56), Hussain Shaheed Suhrawardy (1956–57), Ibrahim Ismail Chundrigar (October–December 1957), and Feroz Khan Noon (1957–58). Within three years Pakistan's new Constitution had been abrogated. In October 1958, President Iskander Mirza dismissed Pakistan's National Assembly and declared martial law before, just three weeks later, being sent into exile by his own chief martial law administrator, Mohammad Ayub Khan. Pakistan's first *Constitution* favored a powerful *parliament*. But, throughout the mid-1950s, real power lay with Pakistan's executive.

Islamic Constitutionalism (1962–63)

The military coup led by Chief Martial Law Administrator General Mohammad Ayub Khan was endorsed (not surprisingly) by Chief Justice Mohammad Munir (*The State v. Dosso* 1958).¹⁶ Even before Ayub turned his attention to the preparation of a new Constitution, however, he stepped forward to outline a number of "Islamic" legal reforms by way of executive ordinance – reforms that set the stage for some of the most important religious provisions to emerge, four years later, in Pakistan's second Constitution (1962).

The most significant reform was known as the Muslim Family Laws Ordinance (MFLO 1961). This ordinance sought to institutionalize a set of (quite "unfettered") proposals recommended by an earlier commission known as the Commission on Marriage and Family Laws (1955), including provisions regarding (a) marriage (requiring state-based registration, permission for polygamous marriages, and a higher minimum age), (b) divorce (outlawing "triple *talaq*" and requiring state-based registration for divorce), and (c) inheritance (allowing orphaned grandchildren to inherit in place of their parents) (Coulson 1963: 240–257; Esposito 1982; Collins 1988: 559). In fact the commission placed the authority to define the terms of shari'a firmly within the parameters of the modern national *state*, going out of its way to marginalize traditional muftis and reject the inflexible understanding of shari'a embraced by most Islamists ("Report of the Commission" 1963).¹⁷ Above all, the new Constitution promulgated by Ayub in 1962 – originating in the work of an 11-member

¹⁶ Justice Cornelius dissented, stressing the indispensability of "fundamental rights" even in the wake of a successful coup.

¹⁷ The first version of this report was published in 1956.

Constitution Commission appointed by Ayub in 1960 before being substantially revised (in secret) by Ayub's hand-picked cabinet – went out of its way to ensure that Ayub's MFLO was carefully shielded from scrutiny.¹⁸ In particular, Ayub ensured that his MFLO was protected from judicial review.

Constitutional Debates

Together with the MFLO (which many traditionalists and Islamists saw as the epitome of “nationalist” legislative arrogance), Ayub's new Constitution defined a fresh high-water mark for the unfettered law-making autonomy generally associated with Group 2 (Collins 1988: 557, 560–562; Qasmi 2010: 1229–1235).¹⁹ But, in many ways, its most ambitious institutional reforms were also short-lived; in fact it is not the Constitution of 1962 so much as *the Constitution of 1962 as amended in 1963* (reinstating certain elements from the Constitution of 1956) that defined the relationship between Islamic law and the parameters of the postcolonial state.

Ayub's Constitution began by changing the name of the country to “*The Islamic Republic of Pakistan*” (removing the word “Islamic”) and retaining the Objectives Resolution as a nonbinding preamble carefully revised to remove religious constraints as follows: “*Whereas sovereignty over the entire universe belongs to Almighty Allah alone and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust, . . . this Constituent Assembly . . . resolves [. . .]*” In fact Ayub went on to ensure that Pakistan's Directive Principles of State Policy were diluted to relax the possibility of constraints imposed by the ulema, noting that “*the Muslims of Pakistan should be enabled . . . to*

¹⁸ K.J. Newman notes that the members of Ayub's Constitution Commission were “not impressive in caliber,” describing them as mostly “lawyers and businessmen of medium standing” (Newman 1962: 360). The Constitution Commission was directly under Ayub's control, but it was not entirely insensitive to public views. In place of an elected assembly it engaged the public through elite interviews and more than 6,000 replies to an elaborate questionnaire. Traditionalists and Islamists led by Maududi responded by reiterating the 22 demands they articulated in 1951; nationalists affiliated with G.A. Parwez responded as well. In the end, however, the views of the commission (particularly with respect to limitations on executive power) were largely ignored by Ayub's cabinet (Newman 1962: 361–362; Choudhury 1963: 144; Rosenthal 1965: 251–254).

