

Progress Derailed

The Legal Status of Women in Pakistan

By Nan Berezowski



Photo: Brenda Cranney

Le Pakistan a déjà été considéré comme l'un des États musulmans les plus progressistes. En 1948, la délégation pakistanaise aux Nations unies a fait sienne l'idéologie qui sous-tend les normes édictées par la déclaration universelle des droits humains et s'est aussi montrée déterminée à les appliquer au Pakistan. Dans ce contexte, le mouvement des femmes a pu réaliser des gains significatifs. Mais les personnes qui ont lutté pour transformer le Pakistan en une démocratie moderne ont sous-estimé l'importance de la réapparition du fondamentalisme musulman. Les fondamentalistes ont pris le dessus en se ralliant le soutien populaire. Avant d'essayer de demander des réformes juridiques, le mouvement des femmes doit cultiver le soutien de la population. Il lui faut tenir un langage modéré afin de susciter l'intérêt d'une plus vaste frange de la société pakistanaise.

Riding a religious roller coaster

The 1988 election of Benazir Bhutto gave many Pakistani women hope that the rising popularity of Islamic fundamentalism would subside. After all, one of Benazir's campaign promises was to dismantle the Hudood Ordinances, a set of stringent Islamic laws introduced in 1979 by her predecessor, Zia-ul-haq. Under these laws for a woman to prove she has been raped she must provide witnesses to the penetration. If she fails to prove the rape, she in turn risks being charged with adultery. (Stackhouse, 1992a: 16) However, Benazir's government was short-lived, its promises remained unfulfilled, and its downfall was shrouded in controversy. With its defeat, women's rights advocates had to relinquish hope that speedy improvements in the legal status of women would emanate from the legislature.

Under Muin Nawaz Sharif, head of the Islamic Democratic

Alliance, the process of Islamization has resumed. His government's erratic attempts to make Pakistani institutions and society congruent with *Shariah*, the traditional socio-religious law of Islam, have resulted in virtual chaos. Banking is but one example: economists warn that if all forms of interest paid or charged by financial institutions are banned because they are incongruent with *Shariah*, as the Federal Shariat Court has proclaimed, the nation's entire financial system will be jeopardized. (Hussain 23b) As for Pakistani women, strict adherence to *Shariah* means that they may be legally forced to wear the veil, they may lose the delegated right to divorce, be unable to bar their husbands from taking new wives, and the repeal of the Ordinances will become next to impossible. Pakistan was once considered a testament to moderate Islam, a country where the status of women would, albeit slowly, become congruent with international human rights standards. What accounts for this turnabout? How can it be rectified?

A matter of interpretation

Like other leaders, those of Islamic states have seldom officially denied that their states are subject to the basic obligations of the United Nations Charter and the Universal Declaration of Human Rights (UDHR). Instead, they deny alleged violations, denounce the intrusion into sovereign affairs, or plead emergency. Such behaviour implies an ideological acceptance of international standards despite a lack of resources or political will to comply with them. However, some have argued that the very nature of Islam makes it unrealistic, or wrong, to hold these states to international human rights standards that express Western values alien to Islamic societies. This attitude reflects an ideological rejection of both the standards and the assertion that they are universal.

It is hardly surprising that during the course of debate at the United Nations on the text of the UDHR, adopted in 1948, as "a common standard of achievement for all peoples and nations," a difference of opinion among the Muslim delegates emerged as to the implications for *Shariah*. (UDHR preamble) Saudi and Egyptian delegates expressed reservations as to the universality of the UDHR's philosophical and political assumptions and considered some of them incompatible. (Sajoo 25) However, speaking on behalf of Pakistan, Mohammed Zafrullah Khan told the United Nations that Islam not only recognized, but advocated the concept of human rights. From his perspective, the aspirations of the UDHR reflected the lessons of history and teachings of all religions and thus were the legacy of all human experience. (Sajoo 28-29) The ease with which Pakistan accepted the UDHR as complementary to Islam can be traced to the modernist interpretation of *Shariah* that prevailed among the nation's political elite at the time. The opposing perspective is a manifestation of classical interpretation.

