

Conference Paper

Rule of Law: The Case of Pakistan

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Written by Susanne Mahrwald

TABLE OF CONTENTS

| | |
|---|-----------|
| Executive Summery | 2 |
| Conference - Rule of Law in the Islamic Republic of Pakistan | 3 |
| Current State of Affairs in Pakistan - Scope and Limitations for the Rule of Law | 3 |
| Panel I: Parallel legal Systems, Myths and Realities | 6 |
| Rule of Law and Gender..... | 6 |
| Relevance of Rule of Law for Pakistan and the Crisis in FATA | 7 |
| The Existence of Different Competing Systems..... | 8 |
| Rule of Law from a Legal Pluralism Perspective..... | 8 |
| Panel II: Rule of Law, Politics and the Role of the Judiciary | 11 |
| Constitutional Courts and Politics..... | 11 |
| The Role of Political Elites..... | 11 |
| The Role of Elections | 12 |
| Constitutional Laws and the Role of Constitutional Courts | 12 |
| Panel III: Political Parties, Civil Society and the Rule of Law | 14 |
| Rule of Law and Society: Does Law Matter? | 14 |
| Democracy and Rule of Law | 14 |
| Political Parties and Power Structures | 15 |
| Conclusion..... | 16 |

Executive Summary

Pakistan is a war zone facing serious threats from militants and terrorists besides a number of other problems and difficulties that urgently demand the establishment of democratic structures as well as Rule of Law. In the light of the current crisis, high-ranking guests from Pakistan and various German experts discussed structures and deficits of the Rule of Law as well as the current state of affairs, parallel legal systems, the relationship between politics and judiciary and the role of political parties and society.

The current situation in FATA, where the Pakistan army tries to root out militants, was certainly the main focus of discussions. The crisis in the tribal areas is not only a military conflict but a conflict of governance. Consequently, FATA needs to be mainstreamed into the provincial and also national assembly and the constitution and laws must be extended to this area. Furthermore, Rule of Law is closely connected to the fight against extremism and militancy. The Taliban are not strong but benefit from the weaknesses and deficits of the state with regard to the Rule of Law and governance. They grew strong because the government does not provide any basic rights such as education, health and most important access to justice.

Decades of dictatorships have weakened democratic structures and the Rule of Law. Since the Supreme Court has legitimized a military coup in the 1950ies for the first time the judiciary has become subservient to ruling regimes. In this regard, courts do not exceed their competences but they do not make sufficient use of their powers when needed. It was not before March 2007, when the first Chief Justice of the country resisted a ruling regime and thus spurred a movement fighting for the establishment of Rule of Law. The Lawyers Movement has contributed to a general understanding of the importance to restore the deposed judges and to install an independent judiciary. In the course of this movement, a new Pakistan has emerged including a vibrant civil society a free media and active political parties.

Despite major developments during the past two years democratic structures still need to be strengthened. A country cannot be democratized if for example one of the main pillars of democracy, the political parties, is completely undemocratic, corrupt and dominated by family politics. Political parties have contributed a lot to the loss of power of the parliament. Therefore, strengthening institutions is very closely related to strengthening political parties. In this regard, special emphasis needs to be put on programmatic parties because charismatic and clientelistic parties, which are present in Pakistan, are detrimental to democracy.

Major sectors of Pakistan social and political structure, particularly politics and governance institutions, are dominated by the elites or feudal families hampering the Rule of Law and democracy for the sake of their own interests. It is mainly the elite benefiting with regard to economic and social justice, access to quality education and health facilities or access to the judicial system. Furthermore, corruption and a lack of accountability dominate the system and as long as those who have violated the constitution are not accountable, ordinary people hardly can expect justice or Rule of Law. Therefore, people are frustrated and turn towards other institutions in their search of justice and thus contribute to the emergence of various competing systems. Particularly the existing parallel legal systems reveal deficits and contradictions affecting mostly women and minorities. Therefore, there is a need of a unified judicial system instead of parallel structures in order to ensure justice for the people. However, Islamic legal institutions coexisting to national legal institutions may also serve to bridge normative conflicts regarding certain religious issues.

If democracy in Pakistan shall succeed, there is an urgent need to create a balance of power in state structures particularly with regard to the relationship of military and government and president and prime minister. In addition, Pakistan needs to develop democratic politics and procedures of voting for or against certain political forces instead of military coups ousting a malfunctioning civilian government. An important experience of democracy is to let governments fail. However, democracies are only functioning well if Rule of Law is already established, but Rule of Law does not function if there is a democracy trying to establish Rule of Law. Nevertheless, Rule of Law cannot be installed or enforced mechanically - it is a process and needs to grow gradually.

Various speakers emphasized that the only solution for the diverse and complex problems of Pakistan is Rule of Law as the only way to win hearts and minds of the people particularly in FATA. Therefore, democracy must deliver – including justice - if Pakistan wants to go back on the path of stability. But the crucial question is: who will provide it?

Conference - Rule of Law in the Islamic Republic of Pakistan

The situation in Pakistan is troublesome and probably the worst in the history of the country. The security situation deteriorates continuously - the country is challenged by growing Islamic militancy and terrorism, which already caused hundreds of casualties. This crisis is intensified by an economic crisis, water and energy shortage as well as drug and human trafficking. In order to encounter and solve these complex problems the state of Pakistan must ensure the Rule of Law particularly a well-established and independent juridical system.

