The Nation and Its Heretics: Courts, State Authority and Minority Rights in Pakistan

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ABSTRACT

In 1984, Pakistan’s military ruler General Zia-ul-Haq passed an executive Ordinance that made it a criminal offence for members of the heterodox Ahmadiyya community, a self-defined minority sect of Islam, to refer to themselves as Muslims and practice Islam in public. Ahmadis challenged the 1984 Ordinance in both the Supreme Court and the Federal Shariat Court in Pakistan – in the former on that grounds that the Ordinance violated their constitutionally guaranteed right to freedom of religion and in the latter on the grounds that it violated shari’a. In a clear departure from the Pakistani courts’ earlier rulings on the issue of rights of religious minorities, the Ahmadi petitions in both these cases were denied. This paper analyzes shifts in the institutional-political and discursive contexts within which Pakistani courts have rearticulated the religious rights of Ahmadis. By examining the triangular relationship between courts, state authority and juridical notions of community and social order, it reveals both complex continuities and disjunctures in sociopolitical relations and legal reasoning through which this shift was constituted.

I. INTRODUCTION

Scholars are increasingly demonstrating that rights of religious minorities (and women) in modern Muslim societies have been articulated in conjunction with public and legal discussions about the relationship between the state and shari’a. By privileging orthodox interpretations of shari’a, states have been pivotal in allowing this coupling to result in constitutional curtailment of rights of religious minorities (An’Naim 1987; Bengio and Ben-Dor 1999). However, relatively little attention has been paid to how these restrictions have constituted a distinct outcome – indeed, oftentimes a historical reversal – of earlier court commitments to safeguarding rights and religious

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1 Shari’a refers to the canon law of Islam, which has roots in Qur’an and in accounts of the life of the Prophet Mohammad.
freedoms of minorities. While courts have begun to take a more political role in the Muslim world, challenging state authorities on grounds of constitutionalism and protection of fundamental rights (Brown 1997; Ghias 2010; Moustafa 2003), there is a glaring absence of judicial activism on the specific issue of the legal rights of religious minorities. An understanding of the conditions under which courts have undertaken reinterpretations of these rights is critical for understanding the historical formation of courts’ apoliticism on this important issue.

This paper engages in such an examination through analyzing the Pakistani courts’ historically shifting legal treatment of the religious rights of the heterodox Ahmadiyya community (in short, Ahmadis), a self-defined minority ‘sect’ of Islam that was forcibly rendered a non-Muslim minority by Pakistan’s National Assembly in 1974. Subsequently, in 1984, military ruler General Zia-ul-Haq passed an executive Ordinance that made it a criminal offense for Ahmadis to refer to themselves as Muslims, to their religion as Islam and to publicly practice Islam. Ahmadis first challenged this Ordinance in the Federal Shariat Court of Pakistan that was established in 1980 by Zia-ul-Haq as part of his ideological project of Islamization of Pakistani state and society (Weiss 1986). In Mujibur Rehman v. Federal Government of Pakistan, 1985 (‘Mujibur Rehman’), Ahmadi counsel contested the 1984 Ordinance on the grounds that it violated shari’a, maintaining that injunctions prohibiting non-Muslims from practicing Islam did not exist in Islam. The Ahmadi claim was denied. Next, Ahmadis challenged the validity of the 1984 Ordinance in the Supreme Court of Pakistan on the grounds that it violated their constitutionally guaranteed right to freedom of religion. In Zaheeruddin v. The State, 1993 (‘Zaheeruddin’), this petition too was denied, making it the first (and at least until 2006 the only) case in which the Supreme Court of Pakistan restricted a constitutionally guaranteed right through recourse to shari’a (Lau 2006: 119).

This is especially unfortunate as discriminatory national laws restricting rights of non-Muslims and heterodox Muslim minorities continue to abound in constitutions, providing a potent backdrop to both state-sanctioned and socially instigated acts of violence and repression as well as more routine practices of denial of access to opportunities and public goods (Ghanem 2004). Especially prominent here is the treatment of the Ahmadiyya community in Pakistan, Coptic Christians in Egypt and Baha’is in Egypt and Iran. See Shatzmiller, ed. (2005) for an excellent collection of essays on how rights of these (and other) minorities have been articulated through state ideologies.
It should be noted at the onset that recourse to shari’a to settle disputes centering on the religious rights of Ahmadis was hardly new within the Pakistani courts in the 1980s. Even prior to the formation of the Federal Shariat Court, courts routinely drew upon the shari’a – albeit as a supplement – to protect and uphold the rights of Ahmadis to freely practice and proclaim their religion as Islam. What renders the case of Mujibur Rehman distinct is that it upheld a more orthodox and less egalitarian interpretation of shari’a than found in legal precedents on the issue. Zabeeruddin also constituted a historical reversal since the superior courts in Pakistan have historically maintained that the Ahmadis’ constitutionally guaranteed right to freely practice and propagate their religion was inviolable.

This paper poses both of these reversals as problematics in need of explanation. Specifically, it analyzes shifts in the institutional-political and discursive contexts within which Pakistani courts have rearticulated the religious rights of Ahmadis by examining the triangular relationship between state authority, courts and juridical notions of community and social order. First, following recent scholarship on courts in authoritarian settings (e.g. Ginsburg and Moustafa 2008; Hilbink 2007; Moustafa 2007), I show that a focus on the relationship between courts and state authority is crucial for situating institutional-political contexts that set the limits of autonomy and constraint on courts. Specifically, I argue that prior to Zia-ul-Haq’s rule, courts were able to rule with considerable autonomy on the religious rights of Ahmadis because their disposition to render this a juridical, and not a national-political, issue was shared by state authorities. This juridical accommodation of Ahmadis was also an outcome of a historical-institutional legacy in which state stability and legal protection of authoritarian regimes were privileged over populist and religious demands. However, while these two distinct dispositions – the liberal defense of minority rights and the illiberal defense of state prerogatives – could be simultaneously articulated under secular, authoritarian regimes, thereby constituting a singular, hegemonic juridical ideology, Zia-ul-Haq’s stringent top-down control of the judiciary and his Islamizing ideology brought the two at loggerheads, fundamentally reconstituting both juridical outcomes and legal reasoning about Ahmadis.

However, in attributing importance to Zia-ul-Haq’s authoritarian, Islamizing regime, I do not want to suggest that only state-desired legal outcomes were possible. Rather, as I will demonstrate, judges were oftentimes unknowledgeable about what relevant state
authorities desired; at other times, they took legal action based on what they perceived state authorities desired; and at yet other times, they drew upon personal beliefs or legal precedents to advance legal reasoning. This suggests, as Alexandra Huneeus has argued, that “judicial ideology is itself always a contested, heterogeneous set of ideas and practices even within seemingly monolithic judicial hierarchies” (Huneeus 2010: 129). Furthermore, while state authorities may significantly constrain possible legal outcomes, the relative autonomy of law as a distinct social field – that is, as an internal system of norms, rules and recourses – means that legal discourse follows a logic internal to the field itself (Bourdieu 1987; Luhmann 1988). This provides judges with considerable latitude with regard to adapting externally determined outcomes to internally generated norms and legal repertoires. Thus, changes in political contexts produce shifts within juridical reasoning in ways that are not reducible to either the institutional relationship between courts and state authorities or to preexisting juridical ideologies.

Second, this paper draws on critical scholarship on legal pluralism (e.g. Bowen 2003; Dupret 1999) and demonstrates that the expansion of state-centered legal pluralism through the creation of the Federal Shariat Court in 1980 led to legal enactments of new national imaginaries by the Supreme Court of Pakistan. By comparing juridical discourses across key court cases involving religious rights of Ahmadies, I show that different interpretations of constitutional law and shari’a were creatively conjoined at different historical moments to produce distinct juridical outcomes. While such conjoining is critical for giving cultural coherence to law in societies undergoing political change (Rosen 1989), it also serves as means for investing core juridical signifiers with new meanings through which social hierarchies are reconfigured or reenacted. Such reinscription also allows courts to use novel forms of evidence, reconstitute what counts as a proof and to legitimate certain cultural stories over others (Scheppele 1994), thereby maintaining juridical consistency while responding to external imperatives.

Specifically, I demonstrate that two interrelated notions have been central in the legal narratives on Ahmadies – public order³ and community. Prior to the promulgation of the

³ See Rosen (1978) for a discussion of the importance of the notion of ‘the preservation of ordinary public order’ for nation-states struggling with economic and social development.
1984 Ordinance, the courts drew upon a juridical discourse premised on ontology of individual, rights-bearing citizens constituting a civic community. Within this legal narrative, orthodox religious groups were deemed as the moral dissenters threatening public order. In Zaheerddin, however, the majority judgment invested these signifiers with new meanings such that the Ahmadis were constructed as disrupting social order, encroaching on the cultural rights and property of Muslims and threatening the homogeneity of the Pakistani Muslim national community. Such symbolic reinscriptions allowed the Supreme Court to render the religious right’s narratives about Ahmadis – now sanctioned by state authorities – as juridical facts.

By thus combining institutional and discursive trajectories with historical contingencies, this paper employs a narrative approach (Somers 1992) to provide a rich account of both relevant jurisprudence and the political stories told by key legal actors (Solomon 2007). This paper develops these arguments in detail through drawing upon interviews conducted with political and legal actors and officially published court judgments of key court cases. Political stories told by key social actors allow an investigation of the historically concrete ways through which top-down pressures were exerted on judges, while court judgments provide a rich source for analyzing different legal narratives upheld by courts. In what follows, I first provide a general background of the Pakistani state’s relationship with the orthodox religious establishment and the Ahmadis. Next, I discuss the central theoretical and empirical concerns addressed in this paper in more detail. I follow this with an analysis of institutional-political and discursive contexts informing key court cases.

II. GENERAL BACKGROUND

The controversy over Ahmadiyya interpretation of Islam arises from a fundamental doctrinal difference between Ahmadis and orthodox Muslims regarding the founder of the Ahmadiyya sect, Mirza Ghulam Ahmad (1835-1908) who had lived in colonial India and

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4 The project on which the present paper is based was approved by University of Michigan’s Institutional Review Board (ID # HUM00009911). The larger study included 23 interviews conducted with key political, religious and legal actors that have been involved in managing the Pakistani state’s relationship with the Ahmadis. All interviewees freely consented to having their identities disclosed. All requests to keep parts of the interviews undisclosed and/or anonymous have been duly complied with.
claimed the status of *Mahdi*\(^5\), Messiah and Prophet (Friedmann 1989). Traditionally, Muslims believe that the Prophet Muhammad is the last prophet to be sent on Earth by God and any suggestion to the contrary is perceived to be blasphemous. Within orthodox Islamic belief structure, it is held that any person who questions the finality of Prophet Muhammad is not a Muslim and lies outside the circle of the Muslim *ummah* (community of believers). The majority of ordinary Muslims in Pakistan believe that Mirza Ghulam Ahmad was an apostate who claimed for himself *khatam-e-nabwaat*, that is, the seal of prophecy.

