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Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice

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Tayyab Mahmud

Abstract

Pakistan's successive constitutions, which enumerate guaranteed fundamental rights and provide for the separation of state power and judicial review, contemplate judicial protection of vulnerable sections of society against unlawful executive and legislative actions. This Article focuses upon the remarkably divergent pronouncements of Pakistan's judiciary regarding the religious status and freedom of religion of one particular religious minority, the Ahmadis. The superior judiciary of Pakistan has visited the issue of religious freedom for the Ahmadis repeatedly since the establishment of the State, each time with a different result. The point of departure for this examination is furnished by the recent pronouncement of the Supreme Court of Pakistan ("Supreme Court" or "Court") in *Zaheeruddin v. State*,¹ wherein the Court decided that Ordinance XX of 1984 ("Ordinance XX" or "Ordinance"), which amended Pakistan's Penal Code to make the public practice by the Ahmadis of their religion a crime, does not violate freedom of religion as mandated by the Pakistan Constitution. This Article argues that *Zaheeruddin* is at an impermissible variance with the implied covenant of freedom of religion between religious minorities and the Founding Fathers of Pakistan, the foundational constitutional jurisprudence of the country, and the dictates of international human rights law. This Article is divided into four parts. Part I presents *Zaheeruddin* and identifies its main themes, holdings, and assumptions. Part II argues that there exists in Pakistan an implied covenant of religious freedom with religious minorities based upon the pronouncements of the Founding Fathers of the State. Part III examines the three phases of judicial practice regarding the freedom of religion of religious minorities. Part IV examines the evolution, scope, and domestic applicability of international freedom of religion norms. This Article ends by drawing some broader conclusions regarding judicial practice in post-colonial settings. First, the Article concludes that because of the instability of constitutional governance in these settings; the judicial branch is insufficiently insulated from political currents. The result is that dominant political forces and ideological constructs assert a determinative influence over judicial pronouncements. Second, judicial choices, constructions, and applications of sources of applicable norms are indeterminate and contingent. Consequently, doctrinal underpinnings of judicial pronouncements are inconsistent, unpredictable, and often arbitrary. Third, by demonstrating a willingness to accommodate dominant political forces at the expense of constitutional mandates, the judiciary becomes party to the erosion of its own independence and legitimacy. This sustained erosion renders the judiciary even less equipped to fulfill its assigned constitutional role to protect fundamental rights in general, and the rights of politically vulnerable minorities in particular.

ARTICLES

FREEDOM OF RELIGION & RELIGIOUS MINORITIES IN PAKISTAN: A STUDY OF JUDICIAL PRACTICE

*Tayyab Mahmud**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.¹

INTRODUCTION

Repression of and discrimination against minorities is as old as recorded history itself.² Religious minorities are no exception to this phenomenon.³ In modern times, the search for princi-

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1. Universal Declaration of Human Rights, art. 18, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

2. The concept and definitions of a minority remain vague in social science literature. See generally Arnold M. Rose, *Minorities*, 10 INT'L ENCYCLOPEDIA SOC. SCI. 365-71 (1968); Christen T. Joanssen, *Towards Standardization of a Conceptual Scheme for Minority Group Research*, 8 ETHNICITY 121 (1981). This Article defines minorities as groups:

[N]umerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the state—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 34th Sess., at 96, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979).

3. See generally Patrick Thornberry, *Is There a Phoenix in the Ashes? International Law and Minority Rights*, 15 TEX. INT'L L.J. 421 (1980) (presenting development of international law regarding protection of minorities); Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615 (1991) (discussing role of majorities in defining minorities and majority attempts to acculturate minority ethnic community); THE PROTECTION OF MINORITIES AND HUMAN RIGHTS (Yoram Din-

ples and processes to combat repression of religious minorities has taken three complementary paths: political compromise, constitutional guarantees, and international codes of conduct. Politically, adherents of diverse religious persuasions together arrive at express or implied covenants of reciprocal respect, protection, and cooperation. Constitutionally, many basic laws provide guarantees of freedom of belief and practice of religion, and furnish means of redress when these guarantees are in jeopardy. Internationally, modern international law prescribes express codes of conduct that oblige all members of the international community to protect the fundamental human right of freedom of thought, conscience, and religion.

But political compacts, constitutional guarantees, and international normative codes are, in any given setting, only as good as their actual practice. Judicial practice related to freedom of religion of religious minorities is of particular interest to lawyers and legal scholars. How does the judiciary receive political covenants aimed at the protection of religious minorities? Are judicial pronouncements informed by express international human rights norms? Does the judiciary furnish adequate protection of constitutional guarantees? Is the judiciary sufficiently insulated from political currents to guard against potential tyranny of shifting majorities? Any exploration of these questions, of necessity, implicates the efficacy of judicial review, understood as a method of subordinating state action to higher normative principles,⁴

stein & Mala Tabory eds., 1992) (discussing conceptual and specific problems of protecting rights of minorities); JAY A. SIGLER, *MINORITY RIGHTS: A COMPARATIVE ANALYSIS* 15-19 (1983) (discussing population movement as historical root cause for minority problems); PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (1991) (discussing transition in international law from protection of minority rights to establishment of universal human rights); *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* (Catherine Brölmann et al. eds., 1993) (discussing evolution of minority rights in area of international law).

4. Judicial review is traditionally understood as the process whereby a judicial body determines the constitutionality of activity undertaken by the legislative and executive branches of government. The genesis of judicial review begins with the pronouncements of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For the theory of judicial review and its practice in different legal systems, see RONALD D. ROTUNDA ET AL., 1 *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 1.1-4 (1986); EDWARD MCWHINNEY, *JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD* 140-57 (3d ed. 1965) (discussing practice of judicial review in member states of British Commonwealth); Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CAL. L. REV. 1017 (1970) (discussing historical antecedents of judicial review and spread of judicial review from United States to numerous other countries); Mauro Cappelletti, "Who Watches the Watch-

and some broader and fundamental postulates regarding the relationship between law and society.⁵

This Article explores these questions through an examination of the practice of the superior judiciary of Pakistan as it relates to the freedom of religion and religious minorities.⁶ Pakistan's successive constitutions, which enumerate guaranteed fundamental rights and provide for the separation of state power

men?: *A Comparative Study on Judicial Responsibility*, 31 AM. J. COMP. L. 1 (1983) (discussing models of judicial review and suggesting trend toward judicial responsibility to citizens of each society).

5. The dominant paradigm regarding the relationship between law and society is that of Evolutionary Functionalism, which posits that law and society are separate social categories and that laws should be described and explained in terms of their functional responsiveness to changing social needs. See PETER STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* (1980). In modern American legal thought, the Realist School dominates the vision of evolutionary functionalism. American Realists, who posit law as being self-consciously directed towards the satisfaction of social needs, do not recognize any fundamental division between law and public policy. American Realists postulate legal autonomy only in that policymakers ought to be insulated from the pressures of short-term needs. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (characterizing "functionalism" as assault upon all dogmas and devices that cannot be translated into terms of actual experience); KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1960) (discussing conceptual and pedagogical approaches of legal realism); Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934) (presenting succinct enunciation of American realism); WILLIAM W. FISHER III ET AL., *AMERICAN LEGAL REALISM* (1993). Some contemporary interventions in legal thought, particularly those represented by critical legal studies, feminist jurisprudence, and critical race theory, further advance the realist thesis that legal forms cannot be understood apart from their social context. Because these interventions see society as stratified along class, gender, and race lines, law is seen as an instrument of coercion and legitimation. See, e.g., ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) (discussing evolution of conceptual framework of critical legal studies); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (presenting feminist critique of conventional approaches to law); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

6. The choice of Pakistan is influenced by the fact that in recent years the country has been cited repeatedly for discrimination and persecution of religious minorities. See, e.g., *Persecuted Minorities and Writers in Pakistan*, 5 NEWS FROM ASIA WATCH, Sept. 19, 1993, at 1 (citing discrimination and persecution in Pakistan on basis of religion); *Persecution of the Ahmadiyya Community in Pakistan*, 36 I.C.J. REV. 16 (1986) (reviewing passage of legislation criminalizing minority religious practices that offend religious feelings of majorities); HUMAN RIGHTS ADVOCATES, INC., *HUMAN RIGHTS IN PAKISTAN* 9-10 (1987) (reporting diminishment of judicial authority because of ordinances and orders promulgated under martial law); INTERNATIONAL COMMISSION OF JURISTS, *PAKISTAN: HUMAN RIGHTS AFTER MARTIAL LAW: REPORT OF A MISSION* (1987) (reporting inadequacy of protection of human rights); AMNESTY INTERNATIONAL, *PAKISTAN: VIOLATIONS OF HUMAN RIGHTS* 6-7 (1985) (reporting patterns and instances of human rights violations). See also AMNESTY INTERNATIONAL REPORT (1994) (documenting human rights violations in Pakistan).

and judicial review, contemplate judicial protection of vulnerable sections of society against unlawful executive and legislative actions. The record of Pakistan's superior judiciary in the area of protection of religious minorities, however, is very uneven and has gone through three distinct phases. The first phase is remarkable for its unequivocal protection of freedom of religion and religious minorities. The second phase represents a contraction of this protection through undue deference to the formal constitutional amendment process prescribed by the Constitution. The last, and current, phase is one in which the judiciary has capitulated before the ascendant forces of religious reaction and abdicated judicial protection of religious minorities. This Article examines the context, nature, and doctrinal determinants of judicial practice in all three phases.

This Article focuses upon the remarkably divergent pronouncements of Pakistan's judiciary regarding the religious status and freedom of religion of one particular religious minority, the Ahmadis.⁷ The superior judiciary of Pakistan has visited the