¹⁹ In 1959 Ayub Khan promulgated the West Pakistan Auqaf Properties Ordinance to manage the endowments that supported so much of Pakistan's (previously autonomous) religious infrastructure: madrasas, shrines, and so on. The ulema knew they were under attack.

order their lives in accordance with ~~[the teachings and requirements of Islam as set out in the Holy Qur'an and sunna]~~ the fundamental principles and basic concepts of Islam.” And, in Article 198, Ayub removed similar constraints to stress that, with respect to future legislation, “no law shall be passed which will be repugnant to ~~the teaching and requirements of Islam~~” (Choudhury 1963: 177–189). Together, these adjustments were intended to stress that, under Ayub, Islamization and the removal of “repugnancy” could only proceed if the different schools of traditionalist thought managed to accomplish the almost impossible task of “evol[ing] unanimity” with respect to “the fundamentals of Islam” (Lau 2006: 7).

Naturally, all of these adjustments were fiercely opposed by Groups 1 and 3. In fact within a year each was reversed as a consequence of their opposition. In particular, Article 198 was amended to ensure that, in the course of state-based efforts to ensure that no law was repugnant to Islam “as set out in the Holy Qur’an and sunna,” the expression “Qur’an and sunna” was taken to mean “the Qur’an and sunna as interpreted by each sect.”²⁰

In the amended Constitution of 1963, Article 6 continued to stress that, as per the Constitution of 1956, official decisions regarding repugnancy (and its correction) would be made, not by the Supreme Court, but rather by the *National Assembly*: “Our courts are not conversant with . . . religious knowledge, [so] . . . it would be a great mistake to leave this matter to the courts,” noted Law Minister Khurshid Ahmed (Tanzil-ur-Rahman 1996: 47). In fact, returning to the views of the Pakistan Education Conference (1947), Ahmed argued that the best option was to proceed by way of education, so that “by education . . . we create such [a] public opinion that we [are able to] Islamize our laws” via *parliament*.

Even as it provided for a set of institutions to support the Islamization of existing laws, then (drawing attention to the nonbinding advice of Pakistan’s Advisory Council of Islamic Ideology in Article 199), the Constitution of 1962–63 simply reiterated elements first articulated in 1956 to prevent the courts from correcting instances of repugnancy on

²⁰ This attention to the views of each sect was articulated by Group 1 traditionalists as early as 1951 (Binder 1961: 220, 283–284, 371; Rosenthal 1965: 219, 222). Fazlur Rahman stressed conflicting trends in the 1962 Constitution (as amended in 1963), namely (a) the perpetuation of “all existing fiqh schools” (Group 1) and (b) principles of policy stressing “unity” and “observance of Islamic moral standards” (Group 3). It was a relief, Rahman noted, revealing his preference for Group 2, that “despite the recognition of fiqh-schools . . . the Muslim Family Laws Ordinance – a great stroke of reformist legislation – was enforced in 1961” (Rahman 1970: 286–287).

their own. Indeed, even as the superior courts were empowered to review laws that cut against specific fundamental rights, they were *not* unilaterally empowered to *revise* any law suspected of questionable ties to “Islam.” This was partially a consequence of Article 6 (regarding the primacy of parliament vis-à-vis Pakistan’s “principles of law-making”), but in many ways, it was also the result of a rather unusual Fourth Schedule (which stated that certain laws, including laws like the MFLO that fell under the heading “Muslim personal law,” would *not* be open to judicial review).²¹ In fact, together with Article 6, this Fourth Schedule stepped in to ensure that, precisely insofar as Ayub Khan’s Muslim Family Laws Ordinance (MFLO) sought to revisit (and revise) the parameters of “Muslim personal law,” it was protected from any articulation of judicial review that might seek to challenge its “unfettered” (nationalist) power.²² Legislation pertaining to Muslim personal law, in other words, like the Constitution itself, was protected from judicial review, even as judicial efforts touching on other legal matters were restricted to an explication of what was *not* “Islamic” (rather than what actually *was*). The task of defining what *was* Islamic, in a positive statutory sense, was carefully reserved for *parliament*.