Against this background Heinrich-Böll-Stiftung and the Social Science Research Centre Berlin (WZB) has invited Pakistani representatives from politics including a legal expert in order to find out more about the future of the Rule of Law in Pakistan and also to raise the question how to end the violence in the country. In this regard, the experts not only from Pakistan but also from Germany discussed structures and deficits of the Rule of Law as well as the current state of affairs, parallel legal systems, the relationship between politics and judiciary and the role of political parties and society. The speakers from Pakistan were:

Imran Khan, Chairman of the Political Party *Pakistan Tehreek-e-Insaf* (Movement for Justice)

Ahsan Iqbal, Chief Coordinator and Information Secretary of the *Pakistan Muslim League* (Nawaz Sharif) and Member of National Assembly

Athar Minallah, Lawyer at the Supreme Court of Pakistan and former spokesperson for the Chief Justice of Pakistan

Bushra Gohar, Senior Vice President of the *Awami National Party* and Member of National Assembly

The conference was opened by Julia Scherf, head of the Asia Department of the Heinrich-Böll-Stiftung, stressing the difficult and complex current situation in Pakistan. In the month of October Pakistan was hit by a series of attacks and suicide bombings as a reaction to the ongoing military operation in South Waziristan, which used to be a hideout for militant and terrorist elements of different groups. In response to the fragile security situation schools and universities were closed. Furthermore, refugees from affected areas are continuously pouring into the centre of the country again challenging Pakistan with a humanitarian crisis after the massive flow of refugees from Swat and Malakand region in summer this year. However, it is perceived that there is already a general shift in explanations among policy makers and analysts with regard to the root of this situation. It is understood and discussed that the terror and militancy in Pakistan also partly comes from within the country.

Current State of Affairs in Pakistan - Scope and Limitations for the Rule of Law

As an overall introduction into the topic Athar Minallah, former spokesperson for Chief Justice Iftikhar Muhammad Chaudhry and a lawyer by profession, gave a key note speech on historical developments, which certainly have influenced and shaped the current status of the Rule of Law in Pakistan.

Pakistan is in a state of crisis, but at the same time Pakistan and its people are also a misunderstood nation. In regard to this state of crisis Athar Minallah reflected about the vision of Pakistan in order to analyze why and when the country went astray. The vision for Pakistan was articulated in a speech by the founding father of the nation - Muhammad Ali Jinnah - in 1947, in which he explained the reason for the partition of the Indian Subcontinent. According to Jinnah, "Hindus are Hindus and Muslims are Muslims", and therefore constitute two different nations. However, religion plays only a minor role, since it is a private issue of an individual and has nothing to do with politics. For this reason, Jinnah's vision for Pakistan was that of a democratic and secular state adhering to the Rule of Law.

In the early 1950ies the process of framing the nation and turning the vision of Jinnah into reality derailed after the assassination of the first prime minister. In 1958 the first military ruler imposed martial law, abrogated the constitution of 1956 and framed a new constitution including a presidential system in 1962. In 1969 yet again martial law was imposed and the constitution of 1962 was abrogated and the secession of former East Pakistan, today known as Bangladesh, followed. After a span of democratic rule, the civilian government was overthrown by the third military ruler in 1977. Eventually democracy returned in 1988 at least in theory because important areas including foreign policy and the finances were not in the hands of elected representatives of the civilian governments. In October 1999 another military coup ended a democratic period, which was also characterized by several deficits and weaknesses.

Since then, there also has been a positive development with the signing of the “Charter of Democracy” by the two political leaders of Pakistan’s mainstream political parties. They formulated at least on paper solutions for the challenges faced by Pakistan including weakening of the federation, marginalizing of civil society or the domination of the military of all state institutions. Both parties, however, fail to follow their own agreement.

Athar Minallah continued reflecting about the Lawyers Movement that emerged after the Chief Justice of Pakistan refused to resign from his post as demanded by then President General Musharraf in March 2007. This had a deep impact on the country two years later. Although the nationwide movement was spearheaded by the lawyers it was a movement of the people demanding Rule of Law and independence of the judiciary. The trademark of the Lawyers Movement was the “long march” not only of lawyers and judges but also of people from different backgrounds.

“Pakistan is a war zone”, stated Athar Minallah, and a war cannot be won without the support of the common people who, however, will only support and protect the state if they have a stake in the system in the shape of enforceable rights. Without such rights people become cynical and turn towards those who exercise brute-force and dispense rough justice. The situation changed in the course of the last two years. People took to the streets to demand a system that ensures and enforces their rights. The optimism that emerged from the Lawyers Movement brought a general change in the mindsets of the people and the political leadership of the parties as well. Athar Minallah is furthermore convinced that democracy was a by-product of this movement, and it is still the aim of the people to protect and to strengthen the democratic institutions.

Pakistan is flirting with bankruptcy. According to Minallah, the country is not only a war zone but also faced with several challenges on the economic front, which urgently need investors - but investors only come to states where their investment is protected, and this can only be ensured with the Rule of Law and an independent state machinery. Since the restoration of the judiciary in March 2009 a national judicial policy was articulated stipulating the intention to radically reform the judicial institutions. In addition, legislative matters for instance have been left entirely to the parliament, because the parliament has the role of political leadership, which will be supported by the lawyers also in future.

At the end of his speech Athar Minallah came to the conclusion that there are no shortcuts and that the only solution for the diverse and complex problems of Pakistan is the Rule of Law.

Discussion

After the key note speech the floor was open for a discussion round. The first question related to Pakistan’s first constitution, which was enacted in 1956 only nine years after independence. Therefore, the question was raised why it took so long to finalize the first constitution. Athar Minallah explained that in 1949 the constitutional assembly approved an objective resolution, which included three pillars: a federation, democracy and an independent judiciary. Shortly before the constitutional assembly, whose members mainly belonged to the eastern part of Pakistan, agreed upon a constitution the military and civilian bureaucracy, which belonged to the western part of Pakistan, dissolved the constitutional assembly illegally. It was not before 1954, when a second constitutional assembly was established, which approved Pakistan’s first constitution in 1956. Even this process was marked by a struggle between the military, civilian bureaucracy and the political forces of the two wings of Pakistan. Athar Minallah further stated that in his view this struggle eventually led to the secession of former East Pakistan (Bangladesh).