7. The Ahmadis are followers of Mirza Ghulam Ahmad (1835-1908), who claimed to be the promised Messiah or *Mehdi* and a successor to Muhammad, the prophet of Islam. While Ahmadis claim to be a reform movement within Islam, mainstream Muslims, for whom the finality of prophethood of Muhammad is a cardinal article of faith, consider them heretics. See generally YOHANAN FRIEDMANN, PROPHECY CONTINUOUS: ASPECTS OF AHMADI RELIGIOUS THOUGHT AND ITS MEDIEVAL BACKGROUND 1-2, 16-22, 119-126 (1989) [hereinafter FRIEDMANN]; James Robson, *The Ahmadis*, in 2 RELIGION IN THE MIDDLE EAST 349 (A.J. Arberry ed., 1969) (discussing history of Ahmadis); MUHAMMAD ZAFRULLA KHAN, AHMADIYYAT: THE RENAISSANCE OF ISLAM (1978) (presenting sympathetic exposition of Ahmadi creed); SPENCER LAVAN, THE AHMADIYAH MOVEMENT: A HISTORY AND PERSPECTIVE (1974) (discussing Ahmadi movement from a detached perspective); MAHMUD AHMAD, AHMADIYYAT, OR THE TRUE ISLAM (1951) (arguing that Ahmadis are true Muslims) [hereinafter AHMAD, AHMADIYYAT]; S. ABDULHASAN NADVI, QADIANISM: A CRITICAL STUDY (1967) (arguing that Ahmadi doctrines are false); ABU'LA MAWDUDI, THE QADIANI PROBLEM (1979) (arguing that Ahmadis are not Muslims). Central to the doctrinal conflict between Ahmadis and other Muslims is the question of *Khatm-i-Nabuwat* (cessation of prophethood). The mainstream Muslim position is that Muhammad was the last prophet of God and there can be no legitimate prophet after him. The Ahmadi position, one fraught with ambiguity, ranges from the view that Mirza Ghulam Ahmad was a prophet, to one which holds that he was a "reflector prophet," as opposed to a law-bearing and independent prophet. Still another view is that Mirza Ghulam Ahmad was not a prophet at all but a *mujaddid* (reformer). FRIEDMANN, *supra*, at 16-22. This issue is the source of schism even among the Ahmadis themselves. One group, popularly known as "Qadianis," regard Mirza Ghulam Ahmad as a prophet, whereas another group, popularly known as "Lahoris," regard him as a *mujaddid*. *Id.* Commentators note the "chronically partisan nature of the issue and its 'political sensitivity' in Pakistan." Charles H. Kennedy, *Towards the Definition of a Muslim in an Islamic State: The Case of Ahmadiyya in Pakistan*, in RELIGIOUS & ETHNIC MINORITY POLI-

issue of religious freedom for the Ahmadis repeatedly since the establishment of the State, each time with a different result. The point of departure for this examination is furnished by the recent pronouncement of the Supreme Court of Pakistan ("Supreme Court" or "Court") in *Zaheeruddin v. State*,⁸ wherein the Court decided that Ordinance XX of 1984 ("Ordinance XX" or "Ordinance"),⁹ which amended Pakistan's Penal Code to make the public practice by the Ahmadis of their religion a crime, does not violate freedom of religion as mandated by the Pakistan Constitution.

This Article argues that *Zaheeruddin* is at an impermissible variance with the implied covenant of freedom of religion between religious minorities and the Founding Fathers of Pakistan, the foundational constitutional jurisprudence of the country, and the dictates of international human rights law. This Article is divided into four parts. Part I presents *Zaheeruddin* and identifies its main themes, holdings, and assumptions. Part II argues that there exists in Pakistan an implied covenant of religious freedom with religious minorities based upon the pronouncements of the Founding Fathers of the State. Part III examines the three phases of judicial practice regarding the freedom of religion of religious minorities. Part IV examines the evolution, scope, and domestic applicability of international freedom of religion norms.

This Article ends by drawing some broader conclusions regarding judicial practice in post-colonial settings. First, the Article concludes that because of the instability of constitutional governance in these settings, the judicial branch is insufficiently insulated from political currents. The result is that dominant political forces and ideological constructs assert a determinative influence over judicial pronouncements. Second, judicial choices, constructions, and applications of sources of applicable

TICS IN SOUTH ASIA 71 (Dhirendra Vajpeyi & Yogendra K. Malik eds., 1989) [hereinafter Kennedy]. The air of intimidation and fear that surrounds this question is evidenced by the fact that, with the exception of the Pakistan Human Rights Commission, not many non-Ahmadi voices have been raised publicly in Pakistan to question the persecution of Ahmadis. HUMAN RIGHTS COMMISSION OF PAKISTAN, STATE OF HUMAN RIGHTS IN PAKISTAN 1993 (1994).

8. *Zaheeruddin v. State*, 26 S.C.M.R. (S.Ct.) 1718 (1993) (Pak.).

9. Ordinance XX of 1984: Anti-Islamic Activities of Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984, 36 P.L.D. 102 (1984) (Pak.) [hereinafter Ordinance XX of 1984].

norms are indeterminate and contingent. Consequently, doctrinal underpinnings of judicial pronouncements are inconsistent, unpredictable, and often arbitrary. Third, by demonstrating a willingness to accommodate dominant political forces at the expense of constitutional mandates, the judiciary becomes party to the erosion of its own independence and legitimacy. This sustained erosion renders the judiciary even less equipped to fulfill its assigned constitutional role to protect fundamental rights in general, and the rights of politically vulnerable minorities in particular.

I. THE ZAHEERUDDIN CASE AND ORDINANCE XX

Zaheeruddin is the Supreme Court of Pakistan's response to appeals by Ahmadis, challenging their criminal prosecution and penalization under Ordinance XX on the ground that the Ordinance violated, *inter alia*, their right to freedom of religion, as mandated by Article 20 of the Constitution.¹⁰ Article 20 of the Constitution provides that "[s]ubject to law, public order and morality: (a) every citizen shall have the right to profess, practice and propagate his religion," and that "(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions."¹¹

Entitled "The Anti-Islamic Activities of the Qadiani Group, Lahori Group, and Ahmadis (Prohibition and Punishment) Ordinance, 1984,"¹² Ordinance XX purports that "it is expedient to amend the law to prohibit the Qadiani group, Lahori group, and Ahmadis from indulging in anti-Islamic activities." Ordinance XX amended the Pakistan Penal Code to make the public

10. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1733 (Pak.). Ahmadis also challenged Ordinance XX on the grounds that it violated Article 19 (providing for freedom of speech) and Article 25 (providing for equality of citizens and equal protection of law) of the Pakistan Constitution. *Id.*

11. PAK. CONST. (1973) art. 20, reprinted in XIV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1986). The two earlier Pakistan constitutions, those of 1956 and 1962, contained identical language. See SAFDAR MAHMOOD, CONSTITUTIONAL FOUNDATIONS OF PAKISTAN 251-52, 631 (1990) [hereinafter MAHMOOD, CONSTITUTIONAL FOUNDATIONS].

12. Ordinance XX of 1984, 36 P.L.D. at 102 (Pak.). The designations "Qadiani" and "Lahori" refer to the two schools of thought among the Ahmadis. See FRIEDMANN, *supra* note 7, at 16-22. See generally Linda J. Berberian, *Pakistan Ordinance XX of 1984: International Implications on Human Rights*, 9 LOY. L.A. INT'L & COMP. L.J. 661, 680-87 (1987) (analyzing origin and international human rights implications of Ordinance XX).

practice of the Ahmadi religion a crime.¹³

In *Zaheeruddin*, the minority opinion of Justice Shafiur Rehman found much of the Ordinance *ultra vires* of the Constitution.¹⁴ The majority opinion by Justice Abdul Qadeer Chaudhry, however, dismissed all appeals and upheld the whole of Ordinance XX.¹⁵ The bulk of the majority opinion is devoted to establishing the proposition that Ahmadis are not Muslims because their beliefs and theological doctrines are at variance with

13. Ordinance XX of 1984, 36 P.L.D. at 103 (Pak.). The substance of the Ordinance is as follows:

298-B. *Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places.*- (1) Any person of the Qadiani group or the Lahori group (who call themselves Ahmadis or by any other name) who by words, either spoken or written, or by visible representation,-

(a) refers to or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (peace be upon him), as 'Ameer-ul-Mumineen', 'Khalifa-tul-Mumineen', 'Khalifa-tul-Muslimeen' 'Sahaabi' or 'Razi Allah Anho';

(b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as 'Ummul-Mumineen';

(c) refers to, or addresses, any person, other than a member of the family (Ahle-bait) of the Holy Prophet Muhammad (peace be upon him), as Ahle-bait; or

(d) refers to, or names, or calls, his place of worship as 'Masjid';

shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

(2) Any person of the Qadiani group or Lahori group (who call themselves 'Ahmadis' or by any other name) who by words, either spoken or written, or by visible representation, refers to the mode or form of call to prayers followed by his faith as 'Azan', or recities [sic] Azan as used by the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

298-C. *Person of Qadiani group, etc., calling himself a Muslim or preaching or propagating his faith.* Any person of the Qadiani group or the Lahori group (who call themselves "Ahmadis" or by any other name), who, directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

Id.

14. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1739, 1742-44, 1746-49 (Pak.). Specifically, Justice Rehman found clause (d), subsection (2) of section 298-B, and portions (c) and (d) of section 298-C *ultra vires* of articles 19, 20, and 25 of the Constitution. *Id.*

15. *Id.* Justices Muhammad Afzal Lone and Wali Muhammad Khan co-signed the opinion, whereas Justice Saleem Akhter wrote a separate concurring opinion. *Id.*

the beliefs of the majority of Muslims.¹⁶ The Court emphasized this point notwithstanding the fact that appellants' counsel had made it clear that this issue was not before the Court, and that the Court must provide the Ahmadis with Article 20 protection irrespective of their religious classification. The Court reasoned that in prohibiting the use of distinguishing characteristics of Islam by the Ahmadis, Ordinance XX was in line with statutes that regulate commercial activity, target deceptive trade practices, and protect trademarks.¹⁷ The Court then noted that, "[f]or example, the Coca[-]Cola Company will not permit anyone to sell, even a few ounces of his own product in his own bottles or other receptacles, marked Coca[-]Cola, even though its price may be a few cents."¹⁸ The Court acknowledged that religious freedom is not confined to religious beliefs, but rather extends to "essential and integral" religious practices.¹⁹ It claimed, however, that the appellants had not explained how the prohibited epithets and public rituals were an essential part of their religion.²⁰ The crux of the problem, according to the Court, was that the Ahmadis, whom the Court characterized as "an insignificant minority"²¹ and "hypersensitive,"²² use epithets:

[I]n a manner which to the Muslim mind looks like a deliberate and calculated act of defiling and desecration of their holy personages; [and which] is a threat to the integrity of 'Ummah' [Islamic community] and [the] tranquillity of the nation, and it is also bound to give rise to a serious law and order situation, like it happened many a time in the past.²³

16. *Id.* at 1749, 1765-68, 1775-77. The Court used quotations from leading Ahmadi texts to establish their variance with fundamental tenets of Muslims' beliefs. *Id.*

17. *Id.* at 1751-53. To maintain this line of reasoning, the Court relied upon section 20 of the Indian Company Law, Chapter X of the Trade and Merchandise Marks Act of 1958 of India, Chapter XVII of the Indian and Pakistan Penal Codes, English Company Law, and *Bollinger v. Costa Brava Wine Co., Ltd.*, 3 W.L.R. 966 (1959) (U.K.). *Id.* at 1752. Pakistan's judiciary, like that of other post-colonial common law jurisdictions, treats case law and other authoritative texts from other common law jurisdictions as strong persuasive authority. Pakistan's constitutional cases are rife with citations to Indian, English, and American cases and treatises. See generally H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987); Anne-Marie Slaughter, *A Typology of Trans-judicial Communication*, 29 U. RICH. L. REV. 99 (1995).

18. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1753-54 (Pak.).

19. *Id.* at 1762.

20. *Id.* at 1763.

21. *Id.* at 1768.

22. *Id.* at 1779.