Islamic Constitutionalism “Under Review” (1963–2000)

Naturally, Islamists like Maududi were appalled by the protections articulated within Ayub Khan’s Fourth Schedule. In fact Maududi’s ire was so pronounced that, by 1965, he abandoned his own insistence that the head of state must be a pious Muslim male to support the sister of Mohammad Ali Jinnah, Fatima Jinnah, in that year’s presidential election. Fatima Jinnah failed to unseat Ayub, but Maududi’s opposition to Ayub’s religious-cum-legal tinkering carried on. In fact by 1968 his protests had reached such a pitch that one of Pakistan’s most influential nationalist philosophers, Fazlur Rahman, was forced to resign as chair of Pakistan’s constitutionally mandated Central Institute of Islamic Research (Article 207).

²¹ For the circumstances surrounding the formulation of this Fourth Schedule, see Choudhury (1963: 264–268).

²² When the MFLO was challenged for the first time in the Supreme Court, the Court declared that, according to constitutional provisions protecting the terms of Muslim personal law from charges of “repugnancy,” it was not in a position to intervene (*Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yousaf* 1963).

Throughout the late 1960s protests were brewing both on the right (Maududi) and the left (owing to burgeoning inequality between the country's eastern and western wings). And, in March 1969, Ayub chose to step down, nominating his colleague, General Yahya Khan, to take his place as president (in contravention of Ayub's own constitutional principle [Article 16] stating that the Speaker of the National Assembly should fill any vacancy in the presidency). Yahya quickly imposed martial law and called for national elections (1970). But, when Ayub's turncoat foreign minister, Zulfikar Ali Bhutto (leading a newly formed party known as the Pakistan People's Party), refused to accept what many saw as the free and fair election of his rival, Mujibur Rahman (representing a party based in East Pakistan known as the Awami League), the country collapsed into civil war. India intervened, and in due course East Pakistan was reconstituted as an independent state – the state of Bangladesh.

Intervening Debates

Reflecting on this tumultuous sequence of events following the transfer of power from General Ayub to General Yahya in *Asma Jilani v. Government of the Punjab*, the Pakistan Supreme Court once again sought to shore up the power of parliament. Describing Yahya as a “usurper,” Chief Justice Hamoodur Rahman drew on the Objectives Resolution to articulate “[a] principle of sovereignty based on the idea of trusteeship in which *the body politic* [i.e. the ‘people’ acting through their chosen ‘representatives’]” was treated as the only legitimate trustee “for the discharge of sovereign functions.”²³ In fact Justice Rahman sought to challenge both the authoritarianism of the military and the authoritarianism of Islamists like Maududi, suggesting that, in a parliamentary democracy, “[political] trusteeship must consist of a plurality of persons, which ‘negates the possibility of absolute power being vested in a single hand’” (Lau 2000: 53 [citing Asma Jilani]).

Zulfikar Ali Bhutto succeeded General Yahya as Pakistan's chief martial law administrator after the elections of 1970. And, when martial law was lifted in April 1972 (after the formation of Bangladesh), he was

²³ Justice Afzal Zullah went further, describing the Objectives Resolution as a “supra-constitutional” provision. But, in the end, the Court did not endorse his view (Lau 2000: 55).

installed as the new prime minister. Shortly thereafter, Bhutto reconstituted his rump National Assembly as Pakistan's fourth Constituent Assembly (there were no fresh elections after the separation of East Pakistan and the termination of martial law) to rewrite the country's constitution.²⁴

Constitutional Debates

Building on the Constitution of 1962–63, Bhutto preserved almost all of the existing articles concerning the Islamization of law (even redefining Ayub's Fourth Schedule as a new "First" Schedule to protect Muslim personal law from the burden of judicial review). In fact with respect to the elaboration of an "Islamic" constitution the dictatorship of Ayub and the democracy of Bhutto scarcely differed (even to the point of introducing broadly "secular" provisions initially and, then, following violent protests by Groups 1 and 3, backtracking via "religious" amendments the following year).

