

Islamic Polity and the Constitutional Process in Pakistan

By

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Preamble

This paper explores the answers to a series of interrelated questions that have always revolved around the establishment, existence and governance of Pakistan, which claims to be an ideological state founded on the basis of Islam: What political order do the principles and practices of Islam envisage? How did the political philosophy that led to the creation of Pakistan evolve? Is there a variance between the classical or conventional idea of an “Islamic” state and the state based on Islam as contemplated by Pakistan’s founding fathers? Have the aspirations of Pakistan’s founding fathers been adequately reflected in the country’s Constitutional development? In so doing, this paper first examines the basic Islamic concepts of state structure and sovereignty, and then provides some historical perspectives on how the Islamic political order and system of governance have evolved since the advent of the religion. Thereafter, this paper sets out the ideological backdrop of the emergence of Pakistan in 1947, followed by a discussion of the country’s Constitutional development over the last six decades.

Islamic Concepts of State Structure and Sovereignty

Before embarking on any proper analysis of the Islamic polity, it is essential to recognize the extensive and all encompassing nature of the Islamic religion: it does not merely present a set of personal beliefs, it presents an entire scheme of personal and communal life. Resultantly, examining the concept of governance in Islam requires a view against the background of the “whole Islamic system of life covering the economic, social, political and educational spheres of activity”.¹

In addition, there are at least two fundamental points of contrast between the Islamic system of governance and the modern Western democratic model, and an effective appraisal of the structure of the State under Islam would necessitate prior recognition of these points of contrast.

The first point of contrast is the relationship between Church and State. The Western democratic model hinges on the separation of Church and State, with the former exercising authority over religious matters and the latter controlling matters of civil administration. Not only that, the State also has the obligation to remain neutral in matters of religion and culture. The Western model, therefore, is tailored more towards secular ‘Church’ societies having an institutionalized ecclesiastical structure and is not

¹ Sayyid Abul A’la Maududi, *Islamic Law and Constitution*. trans. Khurshid Ahmed, Lahore: Islamic Publications Limited, 1960, p. 53.

necessarily the most suitable system for ‘organic’ societies where religion cannot be effectively separated from the State. On the other hand, Islamic societies are, by definition, organic with a low ecclesiastical institutionalization of authority and hinge on the concept of a Divinely ordained Muslim *Ummāh* (Community), making the separation of ‘Church’ and State impossible.

Historically, religion and politics have been closely intertwined in most Islamic societies and, whilst religious scholars – the *ulama* – have often furnished interpretations and applications of Islamic law, the apparatus of its enforcement has always been the political structure. The prevalent political philosophy is summed up most aptly by Asad:

“No nation and community can know happiness unless and until it is truly united from within; and no nation or community can be truly united from within unless it achieves a large degree of unanimity as to what is right and what is wrong in the affairs of men; and no such unanimity is possible unless the nation or community agrees on a moral obligation arising from a permanent, absolute moral law. Obviously, it is *religion* alone that can provide such a law and, with it, the basis for an agreement, within any one group, on a moral obligation binding on all members of that group.”²

The second point of contrast is the notion of sovereignty. The modern Western democratic model is built upon the concept of ‘sovereignty of the people’. By contrast, the Islamic system is predicated on the core concept of *Tawhīd* (Oneness), defined as witnessing and bearing testament that ‘there is no God but *Allāh*’. Consequently, *Allāh* holds a unique position in Islamic politics, His will provides the commands and guidelines that shape the lives of all members of the *Ummāh*, and, in essence, sovereignty can be vested in Him alone:

“Say: O *Allāh*, Lord of all dominion! Thou grantest dominion unto whom Thou willest, and takest away dominion from whom thou willest Verily, Thou hast the power to will anything.”³

Western critics and classical Muslim scholars contend that this concept collides head-on with the notion of democracy since Islam does not accept the Western view of ‘sovereignty of the people’. It is, however, noteworthy that while Islam may not provide comprehensive Western-style sovereignty to the people, it furnishes them full authority and control of worldly affairs – *muāmalāt* as opposed to *ibadāt* (matters of belief and worship) – and merely asks them to remain conscious of *Allāh*’s omnipotence during their conduct. In addition, ‘democracy’ itself is a multi-dimensional term and embodies a concept which, in practice, is employed in many different forms (including those

² Muhammad Asad, *The Principles of State and Government in Islam*, Gibraltar: Dar al-Andalus, 1980, p.6.

³ Qur’ān 3:26.

advocating representative government and some forms of guardianship) that do not necessarily vest sovereignty in the entire populace.

Accordingly, the well-established Western notions of constitutionalism and democracy find parallels in the very heart of Islamic jurisprudence⁴ – the principal sources of Islamic law – the Qur’ān and the *Sunnah* (practice of the Prophet): “[in] fact, Islamic jurisprudence resembles an immense ocean on whose bottom one has to search, at the price of very great efforts, for the pearls that are hidden there”.⁵

Islamic System of Governance: Some Historical Perspectives

Islam reached this world as a revelation to the Holy Prophet Muhammad (PBUH) in present-day Saudi Arabia more than 1400 years ago. As the Muslim Empire expanded, the Holy Prophet (PBUH) not only became the spiritual head but also the political leader of the *Ummāh* – the Islamic community – and as such played the composite role of administrator-in-chief, statesman, military commander, judge and legislator.

The City State of Medina, as established and led by the Holy Prophet (PBUH), has always been regarded as the exemplar of the original purity of Islam and an embodiment of the model Islamic state. The Qurān itself maintains silence on the form of government or political order that an Islamic state should adopt, save that it should be principally involved in the implementation of Islamic law. It is historically established, however, that the life which the Qurān requires a Muslim to lead is ideally possible only if he is a member of a society that is politically and economically free. Accordingly, Muslims are expected to establish their own state wherever possible and viable.

The *Sunnah* of the Holy Prophet (PBUH) follows the same principle in his migration from his ancestral home in Makkah and his founding of a civil society and state in Medina. By bringing together the *Muhājirīn* (those who migrated) from Makkah and the *Ansār* (the helpers) of Medina into his *Ummāh*, he laid the foundations of “Muslim nationality” centered around a common spiritual aspiration instead of a common race, language and territory.⁶ As Messenger of God and the ultimate political and military authority, the Holy Prophet (PBUH) was under no obligation to consult others, but he in fact consulted his Companions in all matters except those relating to Revelation. The process of consultation was also followed by four Rightly Guided Caliphs, who were the immediate successors in office of the Holy Prophet (PBUH). The Qurānic verse requiring Muslims to conduct their affairs by mutual consultation⁷ sums up the very

⁴ A later part of this paper discusses the Islamic polity and its democratic fundamentals in detail.

⁵ J.N.D. Anderson, “Codification in the Muslim World”, as cited in Herbert J. Liebesny, *The Law of the Near and Middle East: Readings, Cases and Materials*, Albany: State University of New York Press, 1975.

⁶ Javid Iqbal, *Islam and Pakistan’s Identity*, Lahore: Iqbal Academy Pakistan and Vanguard Books Limited, 2003, p. 7.

⁷ Qurān 42:38.

nature of the Muslim community, and the Holy Prophet (PBUH) himself stated: “My community would never agree on an error”.⁸

The valley of Yathrib, which formed part of the City State established in Medina, had, in addition to a Muslim population, Jewish, Christian and pagan inhabitants. In order to keep the City State strong and independent, the Holy Prophet (PBUH) deemed it necessary to maintain equality among all of its citizens so that they could assist each other in defending their common territory. Accordingly, the Holy Prophet (PBUH), after consulting with the other communities, issued *Mīthāq-e-Madina* (the Covenant of Medina) as the first known written constitution in the world, derived from the Qurānic injunction that there is no compulsion in matters of religion.⁹ Comprised of forty-seven articles, the first twenty-three of which govern the rights and duties of Muslims *inter se*, and the remaining twenty-four of which deal with relations of Muslims with Jews and other inhabitants of the City State of Medina, *Mīthāq-e-Madina* on the one hand joined the *Muhājirīn* and the *Ansār* into a bond of common faith, and on the other hand gave the non-Muslims freedom of their respective religions and properties, thereby joining them together into the *Ummāh* on the basis of humanity, patriotism and the need for the combined defence of a common territory.