23. *Id.* at 1765. According to the Court, allowing Ahmadis to perform their rituals

In interpreting the phrase "subject to law" in Article 20 of the Constitution, the Court rejected the distinction made by the appellant between positive law and Islamic law.²⁴ The Court took the position that due to the incorporation of the Objectives Resolution²⁵ as a substantive part of the Constitution in 1985,²⁶ injunctions of Islam as contained in the Qur'an and *Sunnah* are adopted as "the real and the effective law," and "are now the positive law."²⁷ The Court claimed that due to this change

publicly would be "like permitting civil war." *Id.* at 1777. The Court assured that "[i]t is not a mere guesswork. It has happened, in fact many a time, in the past, and had been checked at cost of colossal loss of life and property . . ." *Id.* at 1777-78. The Court then invited the public to review the REPORT OF THE COURT OF INQUIRY CONSTITUTED UNDER PUNJAB ACT II OF 1954 TO ENQUIRE INTO THE PUNJAB DISTURBANCES OF 1953 (1954) [hereinafter COURT OF INQUIRY REPORT]. In seeking support for its finding from the COURT OF INQUIRY REPORT, the *Zaheeruddin* Court grossly misrepresented the findings and conclusions of the Report. Compare COURT OF INQUIRY REPORT, *supra*, at 239-58 (finding anti-Ahmadi leaders responsible for law and order breakdown in 1962-53) with *Zaheeruddin*, 26 S.C.M.R. (S. Ct.) at 1777-78, (holding Ahmadiis responsible for law and order breakdown in 1952-53).

24. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1757-69 (Pak.). The Court referred extensively to the case law of other common law jurisdictions to establish the validity of the limits upon freedom of religion. *Id.* Among cases cited were: *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Reynolds v. United States*, 98 U.S. 145 (1878); *Hindu Religious Endowments v. Sri Lakshmindra*, 1954 A.I.R. (S.Ct.) 282 (India); *Hamilton v. Regents of Univ. of California*, 293 U.S. 245 (1934); *Commonwealth v. Plisted*, 148 Mass. 375 (1889). *Id.* at 1757-69. See also T.K. TOPE, CONSTITUTIONAL LAW OF INDIA 224-236 (2d ed. 1992) (discussing freedom of religion in India).

25. The Objectives Resolution, adopted in 1949 by the first Constituent Assembly of Pakistan, was intended to provide guiding principles for the country's constitution. See Mahmood, *Constitutional Foundations*, *supra* note 11, at 46 (providing text of resolution). The resolution also represented a compromise between religious and secular political forces, providing that "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 and the *Sunna*." *Id.* The Resolution formed the preamble of the three successive constitutions of the country.

26. In 1985, by virtue of the Eighth Amendment to the 1973 Constitution, orchestrated by the country's third martial law regime, the government designated the Resolution a "substantive part of the Constitution." See PAK. CONST. (1973) art. 2-A. See also Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, 1993 UTAH L. REV. 1225, 1282-94 (1993) (detailing context and nature of Eighth Amendment) [hereinafter Mahmud, *Praetorianism*].

27. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1774 (Pak.). The Court considered misplaced the appellants' reliance on: *Asma Jilani v. Gov't of the Punjab*, 1972 P.L.D. (S.Ct.) 139 (Pak.); *Ali v. State*, 1975 P.L.D. (S.Ct.) 506 (Pak.); *Pakistan v. United Sugar Mills, Ltd.*, 1977 P.L.D. (S.Ct.) 397 (Pak.); and *Fauji Foundation v. Shamimur Rehman*, 1983 P.L.D. (S.Ct.) 457 (Pak.). *Id.* In all of these cases, the Court held that the Objectives Resolution, which formed part of the preamble of the Constitution, was not a supra-constitutional directive that could override other provisions of the Constitution.

"[t]he power of judicial review of the superior Courts also got enhanced,"²⁸ and "every man-made law must now conform to the Injunctions of Islam as contained in Qur'an and Sunnah Therefore, even the Fundamental Rights as given in the Constitution must not violate the norms of Islam."²⁹ The Court went on to say:

Anything, in any fundamental right, which violates the Injunctions of Islam thus must be repugnant. It must be noted here that the Injunctions of Islam, as contained in Qur'an and the Sunnah, guarantee the rights of the minorities also in such a satisfactory way that no other legal order can offer anything equal.³⁰

The Court collapsed any distinction between state and private acts when it designated the declaration of Ahmadis as non-Muslims by the Constitution of Pakistan as an excommunication.³¹ The Court noted that "the right to oust dissidents has been recognised, in favour of the main body of a religion or a denomination, by the Courts."³² The Court wondered why the Ahmadis "do not . . . coin their own epithets etc.,"³³ and then

Id. The Court relied instead on *Pakistan v. Public at Large*, 1987 P.L.D. (S.Ct.) 304 (Pak.), and *Pakistan v. N.W.F.P.*, 1990 P.L.D. (S.Ct.) 1172 (Pak.), in which the Court held that due to the incorporation of the Objectives Resolution into the substantive part of the Constitution, legislation may be tested for repugnancy with the Qur'an and Sunnah. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1774 (Pak.).

28. *Id.* at 1773.

29. *Id.* at 1775.

30. *Id.*; contra Abdullahi A. An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13 (1990); Abdullahi A. An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 (1987); Abdullahi A. An-Na'im, *Civil Rights in the Islamic Constitutional Tradition: Shared Ideals and Divergent Regimes*, 25 J. MARSHALL L. REV. 267 (1992); Abdullahi A. An-Na'im, *Religious Minorities Under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1 (1987); ANN E. MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* (1991) [hereinafter MAYER, *ISLAM AND HUMAN RIGHTS*].

31. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1768-70 (Pak.); see Kennedy, *supra* note 7, at 90-92 (discussing designation of Ahmadis as non-Muslims); ANWAR H. SYED, *THE DISCOURSE AND POLITICS OF ZULFIKAR ALI BHUTTO 199-200* (1992) [hereinafter SYED, *DISCOURSE AND POLITICS OF BHUTTO*].

32. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1768 (Pak.). The Court cited the Indian case of *Sardar Syedna Taher Saifudin Sahib v. State of Bombay*, 1962 A.I.R. (S.Ct.) 853 (India), and the Privy Council case of *Hassanali v. Mansoorali*, 1948 A.I.R. (P.C.) 66 (India), both of which concern the right of religious denominations to excommunicate their members. *Id.*

33. *Id.* at 1754. The Court added:

Do not they realise that relying on the 'Shaairs' and other exclusive signs, marks and practices of other religions will betray the hollowness of their own

opined that it did “not think that the Ahmadis will face any difficulty in coining new names, epithets, titles and descriptions for their personages, places and practices.”³⁴

One should note the polemical tone of the judgment and the Court’s repeated use of rhetorical questions. For example, the Court asked, “[c]an then anyone blame a Muslim if he loses control of himself on hearing, reading or seeing such blasphemous material as has been produced by Mirza Sahib?”³⁵ The Court painted the issue as one of law and order, and upheld Ordinance XX on the ground that “if an Ahmadi is allowed by the administration or the law to display or chant in public, the Shaair-e-Islam’, it is like creating a Rushdi’ [sic] out of him. Can the administration in that case guarantee his life, liberty and property and if so at what cost?”³⁶ The Government itself was made a target of polemics with the observation that:

[I]n this Ideological State, the appellants, who are non-Muslims want to pass off their faith as Islam[.] It must be appreciated that in this part of the world, faith is still the most precious thing to a Muslim believer, and he will not tolerate a Government which is not prepared to save him of such deceptions or forgeries.³⁷

Zaheeruddin rests on several questionable and unsubstanti-

religion. It may mean in that event that their new religion cannot progress or expand on its own strength, worth and merit but has to rely on deception.

Id.

34. *Id.* at 1779.

35. *Id.* at 1777. Mirza Sahib is a reference to Mirza Ghulam Ahmad. See *supra* note 7 and accompanying text (discussing Ahmadi movement and role of Mirza Ghulam Ahmad).

36. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1777 (Pak.). This reference is to Salman Rushdie, author of the novel *THE SATANIC VERSES* (1988), and stems from the fact that many mainstream Muslims protested publication of the work, which they considered blasphemous. M.M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153, 153-57 (1993). Rushdie was condemned to death by Iran’s supreme leader, Ayatollah Khomeini, and a price was put on his head by zealous Iranians. *Id.* at 154. These actions forced Rushdie to go into hiding under the protection of British authorities, a situation that has continued for the last six years. *Id.* at 159. On the Rushdie affair, see generally TIMOTHY BRENNAN, *SALMAN RUSHDIE AND THE THIRD WORLD: MYTHS OF THE NATION* (1989); Akeel Bilgrami, *Rushdie & The Reform of Islam*, 8 GRAND STREET 170 (1989); Akeel Bilgrami, *Rushdie, Islam and Postcolonial Defensiveness*, 4 YALE J. CRITICISM 301 (1990); Talal Asad, *Ethnography, Literature, and Politics: Some Readings and Uses of Salman Rushdie’s The Satanic Verses*, 5 CULTURAL ANTHROPOLOGY 239 (1990).

37. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1754 (Pak.).

ated assumptions and propositions, some express and others implied. These include: (i) Islamic law or *Shari'ah* is the supreme law of the land, and all legislation, including the Constitution, must yield to it; (ii) Islamic law is a self-evident and fixed normative code, one that can be deployed without any revision or development to seek answers to all problems confronting a state in modern times, including issues of constitutional governance and fundamental individual rights; (iii) because of the incorporation of the Objectives Resolution as a substantive part of the Constitution, much of the foundational jurisprudence of the Court regarding the freedom of religion stands overruled; (iv) the historical record of the independence movement and pronouncements of the Founding Fathers of Pakistan about religious freedom and the rights of religious minorities are not relevant to a judicial resolution of the issue at hand; (v) in a Muslim-majority state, no protection needs to be provided to religious beliefs and practices which are out of step with, and offend, the majority; and (vi) the dictates of international human rights law must yield to the pronouncements of Islamic law and are thus irrelevant with respect to questions regarding the freedom of religion in a Muslim state. These assumptions will now be examined in light of the implied covenant between religious minorities and the Pakistan Movement, Pakistan's foundational constitutional jurisprudence, and international human rights law.

II. *THE IMPLIED COVENANT BETWEEN RELIGIOUS MINORITIES AND THE PAKISTAN MOVEMENT*

The express guarantees for freedom of belief and practice of religion, rule of law, due process, equal protection, and a progressive legislative agenda, proffered by the leadership of the Pakistan Movement, constitute an implied social covenant with religious minorities in Pakistan. Because this implied covenant was expressly incorporated by the Founding Fathers into the foundational legislative history of the country, the judiciary must treat this covenant as a doctrinal determinant regarding the nature and the scope of religious freedom for religious minorities in Pakistan.