At the same time, the Supreme Court issued a landmark judgment reinforcing (once again) the primacy of parliament in matters pertaining to Islam. In *The State v. Ziaur Rahman* (1973), the Court reiterated that, when it came to the delineation of Islamic law, the role of the judiciary was limited to defining what was *not* Islamic and *not* to defining what *was*. In effect, the Court held that the state's role in defining Islamic law in a "positive" sense was strictly confined to parliament; neither the (non-binding) Objectives Resolution nor the judiciary occupied anything like an overarching supra-constitutional power.²⁵

Intervening Debates

The Constitution of 1973 changed the name of Pakistan's "Advisory" Council of Islamic Ideology to, simply, the Council of Islamic Ideology or CII (Article 228), noting (once again) that any law found to be repugnant by this CII would be referred back to the *legislature* for amendment

²⁴ Before the elections of 1970, General Yahya announced that Pakistan's National Assembly would include 313 members – 169 from East Pakistan and 144 from West Pakistan. Pakistan's fourth Constituent Assembly was composed of the 144 members elected from Pakistan's (revived) western provinces (Wheeler 1970: xiii).

²⁵ "In effect," Lau writes, "the Supreme Court voluntarily limited its power. It would not interfere with . . . parliament's power to make laws or amend the constitution" (Lau 2006: 19).

(Article 230).²⁶ The Objectives Resolution, in turn, was retained as a *nonbinding* preamble, with Article 2 identifying Islam as Pakistan's state religion (and, in Article 41, the religion of the president, with both the president and the prime minister being expected to swear an oath that Mohammad was the final prophet of God – in other words, an oath rejecting the views of the Ahmadiyya).²⁷ In fact, following on from this, a Second Constitutional Amendment was forged in 1974 to redefine the Ahmadiyya as, legally speaking, “non-Muslims.”²⁸

Both the Constitution of 1973 and this Second Amendment were adopted unanimously. But, again, massive political disagreements continued to fester just below the surface; in fact, within just a few years, Bhutto's opponents came together in a unified show of resistance after Bhutto scheduled fresh elections (1977). Unfortunately, the elections were rigged (in favor of Bhutto). And, as protests spread, the chief of the army staff, General Zia-ul-Haq, stepped in to impose martial law once again.

Zia's coup was endorsed by a unanimous decision of the Supreme Court in the case of *Begum Nusrat Bhutto v. Federation of Pakistan* (1977) – a case that directly challenged the principle of “popular” sovereignty outlined in *Asma Jilani* (1972). Zia, however, did not entirely disagree with *Asma Jilani*'s reading of Pakistan's Objectives Resolution and its specific references to sovereignty. He merely returned to the Objectives Resolution to reshape, with reference to “Islam,” the issue of judicial review.

Reviving “Islamization”: Executive and Judicial Powers

In 1979 General Zia promulgated a remarkable constitutional amendment that, for the first time, empowered provincial high courts to judge whether or not a given law was “repugnant” to the terms of Islam on their own. Modifying earlier efforts to endow the Supreme Court and the National Assembly with such powers, he declared that “repugnant”

²⁶ A final report concerning the enactment of “Islamized” laws was to be submitted by the CII within seven years after the promulgation of the Constitution (for autonomous action on the part of the National and Provincial Assemblies within a further two years).

²⁷ Persistent ambiguity surrounding the prime minister's religion was addressed in the 18th Amendment (2010), which stated that the prime minister must be a Muslim as well.