The next question addressed the special status of FATA - the Federally Administered Tribal Areas of Pakistan - where Taliban and other militant elements but also the military offensive of the army threaten life and existence of the local people. According to Athar Minallah the administrative systems were gradually weakened by interventions, corruption and most of all by lack of governance, which led to chaos and disorder. He added that the regime of General Musharraf has failed to develop and reform the administrative system in FATA. Instead, his policies of joining the “War on Terror” have resulted in creating a safe haven for different terrorist groups. Therefore, it is now the task of the political leadership and the elected representatives to fill the existing power vacuum. Imran Khan, leader of the political party *Pakistan Tehreek-e Insaaf* (Movement for Justice), furthermore added that only very few politicians visited the tribal areas to get an idea about the local structures. The ignorance of many politicians creates continuous misunderstanding. According to him, FATA is the most lawful place where never a central government had the authority to govern. The local population has its own tight social and administrative system, laws and councils, which stretch from one village to another. After the bombing of Tora Bora Mountains in Afghanistan by the coalition forces in 2001 many militants fled into FATA where they found a safe haven for the following years. When General Musharraf decided to conduct a military operation against the militants in FATA in 2004, the subsequent war-like actions could not defeat the militants

rather they fostered the emergence and further development of the Pakistan Taliban. Due to the destruction of the social and administrative system in FATA a power vacuum emerged, which was filled by criminals and various militants, extremists groups. Reliable information about these groups and their objectives or reasons behind their attacks, however, are only rarely available mainly due to the fact that there are hardly any independent journalists in the tribal areas, and most information is provided only by the military.

The last question related to the relation between parliamentarians and the Lawyers Movement and if there is any progress or if there are any agreements or regular meetings. Athar Minallah stated that the lawyers of Pakistan believe in the parliament and also in democracy, though it is sad to observe inactions of the parliamentarians. It is expected to have a functioning parliament, which discusses every upcoming issue. Additionally, it would be appreciated if the parliamentary committees are opened for the public through media in order to inform people about issues discussed by the parliamentarians.

Panel I: Parallel legal Systems, Myths and Realities

The first panel of the conference was chaired by Prof. Dr. Folke Schuppert from the Social Science Research Center Berlin (WZB). The main emphasis of this panel was put on current legal structures and competing systems, the role of gender equality with regard to justice, the relevance of the Rule of Law and legal pluralism. The panellists of this session were:

- Bushra Gohar, Senior Vice President of the Awami National Party
- Dr. Jochen Hippler, University of Duisburg-Essen
- Dr. Dietrich Reetz, Research Institute Zentrum Moderner Orient
- Dr. jur. Matthias Kötter, Social Science Research Center Berlin (WZB)

Rule of Law and Gender

The first input of this panel was given by the Pakistani politician Bushra Gohar of the *Awami National Party* (ANP) reflecting at first about the situation in FATA, which the party considers part of "Pakhtunkhwa".¹ According to Bushra Gohar, who is from the Northwest Frontier Province (NWFP) and who has been to the tribal areas, the ongoing crisis in FATA is a very complex matter. Therefore, a comprehensive understanding of this issue is urgently needed. In the second part, she referred to the parallel structures of the legal system and related gender aspects.

Decades of dictatorship have weakened Pakistan and have brought the country to an image to be the most dangerous country of the world, which is indeed a very saddening fact for the Pakistani people. The Pashtuns, however, are in a far more difficult situation since they are now considered by non Pashtun Pakistanis and also by the rest of the world to be terrorists. The election of February 2008 brought a shift from dictatorship to democracy. Nevertheless, this democracy is very weak and still in transition because it was based on compromises of political parties with a military dictator and was also influenced by external forces. The power shift from military to civilian democratic forces, nonetheless, raised expectations of the people of Pakistan and also the outside world in flourishing democratic processes. These expectations are, according to Bushra Gohar, far too high. The present government is faced by administrative and institutional chaos created by eight years dictatorship of General Musharraf and by playing to the tune of the western world and also patronizing or providing support to militants.

FATA was always used by military dictators as a strategic place where safe havens and training camps of militants were allowed. During the military regime of Zia ul-Haq in the 1980ies for example this was actively funded by the state. Traditionally, radicalization and religious extremism already began at the time of the creation of Pakistan through certain policies. Referring to Athar Minallah's explanation that Jinnah's vision was a democratic and secular Pakistan, Bushra Gohar emphasized some contradictions of this vision. Pakistan was actually created in the name of religion and it was indeed created for the Muslims of the Indian Subcontinent. Later, the religion - Islam - was used by military dictators to rule the country. The first militant activities, also supported by the state, were conducted in Kashmir and later in the Afghanistan War, and the extremists were from FATA. In this regard, the tribal areas and its population have always been used as "cannon fodder" for vested interests and for achieving strategic goals of the state.

At present, Pakistan is at war and until recently the political leadership was in a constant state of denial regarding the existence of militant structures including training camps, and ignoring that the military has backed militant and extremist groups. Therefore, the government needs to review the situation and also address and discuss the issue of extremism and militancy. In Bushra Gohar's view, the problem has never been FATA but Islamabad - more specifically past policies that have been controlled by the military. However, if democracy shall succeed, there is an urgent need to create a power balance in the state structures. She further points out that there are representatives from FATA in the national assembly and senate, but the administrative unit FATA is still excluded from any constitutional legislation. Consequently, FATA needs to be mainstreamed into the provincial and also national assembly and the constitution and laws must be extended to FATA as well. Furthermore, the constitution needs to be reformed because it contains certain contradictions such as the existence of multiple judicial systems or the determination of a state religion.

¹ The ANP and Pashtun nationalist seek a renaming of the Northwest Frontier Province into Pakhtunkhwa.