The Ahmadi interpretation of Islam presents a fundamental challenge to the religious beliefs of orthodox Muslims by claiming that reinterpretations of the classical texts of Islam are not only legitimate but constitute the truth when issued by individuals such as Mirza Ghulam Ahmad who are in direct communication with God. The orthodox religious establishment has also been highly wary of the Ahmadis because of the intensity of Ahmadi missionary activities in Pakistan and abroad. Furthermore, the Ahmadi conception of the meaning of *jihad* (Holy War) as conducted through the pen (that is, through arguments and proofs) and not through warfare is viewed suspiciously by orthodox Muslims. Last, the Ahmadi leadership openly professed loyalty to British during the colonial era, leading to popularization of (unsubstantiated) claims by the religious right that Ahmadis have historically been disloyal to Pakistan\(^6\).

In Pakistan, the demand that Ahmadis be declared non-Muslim minority was first publicly made in 1949 by the religious organization *Majlis-i-Ahrar-i-Islam* (in short, *Ahrar*) in public meetings throughout the province of Punjab. Despite the Pakistani state’s identification with a Muslim religious identity in the preamble of the Constitution termed the Objectives Resolution that was passed by Pakistan’s Constituent Assembly the same year\(^7\),

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\(^5\) Literally, the rightly guided one. In Islamic theology, it refers to the promised personality that will appear before the Day of Judgment as a guide and redeemer.

\(^6\) The most comprehensive account of Ahmadi religious thought and the theological controversies surrounding these can be found in Friedmann (1989). The most authoritative account of the history of Ahmadiyya community’s relationship with the British colonial state can be found in Lavan (1973).

\(^7\) While not declaring Islam the religion of the state, the Objectives Resolution begins by vesting “sovereignty over the entire universe” to Allah and posits that Pakistan is a state “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 Qur’an and the Sunnah”.
the state remained committed to protecting the fundamental rights of all religious minorities and deemed the anti-Ahmadi campaign of the Abrar unlawful (Lahore High Court 1954). Anti-Ahmadi agitation broke out again in 1953 in the province of Punjab, again led by the Abrar but this time with the support of major Islamist parties, notably the Jamaat-e-Islami (JI). In the wake of widespread anti-Ahmadi agitation and violence that ensued, the state authorized the arrest of prominent religious members, most notably Maulana Maududi, the founder of JI, who was charged with treason for inciting sectarian violence. Furthermore, the state ultimately declared Pakistan’s first Martial Law over the city of Lahore. The committee set up by the state to inquire into the disturbances noted in its final report the importance of the question of Muslim identity for the newly formed Pakistani state but concluded that question of who was and was not a Muslim was almost impossible to decide, further noting that the ulama [traditional Islamic scholars] themselves ‘hopelessly disagreed among themselves’ on this fundamental question (Lahore High Court 1954: 205). The report forcefully upheld the importance of individual conscience in religious matters and concluded that the movement had been instigated by radical Islamic to destabilize the central government.

With the Objectives Resolution, it was established that while not an Islamic state, the newly formed Pakistani state was a Muslim state in two senses: first, in the purely demographic sense in that it was populated almost completely by Muslims, and second and more substantively, through a general commitment to bringing Pakistan closer to Islamic ideals. How this was to be achieved and instituted was to be determined by the framers of the constitution which, after much controversy and delay, was passed in 1956. The 1956 Constitution directed, but did not legally enforce, the state to take steps “to enable the Muslims of Pakistan individually and collectively to order their lives in accordance with Islam”\(^8\). Additionally, the “repugnancy clause” was added which stated that “no law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah [sayings and habits of Prophet Mohammad]…and existing law shall be brought in conformity with such injunctions”. However, no obligation was placed either on the

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\(^8\) Article 25 (1), Constitution of Pakistan, 1956.
legislature or the legal system to ensure that the “repugnancy clause” was met (Kennedy 1992).

Political upheaval in the country led to the abrogation of the constitution in 1958 by President Iskander Mirza, an ex-Major General in the army. Mirza’s position was almost immediately co-opted by General Ayub Khan, the Commander-in-Chief of the Pakistani Army, who deemed himself the President of Pakistan. A new constitution was framed in 1962 under the military regime of President Ayub Khan (1958-1969). There was a distancing from Islam under Ayub Khan’s regime, manifested most starkly through measures such as dropping “Islamic” from the country’s official name, thereby renaming it the “Republic of Pakistan”9; removing reference to “the Holy Quran and the Sunnah” in the repugnancy clause, thereby trimming it down to “no law should be repugnant to Islam”; and most significantly, through the promulgation of the Muslim Family Laws Ordinance, 1961 (MFLO) that explicitly brought the laws governing the domestic space of marital and other familial relationships under the liberalizing gaze of the state10.

It was under such a political context that the Lahore High Court delivered its judgment in Abdul Karim Shorish Kashmiri v. The State of West Pakistan, 1969 (‘Kashmiri’). The case concerned an order passed by the Punjab provincial government that banned the Urdu weekly journal Chattan from publishing anti-Ahmadi literature. Chattan’s editor Abdul Karim Shorish Kashmiri, a highly vocal anti-Ahmadi member of the Ahrar, challenged the order on the grounds that it infringed on his right to freedom of speech. The petition was dismissed by the hearing judges and the religious right of Ahmadis to freely proclaim their religious identity was given legal precedence over Kashmiri’s right to freedom of expression, with the latter likened to “religious persecution” of Ahmadis. I will discuss the institutional-political context and the juridical norms informing this decision below.

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9 Following public protests to this, the First Constitutional Amendment Act of 1963 was enacted which re-inserted ‘Islamic’ in the official name.

10 The MFLO was a firm stance against traditionalist interpretations of Islamic law that privileged the patriarchal domination of women by men in the private sphere of familial relationships. Some of the changes instituted by the MFLO included state permission for Muslim men to undertake more than one marriage, changes in divorce laws as a result of which men could not divorce women arbitrarily, and increase in the legal age at which girls could marry from fourteen to sixteen.
The question of the religious status of Ahmadi dis took national significance following a clash between Ahmadi and non-Ahmadi students in May of 1974 that generated a nationwide social movement demanding once again that the state legally declare Ahmadi dis non-Muslim (Saeed 2007). In response, Prime Minister Zulfiqar Ali Bhutto placed the issue before the National Assembly of Pakistan. After parliamentary deliberations, Ahmadi dis were unanimously declared a non-Muslim minority and the Second Constitutional Amendment passed in September of that year. I term this the moment of exclusion of Ahmadi dis by the Pakistani state. However, in terms of practicing Islam in the public space, the Amendment had no practical effects for Ahmadi dis, leading to claims being filed in courts throughout Punjab that Ahmadi dis be prohibited from calling Azaan (Muslim call to prayers), naming their places of worship “mosques”, and so on. These suits were filed on the grounds that such a prohibition was the logical consequence of the 1974 Amendment. Various such claims were grouped together and brought to the Lahore High Court in the case of Abdur Rahman Mobashir v. Amir Ali Shah, 1978 (‘Mobashir’). I will also analyze this case in detail below but will note here that these claims were rejected by the Lahore High Court on both constitutional and shari’a grounds. The cases of Kashmiri and Mobashir show remarkable similarities with each other and form excellent comparative cases for situating legal outcomes in Mujibur Rehman and Zaheeruddin.

The next significant step in the genealogy of the state’s relationship with the Ahmadi dis was the promulgation of the 1984 ordinance by Zia-ul-Haq. Titled Anti-Islamic Activities of the Quadiani Group, Labori Group and Ahmadi dis (Prohibition and Punishment) Ordinance 1984, this Ordinance made additions in the Pakistan Penal Code that explicitly prohibit Ahmadi dis from using Arabic words and phrases that are traditionally reserved for Prophet Mohammad, his companions and wives; make it a criminal offence for Ahmadi dis to refer to their places of worship as masjid (mosque) and to their call to prayers as azaan; prohibits

11 This Amendment added a new clause under Article 260 of the Constitution of 1973 which held that:
“A person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon Him), the last of the Prophets or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon Him), or recognises such a claimant as a prophet or a religious reformer, is not a Muslim for the purposes of the Constitution or Law.”
Ahmadis from calling the *azaan* and preaching and propagating their faith. It explicitly renders these as acts of “posing as Muslims” and makes any Ahmadi who “outrages the religious feelings of Muslims” liable to fines and imprisonment. I term this the moment of criminalization of the Ahmadis by the Pakistani state\(^{12}\).

Like earlier moments in the Pakistani state’s relationship with the Ahmadis, this moment too was preceded by anti-Ahmadi demands being placed before the state by the religious establishment. In 1984, the orthodox religious establishment re-launched an anti-Ahmadi movement, demanding the introduction of death sentence for apostasy; state ban on publication and distribution of Ahmadi literature and prohibition on Ahmadis from naming their places of worship as mosques, their call to prayers as *azaan* and so on (Kaushik 1996: 63-4). In February of 1984, the ulama threatened to launch a nation-wide anti-Ahmadi campaign if the government did not accede to their demands. If the government did not demolish all Ahmadi mosques, it was announced, the ulama would be compelled to do so themselves. Zia-ul-Haq responded to these demands by promulgating the 1984 ordinance.

Personal interview conducted with close aides of Zia-ul-Haq reveal the political imperatives perceived by Zia-u-Haq at that time. For example, Raja Zafar-ul-Haq, the Minister of Information and Religious Affairs at that time, spoke at length about the immediate causes as well as the larger political context that led Zia-ul-Haq to accede to the demands\(^{13}\). According to Zafar-ul-Haq, while this campaign was restricted to the religious establishment, a large number of people had begun arriving in the twin cities of the capital Islamabad and Rawalpindi and the perception that the public meeting being organized for April 27 would take on national proportions was perceived as a real possibility. Syed Sharifuddin Pirzada, Minister of Law and Parliamentary Affairs at that time, revealed that there had been opposition to the implementation of the Ordinance within the regime\(^{14}\).