Mīthāq-e-Madina, as conceived by the Holy Prophet (PBUH), was not only an attempt on his part to establish a pluralistic society, it also brought into existence a “federal” state as the conduct of the non-Muslim tribes was governed by their own laws, just as that of the Muslims was governed by the *Sharī‘a* – the Islamic laws – and the non-Muslims enjoyed complete political and religious autonomy in their own regions. The drafting of the Treaty of Hudaibia, entered into between the Holy Prophet (PBUH) and Suhayl bin ‘Amr, the representative of the pagans of Makkah, is also of great political significance. Providing for non-aggression between the Muslims and the tribe of the Quraysh for a period of ten years, the Treaty begins with the pagan invocation: “In Thy Name, O Lord” as, according to reputable historical sources, the Holy Prophet had agreed to withdraw the introductory sentence “In the name of *Allāh*, the Beneficent, the Merciful” when the other side objected that the Quraysh would not approve of the words “the Beneficent, the Merciful”. Furthermore, the Holy Prophet (PBUH) also agreed for himself to be named in the Treaty as “Muhammad, the son of Abdullah” instead of “Muhammad, the Messenger of *Allāh*” when Suhayl bin ‘Amr objected on the ground that if the Quraysh had recognized Muhammad as the Messenger of *Allāh* there would have been no war between the two sides. This pragmatic approach to treaty-making reflects the political wisdom and far-sightedness of the Holy Prophet (PBUH) as a statesman.¹⁰

⁸ This is a well known *Hadīth* (saying of the Holy Prophet (PBUH)) that is quoted by many scholars – see, for example, T. W. Arnold, *The Caliphate* p. 184, as quoted by Javid Iqbal, *Islam and Pakistan’s Identity*, Lahore: Iqbal Academy Pakistan and Vanguard Books Limited, 2003, p. 62.

⁹ Qurān 2:256.

¹⁰ Javid Iqbal, *Islam and Pakistan’s Identity*, Lahore: Iqbal Academy Pakistan and Vanguard Books Limited, 2003, p. 11.

One of the most immediate issues that arose after the death of the Holy Prophet (PBUH) was that of a political successor or *Khalīfah*. While there is a difference in the *Sunni* and *Shī'a* versions of history on whether the Holy Prophet (PBUH) had named a successor or not, Jalaluddin Suyūti, an eminent *Sunni* scholar, has noted, on the authority of Imam Bukhāri, Imam Muslim, Imam Behāqi and Imam Ahmad, that Caliphs Umar and Ali had confirmed, before their death, that the Holy Prophet (PBUH) had not appointed any successor.¹¹ Thus, by neither naming any successor, nor providing for a mode or framework for his placement in office or removal therefrom, the Holy Prophet remained consistent with the Qurān, wherein this subject has passed *sub-silentio*, which confirms that the political system in Islam is a temporal or worldly matter rather than a spiritual or religious one, and any form or mode of governance is acceptable provided and for so long as it implements the *Sharī'a* and does not interfere in the performance by the Muslims of their religious obligations.

The federalist state structure left by the Holy Prophet (PBUH) was followed by a republican order introduced and maintained by the four Rightly Guided Caliphs, Abu Bakr (who was first elected by a private assembly of the *Muhājirīn* and the *Ansār* after an intense debate, followed by an endorsement from the general public), Umar (who was recommended as successor by Abu Bakr and endorsed by the public at large through a referendum), Uthman (who was first elected by a small electoral college of influentials constituted by Umar and then endorsed by public vote), and Ali (who rejected a private nomination and took office upon the public at large swearing allegiance to him). While the modes of appointment in these four cases were distinguishable from each other in some respects, their common element was the eventual approval in some form or the other by the public at large. In short, these modes were democratic and participatory, though not necessarily majoritarian in nature, adding, as a significant constitutional principle to the Islamic polity, the appointment of a Head of State by approval of the Muslim community to the specific exclusion of traditional hereditary succession.

During this phase of the seventh century Islamic republican state, what is in today's world understood as "human rights" were comprehensively enforced as laid down in the Qurān and *Sunnah*. These include: equality of all citizens before the law as well as equality of status and opportunity (Qurān 4:1 and 28:4), freedom of religion (Qurān 2:256, 10:100, 6:108, 5:48, 22:40 and 109:6), right to life (Qurān 17:33), right to property (Qurān 2:188), no one is to suffer from the wrongs of another (Qurān 6:165 and 53:38), freedom of person (from the *Sunnah*), freedom of opinion (Qurān 4:148, 5:78–79, 7:165 and 3:110), freedom of movement (Qurān 67:15), freedom of association (Qurān 3:104), right of privacy (Qurān 2:189, 24:27–28 and 49:12), right to secure basic necessities of life (Qurān 3:180 and 51:19), right to reputation (Qurān 49:11–12), right to a hearing (from the *Sunnah*), and right to decision making in accordance with proper judicial procedure (Qurān 49:6, 17:36 and 4:58).¹²

¹¹ Suyūti's *Tarīkh-al-Khulafā* Urdu translation by Shibbir Ahmed Ansari pp. 9–10 as cited in *Ibid.* p.62.

¹² Javid Iqbal, *Islam and Pakistan's Identity*, Lahore: Iqbal Academy Pakistan and Vanguard Books Limited, 2003, pp. 21–26.

The permanent democratization of the Islamic polity, however, could not be attained beyond 661 A.D. – the year in which the era of the first four Rightly Guided Caliphs, the latter three of whom were assassinated, came to an end – as the process of consultation could not become more broad-based and binding, suspicion and hatred caused by ancient tribal rivalries intensified, and differences among rival political groups led to militant confrontation. Muslims of the time got divided into several intolerant religio-political factions who ruthlessly slaughtered each other in a civil war that erupted due to the prevalent power struggle. So bemoaned Ameer Ali, while closing his chapter that marked the end of the republic of Islam with the demise of Caliph Ali, by quoting Oelsener, “[t]hus vanished the popular regime, which had for its basis a patriarchal simplicity, never again to appear among any Mussulman nation”.¹³

Thereafter, the office of caliph started to pass – right through 13th century A.D. under the Umayyad and Abbasid Caliphates – not to persons selected for their piety and accomplishments, but according to dynastic principles:

“Less than three decades after the Prophet’s death, the caliphate had decayed to kingship in all but name. From then on the conception of the caliphate seemed to draw more on theories of kingship from prior civilizations than from Islam. Such an outcome was hard school for naive piety. And further humiliations were in store when, in the course of time, power passed from the caliphate altogether to usurpers whose only claim to power was their success in seizing it, and then, in 1256 A.D., the Mongol invasions destroyed the caliphate itself.”¹⁴

As the original political message of the Holy Prophet (PBUH) and the *Sunnah* of the Rightly Guided Caliphs were quietly consigned to oblivion, the dynastic world of Islam degenerated into a number of petty principalities in a constant state of war with each other, with a figurehead caliph reduced to the status of a silent spectator. Throughout this period, the ruling Muslim elite by and large remained above the law, and many jurists, moralists and philosophers of the prevalent times kept rationalizing the departure from Islam’s original political message on grounds that tyranny is preferable to anarchy.

The post-caliphal period lasted until the rise of the Ottoman and Mughal Empires in 15th Century A.D. and, yet again, dynastic rule became the order of the day until 19th Century A.D. when Mughals lost control of the Subcontinent to the British, and the seat of the Ottoman Empire became ‘the sick man of Europe’ trying to resist the encroachments of the Western powers. Incidentally, it was in 1839 that the legal reform

¹³ Ameer Ali, *A Short History of the Saracens* 1951 Ed. p. 54, as cited in *Ibid.*, p. 62.

¹⁴ Frank E. Vogel, *Islamic Law and Legal System: Studies in Saudi Arabia*, (unpublished paper) Chapter Three, Part Two, draft, March 1993, p. 3.

movement began under the Ottomans – the *Tanzīmāt* reforms – which marked the first time in Islamic history that principles derived from the Divine, uncoded Islamic law – the *Sharī‘a* – were enacted as codified law by the authority of the State. Finally, in 1924, the government of Kemal Atatürk abolished *Sharī‘a* law altogether and established a secular system of governance.

Presently, in the fifty Muslim countries worldwide, the systems of government in place include absolute monarchies, constitutional monarchies with titular heads and elected governments, power sharing between military and civilian leaderships (as is the case in Pakistan), authoritarian or autocratic civilian regimes, democracies with theocratic characteristics and ‘Westminster’ style democracies tinged with certain Islamic institutions. On the whole, the influence of Islam is significant (and the strength of Islamic resurgence is visible) throughout the fifty-state spectrum – although Islamic political parties are not equally successful in every country – and Turkey, which is today the only Muslim majority country that calls itself a secular state, is facing a resurgent wave of Islamic revivalism.

There is, however, no extensive history of any Islamic regime that held sway over the *Ummāh* after the era of the Holy Prophet (PBUH) and the Rightly Guided Caliphs that has followed the Islamic model of governance in its truest republican form.