²⁸ Within Article 260, pertaining to constitutional definitions, Clause 3 was added to note that “a person who does not believe in the absolute and unqualified finality of the Prophethood of Mohammad . . . is not a Muslim for the purposes of this Constitution or law.” For earlier efforts to introduce this provision, see Binder (1961: 272); Qasmi (2014).

laws should be sent back to the *president* (federal laws) or his appointed *governors* (provincial laws) for amendment. (Appeals were then referred to a special bench of the Supreme Court known as the Shariat Appellate Bench. However, Zia nominated the judges who sat on that appellate bench and ensured that any power to revise impugned laws would be undertaken by his own CII appointees in conjunction with the executive.)

Just one year later, however, in 1980, Zia revised this amendment. In particular, he disbanded his provincial shariat courts to create, with the help of an entirely new chapter in the Constitution (Chapter 3A), a body known as the Federal Shariat Court (FSC) composed of a chair (nominated by the president from amongst those eligible for appointment to the Supreme Court) and four members (again, nominated by the president). This FSC is often viewed as an “apex” shari‘a court. But, technically speaking, this court still sits within Pakistan’s ordinary judicial hierarchy (with appeals traveling to the Shariat Appellate Bench of Pakistan’s existing Supreme Court). Moreover, rather than allowing the FSC to review of all shari‘a-oriented legislation, a special article (Article 203-B) was introduced to ensure that, once again, the FSC was *not* empowered to review (a) the Constitution itself or (b) any “Muslim personal law” (including, at least ostensibly, Ayub Khan’s Muslim Family Laws Ordinance) (Tanzil-ur-Rahman 1996: 67–68).

Initially, the FSC was reluctant to embrace its new powers. In *Kaikus v. Federal Government* (1981), for instance, the FSC held that it was not able to judge matters like the permissibility of elections spelled out in the Constitution itself. And, in *Federation of Pakistan v. Mst. Farishta* (1981), dealing with inheritance, the court held that, with respect to Muslim personal law, it was constrained by Article 203-B. In fact, even when the court *did* exploit its jurisdiction, it embarrassed Zia. Its first-ever judgment (*Mohammad Riaz v. Federal Government* 1980), for instance, regarding the enduring validity of the Indian Penal Code (1860) in Pakistan, turned to Mohammad Iqbal in setting aside the influence of the ulema: “While the opinions of the [classical] jurists are entitled to some weight,” the FSC explained, those opinions “are not controlling” (Collins 1988: 571). And, in *Hazoor Bakhsh v. Federation of Pakistan* (1981), the court rejected the “traditional” view that stoning was an acceptable Islamic punishment for adultery.²⁹

²⁹ Apparently, nationalist views inspired by Mohammad Iqbal, G.A. Parwez, and scholars like Fazlur Rahman prevailed even *within* Zia’s (ostensibly Islamist) FSC (Brown 1996: 136–138).

This decision, however, led Zia to reconsider the composition of the court itself. Promulgating yet another constitutional amendment, Zia added three ad hoc ulema to the court, while, at the same time, allowing the court to review (and reverse) its own decisions (Collins 1988: 572–574).³⁰ Apparently, judicial autonomy was not Zia’s intention; the FSC was clearly intended to serve as a handmaiden of the executive.

Even after it was reconstituted to include representation from the traditionalist ulema, however, Zia found the FSC hard to control. In *Habibur Rehman v. Federation of Pakistan* (1983), regarding Shi’i participation in the hajj, for instance, the FSC noted that, where there was no “state action” transforming an element of shari’a into statute, there was nothing for the court to strike down (or send back to the president and his legislature for amendment).³¹ The FSC, in other words, continued to insist that its role lay in deciding whether a state-based law was *not* Islamic (rather than what actually *was*).³² Indeed, even apart from the Constitution and “Muslim personal law,” the FSC held that ostensibly “Islamic” laws that failed to reflect a cross-sectarian consensus (as reflected in formal legislation) could not be reviewed at all (*Dr. Amanat Ali v. Federation of Pakistan* 1983; Redding 2004: 777, 783–784).