\(^{12}\) The 1984 Ordinance has led to a huge number of Ahmadis being charged and punished on grounds of defiling Islam, blasphemy and similar charges. Instances of persecution have been discussed by Gualtieri (1989) and Khan (2003). A number of NGOS that have been documenting the severe breach of human rights with regard to the Ahmadis in Pakistan include Human Rights Watch, Amnesty International and the Human Rights Commission of Pakistan. The Ahmadi-run website www.thepersecution.org also documents all instances of human rights abuses.

\(^{13}\) Interview with Raja Zafar-ul-Haq, Islamabad: 7 February 2008.

\(^{14}\) Interview with Sharifuddin Pirzada, Islamabad: 12 March 2008.
According to Pirzada, he had conveyed his misgivings to Zia-ul-Haq but the latter had been “poisoned” by the religious lobby. According to Pirzada, Zia-ul-Haq had been motivated by political gains: “Zia was doing this more from the point that his constituency was the **mullas**\(^{15}\). So he did it more from that point of view rather than any conviction”.

Taken together, and placed alongside the popularly demanded Second Constitutional Amendment of 1974, these interviews reveal the highly charged public space within which issues of the religious status and rights of Ahmadis were politicized by the religious establishment in Pakistan. While the Second Constitutional Amendment can be historically situated through considering the logic of democratic politics under the Bhutto regime (Kaushik 1996; Saeed 2007) and the 1984 Ordinance through Zia-ul-Haq’s attempt at gaining legitimacy for his undemocratic rule through recourse to Islamization (Burki and Baxter 1991; Weiss 1986), we need an account of how and why Pakistan’s courts became complicit in restricting the rights of Ahmadis. Before undertaking my empirical analysis, I briefly outline the main theoretical and empirical points of inquiry that set the framework within which I approach this problematic.

**III. FRAMEWORK FOR ADDRESSING SHIFTS IN RELIGIOUS RIGHTS OF AHMADIS IN PAKISTAN**

Specifically, this paper addresses three sets of inter-related questions, thereby setting the theoretical framework and methodological orientations of this study. Below, I briefly discuss each in turn.

*First, how are we to understand the relationship between shari’a and rights of religious minorities in the context of the Pakistani courts’ shifting interpretations of the shari’a about the religious rights of Ahmadis?*

This paper rejects the supposition that there is an overarching “Islamic law” that provides the basis for an uncompromising restriction of rights of heterodox religious communities such as the Ahmadis. This is not to deny that within Islamic jurisprudence,

\(^{15}\)When issued from a secular platform, the term *mulla* used to refer to the petty *ulema*, takes on a derogatory connotation.
minorities (referred to as dhimmis) have a separate institutional status whereby they are required to pay taxes in return for qualified rights and protection from the state (An’Naim 1987; Lewis 1988). Nor is it to deny the centrality of the idea of the Muslim ummah within Islamic political thought which hails an undivided Muslim body that transcends race, region and class but regards infidels and heretics as posing the greatest moral danger. Instead, this paper builds on the conceptual distinction between the shari’a and the interpretation of shari’a – while authoritative renderings of the shari’a normally entails training in fiqh (Islamic jurisprudence) through culturally legitimated forms of knowledge dissemination, an examination of the various interpretations of the shari’a over time demands a critical sensitivity to the institutional, political and discursive contexts within which re-interpretations are undertaken (Hajjar 2004). Thus, neither instances of toleration and accommodation nor of expulsion and exploitation are reducible to arguments about jurisprudence that posit a false choice between the Quran’s “sword” verse and the “Let there be no compulsion in religion” verse (2:256) (Benthall 2005; Masters 2001; Salzmann 2010). The lack of an overarching consensus about the status of heterodox minorities such as Ahmadis within shari’a suggests that particular interpretations of shari’a themselves need to be historically and politically situated (Hallaq 2005; Johansen 1999; Powers 1993).

Second, how can we explain the Pakistani courts’ commitment towards protecting the religious rights of Ahmadis in the decades preceding Zia-ul-Haq’s rule, especially in face of widespread social antagonism that has historically existed towards Ahmadis? Why was the courts’ commitment to safeguarding these rights abandoned in the 1980s?

This set of questions challenges characterization of states in Muslim societies as unwilling to tolerate cultural difference in the interest of what Ann Mayer has defined as “rationalizing governmental repression, protecting and promoting social and religious conformity, and perpetuating traditional hierarchies, which includes discriminatory treatment of women and non-Muslims” (Mayer 1999: 175-6). While the Pakistani courts have until very recently routinely provided legal covers for undemocratic takeovers by military and authoritarian rulers, their political embeddedness did not entail the curtailment of rights of religious minorities. In fact, as scholars of Pakistani legal system have suggested, such legal
covers have implicitly involved a trade-off so that courts in effect have bought autonomy in certain areas, usually having to do with protection of fundamental rights of citizens (Lau 2006; Newberg 1995). This is consistent with recent studies on courts and judges in authoritarian societies, which have emphasized the multiplicity of formal and informal arrangements that exist between powerful rulers and courts, complex horizontal and vertical systems of constraints on courts that involve unique matrices of trade-offs between independence and power, and legacies of political activism (or apoliticism) in accounting for relationships between states and courts (Ginsburg and Moustafa 2008; Hilbink 2007; Moustafa 2007).

Lisa Hilbink’s work on the relationship between courts and political regimes in Chile is highly informative for addressing some of the concerns raised in this paper (Hilbink 2007). Specifically, Hilbink addresses the issue of why Chile’s formally independent and highly institutionalized judiciary supported the illiberal regime of General Augusto Pinochet. Taking an institutional approach, Hilbink locates court’s failure to challenge Pinochet in a historical legacy of apoliticism and deference to elite interests through a legal, as opposed to political, valorization of the constitution. As I will discuss below, a remarkably similar situation has prevailed in Pakistan for most of its history.

However, as Alexandra Huneeus (2010) has demonstrated using the recent “prosecutorial turn” in Chilean courts towards addressing Pinochet-era human rights violations, judicial ideologies are never wholly monolithic and invariant. Instead, following recent sociological work on law as a cultural domain in which dynamic meaning-making work is undertaken by concrete social actors (e.g. Edelman 1992; Ewick and Silbey 2003), Huneeus emphasizes the heterogeneity of position-takings within seemingly singular juridical ideologies. Such a perspective opens up space for considering the internal contradictions and oppositions through which counterhegemonic juridical notions are made possible but which nonetheless remain contingent on institutional-political contexts for getting translated into juridical outcomes. Tamir Moustafa uses a similar approach to explain how Egypt’s Supreme Constitutional Court was able to function independently for almost two decades, simultaneously protecting liberalizing economic interests and engaging in “bounded activism” to challenge illiberal and undemocratic political practices (Moustafa 2007: 8). The point is that an exclusive focus on judicial outcomes is insufficient for examining legal
trajectories. While the Pakistani courts’ shift from upholding the rights of Ahmadis to becoming complicit in their criminalization ostensibly appears to constitute a shift in juridical ideology, I will demonstrate below that a more nuanced examination reveals both complex continuities and disjunctures in sociopolitical relations and legal reasoning.

Third, what are the key signifiers and repertoires that have been employed within juridical reasoning to protect, and later subvert, the religious rights of Ahmadis? What is the role of national imaginaries in the construction of juridical discourse?

This paper draws on critical interventions in the study of legal pluralism in the Arab world to examine the relationship between *shari'a* and constitutional law in Pakistan. Gordon R. Woodman defines existence of two bodies of norms within state law as state legal pluralism and argues that such a situation oftentimes leads to instances in which a single legal issue may be adjudicated in two different ways, depending on the body of norms that is drawn upon (Woodman 1999). While opening up the space for a wider range of signifiers and cultural resources that could be appropriated by social and legal actors (Shaham 2006), existence of two bodies of law that may apply to the same situation in contradictory ways is always marked by slippages so that the conflict generated by their mutual existence within the same sphere of activity is always open to negotiations and contestations. The challenge in the present case is to investigate *normative entanglements* (Bowen 2003: 5) – how different set of norms are simultaneously drawn upon in ways that cross-cut the religious/ secular divide while advancing concrete courses of legal action (Dupret 1999).

In Pakistan, the institutionalization of state-centered legal pluralism significantly reconstituted the ways in which slippery signifiers such as ‘community’, ‘Muslim’ and ‘public order’ were invested with socially significant meanings. Dupret and Ferrie (2001) provide an excellent account of how an Egyptian court recognized claims about apostasy of an individual through upholding a discourse of public order. Because the “inner self”, the realm of personal belief and conviction, was unreachable through Egyptian law, the Court invoked the notion of public order to articulate and reify a public cause – the ‘Islam’ of the Egyptian state. As I will demonstrate in this paper, the case of *Zabeeruddin* posed a similar problem for Pakistan’s Supreme Court, which also by-passed the tricky question of belief through
rearticulating notions of public order, the community, or a public, in need of protection, and the dangers, and hence the potential dissenters, that can disrupt this order. Through discursive strategies of conjoining interpretations of constitutional law and shari’a, legal actors in Pakistan engaged in “framing contests” (Pedriana 2006) to legitimate and institutionalize their own social imaginaries (Kogacioglu 2004; Murdocca 2010; Savalsberg and King 2005) of the Pakistani nation and the place of Ahmadis therein.

IV. JURIDICAL ACCOMMODATION OF RELIGIOUS RIGHTS OF AHMADIS BEFORE 1984 ORDINANCE

Historically, the juridical field in Pakistan has given legal sanction to executive, authoritarian rule on grounds of the ‘necessity doctrine’, a disposition partially structured by the fact that many of Pakistan’s early influential legal professionals received their training and started their practice within a milieu of the colonial state’s authoritarian rule. The crucial case that set the legal precedent in Pakistan was The Federation of Pakistan v. Moulvi Tamizuddin Khan, 1955 (‘T. Khan’) in which the Supreme Court deemed Governor-General Ghulam Mohammad’s dissolution of the Constituent Assembly in 1954 as legal and lawful. Similarly, in The State v. Dosso and another, 1958 (‘Dosso’), the Supreme Court gave legal protection to general Ayub Khan’s military coup of 1958 on the grounds that “victorious revolution or a successful coup d'etat is an internationally recognised legal method of changing a Constitution”. This doctrine of revolutionary legality was reinterpreted in the early 1970s when the human rights activist Asma Jilani challenged the legality of General Yahya Khan’s martial law of 1969 in Asma Jilani v. The Government of the Punjab, 1972 (‘Asma

16 In the context of rural Mexico, Laura Nader has referred to such narratives as “harmony ideology”, underscoring how harmony and equality can be constructed as competing norms within the legal system (Nader 1990). In contrast, in contemporary Germany, precautions regarding social stability are tied to concerns about equality as they relate to protection of minorities (Savelsberg and King 2005). In yet other contexts such as that described by Carol Greenhouse (1986), concerns about harmony may result into the explicit avoidance of recourse to the legal system. Taken together, such studies reveal that complex ways in which narrative constructions about harmony and order are tied to equality, justice and rights.