Islamic Polity and its Theoretical Democratic Fundamentals

The earliest structures of Islamic government correctly drew on the principles laid down in the Qur’ān and the *Sunnah*, and notwithstanding the rules of government that developed in the centuries after the era of the Holy Prophet (PBUH) and the Rightly Guided Caliphs, it is the community, not the individual, that is fundamentally the rightful final arbiter in matters of governance. The central role of the community has been set forth and recognized in the most preliminary and basic Islamic teachings:

“You are indeed the best community that has ever been brought forth for [the good of] mankind; you enjoin the doing of what is right [lit., the “recognized,” *al-ma‘rūf*] and forbid the doing of what is wrong [lit., the “rejected,” *al-munkar*], and you believe in *Allāh*.”¹⁵

And this is the message that resonates throughout *Allāh*’s revelation as a cornerstone of Islamic political ideology:

“And (as for) the believers, both men and women – they are close unto one another: they (all) enjoin the doing of what is right and forbid the doing of what is wrong, and are constant in prayer,

¹⁵ Qur’ān 3:110.

and render the purifying dues, and pay heed unto *Allāh* and the Prophet.”¹⁶

And hold fast, all together, unto the bond with *Allāh*, and do not draw apart from one another. And remember the blessings which *Allāh* has bestowed upon you . . . *Allāh* makes clear his messages unto you, . . . that there may grow out of you a community who invite unto all that is good, and enjoin the doing of what is right and forbid the doing of what is wrong: and it is they, they who shall attain to a happy state!”¹⁷

In essence, the concept of the *Ummāh* is similar to the concept of the Greek demos, and is constructed on the pillars of liberty, equality and brotherhood as laid down by Islam. According to Rahman:

“The State organization in Islam receives its mandate directly from the people *i.e.* the Muslim community and is therefore necessarily democratic. The Islamic theory is that there exists a group of people which has accepted to implement the will of God as revealed in the Quran and whose model in history was created by the Prophet. By this acceptance, such a group is constituted into the Muslim *Ummāh*. The State is the organization to which the *Ummāh* entrusts the task of executing its will. There is no doubt, therefore, that the Islamic state obtains its warrant from the people.”¹⁸

It is important to understand, however, that while it *is* the *Ummāh* which is ultimately responsible for the enforcement of right and prohibition of wrong, there is nevertheless a chain of command that has to be followed in order to make this possible. Hence, the *Ummāh* owes its allegiance – and its obedience – to a specific command structure, the pillars of which (in order of importance) are the Qur’ān, the *Sunnah* and, derivatively, the ordinary mortals who hold authority. This command structure forms another cornerstone of Islamic political ideology:

“O you who have attained to faith! Obey *Allāh*, obey the Prophet and those from among you who have been entrusted with authority; and if you are at variance over any matter, refer it to *Allāh* and the Prophet, if you believe in *Allāh* and the day of judgment. This is the best [for you] and the best in the end.”¹⁹

¹⁶ Qur’ān 9:71.

¹⁷ Qur’ān 3:103-4.

¹⁸ Fazlur Rahman, *The Islamic Concept of State*. *Islamic Studies*, Vol. 6, 1967, p. 205.

¹⁹ Qur’ān 4:59.

As already noted, this command structure emanates from the concept of *Tawhīd* meaning, among other things, the sovereignty of *Allāh* and to that extent is a distinct departure from the Western notion of democracy which has ‘sovereignty of the people’ as its basis. Yet, this analysis begs the question of how the day-to-day executive and legislative functions of the state are to be handled. The answer lies in four inter-related Islamic concepts – *Khilāfah* (agency or vicegerency), *Majlis ash-Shūrā* (consultative assembly), *Ijmā‘* (consensus of the community) and *Ijtihād* (exercise of independent reasoning) – which collectively serve as an elaboration of the Islamic concept of democracy.

The concept of *Khilāfah* relates to the issue of political leadership of the *Ummāh*. After the death of the Holy Prophet (PBUH), the leader of the *Ummāh* was designated as *Khalīfah* (successor). In this context, the broader concept of *Khilāfah* prevailed in Islamic political systems from time to time until Kemal Atatürk abolished it in 1924. While *Khilāfah* has been viewed by many Western scholars as an authoritarian and monarchical institution (and this is largely due to its historical connotation, as outlined in the preceding section), the true Islamic connotation of *Khalīfah* is not just ‘successor’ but also a deputy, representative and agent of the people. The *Khalīfah* exercises authority in the name of *Allāh* and is selected by the *Majlis ash-Shūrā* by majority vote.²⁰ He is to possess an exemplary character in the religious, moral and social sense, has to be fully conversant in Islamic law and has to be a respected member of the community – a ‘Fard-e-Kamil’ or Perfect Man as labeled by Allama Muhammad Iqbal, or, more aptly, *primus inter pares* – first among equals.

In advocating rule by a *Khalīfah*, Islam favors some form of guardianship. Certain sections of the Qur’ān identify human beings as *Allāh*’s agents (*Khalīfahs*) on earth and human stewardship over *Allāh*’s creation as the more general meaning of *Khilāfah* (vicegerency):

“[W]hen thy Lord said to the angels, ‘I am setting in the earth a viceroy’.”²¹

A broad interpretation of this concept suggests that each of *Allāh*’s agents (each member of the *Ummāh*) is a ‘trustee’ of *Allāh*, entrusted with the responsibility of governing in accordance with the principles of Islam. While some ‘trustees’ may eventually possess greater qualifications to govern, it does not clash with the inherent equality of all members of the *Ummāh*, who should be active participants in the system of governance, as argued by Maududi:

“The real position and place of man, according to Islam, is that of the representative of God on earth, His vicegerent; that is to

²⁰ The ‘election’ of the *Majlis ash-Shūrā* and the concept of majority vote is discussed – particularly in light of Asad’s analysis thereof – later in this discussion.

²¹ Qur’ān 2:30.

say . . . he is required to exercise Divine authority on this earth within the limits prescribed by God. The specific implications of this for the political system are that the authority of the caliphate is bestowed upon the entire community as a whole and each of its individuals ‘shares the Divine caliphate’.”²²

This concept of vicegerency not only forms the basis of human responsibility and of rebellion against systems of individual supremacy, but also highlights the contrast between the Western and Islamic notions of democracy. In the words of Khurshid Ahmed:

“[S]ecular democracy as it has evolved in the post-Enlightenment era, is based upon the principle of sovereignty of Man, conceptually speaking. Islam, on the other hand, believes in the sovereignty of God and vicegerency of man, the difference being that man is God’s *Khalīfah*, or vicegerent on Earth.”²³

Closely linked to the concept of vicegerency is the notion of consultation or *Shūrā* – hence, the term *Majlis ash-Shūrā* or consultative assembly:

“[C]onsult with them [, O Muhammad,] upon the conduct of affairs. And when thou are resolved, then put thy trust in *Allāh*.”²⁴

“[Heavenly reward] (shall be given) to all who attain to faith . . . , and who . . . , whenever they are moved to anger readily forgive; and . . . whose communal business [*amr*] is [transacted in] consultation [*shūrā*] among themselves . . . and who, whenever tyranny afflicts them, defend themselves. . . . [B]lame attaches but to those who oppress people and behave outrageously on earth, offending against all right: for them there is grievous suffering in store! But withal if one is patient in adversity and forgiveness – this, behold, is indeed something to set one’s heart upon!”²⁵

This nexus, within the Islamic framework of governance, between vicegerency and consultation is equally acknowledged by Western scholars:

²² Maududi, “Political Theory of Islam”, in Khurshid Ahmed ed., *Islam: Its Meaning and Message*, p. 42.

²³ Ibrahim M. Abu-Rabi’, ed. *Islamic Resurgence: Challenges, Directions and Future Perspectives - A Round Table with Khurshid Ahmad*, Tampa FL: World and Islam Studies Enterprise, 1994, p. 62.

²⁴ Qur’ān 3:159.

²⁵ Qur’ān 42:36-43.

“Popular vicegerency in an Islamic State is reflected especially in the doctrine of mutual consultation (*shūrā*). Because all adult Muslims, male and female, are vicegerents (agents of God), it is they who delegate their authority to the ruler and whose opinion must be sought in the conduct of the state.”²⁶

Under the Western democratic conception, this notion closely resembles the idea of representative government in which the electorate places its trust in elected representatives. Not only that, the electorate, by vesting its trust in the ruler, plays the role of an active participant in the day to day affairs of the state through the formation of the *Majlis ash-Shūrā*. The existence of such an assembly is, in essence, participatory democracy.

In this regard, in Asad’s discussion of the application of the *Shūrā* principle to the modern Islamic state – the election of such assembly and the performance of its legislative functions – one can find the most significant modern day parallels between the Islamic conception of democracy and Western democratic ideals.²⁷

In Asad’s view, the *Majlis ash-Shūrā* should be armed with the mandate of the entire community – both men and women – and such representative character can only be attained through free and general elections. Hence, the members of the *Majlis ash-Shūrā* should be elected through the widest possible suffrage. Asad proposes that since the *Sharī‘a* does not specify the method of election, it becomes a matter for communal decision. Therefore, the election may be by direct or indirect, transferable or non-transferable vote, regional or proportional representation and so on. The legislative functions of the *Majlis ash-Shūrā* are to be guided by principles of the *Sharī‘a* and are to cover only those matters of public concern that have not been specifically regulated by the Qur’ān and the *Sunnah*.

