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Religious Liberty in Pakistan: Law, Reality, and Perception (A Brief Synopsis)

*Farooq Hassan**

I. INTRODUCTION¹

In order to understand the current status of religious liberty in Pakistan, it is helpful to look at the major laws that bear on the issue. These laws include Pakistan's constitutional law as well as various statutory provisions of Pakistan's Penal Code. An analysis of these two sets of laws will enable one to fully realize whether religious liberty exists and, if so, the extent to which it is available in contemporary Pakistan.² Prior to this analysis, a brief look at the background of Pakistan's legal system will be useful.

II. HISTORICAL FOUNDATION

A. Laws of the British Period

Many countries of the present day Commonwealth, including Pakistan, inherited the *corpus juris* of statutory rules and jurisprudence devised and enforced by the British during the last quarter of the nineteenth century. Initially created for India, these laws were

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1. The substance of this paper was presented at the Eighth Annual International Law and Religion Symposium, "Implementing the 1981 U.N. Declaration on Religious Tolerance and Non-Discrimination: Twenty Years of Experience," Brigham Young University, J. Reuben Clark Law School, Oct. 7-10, 2001 (on file with the BYU International Center for Law & Religion Studies, Provo, Utah 84602).

2. There are other areas in which the "Islamization" of laws exists (since pre-independence time) or has occurred in Pakistan (particularly in the 1980s during General Zia's presidency) and to which there is a reference in Chapter 11 of my work, FAROOQ HASSAN, THE ISLAMIC REPUBLIC: POLITICS, LAW AND ECONOMY 264-304 (1984). However, this paper will focus on the two articulated categories of laws: the law of the constitution and the applicable criminal statutory provisions.

later implemented in other parts of the Empire and included codified forms of the common law of England in diverse fields such as criminal law, criminal procedure, and evidence.³

The codification of English common law in India was easy enough, but its implementation proved difficult as British jurists attempted to apply their own rules to an environment comprised of many diverse faiths. The challenge was to give equal and uniform treatment to respective religious laws. With no available precedent from England, this change required innovation.

As such, the religious doctrines of different faiths found statutory recognition and enforcement for the adherents of the relevant faiths in matters of personal law under the newly formed laws. Distinct laws governing activities such as marriage, divorce, adoption, trusts, and religious customs were made available to the followers of different religious faiths in accordance with their respective faith. Thus, Christian personal laws only applied to Christians, and the Muslim or Hindu personal laws only applied to followers of those religions.⁴ This type of system was necessary since British India had millions of followers of every major religion.

During British rule, the constitutional law of India did not directly deal with freedom of religion, as the provincial (or state) laws were devised to reach this result. However, the Indian Penal law, codified and enforced by federal law, did contain several provisions on this subject. Pakistan has kept these Indian Penal laws largely intact since it gained independence in 1947. These laws are contained in Chapter XV of Pakistan's Penal Code.⁵

3. The INDIAN PEN. CODE (1860); Indian Evidence Act (1872), *in* M. MONIR, PRINCIPLES AND DIGEST OF THE LAW OF EVIDENCE: BEING A COMMENTARY ON THE INDIAN EVIDENCE ACT (I OF 1872); and INDIAN CODE OF CRIM. PROC. (1898) are all considered masterpieces of drafting.

4. For example, if a Christian couple desired to be married, compliance with the specific marriage rules of their own sect was all that was necessary to achieve state recognition of the marriage.

5. PAK. PEN. CODE ch. 15. The original offenses under this statute included blasphemy and desecration of places of religious worship. *See id.* §§ 295, 295C. To a Westerner, such "wrongs" may seem arcane, but it should be kept in mind that Pakistan is an Islamic State. *See* PAK. CONST. art. 2, *reprinted in* 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1993) [hereinafter 14 CONSTITUTIONS]. Over 97% of Pakistan's population is Muslim. The statutory additions to Pakistan's Penal Code are therefore intended to protect or encourage the majority faith.