Bushra Gohar continued her speech reflecting about the justice system that has witnessed a total collapse. Even after the successful justice revolution earlier this year and the restoration of the deposed judges, the judiciary remains ineffective and only partly independent. Thus, the movement must be continued and the lawyers must work even harder for the total independence of the judiciary. The existing parallel legal systems reveal deficits and contradiction affecting mostly women and minorities. There are for instance certain accepted practices that are crimes and partly considered to be crimes, which go without any conviction. It includes early child marriages, honour killings or giving girls and women for compensation as part of peace deals between families. These are indeed crimes that are practiced in the name of tradition, justified by the Sharia and settled by Jirgas. Moreover, domestic violence against women is not regarded as a crime yet. Also, the process to file a first information report (FIR) is too complicated and difficult also because the authorities are corrupt. Police stations or courts are often biased against women. Another problem is that the procedures at court are expensive, and ordinary people particularly women can hardly afford these expenses. For that reason, people prefer the local Jirga system - a council of old men - to seek justice. For women, however, it is almost impossible to seek justice within this traditional system.

Bushra Gohar raised the question why a federal Sharia Court exists parallel to the national Supreme Court. There is a need of a unified judicial system instead of parallel structures in order to ensure justice for the people. Then there is the Islamic Ideology Council examining if existing laws are in accordance with the Sharia although there are different interpretations of Islamic Law. The recommendation from this institution is not binding, though it still creates problems within the national legal system. A bill against domestic violence is still put on hold because it is considered by the Islamic Ideology Council to encourage divorce. In general, bills that particularly aim to protect women are often rejected by Islamic legal institutions and also Islamic political parties.

In conclusion Bushra Gohar stated that corruption and a lack of accountability dominate the system and as long as those who have violated the constitution are not accountable ordinary people hardly can expect justice or the Rule of Law.

Annotation

In the following Athar Minallah noted that only one percent of the population deals with the judicial system, and there is hardly any actions taken by the parliament to protect the women rights. In regard to the role of the Islamic institutions he further stated that religious authorities cannot deter parliamentarians to legislate certain laws. There are indeed several examples of enacting laws for the protection of women - particularly Chief Justice Chaudry has contributed towards the enactment of such bills. This is exactly the crucial point, responded Bushra Gohar that it is only one instance, the Chief Justice himself, who tries to improve the system and this is in fact an apparent sign that the rest of the judicial systems does not work.

Relevance of Rule of Law for Pakistan and the Crisis in FATA

Dr. Jochen Hippler, senior researcher in the Institute for Development and Peace at the Faculty of Social Sciences at the University of Duisburg-Essen, began his speech in referring to the current situation in the tribal areas stating that this is not a military conflict but a conflict of governance. The war against the Taliban cannot be won only by military means; it will be only won by strengthening governance structures. Rule of law is closely connected to the fight against extremism, which is about to destroy the country. It is important to note that the Taliban are not strong but benefit from the weaknesses and deficits of the state with regard to the Rule of Law and governance, and that is why their attacks are politically of such high significance.

Many people particularly poor people in Pakistan are convinced that there is hardly any justice in the country. According to Jochen Hippler, there is a general credo that people favour the Sharia instead of no justice at all because Sharia is a concept made by god that cannot be manipulated. Furthermore, the people of Pakistan differentiate between the Supreme Court and the rest of the judicial system, which is in their opinion completely rotten. Judges for instance are synonymous with corruption. However, there have been important changes in Pakistan. People of different backgrounds - from the beggar on the street to elitist politicians - are talking about the Rule of Law and that it is worth to fight for it. This is a phenomenon that could not be observed 20 years ago, when people talked very cynical about the judiciary that was dominated and compromised by the elite or the military.

He further stated that the "Charter of Democracy" is a laudable agreement but worthless if the politicians, who have signed it, do not abide by this accord. It is not only the militants but most of all the incompetent and corrupt political elites, who obstruct functional governance and the Rule of Law. In this regard,

Jochen Hippler also referred to the party system in Pakistan and raised the question how a country can be democratized if one of the main pillars of democracy, the political parties, is completely undemocratic, corrupt and dominated by family politics?

Jochen Hippler continued referring about the governance system and the Rule of Law in FATA. The only law that was ever imposed by foreigners on the people of FATA was the Frontier Crimes Regulation introduced by the British in 1899. As a tool of colonialism these harsh laws restrained the tribal population, but at the same time it gave the tribal authorities (maliks, elders and others) some autonomy to keep their tribes under control and this ensured somehow peace and stability. In the case of any problems or hostilities the laws allowed the punishment of a whole village or tribe. In the course of the Afghanistan War in the 1980ies, the traditional, tied structured tribal system was disrupted, when commanders and mullahs took over leading positions. Therefore, the structures of the tribal areas of today are marked by the traditional tribal system, a mullah system with religious connotations and commanders ruling by weapons. The Pakistan military, however, has always ignored the tribal population and their structures, and the military actions of the army have eventually destroyed the last existing governance structures, thus creating instability and chaos.

As Athar Minallah already stated, the Rule of Law is the key for peace and stability and the only way to win hearts and minds of the people particularly in FATA.

The Existence of Different Competing Systems

Dr. Dietrich Reetz, senior research fellow at the institute Zentrum Moderner Orient and lecturer of political science at the Free University addressed in his speech the existing competing systems of governance, law or justice, which have to be properly understood in order to analyze or evaluate the current situation.

Pakistan is a country where different structures coexist: there is an official and an unofficial state, an official as well as unofficial society, a legal economy and an extremely huge and also important black market, Common Law and Sharia Law. The latter one is not a genuine reflection of religious norms because it is a codification by a bureaucracy of religious authorities such as mullahs or judicial clerics, and is therefore not fully recognized by all clerics and religious activists. Other coexisting structures are customary or tribal law, norms of behaviours of various religious groups and sects and feudal laws, which are decisions of closed family elite circles determining decisions within the legal or political system or even the economy, which should be guided by common laws. The rule of this informal process has been perpetuated by the absence of modern, civil Rule of Law or by military dictatorships. On the other side, different people are using this informal system also because they depend on it for economic reasons for instance.