Departing, to some extent, from the traditional concept of *Ijmā‘* (consensus, suggesting legislation by unanimous vote), Asad emphasizes that enactment by majority vote would be the ideal form of legislation because difference of opinion is the fountainhead of progress. To this end, he relies on some well documented *Ahādīth* (sayings of the Prophet): “[t]he differences of opinion among the learned within my community are [a sign of] *Allāh*’s grace”.²⁸ “Follow the largest group”.²⁹ And “[it] is your duty to stand by the united community and the majority [*al-‘āmmah*]”.³⁰ Expanding upon the majority principle, Asad specifies that it would be preferable to have a simple

²⁶ John L. Esposito, *Islam and Politics*, 3d ed. Syracuse, NY: Syracuse University Press, 1991, p. 149.

²⁷ Muhammad Asad, *The Principles of State and Government in Islam*, Gibraltar: Dar al-Andalus, 1980.

²⁸ As-Suyūfī, *Al-Jāmi‘ as-saghir*.

²⁹ Ibn Mūjah, on the authority of ‘Abd Allāh ibn ‘Umar.

³⁰ Ahmad ibn Hanbal, on the authority of Mu‘ādh ibn Jabal.

majority for the passage of ordinary legislation, and possibly a two-thirds majority for matters of extraordinary importance like declaration of war, removal of governments or amendments to the constitution.

The final concept to be introduced in this part of the paper is *Ijtihād*, or the exercise of independent interpretive judgment. Many Muslim scholars consider *Ijtihād* to be the key to the implementation of *Allāh*'s will at any given time or place.³¹ The practice of this concept through different eras of Muslim governance has been limited because independent judgment (by ordinary mortals) on matters of law and governance has been perceived as a threat by political regimes rooted in authoritarianism. Many conservative regimes have discouraged *Ijtihād* based on the fear that it would introduce a kind of dynamism into Islam that would detract from the legitimacy of rulers who prefer Islamic law to remain static.

Yet, modern day analysts continue to advocate the necessity of *Ijtihād*, emphasizing the need to break the shackles of intellectual stagnation and to enter an era of innovation:

“It is possible for a secular leader to suggest that power flows out of the barrel of the gun. In Islam, power flows out of the framework of the Qur’ān and from no other source. It is for Muslim scholars to initiate *Ijtihād* at all levels. The faith is fresh, it is the Muslim mind which is befogged. The principles of Islam are dynamic, it is our approach which has become static. Let there be fundamental rethinking to open avenues for exploration, innovation and creativity.”³²

This is the message that resonates throughout the writings of Iqbal³³ dating back to the first half of the twentieth century wherein he has, among other things, depicted a close relationship between consensus, democratization and *Ijtihād*:

“The growth of republican spirit and the gradual formation of legislative assemblies in Muslim lands constitutes a great step in advance. The transfer of power of *Ijtihād* from individual representatives of schools to a Muslim legislative assembly, which,

³¹ This is supported by the famous *Hadīth* whereby the Holy Prophet (PBUH) asked Mu’adh ibn-i-Jabal upon his appointment as the governor of Yemen as to how he would decide matters in his court. Mu’adh replied, “I will judge all matters according to the Book of *Allāh*”. The Holy Prophet (PBUH) then asked him, “But if the Book of *Allāh* does not contain anything to guide you?” Mu’adh replied, “Then I will act in accordance with the precedents of the Prophet of *Allāh*”. “But if these precedents also fail?” asked the Holy Prophet (PBUH). Mu’adh replied, “Then I will exert to form my own opinion.”

³² Altaf Gauhar, “Islam and Secularism”, in Altaf Gauhar ed. *The Challenge of Islam*, London: Islamic Council of Europe, 1978, p. 307.

³³ Iqbal’s view on the Islamic polity is discussed in greater detail in the next section of this paper.

in view of the growth of opposing sects, is the only form *Ijmā'* can take in modern times, will secure contributions to legal discussion from laymen who happen to possess a keen insight into affairs. In this way alone, can we stir into activity the dormant spirit of life in our legal system.”³⁴

Iqbal's view of representative government is unequivocal that, “not only is the republican form of government thoroughly consistent with Islam, but has also become a necessity in view of the new forces set free in the world of Islam.”³⁵

Emergence of Pakistan: The Ideological Backdrop

Pakistan claims itself to be an ideological state formed on the basis of Islam. It emerged on the horizon because Muslims of the Indian Subcontinent developed a specific mindset – an attitude developed by a consciousness of certain principles or objectives whose realization had become necessary. Muslims ruled the Subcontinent for nearly 900 years. Before the advent of Islam in India, Hindus were the rulers of different parts of the Subcontinent. When the British rulers commenced the introduction of Westminster-style democracy in the Subcontinent, the Muslims feared that they would be reduced to a large minority, although they had majorities in different parts of the territory and had formerly ruled the Subcontinent before the British took over. Against the backdrop of a clash between Hindu and Muslim cultures, no formula for the sharing of political power could be evolved except an acknowledgement of the right of self-determination of Muslims in those parts of the Subcontinent where they were in a majority.

The idea of creating a separate Muslim state in the Subcontinent is primarily attributable to Iqbal, and gained prominence when he first expressed it in the following words in his presidential address at the annual session of the All India Muslim League at Allahabad in 1930:

“I would like to see the Punjab, Northwest Frontier Province, Sind and Baluchistan amalgamated into a single state, self-government within the British Empire, or without the British Empire, the formation of a consolidated North West Indian Muslim state appears to me to be the final destiny of the Muslims at least of North West India.”³⁶

³⁴ Allama Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam*, Lahore: Sheikh Muhammad Ashraf, 1968, reprint, pp. 173-4.

³⁵ *Ibid.*, pp. 157.

³⁶ Presidential Address, Allahabad, 1930, p. 7, as cited in Javid Iqbal, *Ideology of Pakistan*, Lahore: Sang-e-Meel Publications, 2005, p. 72.

It should, however, be understood that Pakistan was not founded on the philosophy of hatred of the Hindu as Iqbal has clarified, in the same address, that:

“A community that is inspired by feeling of ill-will towards other communities is low and ignoble. I entertain the highest respect for the customs, laws, religious and social institutions of other communities. Nay, it is my duty, according to the teaching of the Quran, even to defend their places of worship if need be. Yet I love the communal group which is the source of our life and behaviour; and which has formed me what I am, by giving me its religion, its literature, its thought, its culture, and thereby recreating its whole past, as a living operative factor, in my present consciousness.”³⁷

Some critics of Pakistan contend that the “Two-Nation Theory” was a manufactured one and does not find any historical basis in Indian Islam. In reality, however, the issue of two nations originally arose soon after Muslims arrived in India as conquerors. Al-Biruni, who visited India in the ninth century with Sultan Mahmud of Ghazni, provides one of the earliest accounts of the difference between the Hindus and the Muslims in his famous work *Kitabul Hind*, “...[t]he Hindus entirely differ from us [the Muslims] in every respect, many a subject appearing intricate and obscure which would be perfectly clear if there were more connections between us... ...our customs do not resemble theirs, but are the very reverse; and if ever a custom of theirs resembles one of ours, it has certainly just the opposite meaning... ...[t]hey consider as impure anything that touches the fire and water of a foreigner, and no household can exist without these two elements. They are not allowed to receive anybody who does not belong to them even if he wished it, or was inclined to their religion. This renders any connection with them quite impossible, and constitutes the widest gulf between us and them”.³⁸

While Al-Biruni wrote his account a thousand years ago, the history of the Subcontinent demonstrates that several unsuccessful attempts were subsequently made to bridge the gulf between the two communities. In the sixteenth century, for example, the Mughal Emperor Akbar sidetracked Islam in an attempt to merge the Hindu and Muslim communities, but he failed primarily because the two communities were unwilling to amalgamate with one another. Thereafter, in the seventeenth century, Moghul Emperor Aurangzeb Alamgir alternatively tried to impose strict compliance of the laws of the ruling Muslim minority over the recalcitrant Hindu majority, which was not inclined to accept it, hence another failure ensued. Accordingly, the founder of Pakistan, Quaid-e-Azam Muhammad Ali Jinnah was not manufacturing a new theory a thousand years after Al-Biruni when he observed:

³⁷ *Ibid.*, p. 145.

³⁸ *Kitabul Hind*, translation by E. Sachau, Vol. I, p.17, as cited in *Ibid.*, p. 147.