*B. Pakistani Independence and Constitutional Foundations**1. Pakistan gains independence*

In the spring of 1940, in Lahore, Mohammad Ali Jinnah introduced a resolution for the division of British India.⁶ After two decades of failed attempts by Jinnah to unite the Hindu and Muslim communities, the “Lahore Resolution” finally called for a separate Muslim state.⁷ The independent state of Pakistan was the result. On August 14, 1947, Jinnah was sworn in as Pakistan’s first governor-general, and, though seventy years old and suffering from tuberculosis, Jinnah zealously began creating an infrastructure for the new country.⁸

Though Pakistan was created specifically for Muslims, Jinnah continued to proclaim tolerance for all religions.⁹ This pluralistic sentiment became canonized in the 1949 “Objectives Resolution,” which was created to provide guidance to the drafters of Pakistan’s first constitution.¹⁰ It states, in part:

Muslims shall be enabled to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quran (sic) and Sunna; . . . [and] adequate provision shall be made for the minorities freely to profess and practise their religion’s (sic) and develop their cultures¹¹

6. See SHAHID JAVED BURKI, *PAKISTAN: FIFTY YEARS OF NATIONHOOD* 1 (3d ed. 1999).

7. See *id.*

8. See *id.* at 23–24.

9. See David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 *CONN. J. INT’L L.* 27, 27 (1994). Jinnah explained to the Constituent Assembly in 1947:

[Y]ou are free to go to your temples, you are free to go to your mosques or, to any other places of worship in this state of Pakistan. You may belong to any religion or caste or creed—that has got nothing to do with the business of the State. . . . We are all starting with this fundamental principle that we are citizens and equal citizens of one State.

Ann Elizabeth Mayer, *Islam and the State*, 12 *CARDOZO L. REV.* 1015, 1042–43 (1991) (citing ISHTIAQ AHMED, *THE CONCEPT OF AN ISLAMIC STATE: AN ANALYSIS OF THE IDEOLOGICAL CONTROVERSY IN PAKISTAN* 79 (1987)).

10. See S.M. Zafar, *Constitutional Development, in PAKISTAN: FOUNDERS’ ASPIRATIONS AND TODAY’S REALITIES* 30, 31–32 (Hafeez Malik ed., 2001).

11. Forte, *supra* note 9, at 30–31 (citing Objectives Resolution (1949), *in* SAFDAR MAHMOOD, *CONSTITUTIONAL FOUNDATIONS OF PAKISTAN* 46 (2d rev. ed. 1990)).

The guidance of the Objectives Resolution was followed by the constitutional drafters, and in 1956, the first Pakistani Constitution came into being.

2. *Religious freedom under the 1956 and 1962 Constitutions*

The preamble to the 1956 Constitution included the tenets set forth in the Objectives Resolution seven years earlier. The preamble asserted that Pakistan was “based on Islamic principles of social justice,”¹² guaranteed Muslim life “in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah,”¹³ and prohibited any laws “repugnant” to Islam as set forth in the Quran and Sunnah.¹⁴ The preamble also provided that “adequate provision shall be made for the minorities freely to profess and practise their religions and develop their cultures.”¹⁵ These general principles were then broken out into specific religious rights in Article 18 of the Constitution.¹⁶

Nonetheless, the 1956 Constitution was short lived. Following a 1958 military coup under General Muhammad Ayub Khan, a new constitution came into being as part of the restoration to civilian rule. Though the 1962 Constitution established several Islamic institutions, it gave them no real legislative power.¹⁷ Further, two portions of the 1956 preamble were notably missing from the 1962 version: the repugnancy clause and any references to “Quran and Sunnah.”¹⁸ Shortly thereafter, however, even though General Khan staffed the newly formed Islamic institutions with secularists, intense pressure from Islamists forced a 1964 constitutional amendment.¹⁹

12. *Id.* at 32 (citing PAK. CONST. of 1956 pmbl., *in* MAHMOOD *supra* note 11, at 247).

13. *Id.*

14. *See id.* Constitutional references to Quran and Sunnah, rather than to Sharia, were significant in that they emphasized the Muslim, as opposed to Islamic, character of Pakistan. Such constitutional references were aimed at placing authority to create and interpret law in the secular parliament and courts rather than in Islamic jurists. This was necessary since there was, and still is today, much tension between Islam and religious minorities under traditional Sharia. *See id.* at 33–34.

15. *Id.* at 33 (citing PAK. CONST. of 1956 pmbl., *in* MAHMOOD, *supra* note 11, at 247).

16. *See id.*

17. *See id.* at 34.