Traditionally, Islam emphasizes community well-being as opposed to individual rights. (Sajoo 29) Like other religious systems of law, according to classical interpretation, "rights" are the corollaries of duties owed to Allah and to other individuals. (Arzt 205; Rafi, 1992) For the Muslim is not the autonomous individual of Western philosophy, but one who submits to the will of Allah. Therefore, the only rights that are "unalienable," as in the Western concept of "natural rights," are those belonging to

Allah and the state, Allah's servant. (Mayer 1023) Consistent with the view that individual and state are not normally adversarial is the absence of governmental checks and balances that most Western countries see as basic to the guarantee of human rights in Islamic legal tradition. As a result, classical interpretation evolved as fundamentally opposed to an independent judiciary that could define limits of the state. Furthermore, because *Shariah* is divine law, the only need for human agency was fulfilled long ago when the religious jurists conclusively determined the true meaning of the Scriptures. (Collins 522-523) *Shariah* is thus frozen in time.

The classicist emphasis on duties over rights, on community over individual, and the absence of checks and balances provides a weak platform upon which to assert human rights. Furthermore, the inherent rejection of change favours the maintenance of a status quo that denies women and non-Muslims full legal status. As a result, classical interpretation has had little appeal to women's rights advocates, who in turn have formed an early alliance with the modernists.

Modernist interpretation loosely describes three alternatives to the classical interpretation of *Shariah*. The "moderate" view provides that declarations of rights in an Islamic state must, and can, be drawn from Islamic jurisprudence. When scriptural sources support international human rights standards they can be advocated without jeopardizing religious integrity. The "secular" view argues that modern states are by their very nature secular, and must be ruled by secular law. This view is problematic as it pertains to women because "private" family matters are often characterized as an exception. The "radical" view maintains that *Shariah* is neither sacred nor relevant to contemporary Islamic society. In this view, *Shariah* is not divine law, but rather derived by mortals from religious sources, and therefore inevitably influenced by circumstances, knowledge, and customs. International human rights standards are entirely consistent with the principles of Islam because they reflect the essential values preached by the Prophet. (Hanavar 365; An-Na'im 491) Although the three are conceptually distinct, there is a tendency among modernists to blur these differences so as to promote specific goals most effectively. For example, politicians and women's rights advocates sympathetic to the "radical" view may profess a "moderate" view so as to make their ideas more acceptable to the majority of people.

In May 1991, the National Assembly adopted *Shariah* as the country's supreme law by passing the controversial Shariat Act. The interpretation of *Shariah* has always been an important issue for Pakistani women, because Islam, and more specifically the application of *Shariah*, is the primary means by which women's human rights are denied or curtailed. It is subsequently more crucial than ever. (Mumtaz and Shaheed) As such, the status of women is caught in the middle of an ongoing debate of political and legal ideology regarding the role of religion in contemporary Pakistani society.

A history of conflict

British rule in Muslim India had a profound impact on the development of modernist interpretation of Islamic legal theory. Instrumental in the movement was Sir Syed Ahmand Khan who first fostered support for a program of educational and religious

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reform. Khan borrowed from Western ideas what he considered worthwhile and cooperated with the British as a means of improving the lot and influence of Muslims, who were outnumbered on the sub-continent by Hindus four to one. (Collins 525; Mumtaz and Shaheed 7) A growing number of upper-class Muslims joined him in rejecting the stagnancy of classical interpretation and began advocating that the *Quran* be interpreted in light of contemporary circumstances. They embraced the "radical" view, for their objective was to employ the basic principles of the *Quran*, justice and fairness, to effect widespread political and legal reform. In 1906, members of this Western-educated landed elite formed the All Muslim League, which eventually brought about the Independent State of Pakistan. (Mumtaz and Shaheed 7)

Women's rights advocates were part of the early modernist movement. Among the first was Sir Mohammed Shafi who returned from England in 1892 and set about promoting women's education. Pakistan's first women's organization, the *Anjuman-e-Khawateen-e-Islam*, was founded in 1908 in his house; it advocated abandoning the veil, an end to the dowry system, and that women be given their share of inheritance as stipulated in the *Quran*. Although working within the framework of Islam, their mandate was nonetheless considered extreme. Yet they received some support from others of the Western-educated upper-class. (Mumtaz and Shaheed 41) Thus, through its early association with the eventual founders of Pakistan, the women's movement was an integral participant in the establishment of a Muslim political entity on the Indian subcontinent.