“The Hindus and Muslims belong to two different religious philosophies, social customs, and literatures. They neither inter-marry nor inter-dine together and indeed they belong to two different civilizations which are based mainly on conflicting ideas or conceptions... ..it is quite clear that Hindus and Mussalmans derive their inspirations from different sources of history... ..To yoke together two such nations under a single state, one as a numerical minority and the other as majority, must lead to growing discontent and final destruction of any fabric that may be so built up for the government of such a state.”³⁹

The concept of Muslim nationalism evolved in the Islamic world due to the growth of puritanic and militant reform movements, which were protesting against the decadent Ottoman and Mughal Empires. Subsequently, due to interaction with the West, particularly its innovative ideas, the scope of Islamic puritanism widened into liberalism. The expansion of European powers gave rise to the Pan-Islamic movement. Urging the Muslims to get behind the secret of Western power, Jamaluddin Afghani emphasized on the acquisition of European techniques of progress, which essentially depended on the advancement of modern sciences. Afghani also brought forward the conception of a federated Muslim world under the constitutional Ottoman Caliphate.⁴⁰ In the Subcontinent, Sir Syed Ahmed Khan saw the nexus between education and power and exhorted the despairing Muslim populace to acquire Western knowledge consistent with the principles of Islam in order to ensure a secure future in British India.⁴¹ Iqbal, in following the same line of thinking, had an attitude even bolder than that of Afghani and Sir Syed:

“During the last five hundred years, religious thought in Islam has been practically stationery. There was a time when European thought received inspiration from the world of Islam. The most remarkable phenomenon of modern history, however, is the enormous rapidity with which the world of Islam is spiritually moving towards the West. There is nothing wrong in this movement for European culture, on its intellectual side, is only a further development of some of the most important phases of the culture of Islam. Our only fear is that the dazzling exterior of European culture may arrest our movement and we may fail to reach the true inwardness of that culture. During all the centuries of our intellectual stupor Europe has been seriously thinking on the great problems in which the philosophers and scientists of Islam were so keenly interested. Since the Middle Ages, when the

³⁹ Javid Iqbal, *Islam and Pakistan's Identity*, Lahore: Iqbal Academy Pakistan and Vanguard Books Limited, 2003, pp. 329–330.

⁴⁰ *Ibid.*, pp. 273–274.

⁴¹ Afzal Iqbal, *Islamisation of Pakistan*. Lahore: Vanguard Books Limited, 1986, p. 19.

schools of Muslim theology were completed, infinite advance has taken place in the domain of human thought and experience. The extension of man's power over nature has given him a new faith and fresh sense of superiority over the forces that constitute his environment. New points of view have been suggested, old problems have been restated in the light of fresh experience, and new problems have arisen... No wonder that the younger generation of Islam in Africa and Asia demand a fresh orientation of their faith. With the re-awakening of Islam, therefore, it is necessary to examine, in an independent spirit, what Europe has thought and how far the conclusion reached by her can help us in the revision and, if necessary, reconstruction of theological thought in Islam.”⁴²

Iqbal believed that the abolition of the Ottoman Caliphate and the resurgence of a republican spirit in the Muslim world was a return to the original purity of Islam. To his mind, this development was the underlying principle of Islam, which, after the era of the Holy Prophet (PBUH) and the four Rightly Guided Caliphs, was displaced by Arab imperialism. He visualized an international Islam when he observed that Islam was neither “nationalism” nor “imperialism”, but a “commonwealth of nations”. He clarified, however, that for the time being each Muslim nation should focus on itself until all were strong enough to form a living family of republics by overcoming their rivalries through the common bond of Islam. For the internal administration of a modern Islamic state, Iqbal has furnished the following prescription:⁴³

1. It should have a democratic dispensation, and the power of the Caliph is to be exercised by a legislative assembly. The arbitrary rule of a king or dictator is against the spirit of Islam.
2. Islamic laws cannot be imposed therein on non-Muslim minorities – they have always been and shall be governed by their own laws.
3. Parliament should adopt *Ijtihād* in carrying out legislation that meets with the requirements of the modern times.
4. Separation of state organs and the religious establishment is purely functional and is different from the separation of Church and State.
5. The criminal law of Islam may not be enforced dogmatically. There should be greater stress on legislation designed to remove

⁴² Allama Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Edited and Annotated by M. Saeed Sheikh), Lahore: Institute of Islamic Culture, 1986, p. 6.

⁴³ Javid Iqbal, *Islam and Pakistan's Identity*, Lahore: Iqbal Academy Pakistan and Vanguard Books Limited, 2003, pp. 282–305.

poverty and ignorance among the Muslims than on the imposition of *Hudood* punishments because the economic backwardness of Muslims is the real cause of the spread of various crimes in the Muslim society.

6. Interest-free banking need not be enforced in order to promote a free-market economy. Islam sees a problem not with interest *per se* but with usury or extortionist interest.
7. Economic rights of landless tenants and workers must be protected and taxes should be imposed on agricultural produce.
8. Minimum wages of industrial workers must be determined and protected, and such workers must be provided with medical care and compensation upon their retirement.
9. The principle of joint electorates may be adopted in order to bolster national integration.
10. There must be equality for all citizens regardless of their race, religion or creed.

Pakistan's Constitutional Development

There is no evidence of any written constitutions being in existence during the era of Muslim rule in India between 1206 and 1857.⁴⁴ Hereditary monarchical systems remained mostly in place, with the eldest son expected to succeed his father as sultan or emperor, though this was not always the fixed rule of imperial succession. After the last symbol of Mughal power, Bahadur Shah Zafar, was deposed by the British East India Company in 1857, the British government formally assumed control over India through a Proclamation issued by Queen Victoria in November 1858, and the British Parliament passed the Government of India Act, 1858, which was, in effect, a constitutional document for the administration of India in accordance with this Proclamation. Over the ensuing decades, indigenous political movements gained momentum, dictating the need for reform in order to make the system more participatory. Resultantly, the prevailing constitutional dispensation underwent several fundamental alterations, culminating in the enactment of the Government of India Act, 1935, which “was a comprehensive written Constitution given to India by its colonial masters”.⁴⁵ This Act, a sprawling statute comprised of 321 sections and two schedules, contained several measures aimed at enlarging the participation of Indians in governance at all levels, but still offered them no

⁴⁴ Hamid Khan, *Constitutional and Political History of Pakistan*. Karachi: Oxford University Press, 2005, p. 4.

⁴⁵ *Ibid.*, p. 21.

control over constitutional amendments, elections to the federal assembly or the civil, police or military services.

Twelve years later, the Independence Act, 1947, was enacted to give effect to the partition of the Subcontinent into two independent dominions of India and Pakistan. Under this Act, among other things, the British government ceased to control the two dominions, the legislatures of both dominions were made fully sovereign, the Constituent Assembly of each of the dominions was given the power to frame a Constitution, pending which each dominion and its political sub-divisions were to be run as closely as possible in accordance with the Government of India Act, 1935, and the Indian armed forces were divided between the two dominions.

In a radio address made in February 1948, Quaid-e-Azam Muhammad Ali Jinnah made the following observations in relation to the Constitution of Pakistan:

“The Constitution of Pakistan has yet to be framed by the Pakistan Constituent Assembly. I do not know what the ultimate shape of this Constitution is going to be, but I am sure that it will be of a democratic type, embodying the essential principles of Islam. Today, they are as applicable in actual life as they were 1300 years ago. Islam and its ideals have taught us democracy. It has taught equality of man, justice and fairplay to everybody. We are the inheritors of these glorious traditions and are fully alive to our responsibilities and obligations as framers of the future Constitution of Pakistan.”⁴⁶

After independence, the *ulama* and *maulanas* of various schools of thought, particularly religious leaders who had mostly opposed the idea of Pakistan, made it their mission to ensure that Pakistan becomes an Islamic state having an Islamic Constitution which is consistent solely with their beliefs.⁴⁷ By contrast, “the background of the men who organized the campaign for Pakistan was not theology and Islamic law but politics and the common law, not Deoband, but Cambridge, Oxford and the Inns of Court”.⁴⁸ In such circumstances, two trends of thought emerged, one led by the *ulama* and *maulas* with a rigid and obscurantist stance, and the other led by the forward looking men and women with a modern and reformist stance who had actively participated in the independence campaign. Quaid-e-Azam had unequivocally stated in this regard:

“Make no mistake: Pakistan is not a theocracy or anything like it. Islam demands from us the tolerance of other creeds and we welcome in closest association with us all those who, of

⁴⁶ Jamil-ud-Din Ahmad, *Speeches and Writings of M.A. Jinnah*, Vol. 2, p. 463 as cited in Afzal.Iqbal, *Islamisation of Pakistan*, Lahore: Vanguard Books Limited, 1986.

⁴⁷ Rashida Patel, *Islamisation of Laws in Pakistan?* Karachi: Faiza Publishers, 1986, p. 5.