At this point, Dietrich Reetz raised the question how to establish Rule of Law and how to end corruption in the judicial system. According to him, it is not about lack of institutions or laws rather than a lack of willingness to run these institutions in the way they should be run. And a key factor to change the current approach is education also because the illiteracy rate is still very high. In this regard, a stronger emphasis should be put on education, also to improve present structures and standards within the educational system. This eventually discloses a core problem in Pakistan: a general lack of investments in the public sector including housing, education or transport.

Rule of Law from a Legal Pluralism Perspective

Dr. jur. Matthias Kötter, research fellow at the Social Science Research Center Berlin (WZB) spoke about governance instruments that help to reduce normative conflicts. His explanations were based on two examples: Firstly, the monitoring process initiated by the United Nations Convention on the elimination of all forms of discrimination against women, the CEDAW Convention, which has enabled discussions about the political and social life of women in Pakistan. Secondly, the Council of Islamic Ideology, a constitutional body, which gives advice to the parliament and the provincial assemblies and ensures that all laws are in accordance with Islam. Both instruments initiate and institutionalize communication processes in order to discuss differences on normative issues, also publicly, and to find solutions within a formal setting of competences and procedures. Coping with normative plurality of a society has shown to be an important precondition for legal certainty and the Rule of Law.

The issue of gender equality turns social issues into legal categories. The change of social conventions are, however, likely to occur only very slowly particularly in rural areas, where traditions and certain social settings are deeply rooted. The example reveals conflicts between the international rule of CEDAW, which has been turned into national law and the normative situation on the level of social practices. Although states are required to submit a report every four years on legislative, administrative

and other measures and the progress made, Pakistan has delivered its first report only in 2005. It reveals that the requirements of the CEDAW convention are well met but the situation of women in many parts of the country is far from being equal in terms of education and social security. Through the monitoring process, however, political pressure can be built up in order to take proper actions.

Normative conflicts within societies often derived from alternative or parallel normative orders - particularly religious normative orders - existing alongside common laws. As they demand adherence from the believers they may get into conflict with the common laws. With the existence of secular constitutional law and Islamic law there are two parallel normative systems that have to be accommodated in order to prevent further conflicts within the society. The Islamic Council, which has about eight to 20 members, serves to join these two normative spheres. It secures the interest of the religion within the constitutional system, integrates the highest interpreters of religious norms into the constitutional framework and is able to prevent social conflicts by institutionalizing the exchange between legislator and religious institutions.

Social conflicts may be caused by the collision of law and other social norms if the effected non-legal order requires certain behaviours within the normative community that contradict the law. In addition, contradicting norms challenge the claim of validity of the laws. They lead to a loss of legal certainty and destruct the Rule of Law. In order to preserve the regulatory function of the law such dysfunctions caused by normative plurality either have to be dissolved by the law or they have to be released from the regulatory claim of the law and brought to a solution otherwise. The solution of normative conflicts through law or jurisdiction requires two preconditions including the definition of the law as a consistent normative order and the general approval of the law. But only if the Rule of Law is highly approved by the people and if the decisions of the courts are to be complied with legal rules, conflicts may be solved.

Norm building processes require adequate institutional conditions like arenas of discourse or forums where solutions can emerge or conflicts can be diffused. The CEDAW convention as well as the Islamic Council meet these requirements at least in theory. From an international level the CEDAW monitoring process has contributed towards political and legal discussions in Pakistan and has strengthened existing pressure groups, which may lead eventually to the demanded social changes someday. The advisory actions of the Islamic Council lead to a permanent exchange on the claims of the constitution and the religious law. The responsibility for decent solutions will be shared if the council is installed into the constitutional framework. Thus, the Islamic council may serve to adjust the rule of statutory law and the rule of Islamic law and help to achieve common normative order without any unbridgeable collisions.

Discussion

The first panel was closed with a discussion round with questions and statements on the relationship between the parliament and religious authorities, the partly chaotic administrative situation in the country, the change of political behaviour as well as access to justice.

Doubts were expressed that the parliament has to accommodate religious authorities such as the Islamic Council because the parliament is not bound to advice of this institution. As an example it was referred to Swat where people have voted for one of the most liberal parties in the 2008 general election. There was no demand for Sharia, otherwise the people of Swat would have voted for those political parties striving for the enactment of Sharia. When religious extremists were terrorizing the people of Swat and imposing Islamic laws by brutal force, the parliament enacted a law - the *Nizam-e Adl Regulation* - which legalized these actions. It was the parliament that has enacted this law without any discussion and this reveals strong deficits within governance structure and parliament.

Another statement referred to the current administrative situation in Pakistan, which is very much like a "patch work situation". There are many areas with a special administrative status different from the provinces including the Provincial Administered Tribal Areas (PATA), the Federally Administered Tribal Areas (FATA), Gilgit-Baltistan or Azad Jammu and Kashmir, which has even an own constitution. The question was raised why the democratic forces in the country were not able so far to resolve this administrative chaos? Government and opposition could only blame each other instead of discussing solutions in order to integrate these areas into the Pakistani state. It was further questioned why the same democratic forces are supported today, which were ousted earlier by a military dictator with the consent of the people?

In response to the previous statement it was agreed that most of the time in Pakistani politics, events rather than actions or solutions are discussed. However, political parties have already recognized this mistake and they are now eager to discuss and also reach a consensus on certain issues. Nevertheless, the parliament is struggling and only very little work on governance issues are in the forefront of discussions. Pakistan needs time to develop politics and there needs to be a process of voting for or

against certain political forces instead of military coups ousting a malfunctioning civilian government. Furthermore, the country has a very strong military still influencing or partly controlling certain political areas such as foreign policy.