18. *See id.*

19. *See id.*

The amendment reinstated the repugnancy clause and added an additional phrase stating, “[N]o law shall be repugnant to the teachings and requirements of Islam as set out in the Holy Quran and Sunnah, *and all existing laws shall be brought into conformity therewith.*”²⁰ This additional phrase introduced a way to enforce the repugnancy clause and was the first of many steps taken by Islamists to Islamicize Pakistan.²¹

III. CONSTITUTIONAL RELIGIOUS FREEDOM IN PAKISTAN

The foundation for Pakistan’s current Constitution was created in 1973. After a second period of martial law, a civil war, and the separation of Bangladesh from Pakistan, the 1973 Constitution was implemented as part of a new civilian government.²²

A. The 1973 Constitution

The 1973 Constitution reflects the steady influence Islamists have had on the legal and political spheres in Pakistan.²³ It was the first constitution to formally establish Islam as the state religion in Pakistan.²⁴ The 1973 Constitution also retained the retroactive clause of the 1962 Constitution requiring “all existing laws [to] be brought into conformity with the Injunctions of Islam” and created the Council of Islamic Ideology to enforce implementation of the clause.²⁵ Articles 2, 20, and 31 of the 1973 Constitution also discuss aspects of religious freedom.

Article 2 expressly states, “Islam shall be the State religion of Pakistan.”²⁶ Article 31, which appears in Chapter 2 of the Constitution and is entitled “Principles of Policy,” contains a mandate to

20. *Id.* (citing PAK. CONST. of 1962 *amended by* First Amend., Act 1 of 1964, *in* MAHMOOD, *supra* note 11, at 628, 634) (emphasis added).

21. *See generally* RUBYA MEHDI, *THE ISLAMIZATION OF THE LAW IN PAKISTAN* (1994); HASSAN, *supra* note 2.

22. *See* Forte, *supra* note 9, at 35.

23. *See generally* MEHDI, *supra* note 21; HASSAN, *supra* note 2.

24. *See* PAK. CONST. art. 2, *reprinted in* 14 CONSTITUTIONS, *supra* note 5. In fact, some scholars suggest this is one of the main reasons for the survival of the 1973 Constitution. *See* Zafar, *supra* note 10, at 49.

25. Forte, *supra* note 9, at 36 (citing PAK. CONST. arts. 227–30, *in* MAHMOOD, *supra* note 11, at 956–58).

26. PAK. CONST. art. 2, *reprinted in* 14 CONSTITUTIONS, *supra* note 5.

comprehensively adopt the Islamic way of life for Muslims.²⁷ The provisions of this Chapter are not binding on the courts but provide guidelines for policy-oriented decisions of all state functionaries.²⁸

Article 20 of the 1973 Constitution contains the following major provision on religious freedom: "Subject to law, public order and morality,—(a) every citizen shall have the right to profess, practise and propagate his religion; and (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions."²⁹

Two points need immediate attention. First, Article 20(a) is expressly available only to "citizens" of Pakistan. Second, this is a "constitutional right," yet it is "subject to law." This signifies that sub-constitutional legislation, for reasons of "public morality" or "public order," may regulate this right. In theory, the practice of every religion, including Islam, is subject to this provision. But case law indicates that these "restrictions" have only been applied to the time, place, and manner of certain religious celebrations. More often than not, such restrictions have been applied to Muslims who belong to certain sects. As such, it can be asserted that this provision has generally *not* been utilized to the detriment of the non-Muslim minorities.

But does a "foreigner" have no such right? The answer seems to lie in the jurisprudence of Article 20(b). The followers of every religion, whether or not they are citizens, are "constitutionally" free and "authorized" to set up and propagate their faith. However, the "establishment" and "management" of these religions seem to be "subject to law." This provision applies to Muslims and non-Muslims alike. Thus, it appears that religious liberty to practice and profess one's religion is available to both citizens and foreigners in Pakistan.³⁰

Under Article 20, freedom of conscience and freedom to adhere to any religion or form of worship that an individual may choose

27. See *id.* art. 31; see also discussion *infra* Section III.A.

28. Article 31 further explains that steps shall be taken to enable Muslims in Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities that would enable them to understand the meaning of life according to the Holy Quran and Sunnah. See PAK. CONST. art. 31, *reprinted in* 14 CONSTITUTIONS, *supra* note 5.