17 Newberg in her analysis of T. Khan aptly notes that “The court based its judgment on a close reading of the relationship between the English Crown and Dominion government […], a reading that underscored executive powers at the expense of the Assembly’s sovereignty” (Newberg 1995: 46).
Jilani). The Supreme Court overruled the argument of revolutionary legality that had been upheld in Dosso. Asma Jinali was a crucial case since in it, the Supreme Court to cast a critical eye upon its former actions that had supported authoritarian rule in cases such as T.Khan and Dosso, and to declare cases of imposition of martial law as acts of treason. However, the judgment in Asma Jilani came at a time – in 1972 – when Yahya Khan was no longer in power and it therefore did not constitute a challenge to the ruling regime.

Despite this close alliance with authoritarian regimes, there is no evidence suggesting that the courts faced any constraints in the Kashmiri or Mobashir cases with respect to deciding on religious rights of Ahmadis, drawing on the shari’a or favoring certain interpretations of the shari’a over others. This can partially be explained by the fact that until Zia-ul-Haq’s regime, there was no sustained effort to Islamize the laws of Pakistan and any the only body having the authority to do so was the Parliament of Pakistan. This lack of an institutional relationship with Islam did not translate into the absence of a discursive relationship with Islam and at least since the late 1960s, the juridical field in Pakistan has increasingly relied on shari’a (Lau 2006: 19). However, until the end of 1970s, shari’a was invoked by the Courts with the explicit recognition that constitutional law formed the grundnorm and that shari’a supported the fundamental rights of citizens contained in the Constitution. Such a position was not threatening to either Ayub Khan or Zulfiqar Ali Bhutto since neither claimed legitimacy for their political rule on the basis of instituting an Islamic system.

**Before Exclusion: Anti-Ahmadi Establishment as a Threat to Public Order**

The case of Kashmiri, as noted above, concerned a series of orders passed by Punjab provincial government that banned the weekly journal Chattan from publishing any material “touching on the origin, prophecies, revelation or beliefs of any sect of Islam or on their comparative merits of status, by way of news, views, comments or in any other form whatsoever”. These orders were passed in April of 1968 “for the purpose of securing the maintenance of public order” and were issued under Article 30 of the 1962 Constitution which gave the President powers to proclaim emergency under conditions of external threat (war) or “internal disturbances beyond the power of a Provincial Government to control”. President Ayub Khan had proclaimed emergency in September of 1965 during the Pakistan-
India war and the emergency was still in effect in 1968. In *Kashmiri*, the petitioners challenged these orders on a number of grounds, including: the legality of drawing on Emergency provisions at a time when Pakistan was not at war; questioning whether the content of *Chattan* in fact constituted a threat to domestic security and peace; maintaining that the orders violated Article 10 of the Constitution, which guaranteed liberty to profess and propagate religion irrespective of the proclamation of Emergency; and finally that Ahmadis were non-Muslims and any restrictions placed on their right to publicly say so violated their constitutional guarantee to freedom of religion.

For the purposes of this paper, two elements of legal reasoning are especially noteworthy: the court’s articulation of the constitutional limits of freedom of expression within religious discourse and its interpretation of *shari’a* on the issue. With respect to the former, the judges noted that while the Constitution guaranteed the freedom to religious expression, it also made this freedom “subject to law, public order and morality”. The judges argued that limitations on *Chattan*’s content arose not from Emergency provisions but from within the Constitution itself. The judges argued that right to freedom of religion was “not absolute” and “the expression subject to law, implies recognition of similar freedom of every other citizen of Pakistan and also subject to the requirements of maintenance of law and order and morality”. The judges noted that the petitioners based their arguments on the premise that Ahmadis lay outside the fold of Islam and that the petitioners’ right to say so was guaranteed by the Constitution. However, judges maintained that such an argument “overlooks the fact that Ahmadis as citizens of Pakistan are also guaranteed by the Constitution the same freedom to profess and proclaim that they are within the fold of Islam”. The judges also noted that there was an “absence of any legal right...to have this abstract question [of religious status] determined by any right legal process, unless it is somehow linked with any right to property or right to office”. Finally, anti-Ahmadi rhetoric of *Chattan* was linked to “sad instances of religious persecution against which human conscience must revolt, if any decency is left in human affairs”. In short, the right of Ahmadis to freely proclaim their own religious status was given legal precedence over Kashmiri’s right to freely disseminate anti-Ahmadi rhetoric, with the latter likened to disturbing public order.
The judges in Kashmiri were disposed to similar spirit of the shari’a as upheld by the state in its defense of the MFLO. For example, the judgment drew on a number of Quranic verses to show that instances of persecution of Ahmadis were “opposed to the true Islamic precepts and injunctions”. Verse 256 of chapter 2 of the Quran was invoked “which guarantees freedom of conscience in clear mandatory terms”. Another verse was drawn upon in which “there is also a positive injunction….prohibiting man – even though a prophet – from imposing his will upon others”. It was concluded that “freedom of thought and conscience could not have been guaranteed in clearer terms” in the Quran. Thus, judges interpreted the shari’a as being entirely consistent with the constitutional guarantees to minority rights and routinely drew upon the shari’a in their legal judgments to provide further legitimacy for their defense of religious rights of Ahmadis.

In short, the state’s oppositional relationship to the orthodox religious establishment set the institutional-political context within which the court accommodated the religious rights of Ahmadis. Recurrent illiberal demand that the state restrict the religious rights of Ahmadis was regarded as a threat to the moral, secular order. Such a context provided the courts a secure political environment within which to give legal pronouncements on religious rights of minorities and interpreting the shari’a.

Between Exclusion and Criminalization: Shari’a as Guarantor of Rights of Ahmadis

The courts remained committed to protecting the religious rights of Ahmadis even after the enactment of the Second Constitutional Amendment in 1974, as can be witnessed by the case of Mobashir. The timing of this case is significant because it took place in 1978 – in the pre-1984 Ordinance period but post-military coup period. Because Mobashir did not generate attention in the public space and did not have any significance for the state actors at the time\(^\text{18}\), the decision in Mobashir may be regarded as undertaken with considerable autonomy by the judges. I contend that Mobashir provides the paradigmatic legal account of juridical ideology of Pakistan’s superior courts towards legal issues that would be reinterpreted in Mujibur Rehman and Zabeeruddin.

\(^{18}\) This was corroborated in interviews conducted with both the Ahmadi lawyer Mujeeb-ur-Rehman who pleaded the case for Ahmadi petitioners as well as one of the judges in this case K.M.A. Samdani.
The case of *Mobashir* was heard by two prominent judges of the Lahore High Court, the junior judge K.M.A. Samdani who remains highly critical of the 1974 Amendment and refers to it as an instance of persecution of Ahmadis, and the senior presiding judge Aftab Hussain who penned the final judgment, with Samdani adding an “I concur” at the bottom. The case constituted an appeal filed by a group of Ahmadis. In the earlier case, charges were brought by some non-Ahmadi Muslims of the city of Dera Ghazi Khan against religious practices of Ahmadis of that city. Specifically, it was argued that in light of the Second Constitutional Amendment, courts should bar Ahmadis from constructing their places of worship in shape of mosques, from referring to their places of worships as mosques, from shouting *azaan* and from praying in a manner in which Muslims pray. The basis of the complaint was that Dera Ghazi Khan was a city populated predominantly by Muslims and that “the religious sentiments of these Muslims are wounded by these activities of the defendants, which have created a law and order situation”. The trial judges at the lower courts ruled in favor of the non-Ahmadis and temporarily prohibited Ahmadis from engaging in “Islamic” practices. This decision was first challenged by the Ahmadis in the district court where too it was upheld and finally appeal was brought to the Lahore High Court in *Mobashir*.

The judges in *Mobashir* overturned the judgments of the lower courts, referring to them as full of “jurisdictional errors” and to the courts as having “acted illegally and with material irregularity in the exercise of their jurisdiction”. For the purposes of this paper, three issues dealt with in this judgment are of central importance: the legal status of the distinctive characteristics, nomenclature and practices of Islam; the religious status of Ahmadis in light of the Second Constitutional Amendment and the *shari'a;* and articulations of public order.

First, the judges maintained that Pakistan’s civil law did not regard religious nomenclature and practices as having the status of legal property. Drawing on the distinction between “religious property or religious office on one hand and religious rites and ceremonies on the other”, it was maintained that “Rights in trade marks or copyrights are

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19 When I attempted to question Samdani about the *Mobashir* case, I was told that “once a judgment is delivered, the judgment should speak for itself. The judges should not speak about it”. Interview with K.M.A. Samdani, Islamabad, 30 January, 2008.
matters which are the concern of statutory law. There is no positive law investing the plaintiffs with any such right to debar the defendants from freedom of conscience, worship, or from calling their place of worship by any name they like”. This point about the legality of the claim that religious practices and nomenclature could be treated as legal objects, and thereby given legal protection for the exclusive use by a religious community, is important as it would be central to subsequent discussions on the 1984 Ordinance in the case of Zaheeruddin.

Next, the judges considered the issue of whether a suit could be filed on grounds that Ahmadi religious practices constituted a threat to public order. Drawing on the issue of the Ahmadis’ referral to their places of worships as mosques, the judges concluded in the negative, noting that

“There is no threat to the plaintiffs’ own right to use their mosque nor is there any threat in regard to their right to performance of their own prayers. It is merely a suit to stop defendants from performing their religious rites and from calling their place of worship by the name of mosque”.