Frustration with Pakistan’s Federal Shariat Court – what Charles Kennedy described as a certain “reluctance” on the part of the FSC (and the Shariat Appellate Bench of Pakistan’s Supreme Court) “to extend their jurisdiction through an activist interpretation of their constitutional mandate” – ultimately prompted Zia to amend the Constitution again (Kennedy 1992: 774). This time, he rejected the “symbolic” status of the Objectives Resolution and elevated it to a “substantive” provision of the Constitution itself: Article 2A (1985). This article was specifically introduced to counter the case of *Ziaur Rahman* (1973), according to which the judiciary had been prevented from using the Constitution’s nonbinding preamble to strike down other parts of the Constitution (Tanzil-ur-Rahman 1996: 57–63; Conrad 1997: 140–141). Zia hoped that, in formalizing Article 2A, he would finally succeed in providing his courts with a measure of supra-constitutional power – power through which Zia could reference Article 2A to strike down elements of the Constitution he considered “disagreeable”

³⁰ For Zia’s decision to add two handpicked ulema to the Shariat Appellate Bench, see Tanzil-ur-Rahman (1996: 54); Redding (2004).

³¹ For additional examples, see Redding (2004: 778–782); Kennedy (1992: 773).

³² For an early statement of this purely negative approach (as articulated by the ulema), see Binder (1961: 169).

(Kennedy 1992: 780, 783–784, 786; *Hakim Khan v. Government of Pakistan* 1992; Lau 2000: 58–62; Tanzil-ur-Rahman 1996: 69–83).³³

Unfortunately, Zia found that his own courts were (still) quite reluctant to support this cynical approach to Pakistan's separation of powers (Lau 2006: 59–65). In *Hakim Khan v. Government of Pakistan* (1992) and *Kaneez Fatima v. Wali Mohammad* (1993), for example, the Supreme Court held that Article 2A could *not* be treated as a supra-constitutional provision superseding the power of parliament (Lau 2006: 65–68).³⁴ (In *Kaneez Fatima*, the Court noted that, although Article 2A *could* be used to challenge an executive ordinance or regulation, it could *not* be used to strike down ordinary parliamentary legislation.) Indeed, as Charles Kennedy noted, this pattern of reluctance was not confined to the courts; there was also a clear sense of apprehension within the public at large regarding “an expanded role for the superior courts via . . . supra-constitutional [powers]” (Kennedy 1992: 786). Writing in 1992, Kennedy believed that Article 2A would quickly expand the “religious” reach of the courts. But, over time, the courts themselves indicated that Kennedy's concerns were overdrawn.³⁵

Reviving “Islamization” (II): The Primacy of Parliamentary Power

Even as Zia's push for Islamization was failing to inspire the courts, however, Groups 1 and 3 reemerged to push Zia's agenda forward *within the legislature itself*. In 1985, for instance, traditionalist senators Sami-ul-Haq and Qazi Abdul Latif (JUI) drafted a bill known as the Enforcement of Shariah Bill to expand the reach of judicial review in matters pertaining to shari'a (with “shari'a” defined in ways that highlighted the consensus of Pakistan's ulema) (Kennedy 1992: 775). And, shortly thereafter, a group of Islamists affiliated with the Jama'at-e-Islami proposed

³³ Note that Tanzil-ur-Rahman was at the forefront of this push to exploit the “Islamizing” potential of Article 2A.

³⁴ Note that even Tanzil-ur-Rahman was reluctant to usurp the power of the legislature altogether (Lau 2006: 71, 73).

³⁵ For a countervailing perspective, see Cheema (2012: 900–912). Cheema does not stress the expanding reach of the FSC at the expense of Pakistan's National or Provincial Assemblies; he stresses the use of “religious reasoning” by superior court judges seeking to bolster judgments, including judgments targeting unrestrained executive power, *within* which the core argument is *not* primarily religious. Lau also describes cases in which judges invoke religious principles in their interpretation of existing statutes, including judgments that undermine basic rights (Lau 2006: 39–44, 70–73, 36–39, 112–119).

a Ninth Constitutional Amendment to revise Article 203-B (permitting a review of Ayub Khan's well-known MFLO).

