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The Interplay of Majority and Minority Religious Rights and the Role of the Judiciary

*Justice Tassaduq Hussain Jillani**

Honorable chair, distinguished delegates, and Ladies and Gentlemen!

It is a great pleasure and honor to have been invited to speak on a subject which concerns us all in one form or another.

In my presentation, I will briefly explain the role religion has played historically in human affairs, how the union of the state, politics, and religion have affected human behavior and impacted human rights, why the discourse on religious rights has become one of the dominant themes in the contemporary age, and what role the judiciary has played in the interplay of majority and minority rights.

Historically, religion has played an important role both in shaping human morals and conduct and in causing conflict and discord. Intolerance and violence in the name of faith has existed in all periods of human history, only the villains and victims have changed. In the West, the unity of state and church led to state oppression, inquisitions, violence, and wars. In 1606, an English Jesuit Priest, Henry Garnet, was charged, tried, convicted, and executed.¹ The allegation was that he wanted to blow up the Parliament House and kill the Protestant King James I and his eldest son because the Protestants had won a majority in Parliament.² “In his final play, *Henry VIII*, Shakespeare has his Archbishop predict that the future Elizabeth will rule by a mixture of ‘Peace, plenty, love’ and a just measure of ‘terror.’”³

* Tassaduq Hussain Jillani, Former Chief Justice of Pakistan, Address at the Twenty-Third Annual International Law and Religion Symposium: Religious Rights in a Pluralistic World (Oct. 3, 2016).

1. Robert Wilde, *The Gunpowder Plot of 1605: Henry Garnet and the Jesuits*, THOUGHTCO., <https://www.thoughtco.com/henry-garnet-and-the-jesuits-1221975> (last updated Nov. 6, 2017).

2. *See id.*

3. Ian Ward, *Terrorists and Equivocators*, 1 L. & HUMAN. 111, 114 (2007) (quoting WILLIAM SHAKESPEARE, *HENRY VIII* act 5, sc. 5).

When Americans gained independence from colonial rule, they were conscious of the bitter memories of the unity of church and state in England and, therefore, decided the state should have nothing to do with religion.

Jefferson lobbied for, as he put it, “a wall of separation between church and state,”⁴ but other founding fathers sought no more than a constitutional provision forbidding the government from establishing a national religion. The founding fathers wanted religious freedom and feared the religious persecution that would result if the government were permitted to endorse one religion over another.

“When all was said and done, the framers of the Constitution inserted into the First Amendment a provision known as the ‘Establishment Clause,’ which as now interpreted effectively provides that government ‘shall make no law respecting an establishment of religion.’”⁵

This U.S. constitutional provision⁶ has been a constant check on the state and society to protect freedom of religion and belief. Any attempt to transgress this provision has been resisted by the U.S. Supreme Court through the power of judicial review. In 1962, the U.S. Supreme Court invoked this constitutional provision to disallow the Regents Prayer, which the State of New York had adopted for recitation in its public schools.⁷ Speaking for the Court, Justice Hugo L. Black said, “[A] union of government and religion tends to destroy government and to degrade religion.”⁸

We are living in an age of globalization and ongoing transition. This has led to greater cooperation and collaboration in various fields of human activity: economic, political, social, space research, scientific research, medical research, nuclear technology, etc. This transition has been paralleled by the declared commitment of the international community to promote and protect universal human rights, which include religious rights.

The process of convergence on human rights issues started with the United Nations (U.N.) Universal Declaration on Human Rights after the Second World War. The concern for protection of religious

4. Reynolds v. United States, 98 U.S. 145, 164 (1878).

5. MICHAEL G. TRACHTMAN, THE SUPREMES' GREATEST HITS 35 (2006).

6. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]”).