Another statement related to the huge social divide within the Pakistani society and the different access to justice. A great majority of the people lives below the poverty line and has no access to justice mostly because they simply cannot afford a lawyer. Furthermore, those people hardly have access to basic rights such as education, which is an important key for development. Even women rights are closely related to education. Moreover, the current problems of fundamentalism and extremism are also related to the lack of education and lack of governance particularly in FATA. Taliban grew so strong because they promised and delivered justice for the ordinary people - the people want justice and governance no matter if it is delivered by a dictator or a civilian government.

In conclusion, democracy must deliver – including justice - if Pakistan wants to go back on the path of stability. But the crucial question is who will provide it?

Panel II: Rule of Law, Politics and the Role of the Judiciary

The second panel was chaired by Prof. Dr. jur. Wolfgang Hoffmann-Riem, emeriti professor of the Centre for Research in Law and Innovation of the Faculty of Law at the University of Hamburg. The main topics presented in this panel were the relationship of constitutional courts and politics as well as the role of the elite and elections. The panellists of this session were:

- Imran Khan, Chairman of the Political Party *Pakistan Tehreek-e-Insaf* (Movement for Justice)
- Dr. Gunter Mulack, Executive Director and Member of the Board of the German Orient Foundation/ German Orient Institute
- Boris Wilke, Researcher at the Institute for International and Security Affairs (SWP)
- Dr. Sascha Kneip, Research Fellow at the Social Science Research Center Berlin (WZB)

Constitutional Courts and Politics

Imran Khan, politician and former cricket player of the Pakistani national team, began his speech referring to the situation in the sixties and seventies, when Pakistan had huge potential for development. Although the judiciary was not free and military dictatorships ruled the country for some time, Pakistan was prospering; the country had strong institutions and a vibrant population, a prospering economy and high quality universities. The hopes and optimism, however, disappeared gradually after the secession of East Pakistan.

The major difference between developed countries and countries of the Third World is the existence of the Rule of Law, which is a precondition for development. In Pakistan an elitist culture exists, which dominates politics and governance institutions and only acts in its own interests. Therefore, only the elite benefits particularly with regard to quality education, justice or the field of economy where poor people subsidize the rich rather than the other way around.

Furthermore, ever since the Supreme Court legitimized martial law for the first time in the 1950ies the judiciary became subservient to military executives. After each military coup the justice system was always the first institution to be suspended. Even in the democratic periods it was common to install handpicked judges to secure own political interests. As a result, Pakistan never had Rule of Law and a genuine democratic system. However, according to Imran Khan, democracy can only succeed if the Rule of Law, an independent judiciary, a free election commission and free mass media are well established. It was a historical moment for Pakistan, when a Chief Justice resisted his deposition by General Musharraf on 9th March 2007.

Despite the emergence of a movement fighting for the Rule of Law, the political developments with regard to the general elections in February 2008 were, according to Imran Khan, far from being satisfying. In his view, the elections were heavily influenced by the Bush administration for strategic reasons in the region thriving for another puppet government, which would pursue the "War of Terror". Democracy, though, did not play a key role. The US government supported a deal that allowed General Musharraf to remain in power and enabled Benazir Bhutto, chairwoman of the *Pakistan Peoples Party*, to return to Pakistan after long years in exile. This deal called "National Reconciliation Ordinance" was in fact an amnesty law designed for Mrs. Bhutto, who faced corruption charges. Imran Khan considers this as a major setback for democracy, Rule of Law and justice in the country.

Despite the political disaster of the present government and the ongoing military operation, Pakistan has a free media, an independent Supreme Court and a politically interested public and Imran Khan is convinced that whenever the next election will be held, Pakistan will move toward a genuine democracy.

The Role of Political Elites

Dr. Gunter Mulack, Executive Director and member of the board of the German Orient Foundation, identified in his speech that the elites, the feudal families are among the problems hampering the Rule of Law and democracy.

Pakistan was at best a controlled democracy. Military rule dominates the history of the country and unfortunately the judiciary always supported the interest of the dictators. On the other side the lawyers of South Asia always played a very important role in building democracy. The leaders of the independence movement during the British Raj, Gandhi and Jinnah, were lawyers by profession. Also during the past two and a half years, lawyers played a key role in the movement for justice and the Rule of Law. The Lawyers Movement was supported by people of different social backgrounds - by lawyers, by the middle

class, by intellectuals and later on also by politicians and political leaders. Furthermore, the movement also represented the will of the overwhelming majority of the people to abolish military rule and to restore democracy.

Nevertheless, beside positive developments such as a free media and independent journalist or an energetic civil society, Pakistan is faced with ruling elites, which do not act in the interest of the common people. As previously stated, the country's elite is dominating and influencing all major sectors in the state. Even political parties are far from being democratic and are controlled mainly by feudal landlords or families. People are frustrated, there is a lack of social justice and Rule of Law and the elites are filling only their own pockets and are not accountable for any misbehaviour or misruling. Therefore Islamic organization gained influence.

At the moment, Pakistan has the chance to re-establish the Rule of Law, to build institutions and fight corruption. Maybe midterm election, as also Imran Khan suggested, will bring a government into power that would address the needs of the people rather than the elites. He further emphasized the importance of social dialogs, economic development and the provision of education and health care particularly in those areas where fundamentalism and extremism is deeply rooted and partly supported by the local people.

The Role of Elections

Boris Wilke, researcher at the German Institute for International and Security Affairs (SWP) referred to three controversial issues: Firstly, according to him, the past elections were free and fair in contrast to the general elections in 2002 and therefore Asif Ali Zardari has to be accepted as a legitimate President for the time being. Secondly, he doubts that the constitution provides a clause for midterm elections. If so, there needs to be external pressure by other countries (USA or Europe maybe) or interference by the military or other players such as the bureaucracy or the people in order to achieve new elections. In this regard Boris Wilke emphasises the fact that an important experience of democracy is also to let governments fail.

The third point is the role of the Supreme Court, which certainly could not act independently if there is no democracy in the country. In 2007, however, the situation was different because of the media and a growing political consensus within Pakistan. In order to institutionalize the process of "getting closer as a nation" it is important to have elections and also to let government or political leaders fail.