Eventually, however, both the Enforcement of Shariat Bill and the proposed Ninth Amendment failed to gather sufficient support in the legislature. In the end both were defeated by nationalist politicians (Group 2) affiliated with the Pakistan Muslim League and the Pakistan People's Party – nationalist politicians who balked at “religious” efforts to shift legislative authority away from Pakistan's parliament.

Conclusion

This rather persistent defense of parliamentary power was finally disrupted in 1988 when Zia stepped in to (a) dissolve the National Assembly and (b) promulgate his own “Enforcement of Shariah” Ordinance. This ordinance, however, was not introduced as a constitutional amendment; it was introduced as a presidential *ordinance*. And, during the next four months, when this ordinance was not ratified by any *legislature* (during which time Zia was also killed in a mysterious plane crash), it simply collapsed as expired.³⁶

Finally, however, nearly 15 years after its creation, Pakistan's FSC stepped in to strike down a portion of the MFLO (Section 4) regarding the inheritance of orphaned grandchildren (*Allah Rakha v. Federation of Pakistan* 2000). In particular, the court built on the case of *Kaneez Fatima* (1993) to annul the executive *ordinance* through which Ayub Khan “created” a Qur'anic right of inheritance for these grandchildren. Drawing attention to the absence of orphaned grandchildren in any known scheme of Qur'anic heirs, however, the FSC refused to say what the terms of Islamic inheritance regarding orphaned grandchildren might be. Instead, drawing on the experience of Syria, Morocco, Egypt, Iraq, and many other Muslim-majority countries, the court simply turned to the work of the CII and referred the issue back to the

³⁶ Following national elections in 1988, Zia's ordinance was revived in the Senate before advancing to the National Assembly under Prime Minister Benazir Bhutto. Even before it could be put up for a vote, however, the assembly itself was dissolved on the orders of Zia's presidential successor. Subsequent elections (1991) installed Nawaz Sharif as prime minister. And, in due course, Sharif went on to introduce yet another Enforcement of Shariah bill. This time, both the Senate and the National Assembly voted to pass the bill (with every traditionalist and Islamist abstaining) – although, crucially, this new law broke no new ground; it merely recognized *existing* habits vis-à-vis the interpretation of statutory law in light of Islamic principles (Amjad Ali 1992; Lau 2006: 91–93).

National Assembly for amendment.³⁷ Again, the FSC stepped in to declare what Islamic law was *not*; it did not intervene, in place of parliament, to define what that law should *be*.

“By 1977,” Martin Lau believes, “it was well established that Islamic law imposed limits on the legislative power of the government” (Lau 2000: 66). In fact “until the creation of the FSC [in 1980],” he notes, “the locus for any introduction of Islamic law was parliament,” but *thereafter* he asserts that the FSC became “an institutional mechanism to Islamize the legal system independently” (Lau 2000: 45, 48; Lau 2006: 6).³⁸ “In the absence of political leadership or societal consensus,” Kennedy adds, “the real determinant of the content ... of Islamic reform has been the ... courts themselves.” “In the absence of [political] consensus,” he argues, “the superior courts ... adopt[ed] an increasingly activist stance” (Kennedy 1992: 787).³⁹

Perhaps such claims are understandable given the lack of any robust political consensus regarding the terms of Islamic law in Pakistan. But, in a constitutional sense, I argue that these claims are also vastly overstated. In fact, with respect to the Constitution, the locus of power vis-à-vis the terms of Islamic law has *not* come to rest with the executive or the judiciary. On the contrary, when it comes to Islamic law, the locus of power has generally been vested in *parliament*. The courts have *not* sought to claim autonomous power (despite the persistent hopes of Groups 1 and 3 and the constitutional interventions of General Zia); they have, instead, persistently stressed the preeminence of the legislature (however lacking in “consensus” it might be).