7. Engel v. Vitale, 370 U.S. 421, 424–25 (1962).

8. *Id.* at 431.

freedom and minority rights and their enforcement through the judiciary surfaced on the global stage during the Holocaust. The courts in Germany, on account of their timidity, set the stage for Nazi atrocities. The U.N. Charter, after pledging to save humankind from the scourge of war, affirmed its “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”⁹

The nations realized that peace and tolerance would remain elusive until discrimination among the human race was eliminated. This led to the 1981 U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.¹⁰ Decades after the adoption of the U.N. Charter, notwithstanding their differences in other fields, nations reaffirmed their consensus on human rights through the Vienna Declaration of the World Conference on Human Rights.¹¹ Therein, States committed to promote universal respect for observance and protection of all human rights and fundamental freedoms. They declared:

The universal nature of these rights and freedoms is beyond question. . . . All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.¹²

Many of the states that acquired independence in the post-World War II era, with the exception of one-party states, were influenced while drafting their respective constitutions by the vision and idealism reflected in these international instruments.¹³ These constitutions carry elaborate fundamental rights provisions as well as commitments to honor the international instruments and declarations on such rights.

9. U.N. Charter pmbl.

10. G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981).

11. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Docs. A/CONF.157/23 (June 25, 1993), <http://www.un-documents.net/ac157-23.htm>.

12. *Id.* art. I, §§ 1, 5.

13. See, e.g., Ahman Reza Kamarei, *Constitutional Provisions Referring to the Universal Declaration of Human Rights*, HUM. RTS. RESOURCE CTR., www.hrusa.org/workshops/HREWorkshops/usa/HRCstitutions.doc (last updated June 2005).

This elaborate regime of fundamental rights and freedoms enshrined in various State constitutions would remain mere textual pledges unless there was an independent judiciary to enforce those rights. The two concepts of good governance and the rule of law are intertwined—an independent, fair, and effective judiciary enforcing the rule of law is a *sine qua non* for good governance. Some rather telling examples of such a state of affairs can be seen in the recent situations in Bosnia-Kosovo and some African countries where their constitutions protect certain specific minority rights, but, due to weak judiciaries and lack of political will, those rights could not be enforced.

Surveying the state of religious freedom around the world, Thomas Reese of the U.S Commission on International Religious Freedom commented:

[I]n China and Vietnam, although communist ideology no longer governs the economy, it still opposes religion, especially if it is outside Communist control. Officials fear any popular organization that gathers people together and has respected leaders outside their control.

On the other hand, in Iran and Saudi Arabia, the state is used to suppress any views that do not align with the state's theological orthodoxy. Members of other religions are few in these countries, so the religious police target dissidents of their own faith. People can be jailed simply for holding different views.

We also see countries where a particular religion is identified by some as part of the national identity. If you are not of that religion, you are not a good citizen.

....

Likewise in India, Hindu nationalists are telling Muslims to go to Pakistan and Christians to go to Europe if they are unwilling to become Hindus. For them, Indian and Hindu are synonymous.

In some countries, such as India, the state is not so much persecuting religious minorities as not protecting them from fanatics and mobs. The police often stand aside and watch others attack minorities. Here, politicians are often either afraid of the militants or dependent on them for political support.

In Pakistan, lawyers and judges have been assassinated for defending Christians and other minorities falsely accused of

blasphemy. The assailants and those making false accusations are rarely punished.¹⁴

In Pakistan, although Islam is the state religion, the people, in the very preamble of the Constitution, have committed themselves to creating a State “[w]herein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed.”¹⁵ The Pakistan Constitution also contains a full chapter on fundamental human rights, which include, *inter alia*, the right to life (Article 9), safeguards against arrest and detention (Article 10), the right to a fair trial (Article 10A), the inviolability of the dignity of man (Article 14), the freedom to profess religion and to manage religious institutions (Article 20), and the equality of citizens (Article 25).¹⁶

The fundamental right of religious freedom is of particular significance because, in Pakistan, there are various sects of Islam and believers of religions other than Islam. The founder of the country, Quaid-e-Azam Muhammad Ali Jinnah, was conscious of the State’s pluralistic complexion. In his first speech to the Constituent Assembly he declared:

You are free; you are free to go to your temples, you are free to go to your mosques or to any other place of worship in this State of Pakistan. You may belong to any religion or caste or creed—that has nothing to do with the business of the State.¹⁷

Despite this vision of the founder of the country and the textual guarantees in the Constitution, minorities in Pakistan have at times been subjected to discrimination and violence. In such situations, courts have exercised their role in the enforcement of the rule of law. A recent example of this is a case that I, as Chief Justice of Pakistan,

14. Thomas Reese, *Religious Freedom is Under Attack Around the World*, NAT’L CATH. REP. (Apr. 30, 2015), <https://www.ncronline.org/blogs/faith-and-justice/religious-freedom-under-attack-around-world>.

15. PAKISTAN CONST. pmbl.

16. PAKISTAN CONST. ch. I.

17. Muhammad Ali Jinnah, President of Pakistan, Address Before the Constituent Assembly of Pakistan (Aug. 11, 1947), http://www.pakistani.org/pakistan/legislation/constituent_address_11aug1947.html.

took *suo motu* notice of such incidents and authored the judgment.¹⁸ The proceedings were initiated via (1) “a letter received from Justice Helpline, an NGO, regarding an attack on a Church in Peshawar in which 81 persons died” and the culprits had still not been brought to justice nor had the victims been compensated; and (2) a newspaper report “that the Kalash Tribe and Ismaeli’s in Chitral were being coerced to convert to a different sect within Islam or face death.”¹⁹ The Pakistani Supreme Court, after hearing State functionaries and minority committee members, gave a detailed judgment. The judgment begins with an inspirational quote from the Prophet Muhammad (PBUH):

All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over [a] black nor a black has any superiority over a white except by piety (taqwa) and good action.²⁰

The court held that religion cannot be defined in rigid terms and that freedom of religion is a comprehensive term that includes freedom of conscience, freedom of thought, freedom of expression, and freedom of belief and faith.²¹ The court went on to add that this right is available to each citizen and is multidimensional—it is the right to profess, practice, or propagate his or her religious views, even against the prevailing or dominant views of his or her own religious denomination or sect.²²

Expounding on the international dimension of this right the court said:

The fundamental right to freedom of religion and belief was articulated at the international level by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. These human rights norms then serve as moral checks and efforts are continually being made to incorporate these rights into domestic laws. The Supreme Court of Pakistan has

18. See *Suo moto* actions regarding suicide bomb attack on the Church in Peshawar and regarding threats being given to Kalash tribe and Ismailies in Chitral, (2014) 66 PLD (SC) 699, 705 (Pak.) [hereinafter *Suo moto* actions].

19. *Id.*

20. *Id.*

21. See, e.g., *id.* at 716–17 (discussing the definition and usage of “freedom of religion”).

22. *Id.*

invoked International Human Rights norms in numerous cases. It is evident from a bare reading of these [constitutional] provisions that the freedom of conscience cannot be separated from the freedom of religion. While the freedom of conscience is an individual right, the right to religion has both individual and community based connotations. Sub-article (a) of Article 20 of the Constitution also recognizes the individual and communal nature of the right to freedom of religion as it addresses “every citizen” and “every religious denomination and every sect thereof” and one aspect cannot trump the other. Moreover, the individual aspect to the freedom of religion applies both against inter-religion and intra-religion conflict.²³

While interpreting Article 20 of the Pakistani Constitution, the court held that the right to religious freedom is available to all, whether Muslims or non-Muslims.²⁴ The judgment was called a “judicial bombshell” by a jurist²⁵ and while explaining its implications he added:

In other words, Muslims don’t have a superior or special right to belief over non-Muslims. Rather, there is an ‘equal religious protection clause’ under Article 20 for all Pakistani citizens. Secondly, ‘the right to profess and practise [sic] is conferred not only on religious communities but also on every citizen’. In other words, every citizen can exercise such a right to belief against the dominant religious views of his own community too. Thirdly, within religious communities, sects have a right to belief against the views of their own co-religious denominations Fourthly, the right to belief has ‘three distinct rights, ie [sic] right to profess, right to practice and right to propagate.’²⁶

Conscious of the fact that Islam is the State religion and that the country was carved out from undivided India where Muslims were a minority and were seeking protection of their rights against the Hindu majority, I reminded the nation in my judgment that, “the very genesis

23. *Id.* at § 14 (footnote omitted).