29. *Id.* art. 20.

30. Compare this provision to Articles 25 and 26 of the Indian Constitution, which essentially provide the same protections. However, this position is not *parsi pasu* with Pakistan as explained *supra*.

cannot be restricted by law. The phrase “subject to law” does not invest the legislature with unlimited power to impinge upon this constitutional right. Lawmakers can act only in limited circumstances, which must pertain to “public order” and “morality.” The “subject to law” clause is essentially a regulatory power that must be exercised for a permissible end. This provision seems to be in harmony with similar provisions from other state constitutions that deal with the time and place of worship and the manner of soliciting and holding public meetings. It should also be noted that in order to safeguard peace, order, and comfort of the community, the government could legitimately undertake regulation of religious practices.³¹

It is incorrect to say that religion is nothing more than a set of beliefs. Religion includes certain practices as well as beliefs, and the Constitution protects such actions.³² This constitutional protection covers all practices that are regarded by a particular religious community to be *a part of their faith*. As long as such religious practices are “well established,” they will prevail over any general law that appears contrary to such practices.³³ This line of reasoning appears to “protect” practices such as polygamy and other practices that are sanctioned by clear religious doctrine.³⁴ In Pakistan, similar results have been reached. For example, Section 30 of the 1984 Punjab Ordinance VIII prohibited the Shia community from conducting certain religious processions because the processions were held to be against “public order.”³⁵ Both the supreme court and the Lahore High Court struck down the ordinance as being ultra vires of Article 20 of the Constitution.³⁶

31. The approach to what the legislature can do under the cloak of such regulatory power has been dealt with differently by the United States Supreme Court, the Indian Supreme Court (Apex Court), and some decisions in Pakistan. The United States Supreme Court held that laws are made for the government of “actions,” and while these actions cannot interfere with mere religious beliefs and opinions, they may interfere with practices that are contrary to the general law of the land. *See Reynolds v. United States*, 98 U.S. 145 (1878). On the other hand, the Indian Supreme Court held that a religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess them to be conducive to their personal and spiritual well-being. *See A.I.R. 1954 S.C. 282*.

32. *See A.I.R. 1954 SC 282*.

33. *See id.*

34. *See id.*

35. *See 1985 P.L.D. S.C. 8; 1992 P.L.D. Lah.1.*

36. *See 1985 P.L.D. S.C. 8; 1992 P.L.D. Lah.1.*

B. The Impact of India's Constitution on Pakistan

In order to further understand Pakistan's position on religious liberty, it is helpful to review the corresponding constitutional position in India. Article 25 of the Indian Constitution reads as follows:

FREEDOM OF CONSCIENCE AND FREE PROFESSION, PRACTICE AND PROPAGATION OF RELIGION—Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion.

(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.³⁷

The essential difference between Article 25 of the Indian Constitution and the corresponding provision in Pakistan's Constitution is that the former applies to all persons, not merely citizens, whereas the latter applies only to citizens. Further, Article 25 of the Indian Constitution specifically provides protection for traditions and customs of the two major historical components of the Indian religious society, the Hindus and Sikhs, *qua* their main religious doctrines, which may be manifested by overt actions.

Article 26 of the Indian Constitution reads as follows:

FREEDOM TO MANAGE RELIGIOUS AFFAIRS—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

37. INDIA CONST. art. 25, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1997).

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.³⁸

Article 26 appears to be more exhaustive than the corresponding provision in Pakistan's Constitution. In particular, Article 26 protects "religious affairs" that a community regards as essential for matters of faith or those practices that are generally considered to be an integral part of religion.

In sum, India's constitutional position regarding religious beliefs, even when pertaining to *overt* actions, is that freedom of religion will be protected. This freedom will be protected even if it is contrary to the secular law of the land as long as its usage is established and as long as the religion has, *prima facie*, the consent of the parties affected and the consent of the community. This is particularly true of many of the practices affecting the personal laws of the major religions that exist in India and Pakistan today.