In 1947, the modernists succeeded in partitioning Pakistan from India. Ironically, Pakistan was created because of religion: Muslims who feared prosecution in a Hindu-dominated India sought separation to preserve their Islamic identity, yet its modernist founders did not envision a theocracy.

For Muhammad Ali Jinnah, the nation's first prime minister, the Muslim

community was not defined by the single dimension of religion, but rather by a combination of "all the various elements—religion, culture, race, language, art, music and so forth." (Collins 557-560) He, and other modernists, set about building a nation that reflected a broad interpretation of *Shariah*, one that would permit the flexibility demanded by a modern democracy. During the early years, the modernist domination of the legislature and subsequent staffing of the courts and bureaucracy with similar-minded people made it appear that Jinnah's secular vision would become reality.

In this era, the most significant and controversial reform specifically pertaining to women was the 1961 Muslim Family Laws Ordinance. It aimed to discourage polygamy and to regulate divorce by prescribing procedures for both. For example, the Ordinance stipulated that for a man to have multiple wives, he would now be obliged to obtain the consent of his existing wife or wives. (Article 6(2)) The Ordinance also eliminated *Talaq*, the customary and much abused practice whereby a man could repudiate his marriage by repeating the word *Talaq* three times, and it provided for *taleq-e-tawid*, the delegated right of the wife to divorce. (Articles 7(1) and 8) As well, it provided for divorce by mutual consent, and raised the marriage age for girls from 14 to 16 years of age. (Article 8)

The Ordinance was both a real and symbolic victory for Pakistani women, for it exemplified the prevalence of the modernist interpretation of *Shariah* over the classic. The 1956 Commission on Marriage and Family Laws, which provided the impetus for the legislative battle, clearly articulated the modernist position: the *Quran* embodied "basic principles" that must be applied afresh to changing conditions. For example, it argued that the practice of polygamy no longer served its historical purpose, which was to provide support for widows (and their children) by allowing them to marry a man who already had a wife. Furthermore, it argued that contemporary practice ignored the *Quranic* condition that all

wives receive equal treatment, and interpreted it as requiring that second marriages be granted only if the court was persuaded that "no injustice" would be done to the first wife. (Collins 547) In this manner, women like Begum Jahan Shah-Nawaz, who led the legislative battle, were able to erode the classical constraints to women's rights in marriage. (Shah-Nawaz)

The Ordinance was attacked by conservative forces: the *Ulema* (religious scholars) and the *Mulvi* (unofficial preachers) dismissed it as un-Islamic. The *Mulvi* insisted that it was not possible to deter men from multiple marriages, as this was sanctioned by Islam. As such, the Ordinance encouraged men to take mistresses. (Mumtaz and Shaheed 60) In response, the *Ulema* and, more vocally, the *Mulvi* stepped up their continued effort to rally the masses in favour of complete enforcement of *Shariah* in accordance with classical interpretation.

The power of Islam to rally the people proved irresistible to the modernist politicians as well. For example, despite his secular vision, much of Jinnah's image had a religious flavour. He was even proclaimed "the servant of God." (Collins 547) Like those who followed him, Jinnah felt it necessary to cloak the tenets of liberal democracy in Islamic language so as to maintain unity among the people who were divided by ethnicity, language, and class. This political strategy continued in the Ayub Khan era and reached new heights during Zulfikar Ali Bhutto's term in office.¹ Bhutto's "Islamic Socialism" not surprisingly lent credence to the *Ulema's* heightened charges of hypocrisy. (Collins 563) However, these were turbulent times: in East Pakistan there was civil war and ultimately separation, and elsewhere democracy remained tenuous—the military becoming an increasing threat. Islamic rhetoric seemed the most effective means of maintaining unity and control in the midst of chaos.

