



# LSE Pakistan Summit 2017

## Working Paper #3

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1. Philanthropy and Institution Building
2. Art and Modernity
- 3. The Constitution of Pakistan**
4. Development and its Dividends



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## Executive Summary

The Constitution panel at the LSE’s first Pakistan Summit explored the journey of Pakistan’s constitution through its various phases from inception, military intervention and finally, to more recent developments including the amendment of Article 18. Although panellists were cautious following the end of military intervention and have debated the extent to which this also constitutionally remains the case, they also acknowledged the capacity of the constitution in improving human rights and safeguarding democracy.

## Panellists

**Hina Jilani**, Human Rights Activist, Advocate at the Supreme Court of Pakistan, and co-founder of AGHS Legal Aid Cell and the Human Rights Commission in Pakistan.  
**Anwar Mansoor Khan**, Senior Advocate at the Supreme Court of Pakistan, former Advocate General for Sindh and former Attorney General of Pakistan.  
**Matthew Nelson**, Reader in Politics at the School of Oriental and African Studies (SOAS) and a founding member of the Centre for the International Politics of Conflict, Rights and Justice, and the Centre for Comparative Political Thought at SOAS.

Opening remarks were made by **Senator Sherry Rehman**, Vice President of the Pakistan People’s Party and former Ambassador of Pakistan to the US.

The panel was chaired by **Mukulika Banerjee**, Director of the South Asia Centre and Associate Professor of Anthropology at LSE.

## Inauguration: Overhauling Pakistan’s international image

Inaugurating Day 2 of the LSE Pakistan Summit 2017, Senator Sherry Rehman explored Pakistan’s need for a new international narrative. At the moment, the nation’s identity – and at times even its existence – is constantly questioned, and as a result major players in Asia and the West often write it off. This rebranding can only be achieved through domestic reform. For example, although Pakistan is home to a multitude of identities and cultures, successive governments have been notoriously poor at managing diversity. In order to project a positive and cohesive image to the international community Pakistan needs to develop a genuinely inclusive democratic society.

Pakistan’s image matters because many of the challenges it faces require regional solutions. The severe flooding and droughts in recent months illustrate the impact of

climate change across subcontinent, while attacks coordinated by international networks indicate that a unified strategy is needed to tackle terrorism. Yet 'South Asia' has become an imperilled concept over the last quarter of a century, with rigid borders born out of animosity between neighbours disrupting everything from families and cultural exchange, to trade and diplomacy. Until this scenario changes, it will be difficult to make progress on many of the most pressing issues.

According to Senator Rehman, the constitution is "the essential social contract that binds us as citizens together" and therefore lies at the heart of changing the domestic narrative. However, it up to now failed to live up to its promise of equality, in part due to revisions by non-democratic leaders, which centralised power and restricted democratic freedoms. The 18<sup>th</sup> Amendment, passed in 2010, sought to address some of the issues by reviving the federal framework and bill of rights that featured in the original 1973 Constitution. But there is still more work to do: the government needs to accelerate implementation and ensure that provinces have the capacity to deliver their new responsibilities.

Citizens also need to participate actively, and claim the rights and entitlements provided by the constitution. Recent developments are making this easier: for example, codifying the Right to Information has made the constitution less remote as it can be used to hold politicians to account over day-to-day service delivery. Similarly, the digital revolution is enabling direct citizen engagement via social media and email so politicians are now bombarded with more questions than they can deal with. Senator Rehman expressed hope that the increased demand for democracy would eventually lead to greater accountability, transparency and predictability in governance, as well as further amendments to enshrine inclusivity in the constitution.

## **A brief history of the constitutions of Pakistan**

Dr Matthew Nelson helped to contextualise Senator Rehman's remarks by outlining the evolution of the Constitution of Pakistan since independence. There have been three separate constitutions in this time, the first of which was promulgated in 1956 after nearly 10 years of debate and conflict.

The drafting process was led by the Constituent Assembly (CA), which was elected indirectly from those who had participated in the 1946 pre-partition elections. It was decided Islam would be the 'unifying ideology' of Pakistan, and the 1949 Objectives Resolution was produced in an attempt to balance religion with elements of a democratic political structure. This involved pairing "the sovereignty of Allah with a dynamic practical expression of sovereignty in the people, the state and elected representatives, [while also] factoring in minorities".

Separate electorates for certain non-Muslim minorities were therefore maintained, and it was decided that the head of state had to be a Muslim. Unfortunately, this gave rise to heated disputes over the definition of 'Muslim', which spiralled into riots, the imposition of martial law and power struggles between the legislature and the executive.