However, "reformative" measures devised by the government that do not satisfy the element of "established usage" in either Pakistan or India have, of late, been protected by the courts. In India, attacks on the Hindu Marriages Act aimed at social welfare of the community were repelled. In Pakistan, challenges to the 1961 Muslim Family Laws Ordinance failed because stringent procedural requirements imposed on second marriages were held to be valid and not affected by the Constitution.³⁹ Based on these results, it seems that the legislature is perhaps best suited to promote public good by effecting changes in religious practices.

IV. RELIGIOUS FREEDOM UNDER PAKISTAN'S PENAL CODE

Pakistan's Penal Code contains several sections that are relevant to this discussion.⁴⁰ The original Penal Code, drafted by the British,

38. *Id.* art. 26.

39. *See* A.I.R. 1952 Bom.; A.I.R. 1961 All. 335; 1989 P.L.D. Kar. 513.

40. These are Sections 295, 295A, 295B, 295C, 296, 297, 298, 298A, 298B, and 298C. Section 295A was added by Ordinance XXI of 1991. Section 295B was added by Ordi-

contained four sections (Sections 295 through 298) that dealt with religious liberty. The remaining sections were added by amendment during General Zia's military rule in the 1980s. The sections added through November 1985 were added during a period of Martial Law, while the other sections were subsequently introduced by the civilian government that later came into existence under the same General Zia.

Before analyzing these diverse provisions, it is helpful to list what they contain:

(1) Section 295. Injuring or defiling places of worship with intent to insult the religion of any class: Punishment—two years.

(2) Section 295A. Deliberate/malicious acts that outrage religious feelings of others: Punishment—ten years.

(3) Section 295B. Defiling the Holy Quran: Punishment—imprisonment for life.

(4) Section 295C. Use of derogatory remarks with respect to the Holy Prophet: Punishment—death or imprisonment for life.

(5) Section 296. Disturbing religious assembly: Punishment—one year.

(6) Section 297. Trespassing or indignity upon burial places: Punishment—one year.

(7) Section 298. Uttering words that injure religious feelings: Punishment—one year.

(8) Section 298A. Using derogatory remarks about holy personages: Punishment—three years.

(9) Section 298B. Misuse of epithets or titles of holy people: Punishment—three years.

(10) Section 298C. Persons of Qadiani (Ahmadi) Group claiming to be Muslim: Punishment—three years.

It is immediately apparent that while some of these offenses are for the protection of every faith, those sections introduced during the 1980s are for the exclusive benefit of the Islamic faith. This should not seem strange since the Constitution itself declares Paki-

nance I of 1982. Section 295C was added by Act III of 1986. Section 298A was added by Ordinance XLIV of 1980. Section 298C was added by Ordinance XX of 1984: Anti-Islamic Activities of Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984, 36 P.L.D. 102 (1984) (Pak.) (as cited in Tayyab Mahmud, *Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT'L L.J. 40 n.9 (1995)).

stan to be an Islamic Republic.⁴¹ Furthermore, Article 31 of Pakistan's Constitution declares that:

(1) Steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah.

(2) The State shall endeavour, as respects the Muslims of Pakistan,—

(a) to make the teaching of the Holy Quran and Islamiat compulsory, to encourage and facilitate the learning of Arabic language and to secure correct and exact printing and publishing of the Holy Quran;

(b) to promote unity and the observance of the Islamic moral standards; and

(c) to secure the proper organisation of *zakat*, [*ushr*,] *auqaf* and mosques.⁴²

Given the historical background of Pakistan's creation, the *raison d'être* of having such provisions is understandable. Since Pakistan's creation, political parties and religious groups have insisted on creating a state system based on Islamic heritage. Generally speaking, the religious elements have never had any degree of apparent success in any electoral process. Secular parties have triumphed in every election in Pakistan since its creation. Yet, the public philosophy of the country is such that, at least rhetorically, even the accepted secular leadership of the country has found it impossible to deny the application of this *volkgeist*. For example, the basis of Section 298C of the Penal Code is the Second Amendment to the Constitution, which declared the Qadiani sect as non-Muslims.⁴³ This alteration took place in September 1974, when the highest civilian leadership of the

41. See discussion *supra* Part III.A. Article 2 of Pakistan's Constitution states that "Islam shall be the State religion of Pakistan." PAK. CONST. art. 2, *reprinted in* 14 CONSTITUTIONS, *supra* note 5.