Constitutional Laws and the Role of Constitutional Courts

Dr. Sascha Kneip, research fellow at the Social Science Research Center Berlin (WZB), spoke about constitutional arrangements and the relationship of constitutional courts and politics. In this regard, three points need to be considered: The question of power and competencies, the courts neutrality and independence as well as the quality of the judges, particularly of their decisions.

Constitutional courts are political actors in a broader sense. Their decisions do influence policies, politics and also sometimes the polity of a community. Constitutional courts can limit the scope of political actors, they make decisions on relevant societal issues or they can curtail the power of political leaders. Even non-interference has an effect because than politician can act as they like. On the other side, political actors can also exploit constitutional courts in order to push through own interests. Against this background the question can be raised what role constitutional courts play with regard to Rule of Law and democracy. Is it the duty of constitutional courts to establish Rule of Law or democracy, or should they refrain from politics at all?

There are three main points that are important for the functioning of constitutional courts: The first point to be mentioned is institutional independence from political influence, which is also marked by the election process of its judges. Secondly, constitutional courts need proper institutional strength and powers in order to exercise their duties. Sascha Kneip is of the opinion that the most important power among others is the possibility to hear constitutional complaints of ordinary citizens because this ensures that the courts deal with issues political actors would try to avoid. Furthermore, the institutions need to have legitimacy through political actors and also the people in order to get decisions implemented. The third point is related to a democracy friendly and functional role orientation of courts. The democratic function of constitutional courts is to protect and guard core principals and institutions of democracy rather than to make policy at the expense of other government branches.

The problem in Pakistan is not that courts exceed their competences but they do not make sufficient use of their powers. Furthermore, military and political forces try to repress demands of the judiciary. The courts in Pakistan have hardly intervened in cases when it would have been necessary. A change of this

situation requires the support of the people and judges who act in favour of liberal rights and democratic procedures.

Discussion

In the following discussion round it was stated that Pakistan faced a judicial crisis. Judges were not appointed on merit rather than on their political orientation. Moreover, the question was raised who set the merit for their appointment? Another statement was related to the professional qualification of women who hardly can enter the justice system or get sufficient qualification to access the Supreme Court. Decades of misuse of the judiciary has politicized the system. Judges do not necessarily obey the constitution but follow their own interests or the interest of political leaders.

Furthermore, the state is not run as described by the constitution of 1973. In this regard, it was also questioned whether this constitution is the best solution for the country because certain amendments were made that enabled Nawaz Sharif to become a strong prime minister and later enabled Musharraf to become a strong president. In the latter case, it was the 17th amendment of the constitution that caused a power imbalance between president and prime minister. Even today the president still has power that should be executed by the prime minister and as long as this power imbalance is not corrected the functions of the parliament remains limited. By now, constitutional committees discuss the repeal of the 17th amendment of the constitution.

It was also emphasised that Pakistan needs a decentralized and responsive system as well as strong and effective institutions. And politics for the elites must be shifted towards politics for the common people.

Panel III: Political Parties, Civil Society and the Rule of Law

The last panel of this conference was chaired by Ina Lepel, speaker of the Federal Foreign Office, and focussed the relationship of Rule of Law and civil society, the correlation of Rule of Law and democracy to each other and the role of political parties. The panellists of this session were:

- Ahsan Iqbal, Chief Coordinator and Information Secretary of the *Pakistan Muslim League (Nawaz Sharif)*
- Prof. Dr. Wolfgang Merkel, Social Science Research Centre Berlin (WZB)
- Prof. Dr. Ulrich K. Preuß, Otto Suhr Institute of Political Science at Free University Berlin

Rule of Law and Society: Does Law Matter?

The last panel was opened by a speech of Ahsan Iqbal, member of the *Pakistan Muslim League (Nawaz Sharif)* reflecting about the main pillars of Rule of Law and the importance of a vibrant civil society.

Rule of law and sustainable development have a strong correlation and one cannot succeed without the other. However, Rule of Law cannot be installed or enforced mechanically. It is an organic process and needs to grow gradually. In this regard, there is a great difference between theory and praxis of Rule of Law. It is not difficult - also for Pakistan - to have proper laws, but to enforce these laws is different. Therefore, the enforcement of Rule of Law is crucial and related to certain factors: First of all, political institutions such as the parliaments need to reflect the political will of the society. Secondly, the enforcement of Rule of Law within the society must be ensured by the executive. Thirdly, as a monitoring instrument the status of the judiciary is of most importance. At last, support for the Rule of Law role needs to be assured through political parties but also through media and civil society.

Ahsan Iqbal further explained that Rule of Law is a soft power different from physical powers such as the military. Since the Rule of Law in Pakistan is weak, the physical power was always able to overrun the soft power of law. Furthermore, different leaders have appointed handpicked judges or suspended judges, who were considered not to be in favour for the policies to be implemented, in order to seek legitimacy.

The Lawyers Movement had a tremendous impact also on society. It contributed to a general understanding of the importance to reinstate the judges deposed by General Musharraf and to install an independent judiciary. In the course of the Lawyers Movement a new Pakistan has emerged including a vibrant civil society and a free media, and political parties have taken a much stronger stand and adopted new principles. Therefore, the Lawyers Movement can be recognized as a new watershed in Pakistani politics.

Ahsan Iqbal also stated that the power of the parliament must be restored, and the institution also needs to be supported by a functioning parliamentary committee system, which needs to have access to different expertise in order to hold ministries accountable. Another point was related to political party democracy particularly election procedures, which need to be strengthened from the grass root level to the national level.

Democracy and Rule of Law

Prof. Dr. Wolfgang Merkel, researcher at the Social Science Research Centre Berlin (WZB) reflected about some theoretical aspects of democracy, political parties and civil society.