The 1956 Constitution eventually "tumbled out of these controversies" by adopting "a form of state neutrality vis-à-vis the definition of a Muslim". It committed to democracy as a foundation principle, and provided for a federal system, with the principle of parity included to ensure equal representation of East and West Pakistan. It was based on a degree consensus but it was weak and proved to be short-lived: in 1958 it was abrogated by the President of Pakistan, Iskander Mirza.

General Ayub Khan brought in a new constitution in 1962, which incorporated presidential elements to moderate parliament's authority and scrapped the federal provisions in favour of a unitary system, supposedly to address tensions between East and West Pakistan. As Hina Jilani put it "there was no consultation. It was imposed on the people and the country, in the name of constituting a state". This iteration of the constitution did not last much longer than the first one as it was suspended in 1969.

The next constitution was promulgated in 1973 following the separation of Bangladesh. Jilani indicated that this text was based on a much greater degree of consensus, perhaps because the military was weaker at that time, and indebted to Zulfikar Ali Bhutto who had struck peace with India and brought back 93,000 prisoners of war. She also went as far as to suggest that this was the first time Pakistan had actually been envisioned. Although the state was born in 1947 key questions around national aspirations and identity were not addressed until after the East and West had parted.

The 1973 constitution has survived to this day, albeit with some alterations. Both military and elected leaders have used various legal approaches set aside certain aspects and General Zia ul-Haq suspended it for over five years. When he revived the constitutional order in 1985 he added the 8<sup>th</sup> Amendment, which strengthened his presidential powers, allowed him to dissolve the National Assembly "in his discretion", and introduced a significant degree of sectarianism. Nevertheless, Dr Nelson argued the trajectory has been broadly democratic, particularly in light of the 18<sup>th</sup> Amendment. He noted that today, "the power of the presidency has been curtailed, the independence of the judiciary has grown and the authority of the provinces has increased".

## **The constitution as a tool for protecting human rights and democracy**

Hina Jilani indicated that, for all its weaknesses, the constitution has facilitated her work to protect and promote human rights, peace and democracy. She cited [Article 25](#), which provides for the equality of citizens and allows for affirmative action, as an example of a provision she had used time and again to tackle discrimination against women. Furthermore, she participated actively alongside other civil society actors in the consultation on the 18<sup>th</sup> Amendment. It was as a result of this lobbying that some of Zia's most discriminatory alterations were reversed. For example, the guarantee that minorities will be able to practice their religion freely was reinstated in the objectives resolution.

However, there is still a lack of citizen attachment to the text. Constitution Day – which fell the day before the panel – passes each year with limited fanfare, and there is little sense that people see protecting the constitution as a political obligation. The 18<sup>th</sup> Amendment also does not go far enough. While provisions to advance democracy were added, other parts of the constitution which contradict them have been left untouched. For example, the Federal Shariat Court, established with a constitutional mandate in 1980, continues to compete with the judiciary. Building a consensus to address these contradictions will not be easy because they reflect and reinforce many of the divisions that exist in Pakistani society.

Nevertheless, as stated by Jilani and as also discussed by Khan, there have been positive changes in the constitution and its implementation vis-à-vis the protection of

human rights. Khan noted that previously whilst the right to fair trial for instance, was mentioned in article four of the constitution, it was never a 'fundamental' right. In introducing [Article 10a](#) the 18<sup>th</sup> Amendment, according to Khan 'did a very great thing' – requiring that cases filed were supposed to be under due process, and most significantly, using the words 'fair trial'. However, in spite of this, the laws do not yet cater for the providence of article 10a. Due process has not been taken. Let me give you an example again, [under the National Accountability Bureau \(NAB\) ordinance](#), the arrests can be made, a person can be kept behind bars without being charged for an offence only for the purposes of investigation. According to Khan, although there are judgements taking place, article 10a has to be enacted more – due process and fair trial must be given more space.