Despite the politicians' rhetoric, until General Zia-ul-Haq's military coup in 1977, the main corpus of law inherited from the British remained largely intact.

regarding the role of religion in contemporary Pakistani society.

Furthermore, the modernists, who dominated the courts, continued to function as the British Indian courts had by using the common law method to gradually undermine any of the Islamic law they purported to apply. In other words, even if courts were hesitant to evoke their own interpretation of the *Quran*, they would look to common law precedent, substituting an earlier judge's interpretation for that of the ancient religious scholars. *Rashida Begum v. Shahib Din*, where the brother of a deceased and divorced father sought to enforce the father's automatic right to custody of his son after age seven, and daughter after puberty, went beyond this. The court directly interpreted the *Quran* to find in favour of the mother. (1142) In doing so, it rejected the established religious rule, saying that the *Quran* provided only "broad and general rules" in order to allow flexibility in changing circumstances. (1150)

Such decisions fueled fundamentalist dissent and heightened support for the increasingly vocal *Mulvi*. Meanwhile, in addition to the modernist legacy of employing Islamic rhetoric and symbolism to promote political goals, the practice of making concessions to the *Ulema* and *Mulvi* intensified. For example, in 1973, Bhutto agreed to declare Pakistan an Islamic Republic. Bhutto, who inducted women into all branches of the civil service and did not oppose social drinking, declared the Ahmadiya minority non-Muslim and banned liquor under fundamentalist pressure. (Rafi, 1990: 18) Although concessions may have had short term strategic advantages, they inevitably eroded the power and influence of the modernists who made them. As for Bhutto, Islamic consciousness ran counter to his party's progressive platform and contributed to his demise.² Improvements in the legal status of women would become another casualty.

General Zia's military takeover abruptly changed Pakistan's history of *de facto* secularism at the hands of the modernists. Zia insisted that restructuring Pakistani society in accordance with Islamic ideology would rid the nation of its economic,

political, and social problems. The legal aspect of his Islamization program included the reinstatement of an Islamic penal code through the 1979 Hudood Ordinance and changes in the laws of evidence so that a woman's testimony in court was now worth half that of a man's. (Mumtaz and Shaheed 99-122) His changes closely paralleled the classical interpretation of *Shariah*.

However, the judiciary was slow to follow Zia's lead, and surprisingly he seemed unconcerned. For Zia too was employing the power of Islamic rhetoric to serve his political agenda—to legitimize and consolidate his own authority. He justified postponement of elections on the grounds that the Islamization process had not yet proceeded sufficiently, and co-opted conservative support in the legislature through his promise of Islamization.

Eventually, the slow pace of Islamization began to displease the *Ulema*, and in July 1985, the fundamentalist party, *Jama'at-i-Islami*, introduced the Shariat Bill. (Collins 577) But before it was passed into law, Zia died suddenly in a plane crash and Benazir Bhutto, leading the Pakistan People's Party, was democratically elected prime minister. At first glance, the subsequent promulgation of the Shariat Bill can be attributed to the simple fact that Benazir's government lacked the two-thirds majority in the National Assembly required to prevent it. (Weiss 436) Yet, upon closer examination, it becomes apparent that the root of the problem was the success of the fundamentalists in cultivating popular support and the corresponding failure of the modernists to counter it. As Pakistan entered the industrial age, economic and political power had begun to shift away from the landed class that constituted the modernists. They found themselves no longer able to effect their goals through status-based influence and prestige.

Decline of the modernists

Despite attempts at reform, the distribution of wealth, power and educational

resources in Pakistan remains remarkably lopsided. Nearly one in ten infants die at birth and half the population does not have safe drinking water. (Stackhouse, 1992b: A9) Ironically, the modernist support for democracy gradually undermined its status-based source of power. (Rouse 54) However, a large educated middle-class, sympathetic to modernist views, has not emerged. (Mumtaz & Shaheed 158) Instead, the power and influence of the old pro-modernist landed class has been replaced by that of a small new industrial elite. Today, 22 industrial families own 66 per cent of the country's wealth. (Mumtaz & Shaheed 140) Having acceded to economic power, these men, who own cellular phones and meet with foreign investors in five star hotels, are amassing political power as well. Unfortunately, this new elite, with its roots in rural culture, believes that its interests are better served through support of fundamentalist and not modernist causes.