In his reading of prevailing trends pertaining to the Objectives Resolution, constitutional scholar Dieter Conrad reinforces this conclusion, noting that, within the Supreme Court of Pakistan, the terms of “Islam” were never thought to provide judges with any sort of supra-constitutional power. With respect to divine authority, Conrad notes that

³⁷ For an account of the superior court judgments leading up to “Allah Rakha,” see Lau (2006: 138–139, 157–160).

³⁸ Lau draws attention to what he calls a “judge-led process,” arguing that the FSC should be understood as “an institutional mechanism to Islamize the legal system independently from parliament” (Lau 2006: 9).

³⁹ For one case in which this activist stance appeared to *challenge* a general deference to legislative authority, see Cheema (2012: 892–896); here, a decision issued by the Shariat Appellate Bench of the Supreme Court (*Federation of Pakistan v. Gul Hasan Khan* 1989) prompted a new Qisas and Diyat Ordinance – a rare case in which the shariat courts actually seemed to prompt new legislation (1995) articulating what the terms of Islamic law *should be*.

“the direct recipient of [this] delegated authority is not . . . a monarchical head of state but the people” (Conrad 1997: 128). Of course the degree to which these “people” might take up this mantle of authority is variable (as I have written elsewhere).⁴⁰ But, with respect to Pakistan’s *constitutional* jurisprudence, Conrad clearly notes that *primacy lies with “the people.”*

As Conrad points out, Pakistan’s first Constituent Assembly (1952) took a key decision regarding “the power of interpretation” vis-à-vis shari’a, and “this decision has remained the common basic structure [for every] constitution” thereafter. “The power to . . . bring all legislation in accordance with ‘the injunctions of Islam,’” he explains, “was vested in *parliament* as the final interpreting authority” (Conrad 1997: 133–134; Omer 2012). “The general disposition” of the state was, thus, “to treat Islamic principles as a matter [for] the future” and “to entrust their realization to the . . . political responsibility of the *legislature*” (Conrad 1997: 135). Whereas Kennedy and Lau see a rising star for Pakistan’s Islamic judiciary, in other words, I join Dieter Conrad in seeing Pakistan’s judicial record as infused with the primacy of *parliament*. This emphasis is fragile, but to my mind it is empirically unmistakable.

This chapter has traced the extent to which Pakistan came to embrace a formula of effective parliamentary preeminence in 1956, and the extent to which, despite two superseding constitutional texts and several constitutional amendments, this formula was not reversed. The original context within which this balance was struck – a context framed by debates about “Islam” as the basis for holding East and West Pakistan together – was altered. But, through periods of both civilian and military rule, as well as the loss of East Pakistan, this balance has remained remarkably stable, taking shape in a series of restorative amendments introduced by Ayub Khan in 1963.

Initially, constitutional provisions rendered specific references to Islam nonbinding (in the Objectives Resolution), nonenforceable (in the Directive Principles), or outside of the scope of routine judicial review (with reference to the MFLO). Yet, even as these restrictive features waxed and waned, the judiciary never fully or successfully challenged the underlying principle of parliamentary preeminence in matters pertaining to the statutory delineation of Islamic principles. While newer institutions like the FSC subtly revised the institutional balance developed in 1956, the power to define Islamic law in a “positive” sense continued to lie with *parliament*.

⁴⁰ For an account of the political conditions under which parliamentary primacy vis-à-vis the terms of Islamic law has been exercised in practice, see Nelson (2013).

At first glance, Pakistan has much in common with the framework of religious “establishment” in countries like Israel. But, in the end, Pakistan’s efforts to limit the reach of traditional scholars and totalitarian Islamists in favor of a written defense of parliamentarism – indeed, Pakistan’s efforts to ensure that, notwithstanding the “advice” of the ulema, state-based religious laws are solely delineated within a parliament subject to the power of the ballot – are very different. Democratic forms of constitutionalism need not be defeated by the terms of religious establishment. In Pakistan, following Iqbal, the promise of democracy is closely tied to a nuanced combination of law and religion filtered through the work performed by an elected parliament.

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