⁴⁸ Afzal.Iqbal, *Islamisation of Pakistan*, Lahore: Vanguard Books Limited, 1986, p. 24.

whatever creed, are themselves willing and ready to play their part as true and loyal citizens of Pakistan.”⁴⁹

Prior to that, Quaid-e-Azam had, in his renowned maiden speech as the first President of the Constituent Assembly on 11 August 1947, spelled out the concept and Constitutional structure of Pakistan, and the hopes and aspirations of its people, to the following effect:

“You are free; you are free to go to your temples, you are free to go to your mosques or to any other places of worship in this state of Pakistan. You may belong to any religion or caste or creed – that has nothing to do with the business of the state.

Now, I think we should keep that in front of us as our ideal and you will find that in the course of time, Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the state.”⁵⁰

However, while the formulation of Pakistan’s Constitution was still in its preliminary stages, and the Government of India Act, 1935, with certain adaptations, was serving as Pakistan’s interim Constitution, Quaid-e-Azam died on 11 September 1948. The Constituent Assembly had already entrusted the task of framing a Constitution to a number of committees and sub-committees, the most significant of which – the Basic Principles Committee – was established about six months after Quaid-e-Azam’s death, on 12 March 1949. On the same date, the Constituent Assembly passed the Objectives Resolution, which laid the foundations of the Constitution and set out the broad outlines of its structure. This was expressed to be the most important occasion in Pakistan’s history, second only to independence.⁵¹ The Objectives Resolution, which was moved by Prime Minister Liaquat Ali Khan and certain members of his Cabinet, was passed by the Constituent Assembly in the following form:

“In the Name of Allah, the Beneficent, the Merciful:

Whereas sovereignty over the universe belongs to God Almighty 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;

⁴⁹ Jamil-ud-Din Ahmad, *Speeches and Writings of M.A. Jinnah*, Vol. 1, p. 58 as cited in Javid Iqbal, *Ideology of Pakistan*. Lahore: Sang-e-Meel Publications, 2005, p. 15.

⁵⁰ Hamid Khan, *Constitutional and Political History of Pakistan*. Karachi: Oxford University Press, 2005, p. 49.

⁵¹ *Ibid.*, p. 59.

This Constituent Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent State of Pakistan;

Wherein the principles of democracy, freedom, equality, tolerance, and social justice as enunciated by Islam shall be fully observed;

Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qurān and the *Sunnah*;

Wherein the adequate provisions shall be made for the minorities freely to profess and practice their religions and develop their cultures;

Wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;

Wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship, and association, subject to law and public morality;

Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;

Wherein the independence of the Judiciary shall be fully secured;

Wherein the integrity of the territories of the federation, its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded;

So that the people of Pakistan may prosper and attain their rightful and honoured placed amongst the nations of the world and make their full contribution towards international peace and progress and happiness of humanity.”

The Objectives Resolution, which, about two decades later, was declared by the Supreme Court in the *Asma Jilani Case*⁵² as “our own *grundnorm*”, appeared to strike a middle ground between the assertive demands for a theocratic state and the recognition by the political leadership that the Constitution of Pakistan must be reflective of the

⁵² *Asma Jilani v The Government of Punjab*, PLD 1972 SC 139.

principles of Islam as its guiding lights. This was also the first formal declaration that the Constitution and ideology of Pakistan was not to be secular but Islamic.⁵³ Within and outside the Constituent Assembly, a heated debate nevertheless continued on whether the Constitution would be secular or Islamic and on at least one other subject, that of provincial autonomy.

After seven years of quibbling, the Constituent Assembly was dissolved by the then Governor-General, Ghulam Muhammad. A new Constituent Assembly came into being in July 1955, installed by an electoral college comprised of the provincial legislatures, and resumed work on framing the Constitution. Finally, almost nine years after independence, Pakistan got its first Constitution, which became effective on 23 March 1956, and wherein Pakistan was declared an Islamic Republic. With its framework derived significantly from the Government of India Act, 1935, the 1956 Constitution was a detailed document comprised of 234 Articles, spread over 13 parts, and 6 schedules. It was a federal Constitution with an Islamic character and provided for a parliamentary system of government with a unicameral legislature, cognizant of all recognized fundamental rights, with the standard qualifications, such as the right to life, liberty and property, and the freedom of speech and expression, of assembly and association, and of movement and profession. The judiciary was empowered to enforce fundamental rights, and the courts could strike down any law that was inconsistent with such rights (Article 7).

The 1956 Constitution forbade discrimination on the basis of religion, race, caste, sex, or place of birth with regard to access to places of public entertainment, recreation, welfare or utility (Article 14), and guaranteed freedom of conscience and the right to profess, practice and propagate any religion, subject to public order and morality (Article 18). Certain directive principles of policy were also included in the 1956 Constitution, which were to guide the state in the formulation of its policies but were not enforceable in any court of law. These included a provision calling for steps to be taken to enable Muslims to order their lives in accordance with the Qurān and the *Sunnah*, such as compulsory teaching of the Qurān, the prohibition of drinking, gambling and prostitution, and the proper organization of mosques (Article 25), and a provision calling for the elimination of *riba* (interest) as early as possible (Article 29(f)).

To highlight its Islamic character, the 1956 Constitution, while declaring Pakistan as an Islamic Republic, described it as a place where the principles of freedom, equality, tolerance, and social justice as enunciated by Islam must be fully observed. In addition, the President or Head of State was required to be a Muslim. More importantly, Article 198 of the 1956 Constitution provided that no law must be enacted that is repugnant to the injunctions of Islam as laid down in the Qurān and *Sunnah*, and that existing laws must be brought into conformity with such injunctions (with solely the National Assembly being empowered to decide whether a law was repugnant to Islam or not. The said Article 198 also provided for the appointment by the President of a Commission to recommend the measures and stages by which existing law is to be brought in conformity with the injunctions of Islam. This Commission was to compile a

⁵³ Rashida Patel, *Islamisation of Laws in Pakistan?* Karachi: Faiza Publishers, 1986, p.6.

suitable form for the guidance of the National and Provincial Assemblies for this purpose. The Committee was to submit its final report within five years and the National Assembly, after considering the same, was to enact appropriate laws. Additionally, Article 197 of the 1956 Constitution provided that the President would set up and organization for Islamic research and instruction in advanced studies to assist in the reconstruction of Muslim society on a truly Islamic basis.

The 1956 Constitution, however, died in its infancy, as political infighting within the civilian power structures, and a lack of will to put the electoral process into motion, led President Iskander Mirza to abrogate the Constitution on 8 October 1958 and install General Ayub Khan as Chief Martial Law Administrator. This was the first of several constitutional deviations that Pakistan was to experience in its short and turbulent history. When challenged in court under the famous *Dosso Case*,⁵⁴ this deviation was upheld on grounds that a successful revolution or *coup d'état* is an internationally recognized legal method of altering a constitution, and that after occurrence of such a change of character must depend for its validity on the new law-creating organ.

Ayub Khan was soon to dislodge Iskander Mirza and assume full control as the country's Martial Law Administrator. In order to fill the constitutional vacuum, Ayub in early 1960 appointed a Constitution Commission headed by the former Chief Justice of Pakistan, Justice Shahabuddin, and assigned it with the dual task of examining the causes of the failure of the parliamentary form of government and submitting constitutional proposals aimed to give the country a sustainable system of governance. Ayub had also procured so called public participation in the process by putting in place a presidential electoral college of 80,000 basic democrats elected by grassroots vote. Approximately a year later, the Constitution Commission submitted a comprehensive report recommending a federal structure, presidential form of government, a bicameral legislature comprised of a House of People and a Senate, universal adult franchise, revival of political parties, retention of the Islamic provisions of the 1956 Constitution with certain improvements, independence of the judiciary, and a long list of fundamental rights and directive principles of policy.

Paying heed to some but not all of the recommendations of the Constitution Committee, Ayub got his drafting committee to assemble the country's second Constitution, which was promulgated on 1 March 1962. Reflecting Ayub's secular leanings, the 1962 Constitution of the "Republic of Pakistan" was comprised of 250 Articles, spread over twelve parts, and three schedules. Its preamble was derived from the Objectives Resolution and was similar to that of 1956 Constitution, but its most significant aspect was that it envisaged a presidential form of government within a centralized federal structure. Moreover, the president and the legislature were to be independently elected by indirect vote and had their own respective terms of office. It also provided for a unicameral central legislature and an independent judiciary. While the 1962 Constitution contained the usual list of fundamental rights, there was no provision for their enforceability through courts.

⁵⁴ State v. Dosso, PLD 1958 SC 533.