Thus, the judges subverted the attempt by the non-Ahmadi defendants to appropriate the notion of public order and render Ahmadis as a public threat. Furthermore,

“In the absence of any law barring the right of the Ahmadis to perform their religious rites or ceremonies in a manner objected to by the Muslims, such an objection is only sentimental which cannot cause any material loss or injury to the comfort or happiness of the plaintiffs or those whom they represent.”

Thus, sentiments, emotions, and perceived injustices that privileged the Muslim religious community at the expense of the religious rights of Ahmadis were deemed irrelevant to the case. As I will show below, such legal reasoning was reversed in the case of Zaheeruddin in which the Supreme Court explicitly reified the discourse of a national Muslim community.

Third, during the case proceedings, Ahmadi counsel Mujeeb-ur-Rehman repeatedly argued that the Second Constitutional Amendment deemed Ahmadis non-Muslim for the purposes of “law” and “constitution” only and that from all other perspectives, including that of the shari‘a, Ahmadis remained Muslims. Furthermore, even if it were conceded that
Ahmadis were non-Muslim under the *shari‘a*, Ahmadis still could not be prohibited from using Muslim nomenclature and practices since injunctions prohibiting non-Muslims from using these were not present in the *shari‘a*. Finally, Mujeeb-ur-Rehman invoked Article 20 of the 1973 Constitution that guarantees fundamental rights of citizens with regard to religious practices. Specifically, Article 20 of the Constitution states that:

“Subject to law, public order and morality: (a) every citizen shall have the right to profess, practice and propagate his religion; and (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.”

The counsel for non-Ahmadis however argued that Article 20 guaranteed religious rights with the qualification that these rights were subject to “law, order and public morality” and that the word “law” connoted *shari‘a* whose interpretation did render Ahmadis non-Muslim. One of the central tasks for the Court thereby became the interpretation of the term “law, order and public morality” in Article 20 as well as the position of *shari‘a* on the religious status and rights of Ahmadis.

The judges first argued that the only instances of *shari‘a* that could be enforced by the Courts were the ones that had been specifically made applicable in positive law, as for example Muslim personal law, and thus, the word “law” in Article 20 did not refer to *shari‘a*. Next, it was noted that *shari‘a* was applicable only when both parties were Muslim but that was not the case in the present situation since the Ahmadis were non-Muslim by Pakistani law. In a later point in the judgment however, it is maintained that in cases involving Ahmadis, the invocation of *shari‘a* may be justified since “like Muslims this section of the non-Muslims claims to be bound by the law of Koran and Sunnabi”. The judges thereby created legal space for Ahmadis to publicly retain their religious identity and practices even though they had been constitutionally declared non-Muslim. Despite the politicization of the issue of the religious status of Ahmadis in 1974, and the “deference to the legislature” (Mahmud 1995) contained therein, by going back and forth between the Second Constitutional Amendment and the normative position that an individual possessed the right to religious self-identification, the judgment created deliberate ambiguity about the religious status of Ahmadis, at one point deeming this point irrelevant to the case at hand. It is
however significant that when the court did deem Ahmadis non-Muslim, it was done towards the ends of placing Ahmadis out of ambit of interpretations of shari’a that could potentially threaten the religious freedoms of Ahmadis. That the judges was prepared to go to any length to protect the religious freedoms of the Ahmadis in the wake of the Amendment can be gauged most clearly by the following statement that attempted to minimize the alleged differences between the two faiths:

“Except for some…minor differences the Qadianis do believe in the mission of Prophet Muhammad (peace be upon him), and the Holy Qur’an and traditions. In this view they call their places of worship as Masjid, they perform prayers (Namaz) in the manner ordained for the adherents of Qur’an and call their congregation to prayer by shouting Azan.”

Finally, the judges conceded that recourse to shari’a was not without precedent in Pakistan’s case law but noted that it had been invoked “on the principles of justice, equity and good conscience”. Furthermore,

“The rights of non-Muslims are in all respects at par with those of Muslims. They are in fact superior in some respects since all Muslims are required even to fight in their defence…and the Holy Prophet is reported to have said that ‘their property is like our property and their blood is like our blood’.”

It was also held that prohibiting Ahmadis from engaging in Islamic practices

“…will amount to interfering with their religion, which Islam, the religion of tolerance, does not allow. On the other hand Islam leaves the non-Muslims free to profess and practise their religion…The Constitutional guarantee in Article 20 of the Constitution is to be interpreted in this light. In my view, the fundamental rights should be interpreted as far as possible in the light of injunctions of the Holy Qur’an and ethical values of Islam. Constitutional safeguard guaranteeing freedom to all including non-Muslim to profess, practise their religion and manage their institutions, is in consonance with the Qur’anic guarantee.”

Taken together, the judgments in Kashmiri and Mobashir reveal that until the consolidation of Zia-ul-Haq’s regime, juridical outcomes were rendered with considerable autonomy on issues of religious rights of the Ahmadis despite various shifts in political
regimes and the presence of widespread social antagonism towards Ahmadis. This is explained by the historical dispositions of judges towards public order, community and minority rights, which provided the “ideational context” (Hilbink 2009) within which the judges upheld the religious rights of Ahmadis. It was implicitly maintained that the rights enjoyed by the citizen, first and foremost an individual and the bearer of rights, emanated from their participation in the civic community of the nation and not their religious affiliation. It was explicitly argued that both constitutional law and the shari‘a gave all Pakistani citizens equal rights with regard to expressing their religious identity and views.

V. STATE AUTHORITY AND LIMITS OF JURIDICAL AUTONOMY UNDER ZIA-UL-HAQ REGIME

In this section, I will discuss a number of measures taken by Zia-ul-Haq to limit the juridical autonomy of Pakistan’s courts. These are crucial for describing the institutional-political context that led to the Pakistani court’s shift towards becoming complicit in the state’s criminalization of the Ahmadis. The most significant of these measures was the suspension of the 1973 Constitution and the introduction of the Provisional Constitution Order (PCO) in 1981. The PCO was preceded by the case of Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan, 1977 (‘Nusrat Bhutto’) in which ex-Prime Minister Bhutto’s wife Begum Nusrat Bhutto challenged the legality of Zia-ul-Haq’s martial law regime. In it, the Supreme Court upheld the legality of the martial law through revalidating the doctrine of necessity, in effect providing Zia-ul-Haq the legal basis for holding onto power.

The lower courts however continued to review the regime’s practices, questioning the scope of actions that was allowed to the regime under the doctrine of necessity (Newberg 1993: 174-5). According to Paula Newberg, in the years between Nusrat Bhutto and the promulgation of the PCO, “the high courts subjected the necessity doctrine to serious scrutiny. Because they could not revoke the Supreme Court’s judgment validating the regime, lower courts took steps to dissect the doctrine and define its limits, largely to mitigate the effects of Nusrat Bhutto’s case” (178). These courts were thus engaging in creative ways to uphold fundamental rights of citizens that had been abrogated with the proclamation of martial law in 1977.
While courts retained a degree of freedom of judicial review, the autonomy of the review process faced considerable challenges from the ruling regime with the promulgation of the PCO. The preamble of the PCO stated that one of the reasons it came into existence was because “doubts have arisen...as regards the powers and jurisdiction of the Superior Courts”\(^\text{20}\). The PCO was Zia-ul-Haq’s attempt to extinguish the powers of judicial review and it explicitly stated that actions of his regime could not be questioned by “any Court on any ground whatsoever”. It also barred the courts from passing legal judgments on a broad range of issues including jurisdiction of military courts, an issue that was increasingly being taken up in the Provincial High Courts.

One of the most significant aspects of the PCO was that it required judges to take an oath to uphold the PCO, an unratified political document framed as a constitution but which effectively served as an instrument to make Zia-ul-Haq’s regime appear as lawful. The judges were placed in the awkward position of either accepting the PCO as legitimate or of losing their jobs. A handful of judges who were invited to take the oath chose to decline and lost their jobs but overall, the majority of the judges took the oath. This significantly undermined the autonomy of the courts since it “almost choked the judiciary and virtually silenced dissent” (Newberg 1995: 26).

Another significant factor that undermined the relative autonomy of the courts, especially with regard to how the judges could invoke and interpret the *shari'a*, was a shift towards a particular mode of Islamic jurisprudence historically dominated by the orthodox *ulema* operating outside the judiciary. This was done through the creation of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court that were entrusted with determining if Pakistani laws were in conformity with Islamic principles. If a law (with the exception of the Constitution, fiscal law, and Muslim personal law) was found to be repugnant to Islam, the Court would inform the government who would be obliged to alter the law accordingly (Federal Shariat Court 1988).

Zia-ul-Haq introduced a number of rules regarding the appointment to the Federal Shariat Court that ensured his personal hold over the rulings of this court. For example, all appointments to the Federal Shariat Court were to be made by Zia-ul-Haq himself from

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amongst High Court judges or persons qualified to be High Court Judges without consultation with the Chief Justice of Pakistan. After 1985, it was provided that the Federal Shariat Court would consist of eight judges, of who no more than three would be members of *ulema* and well-versed in *shari’a*. There was to be a ‘probation’ period of one year for each judge after which the appointment would be renewed by Zia-ul-Haq with the consultation of the Chief Justice of Pakistan. Furthermore, any High Court judge who refused the appointment to Federal Shariat Court would undergo compulsory retirement. Through these measures, Zia-ul-Haq strove to curb not only the judicial independence of Federal Shariat Court judges but also those of High Court Judges.

The creation of the Federal Shariat Court has both its supporters and ardent critics. Not surprisingly, the state officials and Ministers who served under Zia-ul-Haq regard it as one of the regime’s accomplishments and defend it as a transparent institution imparting important judicial functions. More telling, however, are the critiques of the Federal Shariat Court. Khalid Anwar, a prominent lawyer and constitutional expert who served as Federal Minister for Law, Justice and Human Rights from 1997 to 1999 has referred to its creation as the ‘usurpation of the prerogatives of the National Assembly’ of Pakistan (Anwar 1998).

Fakhruddin G. Ebrahim, the lead counsel retained by the Ahmadis in *Zabeeruddin*[^21], maintains that since its creation, Federal Shariat Court has been used as a “dumping ground” for judges who the establishment considers undesirable. For example, if a High Court judge became inconvenient for establishment, he was transferred to Federal Shariat Court since it operates at the margins of the legal system and covers limited cases. The other informal way its appointments function is that when a judge is reaching his retirement but is someone who has been loyal to the establishment, he gets rewarded by being appointed to the Federal Shariat Court so that he may continue to enjoy the benefits of a salary, official position and other perks that are equivalent to those enjoyed by a High Court judge.