24. *Id.* at 717.

25. Faisal Siddiqi, *Freedom of Belief*, DAWN (Aug. 9, 2014), <https://www.dawn.com/news/print/1124156>.

26. *Id.*

of our country is grounded in the protection of religious rights of all, especially those of minorities.”²⁷ Explaining the international and historical dimensions of the right to religious freedom, the court referred to Article 18 of the 1966 U.N. Covenant on Civil and Political Rights and writings of intellectuals like John Stuart Mill and Voltaire to emphasize the point that the right to religious freedom is well established historically and globally and any denial would violate accepted human rights norms of the 21st century.²⁸ I intentionally referred to the resolution of apology passed by the Parliament of British Columbia to express their regret for the discrimination meted out to the Chinese immigrants in Canada.²⁹ My intention was to send a message that if a community or a nation has collectively wronged a minority, then it should have the moral courage to apologize so that the society may move on in harmony and tolerance. It was also meant to demonstrate how parliaments can take initiative and exert liberating influence in society.

Referring to the heavy toll that humans had to pay historically on account of religious intolerance and the lessons learned, the court observed:

The political aspect of religion has been rife with conflicts, extremism and a claim of monopoly of truth which historically has not been without its toll of human suffering. A step towards resolution is promoting religious tolerance, which should be the underlying objective in interpreting the right to freedom of religion. In the subcontinent, the individual right of freedom to religion has occasionally been trumped by the right of the community, as in the . . . Indian case of Sardar Syedna. It is imperative that the right to freedom of religion be restored as an individual and inalienable right, while concurrently preserving and protecting this right at a communal level, where the latter does not infringe on the former. For, according to French writer, historian and philosopher Voltaire in his ‘Treatise on Tolerance’ (1763), “religion is instituted to make

27. *Suo moto actions*, (2014) 66 PLD (SC) at § 9.

28. *Id.* at 716–17, 719.

29. *Id.* at 724–25; Dirk Meissner, *Clark Apologizes for B.C.’s Historical Wrongs Against Chinese Immigrants*, GLOBE & MAIL (May 15, 2014), <https://beta.theglobeandmail.com/news/british-columbia/clark-apologizesforbchistoricalwrongsagainstchineseimmigrants/article18693361/?ref=http://www.theglobeandmail.com&>.

us happy in this life and the next. But what is required to make us happy in the life to come” To be just [sic].”³⁰

Making a comparative analysis of how judiciaries in different jurisdictions have dealt with the rights of minorities, ethnic or religious, the court said:

In 1954 the U.S. Supreme Court in the case reported as [*Brown v. Board of Education of Topeka*] abolished segregation in schools and ensured implementation of its judgment by directing the dispatch of federal troops to the concerned State. In the said judgment, the U.S. Supreme Court came a long way from its earlier judgment in [*Dred Scott v. Sandford*] where a colored was refused a status of a citizen.³¹

The court was of the view that minorities in Pakistan, as in several transitional democracies, are a vulnerable section of society because of their social and economic limitations. They cannot effectively espouse their grievances and, to them, the constitutional guarantees are mere hollow promises signifying nothing in practical terms. They and their places of worship have been subjected to violence. Their dilemma is exasperated both by the absence of sufficient political will to provide remedies and by a weak law enforcement machinery. This is further compounded by a lack of empathy in the general public. In such a milieu, judicial intervention pursuant to Article 184(3) of the Pakistani Constitution³² was deemed imperative, and any refusal would be tantamount to abdication of our constitutional mandate as custodians of people’s rights.