The women's movement began over 80 years ago as a small but influential group composed of women from the Western-educated landed class. Although it now includes some professional women, its composition remains largely unchanged. (Rouse 56) For example, many of the present members of the Women's Action Forum (WAF) come from third or fourth generation activist families. (Mumtaz and Shaheed 152) Like the modernist movement that they are a part of, women's organizations have failed to infiltrate the elite industrialists or the country's poor. As a result, while some women have risen to positions of influence, Benazir Bhutto being an obvious example, the majority of Pakistani women remain silenced and secluded. As one female officer of the prestigious foreign service put it: "we know we are only 0.000 something of a percent of Pakistani women (and) that makes us feel guilty." (Crossette, 1990a: A5) The political and religious convictions of these women are removed from those of the majority and with the decline of their collective power and influence, the movement's strength has greatly diminished. Without its modernist allies in govern-

ment, the women's movement, as it is presently composed, can no longer deter regressive legislation, let alone realize positive change. Consequently, to regain and surpass its former influence, it needs desperately to broaden its support base.

Regaining ground—a strategy for the future

The difficulties and dangers entailed in broadening support for the women's movement mean that it will be necessary for it to remain well within the framework of Islam. Unlike the landed class, the new industrial, middle and lower classes did not integrate with the British socially and intellectually. They were not exposed to Western ideology historically, and have been unlikely, until recently, to come into contact with modern media or education because of linguistic, cultural, and economic barriers. Religion remains pivotal in their lives and their peers'. Subsequently, unlike earlier activists, who enjoyed support from their families, women from these classes will be subject to criticism and disapproval. Furthermore, they will be susceptible to public scorn and abuse because they lack family prestige and connections to shield them. Without the legitimizing rhetoric of Islam the risk to these women would simply be too great.

Now, more than ever, it will be essential to adhere to a very moderate modernist approach so as to appeal to a broader spectrum of Pakistani society. There are other advantages to employing the moderate view: Islam is a powerful mobilizing force that evokes nationalist pride, and it should not be left to the exclusive domain of fundamentalists. Islam can legitimize rights and achievements of women that might otherwise be dismissed as Western and alien. If support can be found in religious scripture for reform, then progress is more probable and advocates will be less likely to be accused of heresy. By working within Islam, yet promoting a moderate modernist agenda, women's groups can best mitigate fundamentalist antagonism.

At the same time, external cultural influences have already transformed the consciousness of some Pakistani women and men and contributed to an expectation of institutionalized gender equality;

this notion is slowly precipitating through class barriers. (Rafi, 1990: 18) Perhaps the legacy of Benazir's time in office will be her bold decision to allow Cable News Network (CNN) to be relayed to Pakistan, thus bringing the world to remote villages. (Crossette, 1990b: A20) International human rights law standards have long been embraced by the women's movement's strong leadership, but they must now gradually be integrated with the political, economic and social realities of most Pakistanis' lives.

The women's movement must make the best of this period of fundamentalist strength by eliciting support from the many women whose suffering has increased. Because the movement is no longer a part of the economic and political elite, it must employ new methods of influencing government policy. Whereas past attempts to improve women's legal status directly through law reform have met with some success, they ultimately led to the movement's decline because the gap between law and societal values became too great. Before the women's movement can successfully challenge the nation's discriminatory laws, it must win the support of the people. As it does so, it will be increasingly able to influence government policy through public opinion and to effect long-lasting legal reform. In the meantime, it must put aside the hope for rapid legal reform and be content with modest advances while it rebuilds strength in anticipation of future legal challenges.

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¹ Ayub Kahn ruled Pakistan from 1958-1969 under martial law. Bhutto was in power from 1970-1977; he was popularly elected.

² Bhutto was ousted by a military coup and sentenced to death by his opponents.

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