42. PAK. CONST. art. 31, *reprinted in* 14 CONSTITUTIONS, *supra* note 5.

43. PAK. CONST. art. 260, cl. 3, *amended by* Second Amend., Act 49 of 1974, *reprinted in* 14 CONSTITUTIONS, *supra* note 5.

country was vested in Bhutto, otherwise well known for his secular and, indeed, socialist leanings.

History seems to indicate that the pressure on the government by the poor masses is so overwhelming that the nation's leaders often use the shelter of Islam to fend it off. This device generates a cycle of dynamics that then produces a qualitative status of its own. The people are told that as Muslims they must suffer for the betterment of the state. The *mullahs*, paid by the government, are a major vehicle for the dissemination of this social milieu.

This should not be taken to mean, however, that genuine religious parties have nothing to add here. While performing with only marginal success in the countrywide elections, these religious parties do possess, nevertheless, powerful local and regional bases. For example, the *Jamiat-e-Islami* and other similar parties have genuine national credentials. Above all, their followers are very committed and vocal in public gatherings. The inevitable result is that even while not in power, their basic messages are often incorporated into legislation and are considered in major state actions.

Without undue emphasis, it is also necessary to say that since the Soviet expulsion from Afghanistan in the 1980s there has been a steep upsurge in conservative thinking about Islamic teachings in this region. Whether this is "fundamentalism" in the sense in which Western contemporary writers use the term is not relevant for this analysis. It is, however, important to keep this factor in mind and to remember the implications associated with it.

In a sense, this rise in ideological fervor occurred with abundant Western psychological, material, and media help. The motivation at that time was to utilize this kind of overpowering, emotive zeal to demolish the theoretical basis of Communist ideology, which had bogged down Western nations for nearly half a century. The Muslim "zealots" were hailed as "Mujahadeen," or freedom fighters of God. Now, the circumstances have changed. The very same Mujahadeen are now being called upon to take a new look at the entire meaning and basis of life. Apparently, this is not an easy task.

The present position of religious freedom in Pakistan can be properly comprehended only in the context and framework of these fundamental legal postulates and realities. The larger part of the *corpus* of the law, both in the fields of constitutional and criminal law, is of routine and secular legal format, content, and implication. Pakistan's judicial branch, especially at the level of the high courts and

the supreme court, has rendered sound and progressive interpretations that have given rise to situations in which minorities often have little to complain about.

Still, the major critics contend that religious freedom is less than what it should be under established constitutional⁴⁴ and international guidelines.⁴⁵ Three such contentions may be summarized as follows: (1) the declaration of Qadinais as non-Muslims; (2) the declaration of the state as Islamic, making it *ex hypothesi*, religious in nature; and (3) the wide-state patronage to Muslim institutions as compared to non-Muslim establishments.

It is not necessary to deal with these issues separately, since once it is accepted that Pakistan is constitutionally an “Islamic Republic,” the extent to which the state visibly and manifestly leans towards Islam becomes inevitable. Nevertheless, because minority religions, as such, are not adversely affected directly in their own spheres of activity, there is no real intrusion. Furthermore, “equal opportunity” for Muslims and non-Muslims is evidenced by the fact that Pakistan has both a Federal Ministry of Auqaf and Haj for Muslims and a Ministry of Minorities, invariably headed by a Minister who is either Christian or Hindu.

Pakistan’s Penal Code has received its share of criticisms as well. Most of this criticism has been directed at those sections of the code that became law during the 1980s—Sections 295A, 295B, 295C, 298A, 298B, and 298C. Although there are divergent views on the desirability of these laws, it is clear that they are designed to uphold the sanctity of the Islamic doctrinaire structure.

The most controversial section in this respect is Section 295C. Under this section, an offender may be punished with death or life-

44. For major constitutional provisions generally cited for creating such a regime, see, e.g., U.S. CONST. amend. I; VA. CONST. § 58, pt. 1; CAN. CONST. (Constitution Act, 1992) § 1; THE FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN arts. 18 and 19; and GREECE CONST. art. 13.