[^21]: Interview with Fakhruddin G. Ebrahim, Karachi: 9 March 2008. Ebrahim was a judge of Supreme Court in 1981 but resigned when Zia-ul-Haq asked the judges to take oath under the new constitution promulgated by him upholding his executive rule. Ebrahim would later serve as the Governor of Province of Sind in 1989-90, the Federal Law Minister under the caretaker cabinet of President Farooq Leghari in 1996 and the Attorney General of Pakistan. Ebrahim is widely regarded as a constitutional expert and a human rights activist.
The bifurcation of courts into secular and Shariat courts did not initially lead to jurisdictional contradictions but the situation was significantly muddied with the passing of a Presidential Order in 1985 titled “Revival of the Constitution of 1973 Order” which, like its name suggests, reinstated the previously suspended 1973 Constitution. The Order also inserted a new clause 2A into the Constitution which made the preamble Objectives Resolution a substantive part of the constitution. This would have the effect of making its provision that in Pakistan, “Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah” come into sharp conflict with the provisions guaranteeing Fundamental Rights contained in the Constitution. The significant question that came to fore as a result of the incorporation of the Objective Resolution, was this: “was it a supra-constitutional provision controlling all other parts of the 1973 Constitution and Pakistan’s statute law and making them subject to an overriding repugnancy to the Islam test, or had the Objectives Resolution, in spite of having been incorporated into the 1973 Constitution, remained just a programmatic and inspirational advice to Pakistan’s first Constituent Assembly?” (Lau 2006: 48) This question was to be addressed, either implicitly or explicitly, in numerous court cases in the post-1985 period and was answered differently at different moments, depending mostly on the judges’ own convictions regarding this important issue as well as the specificities of the particular issue being debated. In the case of Zaheeruddin below, the effect of the insertion of clause 2A was the abrogation of a constitutionally guaranteed right on the basis of highly orthodox interpretations of the shari’a.

Politics of Community inside the Federal Shariat Court

Before approaching the Supreme Court, the Ahmadis challenged the 1984 Ordinance in Federal Shariat Court. In Mujibur Rehman, the Ahmadi petitioners challenged the 1984 Ordinance on the grounds that “the impugned Ordinance violates the Sharia and the Constitutional rights of the Ahmadis to profess, practise and preach or propagate their religion”. The final judgment was written by the then Chief Justice of the Federal Shariat Court, Fakhre Alam, the senior-most of the four judges who heard the proceedings. During
the proceedings, six *ulema* and “Jurist-Consults” were invited by the Court for assisting it in religious matters.

Before analyzing the legal reasoning employed in *Mujibur Rehman*, I will draw on political stories told by key legal actors to reveal the external constraints exerted on the judges in this case. One of the most significant aspects of *Mujibur Rehman* was that at the start of the proceedings, there were five judges hearing the proceedings and the senior presiding judge was the then Chief Justice of Federal Shariat Court, Aftab Hussain. As noted above, Hussain had served as the senior judge in the *Mobashir* case and had authored the judgment in that case. After the conclusion of the proceedings in *Mujibur Rehman* but before the deliverance of the final judgment, Hussain was removed from his post as the Chief Justice of Federal Shariat Court and replaced by Justice Fakhre Alam, one of the other judges hearing the case.

During the personal interviews conducted with legal professionals involved or conversant with this case, this change was mentioned several times, directly lending itself to the issue of the Federal Shariat Court’s autonomy from the Zia-ul-Haq regime\(^{22}\). The first mention of the significance of this change was made by Mujeeb-ur-Rehman himself\(^{23}\). An Ahmadi lawyer known for his expertise on both theological and legal matters, Mujeeb-ur-Rehman revealed that he argued his case for fourteen days after which a judgment was drafted by Hussain and circulated within the Federal Shariat Court. Mujeeb-ur-Rehman subsequently learnt that Hussain had been critical of the 1984 Ordinance but had attempted to take a middle ground in his judgment whereby while restricted, Ahmadis would enjoy greater freedom to conduct their religious practices than allowed by the Ordinance\(^{24}\). Mujeeb-ur-Rehman observed that Hussain’s interpretations of *shari‘a* had been in direct

\(^{22}\) Hussain was first given a transference order by Zia-ul-Haq to the position of an Advisor to the Ministry of Religious Affairs. Justice Hussain refused to accept the latter position and thereby stood retired (Mujeeb-ur-Rehman 2002: 23).

\(^{23}\) Interview with Mujeeb-ur-Rehman, Rawalpindi: 21 January 2008.

\(^{24}\) Thus, Hussain asked Mujeeb-ur-Rehman during the course of proceedings if Ahmadis would be willing to accept certain regulations, such as clearly indicating outside their mosques that it was an Ahmadi mosque, not using loud speakers to call the *azaan* (a common practice in Pakistan) propagating the Ahmadi faith only through written literature and not oral encounters etc.
opposition to the mainstream *ulema*. This is clearly borne out by the judgment that Hussain rendered in the *Mobashir* case. Mujeeb-ur-Rehman also maintained that Hussain had been inclined towards the position that the fundamental religious rights of citizens could not be denied but could be regulated. Mujeeb-ur-Rehman did not claim to know for a fact that Hussain’s removal as Chief Justice occurred because of his judgment in this case but strongly believed that it was one of the major causes for his removal.

Interview conducted with Sharifuddin Pirzada, the Minister for Law and Parliamentary Affairs during that time, revealed an equally interesting account. According to Pirzada, Hussain’s judgment in *Mujibur Rehman* was kept in a box in his office. While Hussain was out of the country, the acting Chief Justice of Federal Shariat Court Fakhre Alam opened the box and read Hussain’s judgment in which it was intimated that upon the revival of the 1973 Constitution, the 1984 Ordinance would become repugnant to the fundamental rights protected by the Constitution and would stand abrogated. The acting Chief Justice reported the contents of the judgment to Zia-ul-Haq. Following this, in Pirzada’s words:

“General Zia and two to three ministers met and they decided that he [Aftab Hussain] should not be continued as the Chief Justice and he was dispensed with. Aftab was a good friend of mine…I induced him to take the position. When he returned, he was sent on deputation to someplace else, and portions of his judgment were deleted and rest of the judgment was taken by the other judge and pronounced.”

Pirzada revealed that he had “glanced” at the original judgment and thereby knew that the final judgment passed by Fakhre Alam contained elements taken directly from the judgment written by Aftab Hussain, even though the legal outcome was changed.

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26 Mujeeb-ur-Rehman also questions whether the judgment was written by Justice Fakhre Alam, “who did not know anything about Shariah”. He also claims that he did not say some of the things that are attributed to him in that judgment. He made a formal request to Federal Shariat Court to release to him the audio-taped minutes of the proceedings of *Mujibur Rehman* so that he may correct the record but was denied the request.
Doubts about the authorship of the Mujibur Rehman judgment as well as Hussain’s removal from Federal Shariat Court after he had written the judgment has raised questions about whether this judgment followed a properly juridical reasoning or if it was dictated by the political context of its time. The ulema claim that legal reasoning in Mujibur Rehman flows directly from accepted principles contained in the shari’a. Mahmood Ghazi, one of the invited to assist the Federal Shariat Court in the Mujibur Rehman case, denies that Justice Hussain’s removal was related to this case. According to Ghazi, Hussain had shown him the written judgment and that it had been was identical to Justice Alam’s final judgment. According to Ghazi, Alam directly took Justice Hussain’s judgment and put his name under it. With these claims, Ghazi attempted to dispel the notion that recourse to shari’a could lead to the abrogation of the 1984 Ordinance.

The dismissal of Hussain during the proceedings in Mujibur Rehman case reveals what was at stake for judges who attempted to pronounce legal outcomes that were undesirable to state authorities under Zia-ul-Haq regime. It should be noted that the trade-off between independence and power that crystallized at this moment emerged during the course of events itself and was not foreseen by Hussain who had, after all, taken an oath to uphold Zia-ul-Haq’s PCO. In such a context, judges had to renegotiate how they would play their historical role of ensuring fundamental rights of citizens. The situation was further complicated by the formation of the Federal Shariat Court which essentially placed judges and other legal professionals trained in the Anglo-American legal tradition in an ambiguous legal space since they were now required to speak authoritatively about the shari’a. The issue was not just that judges were now required to draw upon a body of law that they were not acquainted with. As the above analysis of Kashmiri and Mobashir shows, the judges in Pakistan’s courts have historically been adept at creatively drawing upon Islamic history, legal thought and ethics to supplement and strengthen their legal judgments based on the grundnorm of constitutionally protected fundamental rights. Furthermore, these judges were

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knowledgeable about Muslim personal law which had been codified under colonial rule and which continued to function in Pakistan after independence.\(^{28}\)

I argue that the transformation that Islamic legal reasoning underwent during the Zia-ul-Haq regime was significant not only because it led to the strategic employment of shari'a as the grundnorm but because it dictated the employment of a tradition of shari'a that was at odds with the dispositions of legal actors such as Hussain. By placing traditional ulema squarely inside the legal system, Zia-ul-Haq in effect paved the way for the legitimation of narratives about the history of Ahmadis and their religious thought upheld by the orthodox religious establishment. For example, in addition to engaging in theological discussions about the meaning of the term *khatam-e-nabuwwat* and the bases of Mirza Ghulam Ahmad’s claims to prophecy, the *Mujibur Rehman* judgment draws attention to the allegiance of Ghulam Ahmad’s father to the British colonialists and devotes considerable space to tales about Mirza Ghulam Ahmad’s personal life, character, marriages and intrigues, directly borrowed from mainstream anti-Ahmadi literature produced by orthodox religious groups such as *Majlis-e-Tahaffuz-e-Khatam-e-Nabuwwat* (Association for the Protection of the Finality of Prophethood, in short MTKN).