Before examining the above pronouncements by Pakistan's Founding Fathers, it is important to note that they were issued within the context of "the ideological schizophrenia permeating

the Pakistan Movement."³⁸ While the demand for the partition of British India into two separate states was based upon the notion that the Muslims of India constituted a distinct nation, and religious rhetoric was often used to justify this demand,³⁹ the leaders of the All India Muslim League ("AIML"),⁴⁰ who had only tangential contact with religion, were influenced strongly by secular liberal thought and often advocated the separation of religion and politics.⁴¹ Historians note the "obvious contradiction in the demand for a separate, but secular, Muslim State,"⁴² and posit that the movement for Pakistan "can be perfectly well explained without reference to Islam, though not without reference to Muslims."⁴³ Apart from the personal backgrounds and worldviews of the AIML leadership, and the ambiguous distinctions between an Islamic and a Muslim polity, two inescapable considerations defined the AIML position regarding the rights of religious minorities. First, Muslims themselves constituted a religious minority in an undivided India. Even up to 1946, one year before the partition of India, the AIML had not abandoned

38. OMAR NOMAN, *THE POLITICAL ECONOMY OF PAKISTAN 1947-85*, at 3 (1988) [hereinafter NOMAN].

39. See SHARIF AL MUJAHID, *QUAID-I-AZAM JINNAH: STUDIES IN INTERPRETATION* 236 (1981) (quoting Jinnah as saying "Islam is our guide and complete code of life"); KHALID B. SAYEED, *PAKISTAN: THE FORMATIVE PHASE 1857-1948*, at 202-06 (2d ed. 1968) [hereinafter SAYEED, PAKISTAN] (discussing use of religious symbols and of religious and spiritual leaders by AIML to influence electoral results); DAVID GILMARTIN, *EMPIRE AND ISLAM: PUNJAB AND THE MAKING OF PAKISTAN 169-73* (1988). Gilmartin notes that Jinnah had previously advocated the adoption of the Shariat Application Act of 1937 in the Central legislative Council of India. *Id.* at 169-73. Admittedly, the author notes, this was done within the context of the increasingly communal character of Indian politics at the time. *Id.*

40. Formed in 1906, the AIML was the major political party that articulated the political interests of Indian Muslims under British colonial rule, and that spearheaded the drive to create a separate state of Pakistan constituting Muslim majority areas of India. On the AIML, see generally SAYEED, PAKISTAN, *supra* note 39, at 176-219; FARZANA SHAIKH, *COMMUNITY AND CONSENSUS IN ISLAM: MUSLIM REPRESENTATION IN COLONIAL INDIA, 1860-1947* (1989) [hereinafter SHAIKH, COMMUNITY AND CONSENSUS].

41. See HECTOR BOLITHO, *JINNAH: CREATOR OF PAKISTAN* (1954) [hereinafter BOLITHO] (discussing secular and liberal worldview of AIML leader); STANLEY WOLPERT, *JINNAH OF PAKISTAN* (1984) [hereinafter WOLPERT, JINNAH] (discussing phases of secular nationalist politics by AIML leaders); SAAD R. KHAIRI, *JINNAH REINTERPRETED: THE JOURNEY FROM INDIAN NATIONALISM TO MUSLIM STATEHOOD* (1995) (analyzing shift from secular to communal politics by AIML leaders).

42. NOMAN, *supra* note 38, at 4.

43. BINDER, *supra* note 23, at 63; see generally Barbara Metcalf, *The Case of Pakistan, in RELIGION AND POLITICS IN THE MODERN WORLD* (Peter H. Merkl & Ninian Smart eds., 1983).

its quest for a constitutional structure that could accommodate Muslim interests within a united India, a political context within which the Muslims would remain a religious minority.⁴⁴ This necessitated constitutional guarantees for the protection of religion and other interests of religious minorities. Second, if India were partitioned with Muslim majority areas constituting a separate state, large numbers of Muslims would remain in Hindu majority areas. This required the AIML "to negotiate constitutional safeguards for Muslim minorities in the rest of India in exchange for those it would confer on the large non-Muslim populations residing within the territories of the Muslim state."⁴⁵

Guarantees of freedom of religious belief and practice were issued by the AIML throughout the phase of the struggle for self-rule in India.⁴⁶ As the British took their first serious steps toward a new constitutional arrangement, following the work of the Simon Commission in 1927,⁴⁷ the AIML, in its first formal constitutional proposals, included an express provision for religious freedom and even demanded "a further guarantee in the constitution that on communal matters no bill or resolution would be considered or passed if a three-fourths majority of the members of the community concerned were opposed to it."⁴⁸ Again, when Mohammad Ali Jinnah⁴⁹ summarized the Muslim position on proposed constitutional changes in his famous Fourteen Points,

44. See AYESHA JALAL, *THE SOLE SPOKESMAN: JINNAH, THE MUSLIM LEAGUE AND THE DEMAND FOR PAKISTAN* 174-207 (1985) [hereinafter JALAL, *SOLE SPOKESMAN*] (discussing Muslim League's acceptance of Cabinet Mission Plan, envisaging confederal India, in 1946); Ayesha Jalal & Anil Seal, *Alternative to Partition: Muslim Politics Between the Wars*, 15 *MOD. ASIAN STUD.* 415 (1981); SAYEED, *PAKISTAN*, *supra* note 39, at 134-48.

45. AYESHA JALAL, *DEMOCRACY AND AUTHORITARIANISM IN SOUTH ASIA: A COMPARATIVE AND HISTORICAL PERSPECTIVE* 14 (1995) [hereinafter JALAL, *DEMOCRACY AND AUTHORITARIANISM*].

46. For a detailed discussion of the struggle for de-colonization and self-governance in India, see generally CHAUDHRI M. ALI, *THE EMERGENCE OF PAKISTAN* (1967) [hereinafter ALI, *EMERGENCE OF PAKISTAN*]; STANLEY WOLPERT, *A NEW HISTORY OF INDIA* (2d ed. 1982); and 1-12 *CONSTITUTIONAL RELATIONS BETWEEN BRITAIN AND INDIA: THE TRANSFER OF POWER 1942-47* (Nicholas Mansregh & Penderel Moon eds., 1970-83) [hereinafter *TRANSFER OF POWER*].

47. See SAYEED, *PAKISTAN*, *supra* note 39, at 63-75 (detailing work of Simon Commission constituted by British Government to investigate India's constitutional problems and make recommendations for future constitution).

48. *Resolution Adopted at the 19th Annual Session at Calcutta*, AIML (Dec. 1927), quoted in SAYEED, *PAKISTAN*, *supra* note 39, at 65.

49. The leading voice of AIML who later became the first Governor-General of Pakistan. See generally BOLITHO, *supra* note 41; JALAL, *SOLE SPOKESMAN*, *supra* note 44; WOLPERT, *JINNAH*, *supra* note 41.

point number seven provided that “[f]ull religious liberty, i.e., liberty of belief, worship and observance, propaganda, association and education shall be guaranteed to all communities.”⁵⁰

The Presidential Address to the 22nd Annual Session of the AIML, delivered in Delhi in December 1931, articulated the AIML’s position that “the Constitution should contain a clause defining fundamental rights such as freedom of profession, practice and propagation of religion, . . . etc. and that it should devise means whereby these matters may be fully safeguarded. This is a matter with regard to which there can be no possible difference of opinion.”⁵¹ The Resolution adopted by the 27th Annual Session of the AIML at Lahore in March 1940, which, for the first time, formally committed the AIML to the demand of independent states in the Muslim majority areas of India, contained the provision that “adequate, effective and mandatory safeguards should be specifically provided in the constitution for minorities in these units and in the regions for the protection of their religious, cultural, economic, political, administrative and other rights and interests in consultation with them.”⁵² This language was adopted as part of the express aims and objectives of the Constitution and Rules of the AIML, at the 28th Annual Session at Madras in April 1941.⁵³ In his Presidential Address to the 30th Annual Session at Delhi in April 1943, Jinnah acknowledged that “minorities are entitled to get a definite assurance or to ask, ‘Where do we stand in the Pakistan that you visualize?’ ” and took the position that:

[This] is an issue of giving a definite and clear assurance to the minorities. We have done it. We have passed a resolution that the minorities must be protected and safeguarded to the fullest extent; and as I said before, any civilized Government

50. *SPEECHES AND DOCUMENTS ON THE INDIAN CONSTITUTION 1921-47*, at 245-47 (Maurice Gwyer & A. Appadorai eds., 1957).

51. Sheikh Muhammad Abdullah, Chairman of the AIML Reception Committee, Address at the 22d Annual Session, AIML (Dec. 26-27, 1931), *reprinted in* II *FOUNDATIONS OF PAKISTAN: ALL INDIA MUSLIM LEAGUE DOCUMENTS 1906-1947*, at 184 (S. Sharifuddin Pirzada ed., 1970) [hereinafter Pirzada, *FOUNDATIONS*].

52. *Constitution and Rules Adopted at the 27th Annual Session*, AIML (Apr. 1940), *reprinted in* Pirzada, *FOUNDATIONS*, *supra* note 51, at 341.

53. *Constitution and Rules Adopted at the 28th Annual Session*, AIML (Apr. 1941), *reprinted in* Pirzada, *FOUNDATIONS*, *supra* note 51, at 371-72.

will do it and ought to do it.⁵⁴

Equally unambiguous was Jinnah's position on the constitutional framework and legislative agenda of Pakistan. At the annual meeting of the AIML at Delhi in 1943, a section of the members proposed that the AIML should declare that the Qu'ran should form the basis of the future constitution of Pakistan. A draft resolution to this effect was circulated. In his address, Jinnah took strong exception to this move and declared:

The Constitution of Pakistan can only be framed by the *millat* [nation] and the people. Prepare yourselves and see that you frame a Constitution which is to your heart's desire. There is a lot of misunderstanding. A lot of mischief is created. Is it going to be an Islamic Government? Is it not begging the question? Is it not a question of passing a vote of censure on yourself? The Constitution and the Government will be what the people will decide.⁵⁵

In view of Jinnah's position, the Draft Resolution was not moved.⁵⁶ As far back as 1920, in the aftermath of the Khilafat movement,⁵⁷ Jinnah had denounced the participation of the *ulama* (religious scholars and preachers) in politics as invidious, and appealed for "the intellectual and reasonable section" of Muslim opinion to regain the initiative.⁵⁸ Tensions between the *ulama* and Western-educated politicians like Jinnah demonstrated "their fundamentally different orientation to politics."⁵⁹ Speaking to university students in February 1938, Jinnah declared, "[w]hat the League has done is to set you free from the reactionary elements of Muslims and to create the opinion that those who play their selfish game are traitors. It has certainly freed you from that undesirable element of *Maulvis* and *Mau-*

54. Mohammad A. Jinnah, *Presidential Address to the 30th Annual Session, AIML* (Apr. 1943), reprinted in Pirzada, FOUNDATIONS, *supra* note 51, at 425.

55. *Id.*

56. *See id.* at 440 n.2.

57. Muslim religious leaders of India led this movement, which was aimed at preserving the institution of the Khaliphate, personified by the Sultan of Turkey, in the aftermath of the First World War. *See generally* GAIL MINAULT, *THE KHILAFAT MOVEMENT: RELIGIOUS SYMBOLISM AND POLITICAL MOBILIZATION IN INDIA* (1982). The subsequent decision by the Turkish National Assembly to abolish the Khaliphate and institute a Republic took the wind out of the movement's sails. *Id.*

58. Mohammad A. Jinnah, Address to the Nagpur Session of Congress (1920), in M. H. SAYID, *MOHAMMAD ALI JINNAH: A POLITICAL STUDY* 130 (1962). *See also* SHAIKH, *supra* note 40, at 182.