Courts have traditionally been viewed as conservative institutions that preserve the status quo. But I have always believed that superior courts, particularly the supreme courts, in a democracy can be catalysts for social change through such judgments. The seminal judgments of the U.S. Supreme Court in *Brown* and of the Pakistani Supreme Court case that I have been discussing underpin the belief that the judiciary can eliminate discrimination and bias through its judgments and

30. Suo moto actions, (2014) 66 PLD (SC) at 719.

31. *Id.* at 724 (citation omitted).

32. PAKISTAN CONST. art. 184, § 3 (“Without prejudice to the provisions of Article 199[,] the Supreme Court shall[,] if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of part II is involved, have the power to make an order of the nature mentioned in the said Article.”).

thereby promote tolerance, which is one of the important elements of democracy.

The supreme court in a democracy must protect liberal institutions. Any declarations made, and the principles of law laid down by the court, have a trickledown effect on other institutions of the State. The directions in the *suo motu* judgment (1) for the creation of a task force to promote religious tolerance, (2) to develop appropriate curricula in schools and colleges consistent with constitutional values, (3) to eliminate hate speech from social media, (4) to constitute a National Council for Minority Rights, and (5) to establish a special force to protect places of worship of minorities,³³ were all geared toward sensitizing the Muslim majority and promoting liberal institutions, without which democracy remains dysfunctional.

The supreme court has an educative role to play in a transitional democracy. It should act as a pedagogical institution, disseminating constitutional aspirations and explaining the role of various institutions, thereby promoting constitutional literacy among the public. People's awareness of constitutional values and issues is essential to preserve democratic values because it is the people who must protect their rights, liberties, and honor. For, as Justice Learned Hand rightly said, "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it."³⁴

The anthem of the Supreme Court of Pakistan, which I wrote, titled "Justice For All," was made part of the judgment for two reasons. First, it is a poignant reminder of the vision of the founder of the country and the ideals which reverberated the movement for the creation of Pakistan. Second, the anthem cautions the nation that if the values which went into the making of the country are not lived by, the nation would bear a heavy cost. This anthem is perched along with its mosaic rendering on the full wall beside the entrance gate of the Pakistani Supreme Court. The anthem reads as follows:

33. *Suo moto actions*, (2014) 66 PLD (SC) at 727–28.

34. Learned Hand, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (1952).

JUSTICE FOR ALL

Judicial Anthem

*“The toil, the sweat, the tears and the blood, Make up the labor
for the land begot.*

*The freedom is won, but the chains are clung, There are miles
to cover,*

*The voyage is tough and the weather is rough, The odyssey begins;
The Founder declares his vision Of Democracy, Faith, Tolerance
and Compassion.*

Discriminate the State shall not

*Thou may belong to any religion, creed or caste. Oh! The vision is
distorted, the march is thwarted, Castles in the sand, babes in the woods,*

*Recipes of fall abound in the books. The nation is cut, the land
is bled*

*When the message is lost, a die is cast, The wages are loud, Beware
of the clouds.*

*Long live the message, the Lamp and the rays That glow The
Temple, which holds the scales, Pinning the dreams, the hopes and
the oath*

Of Justice for All.”³⁵

The judgment strongly canvasses that the vision of the founder of the nation, as reflected in the poem and the nation’s constitutional rights and values, are in tune with the pluralistic world, and that people must honor and live by those as members of one human race. The judgment continues:

The cherished goal of creating a more pluralistic society where fundamental rights are respected would continue to elude us unless we realize that we are living in a world of globalized interdependence, a world of interconnectivity, of cyber space, of shrunken distances, of cross border migration, and a world of rapidly changing cultural identities. We are all members of one race of humans with common challenges, and we cannot confront these challenges without forging a common alliance. This paradigm shift in the world around us can be achieved at the international and domestic levels only by discouraging sectarian, radical and ethnic

35. Suo moto actions, (2014) 66 PLD (SC) at 726.

biases which are violative of shared values and fundamental rights, and by the promotion of and strict compliance with these values and rights.³⁶