He stated that democracies are functioning well if there is a solid Rule of Law before, but Rule of Law does not function if there is a democracy trying to establish Rule of Law. There are many examples of states that are neither democratic nor autocratic but these are hybrid regimes. According to him, it is most advisable to strengthen the Rule of Law rather than hoping for new elections.

He continued referring to political parties, which have contributed a lot to the loss of power of the parliament. Therefore, strengthening institutions is very closely related to strengthening political parties. In this regard, special emphasis needs to be put on programmatic parties because charismatic parties and clientelistic parties, who are present in Pakistan, are detrimental to democracy.

At last, Wolfgang Merkel spoke about civil society - a term which is used almost inflationary. He raised the question what civil society means and which civil society democracy needs. According to him there are two types of civil society: One is a civil society that produces bridging social capital. That means in a religiously, ethnically heterogeneous society mostly those civil society organisations that assemble people from these different communities are really producing social capital for democracy. If there are

segmented civil societies called bonding social capital, then there is a risk that those are inimical to other civil societies or other religious or ethnic societies. Therefore, it is important to have a close look at those civil societies bridging social capital.

Regarding the future of Pakistan Wolfgang Merkel is less optimistic opinion and fears that it will be similar to the past thirty years because most of the preconditions for democracy are absent in Pakistan.

Political Parties and Power Structures

Prof. Dr. Ulrich K. Preuß from the Otto Suhr Institute of Political Science at Free University Berlin referred in his speech to the underlying social structure, which should be developed before institutions can function. There must be a certain resemblance of social structures in order that constitutional structures can function in a society. One example is party competition as an important element of democracy. In Pakistan, however, the structures of one of the main political parties, the *Pakistan Peoples Party* of Benazir Bhutto, are less democratic rather than dynastic. After the murder of Benazir Bhutto her son Bilawal Bhutto inherited her position as chairman of the party. Since he is still a student his father Asif Ali Zadari took over the political tasks.

He further elaborates on the issue of power relations or structures that exist beyond the reach of political power relations. It must be ensured that public affairs are only ruled by those institutions that are representing the people and that can claim to exercise public authority on behalf of the people. It must also be ensured that there are no parallel structures such as the military, which would be extra constitutional, or religious or economic power structures.

Discussion

The Lawyers Movement has become the biggest hope for change in Pakistan. The movement has created a new mindset of people who have become aware and interested in politics and demand Rule of Law. Also, globalization and “the information revolution” have empowered the people. Also, a major result of the movement is the “National Judicial Policy” containing reforms of the lower judiciary.

Regarding the future of Pakistan, there are some contradictory views expressed. As already stated by Wolfgang Merkel, the future will bring less changes and improvements. The strategies for the country should be tailored according to the difficulties and obstacles. In addition, it was stated that institutional and social developments will take time and will certainly not be visible in the short run. In contrast, also optimistic views were expressed that the changes initiated by the Lawyers Movement will be already observable within a few years.

Democratization is an endogenous process and can be supported from outside only to a limited extent,. The internal processes cannot be substituted. In regard to political parties it would mean that it does not make much sense to support and strengthen the political organisation or the machine of the party that is clientelistic. It will not contribute to democracy or democratization. Instead, there should be a kind of multi- or bi-partisan support meaning neutral organisations supporting both political parties and the parliament. Political parties originate from the cleavage structure of a society and it dictate somehow what kind of political parties will emerge and this can hardly be changed by institutional engineering. However, it is possible to set the right incentives for political parties and parliamentarians.

Conclusion

Relation between Democracy and Rule of Law

Elections can only bring democracy with the Rule of Law and you cannot divide democracy and Rule of Law from each other. Three elements are necessary for the improvement of the Rule of Law including an independent judiciary, independent election commission and independent mass media. The recommendation is therefore strengthening the Rule of Law because it is easier to have a functioning democracy when Rule of Law already exists. There are also factors undermining and disturbing the rule of law. This includes the widespread corruption, the National Reconciliation Ordinance which is an amnesty law that undermines the trust of the people in political processes and institutions, and also the American "War on Terror" that is endangering the Rule of Law rather than protecting it.

Relation between Rule of Law and Sustainable Development

These two terms are closely related. The visibility of the Rule of Law is its enforcement, which relies on three main factors including a political will particularly of the leadership and the members of parliament to enforce the Rule of Law, the quality of the instruments of the enforcement and the support for the Rule of Law by the population.

Relationship between Rule of Law and the Fight against the Taliban

The War on Terror cannot be won by military force, instead the Rule of Law must be expanded to these territories, and moreover the soft power of Rule of Law must be superior to the hard power of the military.

Governance Structures of the Tribal Areas

Prior to 2004 somehow an institutional and legal structure existed ensuring peace and stability. These tribal governance structures, however, were destroyed when the Pakistan army launched a military operation against militant elements in this area.

Functional Equivalence to State provided Legal Certainty and Justice

We must look to the provision of legal certainty for instance with regard to local justice structures, tribal law and tribal justice on village level rather than on district or central state level. We must also take into account different organizational arrangements for providing justice, and one of this functional equivalence can be religious courts like the Sharia Courts.

Implementation of Social institutions

There was a general consensus that there is a necessity to improve the institutional backbones of Pakistan: strengthening the role of the judiciary including appointment of judges on merit and the development of new procedures for this process; strengthening the quality and independence of the judiciary; strengthening the role of parliament and restoration of its sovereignty including access of parliamentary committees to expertise and strengthening the function of the parliament above the executive; strengthening political parties and particularly of programmatic parties that are not poised with clientelistic structures. Institutions can only operate if there is an underpinning social structure and certain embeddedness. That restricts also the possibilities to export institutions. There is often a wrong presumption by the World Bank for instance to export institutions as well as economic and legal ideas without looking at the specialties of the country.

Lawyers Movement

This Movement is a grand coalition of political actors and civil society, political parties and the media - a coalition for the rule of Law that is a promising development and a real sign of change. The society of Pakistan has changed a lot in the past two years and a sense of empowerment was created.