59. MINAULT, *supra* note 57, at 154.

lanas [preachers and religious leaders]."⁶⁰

On July 22, 1947, only three weeks before the partition of India, the Partition Council, which included the top leadership of both the Indian National Congress and the AIML, issued a formal statement affirming that:

Both the Congress and the Muslim League have given assurances of fair and equitable treatment to the minorities after the transfer of power. The two future Governments re-affirm these assurances. It is their intention to safeguard the legitimate interests of all citizens irrespective of religion, caste or sex. In the exercise of their normal civic rights all citizens will be regarded as equal and both the Governments will assure to all people within their territories the exercise of liberties such as freedom of speech, the right to form associations, the right to worship in their own way and the protection of their language and culture.⁶¹

Most significant is the vision of religious freedom and separation of religion and state presented by Jinnah in his Presidential Address to the first session of Pakistan's Constituent Assembly. As the foundation stone of the legislative history of Pakistan, this address furnishes a yardstick to measure all subsequent legislation, constitutional or otherwise.⁶² Jinnah called upon the assembly to:

[R]emember that you are now a Sovereign Legislative body and you have got all the powers. . . . You will no doubt agree with me that the first duty of a Government is to maintain law and order, so that the life property and religious beliefs of its subjects are fully protected by the State. . . . If you change your past and work together in a spirit that every one of you, no matter to what community he belongs, no matter what relations he had with you in the past, no matter what is his colour, caste or creed, is first, second and last a citizen of this

60. I SPEECHES AND WRITINGS OF MR. JINNAH 43 (Jamil-ud-Din Ahmad ed., 7th ed. 1952).

61. 12 TRANSFER OF POWER, *supra* note 46, at 326.

62. The historic nature of the pronouncement was not lost on Jinnah, who pointed out that:

The Constituent Assembly has got two main functions to perform. The first is the very onerous and responsible task of framing our future Constitution of Pakistan and the second of functioning as a full and complete Sovereign body as the Federal Legislature of Pakistan.

Mohammad A. Jinnah, Address to the First Meeting of the Constituent Assembly of Pakistan (Aug. 11, 1947), in WOLPERT, JINNAH, *supra* note 41, at 337.

State with equal rights, privileges and obligations, there will be no end to the progress you will make.

I cannot emphasise it too much. We should begin to work in that spirit and in course of time all these angularities of majority and minority communities, the Hindu community and the Muslim community . . . will vanish.

You are free; you are free to go to your temples, you are free to go to your mosques or 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 We are starting in the days when there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principle that we are all citizens and equal citizens of one State.⁶³

Three days later, when Jinnah took the oath of office as Pakistan's first Governor-General before the Constituent Assembly, the departing British Viceroy, Lord Mountbatten, sought assurance of religious tolerance and non-discrimination.⁶⁴ Jinnah, in response, referred to the long history of Muslim political and religious tolerance of non-Muslims, and assured the continua-

63. *Id.* at 337-39. Commenting on the apparent gulf between Jinnah's pronouncement and the establishment of a new country based on religion, Chaudhri Muhammad Ali, a lieutenant of Jinnah and later a prime minister of Pakistan, noted:

Pakistan came into existence not by conquest but as the result of a negotiated agreement between the representatives of the Hindu and Muslim communities to partition the subcontinent. An explicit and integral part of the agreement was that the minorities in both states would have equal rights and equal protection of law. In that context the Quaid-i-Azam [Jinnah] was wholly right in asserting the fundamental principle that "we are all citizens and equal citizens of one State." It follows that the state must give full protection to "the life, property and religious beliefs of its subjects [and] should wholly and solely concentrate on the well-being of the people and especially of the masses and the poor." These practical tasks of statesmanship can be fulfilled only by giving equal rights and equal responsibilities to all citizens.

ALI, EMERGENCE OF PAKISTAN, *supra* note 46, at 240.

64. Louis Mountbatten, Address to the *Constituent Assembly of Pakistan* (Aug. 14, 1947), reprinted in SHAMEEM H. KADRI, CREATION OF PAKISTAN 501-04 (1983). Lord Mountbatten stated that British trading with India started when:

[Y]our great Emperor Akbar was on the throne, whose reign was marked by perhaps as great a degree of political and religious tolerance, as has been known before or since. . . . Akbar's tradition has not always been consistently followed, by British or Indians, but I pray, for the world's sake, that we will hold fast, in the years to come, to the principles that this great ruler taught us.

Id. at 504.

tion of this practice.⁶⁵ When Pakistan's first cabinet was formed, Muhammad Zafrulla Khan, a prominent Ahmadi and a former president of the AIML, was appointed foreign minister.⁶⁶

Collectively Jinnah's pronouncements add up to an unequivocal guarantee of religious freedom and practice, the separation of religion from the affairs of State, and the unfettered sovereignty of a representative legislature. A former Chief Justice of Pakistan, S. A. Rehman, takes the position that given Jinnah's repeated assurances to non-Muslim residents of Pakistan that they would enjoy all the fundamental rights guaranteed to them on the basis of equality with members of the majority community, and that they could expect to receive generous rather than merely egalitarian treatment, "[t]heir position is assimilable to that of *mu'ahids* - the beneficiaries of a binding pact."⁶⁷

Having failed to sustain the thesis that Jinnah was an advocate for the creation of an Islamic state, apologists for religious orthodoxy and intolerance in Pakistan point out that:

Jinnah was a political leader and not a systematic thinker
For a brilliant and accomplished lawyer such as Jinnah was, his academic grounding was rather inadequate. . . . Jinnah could not work out a consistent theoretical framework of Pakistan. For one thing, his was not the role of a systematic theoretician, nor was he qualified for it.⁶⁸

65. *Id.* at 505. Jinnah in response stated that: "The tolerance and goodwill that the great Emperor Akbar showed to all the non-Muslims is not of recent origin. . . . The whole history of Muslims, wherever they ruled, is replete with those humane and great principles which should be followed and practised by us." *Id.*

66. ALI, *EMERGENCE OF PAKISTAN*, *supra* note 46, at 241. Even before the formation of Pakistan, religious scholars and *ulama* had denounced the Ahmadis as heretics or apostates. See Aziz Ahmad, *Activism of the Ulama in Pakistan*, in *SCHOLARS, SAINTS, AND SUFIS: MUSLIM RELIGIOUS INSTITUTIONS IN THE MIDDLE EAST SINCE 1500*, at 262 (Nikki R. Keddie ed., 1972) [hereinafter Ahmad, *Activism*]. This did not stop the Muslim League and Jinnah from giving Ahmadis leading positions in the party and the movement. *Id.* In February 1940, Zafulla Khan wrote a position paper with the approval of Jinnah and the AIML, outlining desirable constitutional schemes for India after the departure of the British. JALAL, *SOLE SPOKESMAN*, *supra* note 44, at 55-57. The ideas discussed in the paper furnished the basic framework for the Lahore Resolution of March 1940, which was adopted by the AIML. *Id.* Zafulla Khan was later selected by Jinnah to present Pakistan's case before the Boundary Commission, established to demarcate the boundary between India and Pakistan following partition in 1947. *COURT OF INQUIRY REPORT*, *supra* note 23, at 197 (describing how Zafulla Khan later became judge and president of International Court of Justice).

67. S.A. RAHMAN, *PUNISHMENT OF APOSTASY IN ISLAM 2* (1972).

68. AL MUJAHID, *supra* note 39, at 230-32.

Any lack of "systematic theorizing" on Jinnah's part, however, was adequately compensated by the vision and elucidation of Dr. Muhammad Iqbal,⁶⁹ who advanced a comprehensive legislative blueprint and agenda for the proposed state. Iqbal's first clearly articulated call for separate Muslim states in the Muslim majority areas of India, delivered in his Presidential Address to the December 1930 session of the AIML, contained an assurance to non-Muslims. After stating that "[a] community which is inspired by feelings of ill-will towards other communities is low and ignoble," he affirmed that "I entertain the highest respect for the customs, laws, religious and social institutions of other communities."⁷⁰ Iqbal then assured that "[n]or should the Hindus fear that the creation of autonomous Muslim states will mean the introduction of a kind of religious rule in such states."⁷¹ Iqbal argued that:

[T]he formation of a consolidated Muslim state [is] in the best interests of India and Islam. For India it means security and peace resulting from an internal balance of power, for Islam an opportunity to rid itself of the stamp that Arabian Imperialism was forced to give it, to mobilize its law, its education, its culture, and to bring them into closer contact with its own original spirit and with the spirit of modern times.⁷²

As for the legislative agenda of the proposed State, Iqbal stated that:

The claim of the present generation of Muslim Liberals to reinterpret the foundational legal principles, in the light of their own experience and the altered conditions of modern life, is, in my opinion, perfectly justified. The teaching of the Qur'an that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own

69. Iqbal, a thinker, philosopher, and poet, is credited with originating the concept of a separate homeland for the Muslims of India. Correspondence between Iqbal and Jinnah furnishes a unique and intimate look into the former's philosophy and agendas, as well as into the assumptions and postures of the two pivotal figures among the leadership of Indian Muslims during the struggle for decolonization. See generally *QUAID-E-AZAM JINNAH'S CORRESPONDENCE* (S. Sharifuddin Pirzada ed., 3d ed. 1977); *IQBAL: POET-PHILOSOPHER OF PAKISTAN* (Hafeez Malik ed., 1971).

70. Pirzada, *FOUNDATIONS*, *supra* note 51, at 157.

71. *Id.*

72. *Id.*

problems.⁷³

In Iqbal's view, the revitalized institutionalization of *ijtihad* would be the best vehicle for accomplishing this legislative agenda.⁷⁴ The first step in this process was the rejection of an "intellectual attitude which has reduced the Law of Islam practically to a state of immobility."⁷⁵ The second step was to recognize that the representative elected legislature in a republic was the appropriate forum for *ijtihad*.⁷⁶ Thus, Iqbal's vision understood *ijtihad* as a "complete authority in legislation," which had traditionally been reserved for the founders of religious schools, as opposed to "relative authority which is to be exercised within the limits of a particular school, and . . . special authority which relates to the determining of the law applicable to a particular case left undetermined by the founder."⁷⁷ For Iqbal:

The essence of *Tauhid* [unity of God], as a working idea, is equality, solidarity, and freedom. The state, from the Islamic standpoint, is an endeavor to transform these ideal principles into space-time forces, an aspiration to realize them in a defi-

73. *Id.* at 234.

74. *Ijtihad*, which literally means striving or exerting, is part of the elaborate methodology of law in Islamic principles of jurisprudence (*usul al-fiqh*). JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 70 (1964). The Qur'an and *Sunnah* are the primary sources of law, supplemented by *qiyas* (reasoning by analogy) and *ijma* (consensus). *Ijtihad* is the exertion of mental faculties in the search for legal principles in areas where the Qur'an and *Sunnah* may be silent, and to accommodate changes in the context of application of settled principles. However, after the formative phase of Islamic jurisprudence by about 900 A.D.:

[T]he point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all.

Id. at 70-71. This development is designated as "the closing of the door of *ijtihad*," whereby the right of *ijtihad* was replaced by the duty of *taqlid* (conformity or imitation). *Id.* at 71. Ever since, Islamic reformists have sought to reclaim the right of *ijtihad* and have forwarded models of doing so. See generally Wael B. Hallaq, *The Gate of Ijtihad: A Study in Islamic Legal History* (1983) (unpublished Ph.D. dissertation, University of Washington); NOEL J. COULSON, A HISTORY OF ISLAMIC LAW (1964); FAZLUR RAHMAN, ISLAM (1966); FAZLUR RAHMAN, ISLAM AND MODERNITY: TRANSFORMATION OF AN INTELLECTUAL TRADITION (1982).