As in the 1956 Constitution, the Head of State was to be a Muslim (Article 10) and the Islamic provisions were contained in the Directive Principles, pursuant to which “the Muslims of Pakistan should be enabled individually and collectively to order their lives in accordance with the fundamental principles and basic concepts of Islam and should be provided with the facilities whereby they may be able to understand the meaning of life according to those principles and concepts” (Principles of Policy, Para 1). The Principles of Policy also provided that teaching of Qurān and Islamiyat to the Muslims of Pakistan should be made compulsory, unity and observance of Islamic moral standards would be promoted, and proper organizations of *zakat*, *waqfs*, and mosques should be ensured. It was recommended that *riba* should be abolished (Principals of Policy, Para 18), and consumption of liquor discouraged (Principles of Policy, Para 20). It was also provided that bonds of unity among Muslim countries should be preserved and strengthened (Principles of Policy, Para 21).

The 1962 Constitution replaced Article 198 of the 1956 Constitution with a more simplified provision saying, “no law should be repugnant to Islam” (Principles of Law Making, Para 1). This provision was not enforceable through courts, and the relevant legislature had to decide whether a proposed law was repugnant to Islam. An Advisory Council of Islamic Ideology was to be appointed by the President, consisting of not less than five and not more than twelve members. Criteria for appointment of these members was their understanding and appreciation of Islam and of the economic, political, legal, and administrative problems of Pakistan (Articles 199–203). The Council was to recommend to the central and provincial governments the steps and means which would enable and encourage the Muslims of Pakistan to order their lives in accordance with the principles and concepts of Islam. The Council was to also advise the central and provincial legislatures as well as the President or any of the Provincial Governors on any question referred to the Council for advice as to whether a proposed law was repugnant to Islam, but the advice was not meant to be binding (Article 204). Provision was also made for the President to establish an institution to be known as the Islamic Research Institute (Article 207).

It is noteworthy that within almost a year of its promulgation, the 1962 Constitution had to undergo, on popular demand, its first amendment, pursuant to which the country was renamed the Islamic Republic of Pakistan, and courts were granted the power to protect fundamental rights of the citizens by nullifying executive and legislative actions that ran contrary to such fundamental rights. Another year later, the Supreme Court struck down the Ayub government’s orders to ban the *Jamaat-i-Islami* in a landmark case in which the fundamental right of freedom of association was upheld, and political parties were protected against arbitrary government action designed to put a stranglehold on their activities.⁵⁵

Ayub’s political downslide had begun amidst allegations of electoral gerrymandering that got him a second term in office in 1964. Further setbacks were to follow when war with India in 1965 resulted in stalemate, leading to a Soviet-brokered

⁵⁵ Abul Ala Maudoodi v The Government of West Pakistan, PLD 1964 SC 673.

settlement in Tashkent that was largely perceived as a sellout. Regionalism and autonomy in East Pakistan also became points of contention. In such circumstances, as the 1960s drew to a close, street protests against the government had become so widespread and destructive that Ayub was forced to resign on 25 March 1969, handing over power to Yahya Khan who abrogated the 1962 Constitution and assumed the office of Chief Martial Law Administrator. Pakistan thus experienced a second constitutional deviation in just a little over ten years.

After a year in office, Yahya issued a Legal Framework Order pursuant to which direct elections were held in both wings of the country, aimed at establishing a Constituent Assembly that was to frame a Constitution within 120 days. While the Awami League led by Mujib-ur-Rehman secured an overwhelming majority in East Pakistan, Zulfikar Ali Bhutto's Pakistan Peoples Party won an outright majority in West Pakistan. A tragic war was to follow in which the Pakistan Army was pitted a secessionist movement in East Pakistan as well as the Indian Army, culminating in the fall of Dhaka and the separation of East Pakistan as Bangladesh. Under pressure from his cabal of generals, Yahya was forced to quit, and Zulfikar Ali Bhutto assumed office as a civilian Chief Martial Law Administrator in what was left of Pakistan on 20 December 1971.

Yahya's constitutional deviation of forcing himself into office upon Ayub's exit was also challenged in court in the *Asma Jilani Case*,⁵⁶ but by the time the Supreme Court finished adjudicating upon it, Yahya was already out of office. Rejecting the theory pressed into service in the *Dosso Case*,⁵⁷ the Supreme Court this time declared Yahya a usurper and all laws enacted during his regime as illegal. As a practical matter, however, the Supreme Court did not, in the larger public interest, re-open past and closed transactions, and in particular condoned all acts required to be done for the ordinary orderly running of the state and all such measures as would establish or lead to the establishment of the objectives set out in the Objectives Resolution of 1949.

The newly elected National Assembly led by Bhutto took up the task of framing a Constitution. A Constitution Committee first headed by Mehmood Ali Kasuri and then by Abdul Hafeez Pirzada reached an accord with leaders of all parliamentary parties in the National Assembly on the basic framework of the Constitution in October 1972. Thereafter, the permanent Constitution was adopted by consensus of the country's major political parties on 10 April 1973.

Like its precursors, the 1973 Constitution was also a detailed document comprised of 280 Articles, spread over twelve parts, and six schedules. It envisages a federal structure and a parliamentary form of government with a bicameral legislature comprised of the National Assembly and the Senate. It provides for all fundamental rights of the citizens, including equality before the law and equal protection of laws (Article 25), right to life and liberty (Article 9), no discrimination on the basis of religion, race, caste, sex,

⁵⁶ *Asma Jilani v The Government of Punjab*, PLD 1972 SC 139.

⁵⁷ *State v. Dosso*, PLD 1958 SC 533.

or place of birth with regard to access to places of public entertainment, recreation, welfare or utility (Article 26), the right to property (Article 24), freedom of speech, expression and press (Article 19), freedom to assemble peacefully (Article 16), freedom of association (Article 16), and the right to move freely throughout Pakistan and to reside in any part of the country (Article 15). The judiciary is empowered to enforce fundamental rights, and the courts may strike down any law that is inconsistent with such rights (Article 8).

Similarly, like the Constitutions of 1956 and 1962, the 1973 Constitution also includes directive principles of policy. These include a provision calling for steps to be taken to enable Muslims to order their lives in accordance with the Qurān and the *Sunnah*, such as learning of the Arabic language, promoting observance of Islamic moral standards, and securing the proper organization of *zakat*, *auqaf* and mosques (Article 31).

The 1973 Constitution for the first time declares Islam as the state religion of Pakistan (Article 2). The Head of State, the President, has to be a Muslim (Article 41). The 1973 Constitution also provides that no law is to be enacted which is repugnant to the injunctions of Islam as laid down in the Qurān and the *Sunnah* and that existing laws must be brought into conformity with such injunctions (Article 227). The President is required to appoint within ninety days after the commencement of the Constitution a Council of Islamic Ideology to make recommendations to the Parliament and Provincial Assemblies for bringing the existing laws into conformity with the injunctions of Islam and as to the stages by which such measures should be brought into effect (Articles 228 and 230). The Council is also to compile in a suitable form for the guidance of Parliament and Provincial Assemblies such injunctions of Islam as could be given legislative effect. The Commission is to submit its final report within seven years of its appointment and might submit any interim report earlier. The report, whether interim or final, is to be laid before the Parliament and each Provincial Assembly within six months of its receipt and its legislatures, after considering the report were enact laws in respect thereof within a period of two years of the final report (Article 230).

From among the several amendments made to the 1973 Constitution during the Bhutto era, one that stands out for having been made in order to appease the *ulama* and the religious lobby was the addition of sub-clause (3) to the definitions contained in Article 260 in order to secure the removal of Ahmedis from the community of Muslims.

The elections for the National and Provincial Assemblies called by the Bhutto government in 1977 resulted in a landslide victory for the Pakistan Peoples Party, but the opposition's allegations of mass rigging led to widespread agitation in which enforcement of an Islamic system (*Nizam-e-Mustafa*) also became a grand slogan. With power gradually slipping from his hands, Bhutto responded by enacting legislation that banned gambling and alcohol consumption, and declaring Friday as the weekly holiday instead of Sunday. As civil disturbance persisted and a government-opposition settlement remained elusive, the Army Chief Zia-ul-Haq overthrew Bhutto on 5 July 1977 and assumed the office of Chief Martial Law Administrator by holding the 1973 Constitution in abeyance.

This third constitutional deviation was challenged in the Supreme Court in the *Nusrat Bhutto Case*,⁵⁸ but it was held that the extra-constitutional step taken by the armed forces of Pakistan was justified due to state necessity and the welfare of the people, which became the supreme law in the prevailing extraordinary circumstances (*salus populi suprema lex*). This judgment, among other things, gave Zia the power to take acts or legislative measures which were in accordance with, or could have been made under, the 1973 Constitution, including the power to amend it.