But religious freedom and rights have their limits in a pluralistic society governed by law and a constitution. These limitations are pertinent because countries have frequently been confronted with conflicts between religious freedom and the fundamental values of their constitutions. In Pakistan, a typical case of this nature was the Hasba Bill case wherein the Provincial Legislature of Khyber Pakhtunkhwa passed a law popularly known as Hasba Bill, i.e. a law that applied a medieval system of civil administration and accountability based on a rather myopic view of Islamic tenets. The federal government, on account of political expediency, did not intervene and instead filed a reference in the Supreme Court of Pakistan, wherein the court declared the offending provisions of the Hisba Bill to be ultra vires of the fundamental rights provisions of the Pakistani Constitution and directed the governor of the province not to grant assent.³⁷ The judgment³⁸ is important for three reasons: (1) it asserted that religious freedom is not absolute, and it has to conform to other laws and the constitution; (2) it demonstrated that in the event of a conflict between a religious law and the fundamental right provisions of the constitution, the latter shall prevail; and (3) it was a case in which political issues were brought to the judiciary because the political leadership was wary of the extreme right. It could not resolve the issue in the political domain because it feared backlash from the fundamentalist lobby, so it filed a reference in court. (A review petition filed in the Supreme Court was dismissed).³⁹

Another example of conflict between religious freedom and fundamental rights is found in a case from South Africa. In 1996 parliament banned corporal punishment in schools. The constitutionality of this statute was challenged by an association committed to the promotion of Christian education values. The body controlled about 200 schools in South Africa. The association argued

36. *Id.* at 727.

37. See Nasir Iqbal, *SC Blocks Hasba Bill*, DAWN (Dec. 16, 2006), <https://www.dawn.com/news/223645>.

38. *In re* Reference No. 2 of 2005, 57 PLD (SC) 873 (Pak.).

39. See 2007 SCMR 817 (Pak.).

that the ban violated Biblical tenets and therefore, the statute infringed upon their right to freedom of religion. The petition was dismissed both by the High Court and the Constitutional Court in South Africa.⁴⁰ The Constitutional Court found that:

“[A] multiplicity of intersecting constitutional values and interests are involved in the present matter—some overlapping, some competing,” including the right of the child to human dignity, to freedom and security of the person, and to be protected from maltreatment, neglect, abuse, or degradation. In terms of the South African Constitution, “[a] child’s best interests are of paramount importance in every matter concerning the child.”⁴¹

Before I part, I add that the judiciary alone may not be sufficient to create a society where rights are respected—there is tolerance and believers of every faith are free to live by their respective beliefs. Each one of us has a role to play. In a democracy, there is one office shared with the rest, irrespective of career choice, vocation, religion, or sectarian or ethnic affiliation. This is the office of citizen. As a citizen, you are equal regardless of the position you hold—a teacher, a doctor, an engineer, an agriculturist, an industrialist, a father, a mother, a son or a daughter. In the promotion of the values of a pluralistic society, where rights of different communities are respected, everyone has a role to play as a citizen. Countries have witnessed persecution, tyranny, and intolerance because citizens did not play this role, leaving the demagogues, the fundamentalists, and the religious zealots to have their way. We tend to forget that from womb to tomb we have a common destiny and, unless we learn the virtues of empathy and tolerance, the march of folly will continue and humanity will continue to pay the cost. With this message and hope, I take your leave and thank you all.

40. See *Christian Ed. S. Afr. v. Minister of Ed.*, 2000 (4) SA 757 (CC) (S. Afr.); *Christian Ed. S. Afr. v. Minister of Ed.*, 1999 (4) SA 1092 (SE) (S. Afr.).

41. Johan D. van der Vyver, *The Relationship of Freedom of Religion or Belief Norms to Other Human Rights*, in *FACILITATING FREEDOM OF RELIGION OR BELIEF* 85, 86 (2004) (footnotes omitted).