Second, the *Mujibur Rehman* judgment maintains that the cohesion of the ummah, the Muslim community, is based foremost on every single Muslim’s unflinching love and respect for Prophet Muhammad, manifested through belief in the finality of Prophet Muhammad. By imagining Pakistan as an “Islamic state”, the judgment rendered the majority orthodox Muslim community as holding a more privileged position within the national space. While the Lahore High Court in *Kashmiri* and *Mobashir* cases had implicitly regarded the issue of religious rights of Ahmadis as a juridical and not a political issue, the Federal Shariat Court explicitly legitimized its politicization within the legal system:

“The Qadianis are not a part of the Muslim *Ummah*. This is amply proved by their own conduct. In their opinion all the Muslims are unbelievers. They constitute a separate *Ummah*. The paradox is that they have substituted themselves for the Muslim *Ummah* and turned the Muslims out of that *Ummah*. The Muslims consider them beyond the pale of Muslim *Ummah* and curiously enough they consider the

\(^{28}\) Asad A. Ahmed refers to this discursive tradition as “state-sharia” and contrasts it with the other discursive tradition “grounded within traditional Muslim jurisprudence, [which] is the preserve of the ulema” (Ahmed 2010: 280).
Muslims out of the pale of that *Ummah*. Clearly the two do not belong to the same *Ummah*. The question who are members of the Muslim *Ummah* could be left unresolved because of the absence of forum in British India but in an Islamic State in which there are institutions to determine the issue, this matter does not present any difficulty. The Legislature as well as the Federal Shariat Court are competent to resolve it.”

Furthermore, it was argued that the Ahmadis’ “insistence on calling themselves Muslims” was “clearly unconstitutional” in the light of the 1974 Amendment and was “trying the patience of Muslim *Ummah*”. It was held that the Ahmadis had themselves necessitated the 1984 Ordinance by defying the 1974 Amendment by continuing to call themselves Muslim and practicing Islam.

Quite ambiguously, the *Mujibur Rehman* judgment concluded that while the 1984 ordinance rightfully restrained Ahmadis from “calling themselves what they are not; since they cannot be allowed to deceive anybody specially the Muslim *Ummah* by passing off as Muslims”, it did not constitute a violation of their religious freedoms as “the Muslim *Sharia* affords full protection to the practices of religion by the non-Muslims as well as to its profession”. However, by approaching Ahmadi religious beliefs through the prism of anti-Ahmadi narratives of the orthodox religious establishment, the Federal Shariat Court in effect reconstituted the ethos of the *shari’a* from an egalitarian one to a repressive one, in the process restricting rights of heterodox Muslim communities to publicly proclaim, practice and propagate alternative interpretations of Islam.

VI. AFTER CRIMINALIZATION: JURIDICAL REINSCRIPTION OF PUBLIC ORDER, COMMUNITY AND DISSENT IN *ZAHEERUDDIN*

Upon failing in the Federal Shariat Court, the Ahmadis challenged the 1984 Ordinance in the Supreme Court of Pakistan in the *Zaheeruddin* case. At the time *Zaheeruddin* was decided – in 1993 – the democratically elected regime of Prime Minister Mian Nawaz Sharif was in place and judges enjoyed considerable more relative autonomy than they had under Zia-ul-Haq, especially with respect to interpreting the *shari’a*. Nonetheless, the presence of a legal precedent on the issue of the religious rights of Ahmadis in the Federal Shariat Court, the valorization of *shari’a* as a possible *grundnorm* through Article 2A and the
The juridical acceptance of the “Ahmadi issue” as a national-political one in addition to a legal one led to the Supreme Court upholding the 1984 Ordinance on constitutional grounds. However, as I will discuss below, a closer look at the two minority judgments rendered as well as of the political stories told by key legal actors involved in this case reveals that 

*Zabeeruddin* constituted a moment in which the coherence of the juridical ideology upheld in preceding cases on the religious rights of Ahmadis broke down, revealing the contradictions inherent in the simultaneous accommodation of minority rights and illiberal defense of state prerogatives.

While personal stories told to me by both Ahmadi and non-Ahmadi legal actors involved in this case do not suggest direct state involvement, they reveal that the *Zabeeruddin* case was heard in a highly charged sociopolitical context of which both the judges and lawyers were fully cognizant. The case of *Zabeeruddin* was a high profile one, especially because of attention given to it by the *ulema*. An account of the environment within the courtroom during the proceedings of *Zabeeruddin* is given by Fakhruddin G. Ebrahim, the lead counsel retained by the Ahmadis for the case. A civil lawyer by training and practice, Ebrahim was surprised that he was approached by Ahmadis in the case of *Zabeeruddin* since he did not have experience with criminal cases. Upon learning that several prominent lawyers had refused to take the case, Ebrahim became interested in the case and was “shocked” and “amazed” to learn about the 1984 Ordinance, in particular about the reference to “posing as Muslims” in it. For Ebrahim, this comprised the key legal point to be debated:

“I was looking at the case purely as that ‘posing as a Muslim’ is so vague a law that a criminal offence cannot emanate from that….in relation to crime, it must be specific. Posing can mean one thing to you, another to me…..my ground was purely…I don’t know religion much. I cannot justify or condemn anything on the reason of Islamic principles….I am not really competent to do that. My argument was about the word itself. By saying that, I attacked Zia’s power by questioning if he could pass a law like that.”

Ebrahim also took on the case “as a matter of principle” and because he felt emotional and passionate about the issue since he was an “irreligious person” belonging to

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29 Ebrahim was one of the judges of Supreme Court who refused to take oath under Zia-ul-Haq’s PCO of 1981.
the minority community of Dawoodi Bohras, a splinter Shi’ite sect of Islam. However, he did not fully realize what he was taking on at that time:

“I had no idea about what I was taking on because I found at the trial...when I came, there was a lot of crowd and these fellows were trying to sort of [erect] some kind of a shield around me, these Ahmadi gentlemen. I didn’t understand that at all, why is that so. There were a lot of maulanas [ulema] in the courtroom, extremists, and they [Ahmadis] thought that they might even attack me. I had no idea that I was doing something...that I would invite somebody to attack me.”

The legal dispositions and personal impressions of Ebrahim, a former judge of Supreme Court, are instructive because of the vast difference between these and the ones that would be upheld in the Zaheeruddin judgment. About the judges in the case of Zaheeruddin, Ebrahim voiced his impressions as follows:

“Judges were throughout on the defensive. They would not say anything one way or the other. Their attitude was like what is this pain that is being inflicted upon us, having to hear this case. They knew full well that it was a case of grave injustice. This was a cruelty towards an entire community. They were afraid....afraid of being called pro-Ahmadi.”

Ebrahim strongly stated that “I am not prepared to believe that they [the judges] were against Ahmadis as such. I think they were afraid....of becoming unpopular.” Ebrahim explained their attitude by talking about the social meaning of staying in power in Pakistan:

“In Pakistan, it is very important to stay in power. Power has a different connotation in Pakistan. Please understand that. Power makes me a different person. Power gives me status...opportunity to make money, what not, you see, and what is worst, if I am not in power, I am in jail. You follow me? So either I will go for power...or if I am there in power, I will see that I remain in power.”

One of the judges in Zaheeruddin, Justice Salem Akhtar, gave a somewhat similar account of the court environment:

“It was a very charged case because the followers of both sides were always present in Court with good strength and sometimes Court had to control them because
sentiments were running high on both sides. But in any case, the proceedings went for a few days and very peacefully and calmly.”30

Akhtar informed me that he, and likely the other judges too, were “flooded with letters and telegrams from both the sides...pressing their views...giving arguments ...with the intention to help me, not to influence”.

An analysis of the arguments deployed by various legal actors reveals the continued importance of notions of community, social order and dissent. The counsel for Federal Government Syed Riazul Hassan Gilani relied on the argument upheld in Mujibur Rehman that Muslims held a privileged place in Pakistan by virtue of the state being an Islamic state. Thus, Ahmadis could not be allowed to cause “annoyance, detriment and subversion of the Islamic faith”. Second, the fundamental rights enshrined in Article 20 of the Constitution did not allow “the subversion and mutilation of somebody else’s right”. Third, executive ordinances could be lawfully employed by the state to avoid “clash of ideologies” in religious matters, especially in preventing those that are likely to create law and order problems for the community at large. Fourth, he argued that the 1984 Ordinance was consistent with shari’a and that constitutional provisions guaranteeing fundamental rights could be contained through recourse to it.

The dissenting judge Shafiur Rahman explicitly rejected the claim that fundamental rights were subordinate to and controlled by the injunctions of Islam31. Furthermore, making a right “subject to law” did not amount to abolishing the right altogether as was being argued by Gilani. Rahman also undertook a critique of Zia-ul-Haq by stating that the 1984 Ordinance was promulgated by a President who “suffered from no Constitutional restraints of Fundamental Rights or other provisions”. Rahman argued that the clause in the 1984 Ordinance prohibiting Ahmadis from outraging the religious feelings of Muslims did not violate fundamental rights as “nobody has a Fundamental Right or can have one of


31 Justice Rahman drew on the legal precedent found in Hakim Khan v. Government of Pakistan, 1992 (‘Hakim Khan’) in which all the judges of the bench had unanimously struck down the claim that fundamental rights were constitutionally subordinate to and controlled by the injunctions of Islam. He invoked other legal precedents to argue that the conditionality of “subject to law” in Article 20 cannot be invoked to abolish the right contained in it.
outraging the religious feelings of others while propagating his own religion or faith”. However, Ahmadis calling their places of worship “mosque” and giving the Islamic call for prayer could not be taken as instances of outraging feelings of Muslims since these had been religious practices of Ahmadis since the inception of their religion and it therefore could not be argued that such practices had been expressly taken up by them to annoy or outrage the feelings of others. Thus, while a public claim to being a Muslim by an Ahmadi did constitute a violation of the 1974 Constitutional Amendment, prohibiting Ahmadis from propagating and preaching their faith violated “the Fundamental Right of religion’s freedom and of equality and of the speech” in so far as it prohibited only one religious community from propagating their faith. Rahman summed up his views on the 1984 Ordinance as “oppressively unjust, abominably vague, perverse, discriminatory, product of biased mind, so mala fide, and wholly unconstitutional”.

The majority judgment in *Zabeenuddin* delivered by Justice Abdul Qadeer Chaudhary rejected Rahman’s interpretations. First, it was maintained that Islam, like all religions, had its own words, names, epithets, descriptions etc. that carried special meaning for Muslims. When non-Muslims employed these, they gave the impression that “they are concerned with Islam when the fact may be otherwise”. By using Muslim words and epithets, Ahmadis defiled Islam and deceived ordinary people as to their true identity and it was the duty of an Islamic state to protect words associated with Islam. By drawing on political and ideological repertoires that had been privileged by Zia-ul-Haq, Chaudhary bypassed the question of the legality of treating religious nomenclature and practices etc. as legal properties, an issue that had been addressed in the negative in the Kashmiri case.