In exercise of this power, Zia made several amendments to the 1973 Constitution until he had effected its complete revival in 1985 after holding the first general election in the country in eight years. These amendments and other associated legislative measures, all of which are widely believed to have been carried out for the purposes of political expediency and self preservation rather than the furtherance of an Islamic ideal, included:

1. Conferring jurisdiction on the High Courts to examine and decide the question of whether all or part of any law was repugnant to the injunctions of Islam as laid down in the Holy Qurān and the *Sunnah* (1979).
2. Issuing three ordinances and one presidential order prescribing the Islamic *hadd* punishments (widely known as the *Hudood Ordinances*) in respect of liquor and intoxicants, theft and robbery, adultery, fornication and rape, and false testimony or false imputation of chastity (1979).
3. Establishing the Federal Shariat Court and vesting in it, after taking away from the High Courts, the jurisdiction to examine and decide the question of whether all or part of any law was repugnant to the injunctions of Islam as laid down in the Holy Qurān and the *Sunnah* (1980).
4. Constituting a handpicked Federal Council to perform functions that were to be assigned to it by the President while no elected parliament was in office (1981).
5. Making the entire judiciary subservient to the Chief Martial Law Administrator under a Provisional Constitutional Order (1981).
6. Promulgating a new law of evidence pursuant to which a women's right to testify in certain circumstances was seriously curtailed (1984).

⁵⁸ *Nusrat Bhutto v Chief of Army Staff*, PLD 1997 SC 657.

7. Form over substance changes to the country's banking system for the purpose of introducing Islamic banking into the economy (1984).
8. Ordering a Referendum wherein a series of complex questions relating to Zia's steps towards Islamization of Pakistan were asked, and in the event of an affirmative vote, Zia would be deemed to have a term of five years as President (1984).

Accordingly, when the 1973 Constitution was revived in 1985, all of the foregoing measures were formally incorporated and made part of the Constitution or general statutes, as applicable, and a series of other Constitutional amendments were also effected in order to expand the powers of the President over and above those of the Prime Minister, the Cabinet and the federal legislature, to the extent that at times it is difficult to discern whether the country has a presidential or a parliamentary form of government.

A new Article 2-A was also added to the 1973 Constitution in order to make the Objectives Resolution a substantive part of the Constitution.

No other significant changes were made to the Islamic provisions of the 1973 Constitution, save for certain definitional changes that more explicitly exclude Ahmedis from the Muslim community, certain alterations in the composition, jurisdiction and powers of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court, and the requirement that an individual also be a good Muslim in order to be eligible for election as a member of Parliament.

Just two months before his death in a mysterious air crash in August 1988, Zia had promulgated the Shariah Ordinance, 1988, proposing the application of his own brand of Islamic principles to a series of matters including judicial appointments, fiscal laws, and the promotion of Islamic values through the mass media. Divine intervention, however, rid Pakistan from his stifling rule.

The democratic dispensation that ensued for a period of eleven years after Zia's death saw Benazir Bhutto as leader of the Pakistan Peoples Party and Nawaz Sharif as leader of the Pakistan Muslim League alternating in office for two terms each as Prime Minister, with the Muslim League government of Nawaz Sharif succeeding in 1997 to bring about a full restoration of the parliamentary form of government by taking away the sweeping powers of the President through the enactment of the Thirteenth Amendment to the 1973 Constitution. During 1997, the Supreme Court, in the well-known *Achakzai Case*⁵⁹ also specified that federalism and parliamentary form of government, blended with Islamic provisions, formed the basic features of Constitution of the Islamic Republic of Pakistan, 1973.

⁵⁹ Mahmood Khan Achakzai v Federation of Pakistan, PLD 1997 SC 426.

Thereafter, in mid-1999, the Nawaz Sharif government introduced the Fifteenth Constitutional Amendment Bill pursuant to which the Holy Qurān and the *Sunnah* were declared to be the supreme law of the land, the Federal Government was obligated “to take steps to enforce the Shariah, to establish salat, to administer zakat, to promote amr bil ma’roof and nahi anil munkar (to prescribe what is right and to forbid what is wrong, to eradicate corruption at all levels and to provide substantial socio-economic justice, in accordance with the principles of Islam as laid down in the Holy Quran and the *Sunnah*”.⁶⁰ The Bill also aimed to simplify the process of effecting constitutional amendments to the extent of removing impediments in the enforcement of any matter relating to Shariah and the injunctions of Islam. On the whole, this was widely believed to be an attempt to introduce an elected dictatorship in the country in the name of Islam,⁶¹ but before the Fifteenth Amendment could be formally enacted, Nawaz Sharif was forcibly removed from office by the Army Chief Pervez Musharraf, and the Constitution was accordingly held in abeyance, on 12 October 1999 after the former had issued orders for the latter’s dismissal.

This fourth constitutional deviation was also challenged in the Supreme Court in the *Zafar Ali Shah Case*,⁶² but, as in the *Nusrat Bhutto Case*⁶³ twenty-three years earlier, the intervention was validated on the basis of the doctrine of State necessity and the principle of *salus populi suprema lex*, save that the military government was directed to hold elections by the third anniversary of its takeover and was allowed to make Constitutional amendments during the interim period, provided that these amendments did not alter the salient features of the Constitution, namely, the independence of the judiciary, federalism, and parliamentary form of government, blended with Islamic provisions.

Pervez Musharraf’s restoration of the 1973 Constitution in 2002, has, in addition to causing a series of amendments to the Constitution unrelated to the Islamic provisions (such as increasing the number of seats in Parliament, granting special seats to women, and establishing a National Security Council) restored most presidential powers to their 1985 status under Zia, thereby again making it difficult for one to discern whether the country has a presidential or a parliamentary form of government.

It is noteworthy that at the time of writing of this paper, the Musharraf government has, in the face of stiff opposition from the religious parties, tabled in Parliament the Criminal Law Amendment (Protection of Women) Bill, 2006, whose primary purpose is to undo various provisions of Zia’s *hudood* laws that were being misused and abused to the detriment of women.

⁶⁰ Hamid Khan, *Constitutional and Political History of Pakistan*. Karachi: Oxford University Press, 2005, p. 483.

⁶¹ *Ibid.*, p. 484.

⁶² *Zafar Ali Shah v General Pervez Musharraf*, PLD 2000 SC 869.

⁶³ *Nusrat Bhutto v Chief of Army Staff*, PLD 1997 SC 657.

Concluding Observations

It is evident from the foregoing discussion that the Qurān provides for the establishment of a civil society where the laws of *Allāh* are implemented, but it does not specifically spell out the political order or system of governance that an Islamic state must follow. Going by the history of the Islamic polity, a short-lived federalist constitutional republican order was in place during the era of the Holy Prophet (PBUH) and the four Rightly Guided Caliphs that lasted until 661 A.D., followed by a long phase of Islamic imperialism that ended in 1924. It is, however, clear from fundamental Islamic teachings with their emphasis on the management of a polity's affairs by mutual consent, their direction to obey *Allāh*, to obey the Holy Prophet (PBUH) “and those from among you who have been entrusted with authority”, and the preponderance therein of the community over the individual, that the republican system of government comes closest to the spirit of Islam. It is this reason, among others, that lends credence to the argument that the present state of decay or failure of political Islam is attributable to the repaganization or backwards march caused by the long phase of Islamic imperialism.

On the question of legislation, it is also necessary to emphasize on the need for *Ijtihād* in this day and age, whereby the principles of *Shari'a* can be altered to conform to the needs of the times through suspension (*tawīq*), expansion (*tawsī'*) or limitation (*tahdīd*). This can be deemed a part of Allāh's delegation of His sovereignty to man as His vicegerent on earth, and would also be consistent with the ideological leanings of Pakistan's founding fathers Quaid-e-Azam Muhammad Ali Jinnah and Allama Muhammad Iqbal, who belonged to the reformist rather than the traditional schools of thought.

Pakistan's Constitutional development over the last six decades is a matter that has less to do with the aspirations of its founding fathers and more to do with ground realities and political expediency. Barring the fraudulent Islamization of Zia-ul-Haq between 1977 and 1985, Pakistan's Constitutional structure has not undergone much change in the context of its Islamic character as the differences between the Islamic provisions of the Constitutions of 1956, 1962 and 1973 are more of form over substance. The several military-led constitutional deviations have represented the most significant departure from the spirit and teachings of Islam due to the attendant lack of democracy and the suspension of fundamental rights.

It can be said, in conclusion, that Pakistan's sustained political and economic emancipation would only be possible if its Constitutional development is driven by the principles of democracy, the guarantee of fundamental rights, *Shari'a* laws formulated through *Ijtihād* aimed at ensuring that they are cohesive rather than divisive, equality of all citizens regardless of their race, religion or creed, provision of basic necessities of life in the light of Qurānic teachings,⁶⁴ and an effective, widespread and uniform educational structure wherein religious teachings and modern sciences are combined and freedom of thought and reasoning is emphasized.

⁶⁴ Contained, among others, in Qurān 51:19 (in the wealth of the 'haves' – the *Sa'il* – there is a share of the 'have nots' – the *Mehrūm*; and Qurān 2:219 (give away what is surplus).

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