45. For international standards, see, e.g. Declaration on Religious Freedom—Dignitatis Humanae, Promulgated by Pope Paul VI (Dec. 7, 1965), *available at* <http://www.cin.org/v2relfre.html>; Declaration of the Parliament of the World Religions (Sept. 4, 1993); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976) arts. 2, 13.1, 13.3; *Convention of the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49 (1989) arts. 2.1, 2.21, 4.1, 14.3, 20.1, 20.3, 29.1, 30; *International Covenant on Civil and Political Rights*, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, arts. 2.1, 4.1, 18.1, 18.2, 18.3, 18.4, 20.2, 26.2.

time imprisonment if it is proved that he used derogatory language toward or regarding the Holy Prophet Muhammad.⁴⁶ Critics of this section focus on the severe *quantum* of punishment. They argue that capital punishment is not commensurate with the “violation” involved. On the other hand, proponents argue that the purpose of the penal law is to preserve public order by mandating retribution for any act that grievously injures the religious feelings of a large class or community. Those in that class or community, it is argued, should be saved from gross injury perceived to occur by such outrageous actions.⁴⁷ Therefore, this argument continues, Section 295C is meant to prevent situations that could potentially wreck havoc on the law and order of any particular locality. However, when enforcing such provisions, the courts must be very circumspect and ensure that the religious emotions of different classes of the community, whether or not they reflect the majority perspective, are not hurt.⁴⁸

Pakistan’s case law on this issue is less than clear, making it difficult to say whether a certain philosophy is evolving. In a number of cases involving the Ahmadis, the courts have held that Section 295C must be narrowly construed and its consequences strictly applied.⁴⁹ However, in these same cases, the minimum punishment available has actually been given. It appears that the judiciary is aware of the potential misuse of this law, and it has attempted to progressively approach the matter in a “liberal” manner as far as the punishment is concerned. Nevertheless, in upholding the scope of the content of this provision, judges have generally followed the trend of the legislature. In other cases involving the Ahmadis, the attempt to compare Mirza Ghulam Ahmad to the Holy Prophet Muhammad has been found to be punishable under Section 295C.⁵⁰ In contrast, in several leading cases involving Christians, the accused have been set free, invariably by a finding of insufficient proof. One such case drew international attention when the Lahore High Court acquitted the ac-

46. See PAK. PEN. CODE § 295C.

47. See 1976 P. Cr. L.J. 1456 Lah.

48. See 1958 A.I.R. S.C. 1032.

49. See 1992 Lah. P.L.D.1; *Zaheeruddin v. State*, 26 S.C.M.R. (S.Ct.) 1718 (1993) (Pak.). For discussions of *Zaheeruddin v. State*, see Mahmud, *supra* note 40; M. Nadeem Ahmad Siddiq, *Enforced Apostasy: Zaheeruddin v. State and the Official Persecution of the Ahmadiyya Community in Pakistan*, 14 LAW & INEQ. 275 (1995).

50. See, e.g., 1995 N.L.R. S.D. 217 (FB); *Zaheeruddin v. State*, 26 S.C.M.R. (S.Ct.) 1718 (1993) (Pak.); 1992 Lah. P.L.D.1.

cused, and then shortly thereafter, the Senior Judge was murdered in his office.⁵¹ The other judge that decided the case reportedly fled to the United States on an immigrant visa.

It appears that the prosecution will generally follow the public mood, particularly if the locality is rural. The trial courts prefer to do the same, while the higher courts tend to quash such proceedings. It should also be mentioned that this law has not merely been used against non-Muslims; Muslims have also been accused and prosecuted under Section 295C. As recently as September 8, 2001, four Muslims were prosecuted in Karachi for using the Holy Prophet's name on their shop sign. The shop owner's neighbors noticed the sign and brought the local police to the shop; the police determined that the sign was in derogation of supreme respect for the Prophet.

V. REALITIES AND PERCEPTIONS OF RELIGIOUS FREEDOM IN PAKISTAN

A. Realities

As the majority of legal provisions dealing with religious liberty have been presented, it is necessary to turn to an evaluation of the basic realities that exist in Pakistan under the current statutory regime.

Two preliminary points may immediately be noted. First, the greater part of the law, which arguably offends the notions of "religious liberty," is the product of only the last twenty years. This is essentially the period in which Pakistan, with the approval of the international community, became the home of the Mujahadeen. Second, although religious freedom cases produce considerable furor and publicity in Pakistan, the accused tend to be acquitted by the higher courts. In other words, the potential use or misuse of these laws primarily occurs in rural and far-flung areas of the country. Fearing reprisals, local judges usually do not even attempt to approach the matter with unbiased minds. However, at the appeals stage, most of these cases are quashed, as it is generally understood that criminal law should not use these cases as the vehicle for enforcing religious sensitivities.