75. MUHAMMAD IQBAL, RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM 188 (M. Saeed Shaikh ed., 2d ed. 1989).

76. *Id.*

77. *Id.* (citations omitted).

nite human organization. It is in this sense alone that the state in Islam is a theocracy, not in the sense that it is headed by a representative of God on Earth who can always screen his despotic will behind his supposed infallibility.⁷⁸

Iqbal took the unambiguous position that:

The transfer of the power of *Ijtihād* from individual representatives of schools to a Muslim legislative assembly which, in view of the growth of opposing sects, is the only possible form of *Ijma'* can take in modern times, will secure contributions to legal discussion from laymen who happen to possess a keen insight into affairs. In this way alone can we stir into activity the dormant spirit of life in our legal system, and give it an evolutionary outlook.⁷⁹

Terming the decision of the Turkish Grand National Assembly to abolish the institution of Khilafat an "exercise . . . [of] this power of *Ijtihād*," Iqbal approved of the Turkish position of vesting the Caliphate or Imamate in the elected Assembly.⁸⁰ Iqbal also believed that the republican form of government had become a necessity in the Islamic World.⁸¹ For Iqbal, among the Muslim nations, "Turkey alone has shaken off its dogmatic slumber, and attained self-consciousness. She alone has claimed her right of intellectual freedom; she alone has passed from the ideal to the real — a transition which entails keen intellectual and moral struggle."⁸²

These unambiguous pronouncements constitute an implied covenant between religious minorities and the leadership of the Pakistan movement. This covenant embodies several guarantees for religious minorities: (i) that freedom of religion and opinion will be guaranteed, and equal rights of citizenship will be enjoyed by all, irrespective of religious beliefs; (ii) that the State will have a republican form of government with a sovereign legislature unencumbered by medieval formulations of Islamic law or *Shari'ah*; and (iii) that the legislative agenda of a representative

78. *Id.* at 122-23.

79. *Id.* at 138.

80. *Id.* at 124-25.

81. *Id.* Iqbal also believed that "the Turkish view is perfectly sound. . . . The republican form of government is not only thoroughly consistent with the spirit of Islam, but has also become a necessity in view of the new forces that are set free in the world of Islam." *Id.*

82. *Id.* at 128.

legislature will be to facilitate the development and growth of society in tune with the modern world. The subsequent express inclusion of these guarantees in the inaugural address to the Constituent Assembly by the President of the body made the covenant part of the foundational legislative history of Pakistan. As such, the terms of this covenant must inform actions of both the legislature and the judiciary. The Court's complete disregard of these guarantees in *Zaheeruddin*, therefore, puts the Supreme Court of Pakistan at odds with the vision that informed the very establishment of Pakistan.

III. *EVOLUTION OF FREEDOM OF RELIGION JURISPRUDENCE IN PAKISTAN*

When examining the evolution of the freedom of religion jurisprudence in Pakistan, with particular reference to the Ahmadi question, the contextual and doctrinal determinants of judicial practice must be highlighted. The judicial practice in question comprises three inconsistent models: (i) the principled and unequivocal protection of freedom of religion; (ii) the curtailment of fundamental rights dictated by unwarranted judicial deference to the legislative power to amend the Constitution; and (iii) the complete abdication of the judicial function of safeguarding fundamental rights and capitulation to extra-constitutional regimes and regressive religious pressure groups.

A. *Phase I: Unequivocal Protection: 1947-72*

Pakistan's political and constitutional framework during the first phase of its existence as an independent country furnished the context within which the superior judiciary was able to fashion a posture of robust protection of freedom of religion of religious minorities. On the eve of Pakistan's independence, the extent to which religion would determine politics in the new Muslim state remained unsettled.⁸³ The *ulama* seized the oppor-

83. Commentators note that "there was no agreement among the guardians of the faith or the managers of the state as to what should constitute the ideal of a socially uniform doctrinally based cultural monolith called Islam." JALAL, *DEMOCRACY AND AUTHORITARIANISM*, *supra* note 45, at 220. This notion reflected the fact that:

Pakistan was truly a product of many imaginations, each with their own visions of political community and state structure. The evolving state was caught between these images, the languages in which they were expressed, and the people who articulated them. For some, Pakistan was the proud culmination of

tunity to exert pressure on the secular rulers of the new country by demanding the creation of a theocratic state. For Pakistan's religious leadership, such demands were a logical corollary to Pakistan's emergence as a separate homeland for India's Muslims.⁸⁴

The Pakistan Muslim League leaders, however, had no intention of conceding to the demands for a theocratic state. Nevertheless they compromised to diffuse the issue and deny the *ulama* a platform from which to mobilize mass support. This compromise took the shape of the Objectives Resolution, adopted by the Constituent Assembly in 1949.⁸⁵ The Objectives Resolution was a statement of intent regarding Pakistan's future Constitution and contained a deliberately vague pledge to incorporate Islamic principles. It also envisaged, however, guaranteed fundamental rights, including: religious freedom and rights of religious minorities, the rule of law, and an independent judiciary.⁸⁶ On October 6, 1950, the Constituent Assembly

Muslim self-assertion, for others it was the expression of a necessarily Islamic state; for some, it represented successful anti-colonial politics while for others partition meant the failed prospect of a pluralistic, liberal India; for some, independence was the logical outcome of subcontinental politics, for others it was the product of manipulation or historical accident. The state's antecedents, both real and ideal, influenced each attempt to set the strategic and political limits that defined state sovereignty

PAULA R. NEWBERG, JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN 35-36 (1995) [hereinafter NEWBERG, JUDGING THE STATE].

84. During the course of the movement for independence in India, most Islamic religious parties, groups, and leaders opposed the creation of Pakistan as a separate state. As soon as Pakistan came into existence, however, these very groups became contenders for the political and ideological leadership of the state. See BINDER, *supra* note 23, at 137-42, 153-82. The views of the *ulama* regarding the form of the Islamic theocratic state were summarized in a report of the Board of the *Talimat-i-Islamia* (Islamic education) which advocated the model of the classic Muslim Caliphate. *Id.* at 115; see also SAYYID ABUL A'LA MAUDUDI, THE ISLAMIC LAW AND CONSTITUTION 355-59, 363-86 (Khurshid Ahmad ed. and trans., 1960). A resolution adopted by a convention of thirty-one *ulama* declared that the Constitution of Pakistan should incorporate principles of an Islamic state. Moreover, the *ulama* demanded that five *ulama* be appointed to the Supreme Court to determine if any given law was repugnant to the Qur'an or *Sunnah*. See generally ANWAR H. SYED, PAKISTAN: ISLAM, POLITICS, AND NATIONAL SOLIDARITY 63-68 (1982) [hereinafter SYED, PAKISTAN]; Wayne A. Wilcox, *Ideological Dilemmas in Pakistan's Political Culture*, in SOUTH ASIAN POLITICS AND RELIGION (Donald E. Smith ed., 1966); Farzana Shaikh, *Islam and the Quest for Democracy in Pakistan*, 24 J. OF COMMONWEALTH & COMP. POL. 75 (1986).

85. See MAHMOOD, CONSTITUTIONAL FOUNDATIONS, *supra* note 11, at 46 (providing complete text of Objectives Resolution).

86. *Id.* While moving to introduce the Resolution in the Assembly, Prime Minister Liaquat Ali Khan reiterated that the Resolution did not imply a theocracy, declaring:

adopted an interim report on fundamental rights for the citizens of Pakistan, whereby every duly qualified citizen was declared eligible to appointment in the service of the State, irrespective of religion, race, caste, sex, descent, or place of birth, and every citizen's right to freedom of conscience and to profess, practice, and propagate religion was guaranteed.⁸⁷ Pakistan's first constitution, adopted in 1956, guaranteed the fundamental rights of all citizens to profess, practice, and propagate any religion.⁸⁸ While the following years saw the rise and demise of constitutional orders,⁸⁹ the ruling elites remained committed to religious freedom and the protection of religious minorities.⁹⁰

"If there are any who still use the word theocracy in the same breadth as the polity of Pakistan, they are either laboring under a grave misapprehension, or indulging in mischievous propaganda." *Id.* at 47-48. The Prime Minister continued: "In no way will they [religious minorities] be hindered from professing or protecting their religion or developing their cultures" *Id.* at 49. The author describes the debate that followed, remarkable for its express assurance of freedom of religion and equal rights of all citizens. See SYED, *PAKISTAN*, *supra* note 84, at 68-75. According to one scholar:

The Resolution's generality could not hide profound disagreements about the character of the future constitution or state—for example, its characterization of the role of Islam was made simultaneously prominent, obscure and legally undefined. Its grounding power for constitution-writing has been emotional rather than practical, inertial more than assertive.

NEWBERG, *JUDGING THE STATE*, *supra* note 83, at 22.

87. See MAHMOOD, *CONSTITUTIONAL FOUNDATIONS*, *supra* note 11, at 239-42. On September 7, 1954 the Constituent Assembly adopted a report issued by the Committee on Fundamental Rights of Citizens of Pakistan and on Matters Relating to Minorities, which further elaborated religious, cultural, and political rights of minorities. *Id.* at 243-45 (providing text of report).

88. PAK. CONST. (1956) art. 18; see MAHMOOD, *CONSTITUTIONAL FOUNDATIONS*, *supra* note 11, at 247-32 (providing text of 1956 Constitution).

89. See Mahmud, *Praetorianism*, *supra* note 26, at 1231-60; Ayesha Jalal, *The Politics of a Constitutional Crisis: Pakistan, April 1953-May 1955*, in *CONSTITUTIONAL HEADS AND POLITICAL CRISES: COMMONWEALTH EPISODES, 1945-85* (David A. Low ed., 1988); MOHAMMAD WASEEM, *POLITICS AND THE STATE IN PAKISTAN* (1989) [hereinafter WASEEM]; AYESHA JALAL, *THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN'S POLITICAL ECONOMY OF DEFENCE* (1990) [hereinafter JALAL, *STATE OF MARTIAL RULE*].

90. See NOMAN, *supra* note 38, at 8. After the deaths of the first-generation Muslim League leaders, leadership of the country passed to the bureaucratic and military elites. *Id.* Leaders' postures toward religious freedom are reflected in their statements. Governor General Ghulam Mohammad declared, "Pakistan is a secular, democratic and not a theocratic state." *Id.* President Iskander Mirza warned that "if the learned maulanas [preachers] try to dabble in politics there will be trouble . . . religion and politics should be kept apart otherwise there will be chaos." *Id.* Commentators acknowledge that the military regime that ruled the country from 1958 through 1968 "was quite firm in its resolve of not permitting a role for Islam in determining institutional development or governmental policies The tone of the regime remained distinctly secular." *Id.* at 34-35.