## **Military intervention and weak democratic structures**

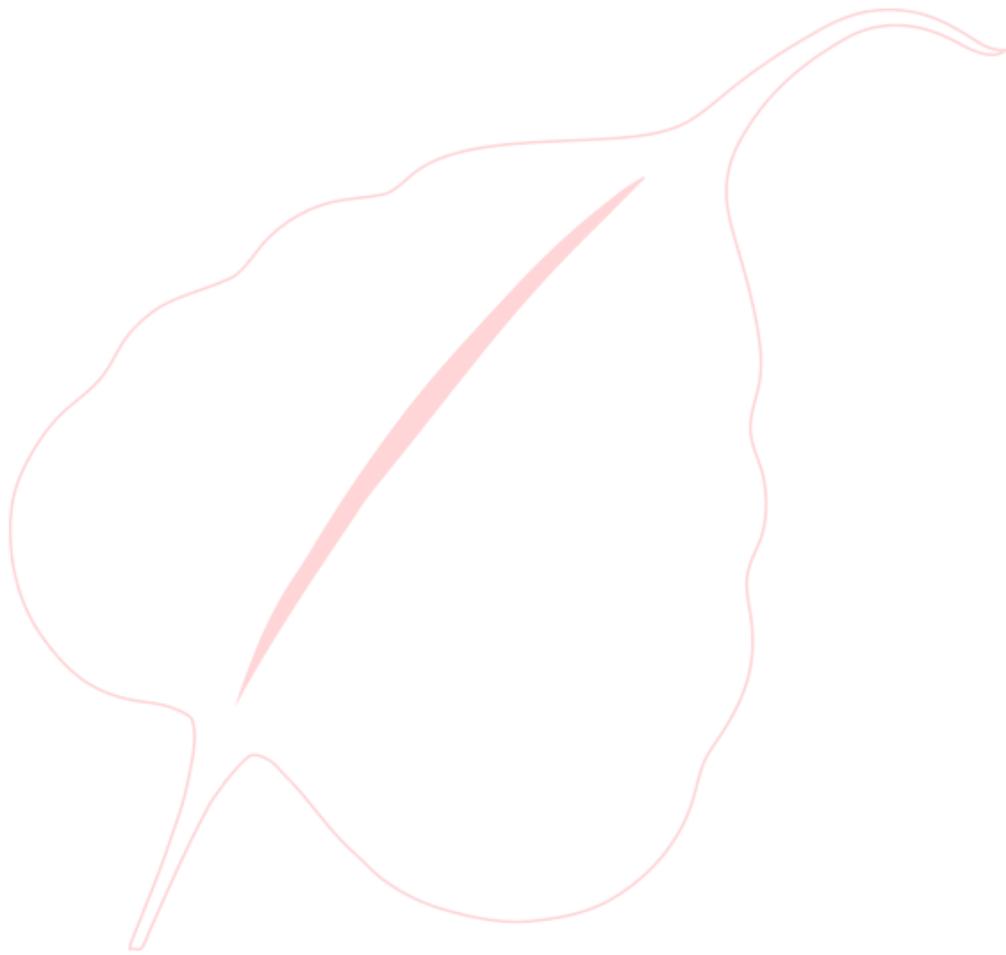
Repeated military intervention by disrupted the development of democratic institutions and allowed military ones to prosper and according to Khan, have created 'a void in the development of democratic institutions'. Moreover, Khan adds that the surprising reality is that military ordinances passed by Musharraf's government have been retained and there was little emphasis on reviving the institutions that had been undermined in the 18<sup>th</sup> Amendment. Like Jilani, he therefore viewed the Amendment as unfinished business, and suggested that all the laws introduced by dictators should be systematically reviewed and modified as necessary.

Khan also expressed concern that politicians were not organised in the same way as military institutions, stating that it was key for them to collectively organise and in doing so, strengthen institutions. If this could be achieved then 'there can and will never be further military intervention', although he also mentioned the shadow cast by military intervention, stating 'Military intervention will never allow democracy to succeed'.

## **Recommendations**

- There is a need to 'demystify' the constitution so ordinary citizens are aware of the rights it guarantees and how to claim them.
- Lawyers, human rights/democracy campaigners and other civil society actors have an important role to play in reviving this constitutional literacy.
- The government must strengthen democratic institutions to help prevent future military intervention. Furthermore, more focus must be made on strengthening local government as this has the most impact on everyday lives.
- The government also needs to do more to realise the 18<sup>th</sup> Amendment, for example by further devolving power and resources to make the federal framework a reality.
- Parliamentarians should commit to reviewing and modifying all constitutional changes introduced during authoritarian rule. A target time frame should be provided to review and where necessary, amend laws that were modified under military intervention.

- To reconsider the implications of the reinstatement of military courts and to transparently try terrorists rather than using military courts which many believe are unjust. This would not only demonstrate the rule of law but allow Pakistan's population to witness the heinous nature of terrorist crimes.



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