These realities immediately lead one to realize that the funda-

51. *See* *Salamat Masih v. The State*, 1995 P. Cr. L.J. 811 (1995).

mental danger to the accused under Pakistan's Constitution and Penal Code is not the fear of ultimate conviction but that of being incarcerated for considerable periods of time without bail. In many of these cases, even the higher courts refuse to grant bail during trials. This is a considerable hardship for ordinary people in Pakistan, in addition to the large legal costs involved with holding a trial.⁵²

It is also necessary to add that religious prejudices or leanings of particular faiths are not only advanced or discouraged through law but also through other methods. The impairment or the attempt to impinge upon religious expression can often occur without recourse to such modalities of law. This phenomenon is the demonstration of the voice of the "public," often by the ill-educated mullah.⁵³

B. Perceptions

Along with the realities concerning religious freedom that have been discussed, there are several commonly held perceptions about Pakistan's level of religious freedom. First, many believe that Pakistan is a country in which the Sharia prevails because Pakistan was created for Muslims out of the subcontinent of India and also because Pakistan has been constitutionally declared an Islamic State. This belief is incorrect. Despite recent legislative attempts to Islamicize Pakistan, Pakistan remains essentially "secular" in character.⁵⁴ Only this acute realization forces the religious political parties of the country to constantly stress that the government is not doing enough to achieve the goal of Islamicizing Pakistan.

Second, despite the efforts of various civilian and military governments that appeared to be "Islamic," the judiciary has steadfastly denied the wholesale acceptance of such a legal philosophy.⁵⁵ Pakistani lawyers know this, politicians are aware of this fact, and the government is quite satisfied with this state of affairs. These parties all seem to silently agree that such a *de facto* arrangement should

52. See generally *Atta Ullah v. The State*, P.L.D. 2000 Lah. 364 (1999); *Riaz Ahmad v. The State*, P.L.D. 1994 Lah. 485 (1994); *Salamat Masih v. The State*, 1995 P. Cr. L.J. 811 (1995).

53. See generally HASSAN, *supra* note 2. I have little hesitation in admitting that through this "voice" even the majority is threatened. All that is required is the manipulation and the ultimate utilization of this process at any given locality.

54. See also MEHDI, *supra* note 21. See generally HASSAN, *supra* note 2;

55. For an excellent review of religious freedom and the Pakistani judiciary, see generally Mahmud, *supra* note 40.

continue. The religious parties, also sensing the existence of such a “public conspiracy,” continue to shout “foul” but with little affect.

Third, when political upheavals may be on the horizon or when circumstances so warrant, the judicial branch can also go the other way in a decisive manner. This is evidenced by some of the major developments in Pakistan’s constitutional history. The best example of this deviation is the recent decision that the Supreme Court’s Shariat Bench reached in December 1999 that declared interest as un-Islamic and void. Under the Constitution, the Shariat Bench ordered the Pakistani administration, by June 2001, to amend the laws under which interest is permitted. However, this amendment did not occur, and the Court allowed the government to delay making the change while the verdict was on review. Interestingly, the Shariat Bench’s Chief Judge was forced into compulsory retirement in January 2000 by the military regime. This demonstrates that, despite rhetorical claims, no government of Pakistan has been genuinely “pro-Islam” as far as its policies are concerned.

Last, as submitted above, the vehicle for keeping the state “progressively modern” has been the judiciary, primarily in the penal law domain. Yet in a philosophical sense, the judiciary has also been keeping the fundamentalists happy. In this vein, the judiciary has gone well beyond the interpretations of the United States Supreme Court in holding that even *overt* actions of people under an established religious practice contrary to the general law of the land are protected under Pakistan’s Constitution.⁵⁶

56. See, e.g., 1985 P.L.D. S.C. 8. Dicta in United States cases such as *Cantwell v. Connecticut*, 310 U.S. 296 (1939) departed from this belief. The United States Supreme Court stated in *Cantwell* stated that “[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. . . . Thus the [Fourteenth] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” *Id.* at 303–04.