It was in this political context that the superior courts fashioned doctrines that provided unhesitating and unequivocal protection of freedom of religious beliefs. As early as 1952, the Chief Court of Sind held that:

[I]t is well-settled law, and one of the fundamental principle [sic] of the Muhammadan Law itself, that no Court can test or guage [sic] the sincerity of religious belief, and in order to hold that a person was Sunni Muslim, it was sufficient for a Court to be satisfied that he professed to be a Sunni Muslim. It is not permissible to [sic] any Court to enquire further into the state of the mind and the beliefs of a person who professed to belong to a particular faith and inquire whether his actual beliefs conformed to the orthodox tenets of that particular faith⁹¹

It was in the context of the struggle between the *ulama* and the leadership of the Muslim League over the role of religion in politics, that the first anti-Ahmadi agitation, spearheaded by the *ulama*, unfolded.⁹² The agitation started in 1952, when an All Pakistan Muslim Parties Convention was convened at the initiative of some *ulama*.⁹³ The Convention demanded that: the Ahmadi be declared a non-Muslim minority community; that Zafrulla Khan, an Ahmadi, be removed from the office of Foreign Minister; and that Ahmadi be removed from all key positions in government.⁹⁴ The Convention appointed a Council of Action, consisting of many prominent *ulama*, to issue an ultimatum to the Government to accept the anti-Ahmadi demands, and demanded the resignation of the Prime Minister, who had refused to dismiss Zafrulla Khan.⁹⁵ The Government, however, rejected this ultimatum,⁹⁶ arrested some of the *ulama*, and imposed martial law in Lahore, where the Provincial Government had connived at the religious disturbances and tried to channel them against the Central Government, imposed martial law.⁹⁷ The anti-Ahmadi agitation was thoroughly crushed and a Court

91. *Moula Bux v. Charuk*, 1952 P.L.D. (Sind) 54, 56 (Pak.).

92. See generally BINDER, *supra* note 23, at 259-96; Ahmad, *Activism*, *supra* note 66, at 257-65; Kennedy, *supra* note 7, at 84-88.

93. Ahmad, *Activism*, *supra* note 66, at 262.

94. COURT OF INQUIRY REPORT, *supra* note 23, at 77.

95. Ahmad, *Activism*, *supra* note 66, at 263.

96. COURT OF INQUIRY REPORT, *supra* note 23, at 1.

97. *Id.*

of Inquiry was constituted to investigate the disturbances.⁹⁸ The Court of Inquiry's terms of reference were: (i) the responsibility for the disturbances; (ii) the circumstances leading to the declaration of martial law; and (iii) the adequacy or inadequacy of the measures taken by the civil administration to prevent, and subsequently, to deal with, the disturbances.⁹⁹

The 387-page Report of the Court of Inquiry, based on a record consisting of 3600 pages of written statements and 2700 pages of evidence, is a document striking in its scope, tone, and conclusions. The Court of Inquiry was firm in its view that "it is not our business to give a finding whether the Ahmadis are or are not within the pale of Islam."¹⁰⁰ Highlighting the open-textured and indeterminate nature of Islamic law, the Court of Inquiry found that this would be an impossible task because "no two *ulama* have agreed before us as to the definition of a Muslim."¹⁰¹ Due to the narrow sectarian definitions of who is a Muslim proffered before it, the Court of Inquiry concluded that:

The net result of all this is that n[e]ither Shias nor Sunnis nor Deobandis nor Ahl-i-Hadith nor Barelvis are Muslims and any change from one view to the other must be accompanied in an Islamic State with the penalty of death if the Government of the State is in the hands of the party which considers the other party to be *kafirs* [infidels].¹⁰²

The Court of Inquiry then undertook a detailed survey of Jinnah's pronouncements regarding freedom of religion, rights of minorities, and the separation of religion and politics, and concluded that Jinnah's vision was of a nation in which religion was "to have nothing to do with the business of the State and [was] to be merely a matter of personal faith for the Individ-

98. See generally BINDER, *supra* note 23, at 259-96. Members of the Court of Inquiry included Justice Muhammad Munir (later Chief Justice of Pakistan) and Justice M. R. Kayani (later Chief Justice of West Pakistan High Court).

99. COURT OF INQUIRY REPORT, *supra* note 23, at 2.

100. *Id.*

101. *Id.* at 219. Spokesmen of some sects testified that, in their view, members of certain other sects were not Muslims. *Id.* Noting that most *ulama* regarded death as the appropriate penalty for apostasy, and considering that the followers of many sects viewed others as heretics, the Court expressed great anxiety concerning the prospect of civil peace in Pakistan if it became an Islamic state. *Id.* at 218-20.

102. *Id.* The proper nouns indicated in the context refer to different doctrinal sects within Islam.

ual.”¹⁰³ The *ulama* took the position that Jinnah’s conception of a modern state, where “[t]he future subject of the State is to be a citizen with equal rights, privileges and obligations, irrespective of colour caste, creed or community . . . became obsolete with the passing of the Objectives Resolution.”¹⁰⁴ The Court of Inquiry, which found the *ulama*’s response to Jinnah’s conception of the state “unhesitating[ly] negative,”¹⁰⁵ concluded however, that the Objectives Resolution, “though grandiloquent in words, phrases and clauses, is nothing but a hoax and that not only does it not contain even a semblance of the embryo of an Islamic State but its provisions, particularly those relating to fundamental rights, are directly opposed to the principles of an Islamic State.”¹⁰⁶

The Court of Inquiry determined that “[r]esponsibility for the disturbances must primarily rest on the members of . . . the numerous religious organisations.”¹⁰⁷ The Court of Inquiry noted that the leading forces of the anti-Ahmadi movement had opposed the creation of Pakistan, and that “Islam with them was a weapon which they could drop and pick up at pleasure to dis-

103. *Id.* at 203.

104. *Id.* Spokesman of the Jama’at-Islami described Jinnah’s vision of a democratic polity as a “creature of the devil.” *Id.*

105. *Id.*

106. *Id.* The Court of Inquiry took the position that:

[T]he authors of that Resolution misused the words ‘sovereign’ and ‘democracy’ when they recited that the Constitution to be framed was for a sovereign State in which principles of democracy as enunciated by Islam shall be fully observed. . . . When it is said that a country is sovereign, the implication is that its people . . . are entitled to conduct the affairs of that country in any way they like An Islamic State, however, cannot in this sense be sovereign, because it will not be competent to abrogate, repeal or do away with any law in the Qur’an or the *sunna*. Absolute restriction on the legislative power of a State is a restriction on the sovereignty of the people of that State and if the origin of this restriction lies elsewhere than in the will of the people, then to the extent of that restriction the sovereignty of the State and its people is necessarily taken away.

Id. at 210.

107. *Id.* at 239. The Court of Inquiry took the view that when the *Majlis-i-Amal* [Action Committee] of the religious organizations decided to serve the government with an ultimatum, they:

[K]new that if the demands were rejected and the threat of direct action was put into execution, large-scale disturbances involving firing, bloodshed and general disorder of a very serious character would be the result, and since the events precisely took the anticipated course, the responsibility for the disturbances directly lies on the members of that Majlis.

Id. at 241.

comfit a political adversary."¹⁰⁸ The most perceptive of the Court of Inquiry's findings was that the anti-Ahmadi movement was an instrument whereby religious groups and leaders who lacked popular support and secure political constituencies "were 'trying to capture a political living space' for themselves."¹⁰⁹ The Court of Inquiry noted that religious groups had started the agitation with a "political motive,"¹¹⁰ and had "purposely chosen an issue on which nobody would have the courage to oppose them."¹¹¹ Besides Muslim religious groups, the Court of Inquiry assigned responsibility to some factions of the Pakistan Muslim League, particularly the provincial leadership in the Punjab, who, the Court of Inquiry concluded, had jumped on the anti-Ahmadi bandwagon in order to gain political advantage in its power struggle with the Central Government.¹¹²

The Court of Inquiry then focused on the evolution of the human rights principles in international law, whereby "every person shall have the right to freedom of thought, conscience and religion, including the freedom to change one's religion or belief and to manifest such religion or belief in teaching, practice, worship and observance."¹¹³ The Court of Inquiry foresaw negative repercussions for Pakistan's standing in the international community if the anti-Ahmadi demands were acceded to,¹¹⁴ and thought Pakistan risked being "ostracised from International So-

108. *Id.* at 254.

109. *Id.* at 257.

110. *Id.*

111. *Id.* at 258.

112. *Id.* at 261-80.

113. *Id.* at 233. The Court of Inquiry specifically referred to Article 13 of the Draft International Covenant on Human Rights, which was prepared by a Commission on Human Rights appointed by the General Assembly of the United Nations. *Id.*

114. *Id.* The Court of Inquiry noted:

The acceptance of the demands would, therefore, have created a flutter in international dovescotes and the attention of the international world would have been drawn in one way or another to what was happening in Pakistan, because the acceptance of the demands would have amounted to a public commitment that Pakistan was basing its citizenship on grounds basically different from those observed by other nations and that non-Muslims were debarred from holding public offices in Pakistan merely for their religious beliefs.

Id. The Court of Inquiry also noted the agreement concluded between India and Pakistan on April 8, 1950, whereby both Governments guaranteed members of minorities equal opportunity with members of the majority community to participate in the public life of their country, to hold political or other offices, and to serve in their countries' civil and armed forces. *Id.* at 234. The agreement recognized these rights as fundamental. *Id.*

ciety."¹¹⁵

In 1957, the Supreme Court of Pakistan had its first opportunity to directly rule on the nature and scope of religious freedom as enunciated in Article 18 of the Pakistan Constitution of 1956.¹¹⁶ Adopting a model of robust protection of basic rights, the Court rejected the argument that because fundamental rights are made "subject to law," they may be taken away by legislation:

The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law. I am unable to attribute any such intent to the makers of the Constitution who in their anxiety to regulate the lives of the Muslims of Pakistan in accordance with the Holy Quran and Sunnah could not possibly have intended to empower the legislature to take away from the Muslims the right to profess, practise and propagate their religion and to establish, maintain, and manage their religious institutions, and who in their conception of the ideal of a free, tolerant and democratic society could not have denied a similar right to the non-Muslim citizens of the State. . . . I refuse to be a party to any such pedantic, technical and narrow construction of the Article in question, for I consider it to be a fundamental canon of construction that a Constitution should receive a liberal interpretation in favour of the citizen, especially with respect to those provisions which were designed to safeguard the freedom of conscience and worship.¹¹⁷

115. *Id.* at 282.

116. The language of Article 18 of the Pakistan Constitution of 1956 is identical to that of Article 20 of the Pakistan Constitution of 1973. See PAK. CONST. (1956) art. 18.; PAK. CONST. (1973) art. 20.

117. *Jibendra Kishore Achharyya Chowdhury v. East Pakistan*, 1957 P.L.D. (S.Ct.) 9, 41-42 (Pak.). The Supreme Court noted that:

Consistently with the language used, constitutional instruments should receive a broader and more liberal construction than statutes, for the power dealt with in the former case is original and unlimited and in the latter case limited, and constitutional rights should not be permitted to be nullified or evaded by astute verbal criticism, without regard to the fundamental aim and object of the instrument and the principles on which it is based.

Jibendra Kishore, 1957 P.L.D. (S.Ct.) at 42. The restrictive construction of the clause "subject to law" was reaffirmed by the Supreme Court in *East & West Steamship Co. v. Pakistan*, 1958 P.L.D. (S.Ct.) 41 (Pak.).