Second, it was held that the qualification “subject to law, public order and morality” in Article 20 meant that freedom to act with regard to religion could not be an absolute right since “conduct remains subject to regulation for the protection of the society”. Thus, when a law was invoked in the interest of maintenance of social order, the question of denial of fundamental rights did not arise since a state could not “permit anyone to violate or take away the fundamental rights of others, in the enjoyment of his own rights” and “no one can be allowed to insult, damage or defile the religion of any other class or outrage their religious

32 Chaudhary noted that the 1984 Ordinance did not bar Ahmadis, either constitutionally or under *shari’a*, from coining their own nomenclature.
feelings, so as to give rise to law and order situation”. That the 1984 Ordinance constituted a fundamental attack on the very foundation of a religious faith was completely glossed over by Chaudhary. This rendering constituted an explicit equation of the very existence of Ahmadi religion with a social and moral problem.

Third, it was maintained that freedom of religion covered only those practices that “are integral and essential part of the religion”. The appellants, he argued, had been unable to show what the integral parts of their religion were and why a public performance of their rituals and ceremonies and use of Muslim epithets was integral to their religion. Fourth, it was held that Muslims in Pakistan believe that the birth of the Ahmadi religion under colonial rule “was a serious and organized attack on its ideological frontiers” and that Ahmadis were a threat to the Muslim ummah and to the socio-political organization of their society which is based on Islam. Ahmadis themselves had highlighted the separatism between themselves and non-Muslims, going so far as to declare all non-Ahmadis infidels. Finally, it was argued that Ahmadis were legally and constitutionally non-Muslim and therefore did not have the right to Islamic terminologies and epithets. Their using Islam’s distinctive characteristics could only be construed as an attempt to pose as Muslims. Chaudhary concluded his statement by equating Ahmadis with Salman Rushdie:

“So, if an Ahmadi is allowed by the administration or the law to display or chant in public, the Shaair-e-Islam’ [characteristics considered unique to Islam], it is like creating a Rushdi’ out of him. Can the administration in that case guarantee his life, liberty and property and if so at what cost? Again, if this permission is given to a procession or assembly on the streets or a public place, it is like permitting civil war.”

A small note was added by Judge Salim Akhtar in which he noted that he concurred with Chaudhary’s judgment with the exception that he upheld the judgment in the case of Hakim Khan i.e. that Article 2A could not be employed to override the rights enshrined in the constitution. The qualification in Article 20 – “subject to law, public order and morality” – however could be employed to legally uphold the 1984 Ordinance. Akhtar thereby appropriated a public order discourse to bypass the issue of the hierarchy between constitutional law and the shari’a.
Zaheeruddin and Beyond

One of the central issues addressed in Zaheeruddin can aptly be summed up by drawing on the following observation by Abdullahi an’Naim, prominent scholar of shari’a, human rights activist and self-proclaimed secularist:

“On a practical level, although most of the constitutions of modern Muslim states guarantee against religious discrimination, most of these constitutions also authorize the application of Shari’ah. As such, these constitutions sanction discrimination against religious minorities. This is inconsistent with the constitutions’ own terms” (An-Na’im 1987: 1).

An-Na’im’s larger intellectual project entails demonstrating that the shari’a is historically and socially constructed and that most of our contemporary wisdom about Islamic law derives from interpretations that were made in the earlier history of Islam. According to An-Na’im, “it should be open to modern Muslim jurists to state and interpret the law for their contemporaries even if such statement and interpretation were to be, in some respects, different from the inherited wisdom” (16-17). But consider this. An-Na’im explains the use of the phrase “in some respects” thus: “I say in some respects because I do not conceive of all aspects of Shari’ah as open to restatement and reinterpretation. Belief in the Qur’an as the final and literal word of God and faith in the Prophet Mohammed as the final prophet remain the essential prerequisites of being a Muslim”. This observation perhaps brings into sharper focus the highly charged and controversial nature of the subject that was dealt in Pakistan’s Supreme Court Zaheeruddin since it depicts the importance of the centrality of the belief in the finality of Prophet Mohammad for defining the boundaries of the ummah for a broad sector of Muslims.

However, the investigation I have undertaken in this paper is fascinating precisely because it brings An-Na’im’s concern about discrimination against religious minorities in conversation with traditional understandings of khatam-e-nabuwwat as forming an uninterpretable core of the Islamic faith. As the Pakistani courts relationship with the religious rights of Ahmadis reveal, the notion khatam-e-nabuwwat has in fact been open to varying ‘restatements and reinterpretations’ and the right to hold and propagate such reinterpretations has been upheld by Pakistan’s courts over a significantly long period.
Historically, this relationship has been mediated by the institutional-political contexts in which courts have found themselves. Prior to Zia-ul-Haq’s rule, courts were able to rule with considerable autonomy on the religious rights of Ahmadis through erecting a liberal defense of minority rights alongside a institutional legacy of providing legal support to secular, authoritarian regimes. This allowed the consolidation of a singular, hegemonic juridical ideology whose internal contradictions were revealed only with Zia-ul-Haq’s stringent top-down control of the judiciary and his Islamizing ideology. At this juncture, the courts bowed to external pressures by continuing in their defense of authoritarian rule and abandoning their commitment to protecting rights of Ahmadis. However, this was only possible because courts were able to reinvest central juridical notions with novel significations, thereby maintaining continuity with legal precedents.

The creation of Federal Shariat Court was pivotal in this process. A strategic tool employed by Zia-ul-Haq to exert control over the judiciary, its creation significantly altered the discursive-juridical terrain on which the question of the religious rights of Ahmadis was contested. In the Muslim world at large, the relationship between Islamic and alternative legal codes has been usually characterized by ambiguity that is valued and creatively exploited by social actors (Ewing 1988). Access to courts theoretically wedded to different normative orders gave the Ahmadis an opportunity to contest the 1984 ordinance from multiple normative grounds. The other side of the same coin is that elements from multiple normative orders were creatively conjoined by judges in the 1980s and beyond to maintain a semblance of internal consistency and legitimacy in the face of external constraints. This has had the effect of the consolidation of a symbolic order that continues to be employed in the courts to marginalize Ahmadis (and other vulnerable Pakistani citizens) on charges of blasphemy and so on.

In recent years, this was witnessed most starkly in the case of the Lahore bombings of Ahmadi mosques in May of 2010. The Punjab provincial chapter of the Pakistani Taliban took responsibility for these attacks that killed at least eighty people and wounded many more. Newspapers across the country reported this as an instance of terrorists attacking Ahmadi “places of worship” even though Ahmadis themselves regard these places as mosques. The difficulty faced by newspapers arises from the enactment of the 1974 Constitutional Amendment and the subsequent promulgation of the 1984 Ordinance that
not only forcibly rendered the Ahmadis non-Muslim but also made referring to the Ahmadis as Muslims (and thereby to their places of worship as mosques) a criminal act liable for punishment. When former Prime Minister of Pakistan Nawaz Sharif Khan and the leader of the Pakistan Muslim League (Nawaz) Party (PML-N) publicly condemned the attacks, stating that “Ahmadi brothers and sisters are an asset” and full citizens of Pakistan, his statements immediately drew criticisms from various religious and political parties. For example, leaders of the Islamist political party Jamiat-ul-Ulema-i-Islam called Sharif’s statement a “violation of the Constitution” and demanded that “The PML-N chief should seek forgiveness from Muslims all over the world”. Some ulama threatened to launch a campaign against the PML-N if Sharif did not retract his statements (Dawn newspaper, Karachi: 10 June 2010). In the May 28 attack on Ahmadis are implicated issues that have been central to this paper: politicization of religious difference, ‘purification’ of national communities, the structures of opportunities and constraints facing political and legal actors that define and limit the practical world of political and juridical claims-making, and the role of the state in protecting fundamental citizenship rights.

VII. CONCLUSIONS

This paper has demonstrated that conjunctures among trajectories of institutional-political relationships and legal reasoning interacted with externalities such as state valorization of orthodox Islam, stricter control of judicial appointments by state authorities and politicization of the “Ahmadi problem” (as it is popularly referred to in Pakistan) to constitute shifts in the Pakistani courts’ articulation of rights of Ahmadis. I have shown that such rearticulations cannot be reduced to arguments about the “ideological apparatus” (Althusser 1971) of an authoritarian state which view court judgments as mere reflections of whims and ideologies of rulers. Such a position posits a deterministic account of the relationship between the state and judiciary in quasi-authoritarian or authoritarian states that is increasingly being challenged by new scholarship on courts and judges in non-Western, transitional democracies (Ginsburg and Moustafa 2008; Hilbink 2007; Huneeus 2010; Moustafa 2007). Taking cues from this scholarship, I have attempted to depict the dynamic processes through which judges variably became knowledgeable about what state authorities desire (e.g. through Justice Aftab Hussain’s removal during Mujibur Rehman case) or formed
perceptions about what state authorities desired (as suggested by Ebrahim’s political observations). Yet at other times, judges drew upon personal beliefs (e.g. Justice Rehman’s minority judgment in *Zabeeruddin*) or continued to creatively draw upon legal precedents as a way to bypass political pressures (e.g. Justice Salim’s minority judgment in *Zabeeruddin*). This suggests the absence of a singular and coherent judicial ideology, revealing instead a contested terrain of juridical decision-making in which different actors respond differently to external constraints.

Second, this paper has argued that an analysis of juridical reasoning in the key court cases that I have analyzed above on the highly sensitive issue of the status and rights of Ahmadis challenges the notion that the constitutional (secular) law/shari'at binary has valence for social and legal actors involved in juridical contestations. The Ahmadi challenge to the 1984 Ordinance is an example of the ways citizens employ a judicial system comprised by state-centered legal pluralism. What we have here are two different legal spheres theoretically characterized by their distinct normative codes and existing side by side within a larger legal system. However, in addition to legitimating multiple of normative orders, the institutionalization of state-centered legal pluralism through privileging orthodox interpretations of shari’a allowed resignifications of slippery signifiers such as community, Muslim, public order etc. in ways that cross-cut the secular/religious divide. Through creative discursive processes of conjoining and/or dissolving earlier narratives, legal actors engaged in legal “framing contests” (Pedriana 2006) to legitimate and institutionalize their own narratives of the nation and its past, the place of Ahmadis within the Pakistani nation, and the relationship between Islam and the state.
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