While the Supreme Court recognized that law may regulate the manner in which religion is to be professed, practiced, and propagated, and religious institutions are to be established, maintained, and managed, it insisted that the term "subject to law" "cannot and do[es] not mean that such institutions may be abolished altogether by the Law."¹¹⁸

Following the *coup d'état* in 1958, the Constitution of 1956 was abrogated. The new Constitution of 1962 initially omitted fundamental rights. However, the First Amendment Act of 1964, reinstated the fundamental rights, including freedom of religion, identical to the ones in the Constitution of 1956.¹¹⁹ In 1969, the Lahore High Court enforced this constitutional guarantee by specifically rejecting the right of anybody to call Ahmadis non-Muslim, and held that there were no grounds for either a declaration that the Ahmadis are non-Muslims or for an injunction against Ahmadis calling themselves Muslims.¹²⁰ Responding to petitioners' argument that freedom of religion protects their right to call Ahmadis non-Muslims, the Court pointed out that this:

[O]verlooks the fact that Ahmadis as citizens of Pakistan are also guaranteed by the Constitution the same freedom to profess and proclaim that they are within the fold of Islam. How can the petitioners deny to others what they claim for themselves is beyond our comprehension? Certainly not by terrorising them.¹²¹

The Lahore High Court surveyed a wide range of primary and secondary sources of Islamic law, quoted relevant passages from the Qur'an, and concluded that "[f]reedom of thought and conscience could not have been guaranteed in clearer terms."¹²² The Lahore High Court designated instances of dubbing Ahmadis as apostates and of violence against them as "sad instances of religious persecution against which human conscience must revolt, if any decency is left in human affairs."¹²³

The first phase of judicial practice regarding the religious

118. *Jibendra Kishore*, 1957 P.L.D. (S.Ct.) at 42 (Pak.).

119. See MAHMOOD, CONSTITUTIONAL FOUNDATIONS, *supra* note 11, at 628 (providing text of First Amendment Act No. 1 of 1964).

120. *Shorish Kashmiri v. West Pakistan*, 1969 P.L.D. (Lah.) 289 (Pak.).

121. *Shorish Kashmiri*, 1969 P.L.D. (Lah.) at 307 (Pak.).

122. *Id.* at 309.

123. *Id.* at 308.

rights of religious minorities, clearly, was one of unequivocal protection. The language of the Pakistan Constitutions of 1956 and 1962 were relied upon as the primary doctrinal determinants. An implied covenant between the Founding Fathers of Pakistan and religious minorities was posited and adopted as persuasive authority. International codes of freedom of religion were deemed relevant and binding. Indeterminacy and inconsistency in authoritative texts of Islamic law regarding rights of religious minorities was acknowledged, and such selections were appropriated which envisaged broad protection. These judicial pronouncements were proffered within a political context where the dominant political forces were secular, where such forces wanted to keep the voices of Islamic fundamentalism at bay, and where the protection of religious minorities was considered a natural part of constitutional governance.

B. Phase II: Deference to Constitutional Amendment and Contraction of Protection

The establishment of the Fourth Republic with the adoption of the Pakistan Constitution furnishes the context of the second phase.¹²⁴ Designated by commentators alternately as “[a]uthoritarian populism”¹²⁵ and “politics of egalitarian reform,”¹²⁶ this phase unfolded in the aftermath of the country’s first free election in 1970, in which parties intent on establishing an Islamic state were electorally decimated.¹²⁷ The leader of the newly elected government, Zulfikar Ali Bhutto, described as an “ideological schizophrenic,”¹²⁸ and a “power craftsman,”¹²⁹ pro-

124. See Kamal Azfar, *Constitutional Dilemmas in Pakistan*, in *PAKISTAN UNDER THE MILITARY: ELEVEN YEARS OF ZIA UL-HAQ* 50, 64-70 (Shahid J. Burki & Craig Baxter eds., 1991) (providing detailed account of constitutional order of Fourth Republic); Fazlur Rahman, *Islam and the New Constitution of Pakistan*, in *CONTEMPORARY PROBLEMS OF PAKISTAN* 30 (J. Henry Korson ed., 1974) (explaining 1973 Constitution’s treatment of Islam).

125. NOMAN, *supra* note 38, at 55; see JALAL, *DEMOCRACY AND AUTHORITARIANISM*, *supra* note 45, at 77-85 (providing perceptive analysis of structural determinants and nature of populism in Pakistan during Fourth Republic).

126. WASEEM, *supra* note 89, at 297.

127. See SYED, *PAKISTAN*, *supra* note 84, at 116-23 (comparing candidates’ election platforms and results of 1970 elections); WASEEM, *supra* note 89, at 255-66 (analyzing 1970 elections in detail).

128. NOMAN, *supra* note 38, at 105. On Bhutto, see generally SALMAAN TASEER, *BHUTTO, A POLITICAL BIOGRAPHY* (1980); PILLO MODY, *ZULFI, MY FRIEND* (1973); SHAHID JAVED BURKI, *PAKISTAN UNDER BHUTTO, 1971-1977* (2d ed. 1988). One biographer

ceeded to establish "hegemony over a single-party dominated civilian structure, rather than developing a democratic participatory framework . . ." ¹³⁰ The road to such hegemony lay through the contraction of civil and political rights and the undermining of the federal system. ¹³¹ To offset the resulting rapid decline in the support for the Government among progressive, secular, and democratic forces, there was an effort to reintroduce religion as a source of political legitimacy and a series of concessions were made to placate conservative forces, including the *ulama*. ¹³²

It was in this context, in 1974, that the *ulama* initiated a second wave of anti-Ahmadi agitation. The *ulama* raised demands similar to those raised in 1952, ¹³³ namely, the declaration of Ahmadis as a non-Muslim minority and removal of Ahmadis from all key governmental positions. ¹³⁴ The Government initially treated the issue as one of law and order, and appointed a respected judge of the Lahore High Court to investigate the matter and submit his findings. ¹³⁵ The Government also sought to discredit the leaders of the anti-Ahmadi agitations, charging them with attempting to sabotage the unanimously adopted 1973 Constitution. The Government opposed Parliament's discussion of the question until after public order was restored and

speaks of Bhutto's "schizoid personality." STANLEY WOLPERT, ZULFI BHUTTO OF PAKISTAN: HIS LIFE AND TIMES 3 (1993) [hereinafter WOLPERT, ZULFI BHUTTO].

129. NOMAN, *supra* note 38, at 105 (quoting Maleeha Lodhi, Pakistan People's Party (1979)) (unpublished Ph.D. dissertation, London School of Economics).

130. *Id.* at 107.

131. See Mahmud, *Praetorianism*, *supra* note 26, at 1261-73; NOMAN, *supra* note 38, at 101-07; WASEEM, *supra* note 89, at 323-40.

132. See NOMAN, *supra* note 38, at 107-11; SYED, PAKISTAN, *supra* note 84, at 126-30.

133. See *supra* notes 91-99 and accompanying text (discussing unfolding of first anti-Ahmadi agitation, which was spearheaded by *ulama*).

134. Kennedy, *supra* note 7, at 90-91.

135. ANWAR H. SYED, THE DISCOURSE AND POLITICS OF ZULFIKAR ALI BHUTTO 198 (1992) [hereinafter SYED, BHUTTO]. The provincial chief executive specifically asked the people not to make this breach of public order into a sectarian issue. Interestingly, the judge appointed to investigate the matter, Lahore High Court Justice K.M.A. Samdani, is of the view that:

[M]ost of the confusion that has arisen in the country as a result of which the institution of democracy has suffered almost irreparably, stemmed from the fact that by and large the judiciary in Pakistan tried, in times of crises, to avoid confrontation with the executive and went out of its way to take the path of least resistance. It [chose to] uphold the de facto situation rather than declare the de jure position.

NEWBERG, JUDGING THE STATE, *supra* note 83, at 7.

the Inquiry Commission submitted its report, and pledged to protect all citizens, regardless of their religious affiliation, with all available means, including the army.¹³⁶ The opposition, however, raised the ante. They boycotted Parliament, formed an "Action Committee," and decided to take "direct action" against the Ahmadis starting June 14, 1974.¹³⁷ Prime Minister Bhutto capitulated and, after meeting the agitation leaders, agreed on June 13 to place the issue before Parliament.¹³⁸ On September 10, 1974, Parliament adopted a bill whereby the Constitution was amended to provide that:

A person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (Peace be upon him) the last of the Prophets or claims to be a Prophet, in any sense of the word or of any description whatsoever, after Muhammad (Peace be upon him), or recognizes such a claimant as a prophet or a religious reformer, is not a Muslim for the purposes of the Constitution or law.¹³⁹

Commentators have accurately identified this development among the "series of cynical concessions [made] to the religious lobby in the hope of stealing their thunder," and one which proved "[b]y far the most detrimental for the future of equal citizenship rights."¹⁴⁰

Apparently, not satisfied with the classification of Ahmadis

136. SYED, BHUTTO, *supra* note 135, at 199; Kennedy, *supra* note 7, at 90.

137. SYED, BHUTTO, *supra* note 135, at 199-200; Kennedy, *supra* note 7, at 91.

138. SYED, BHUTTO, *supra* note 135, at 190-201. Bhutto's capitulation was motivated by the fear that "if the issue lingered, many PPP legislators in the Assembly might bend before public pressure, support the ulema's demands, and in effect abandon [him]." *Id.* at 201. The author notes that "Bhutto had responded to his political needs . . . [and] he put aside his own intellectual inclination and preferences to heed the logic of political survival." *Id.*; see Kennedy, *supra* note 7, at 90 (noting that "[Bhutto's actions] served to silence his critics and to buttress the sagging fortunes of his administration"). The author also comments that "Islamic fundamentalists now had gained greater power inside both Bhutto's government and party," and that the government's reversal of public posture "encouraged immoderate expectations on the part of anti-Ahmadi elements . . . [and] prompted officials to enthusiastically implement public sanctions against the Ahmadiyya." *Id.* at 92; see also WOLPERT, ZULFI BHUTTO, *supra* note 128, at 239. According to Bhutto's biographer, the passage of the amendment was "a major victory for Prime Minister Bhutto because many thitherto [sic] anti-PPP fundamentalists crossed over the assembly lobbies . . . to join what they now considered the more 'orthodox' People's Party." *Id.*

139. CONSTITUTION (SECOND AMENDMENT) ACT, § 3 (Sept. 1974) (Pak.).

140. JALAL, DEMOCRACY AND AUTHORITARIANISM, *supra* note 45, at 238. Jalal characterizes this development as "unlocking the floodgates to the Islamic storm of the 1980s." *Id.*

as non-Muslims, in 1976, a group of *ulama* brought a suit seeking an injunction against the Ahmadis that would prohibit them from calling their places of worship *masjid*, calling the *azan*, performing *namaz*, and reciting the Qur'an.¹⁴¹ The Lahore High Court denied the petition and held that:

It is the policy of the State to protect all religions but to interfere with none. . . . [T]he right of conscience, *i.e.*, the right of individual members of a community to hold certain religious beliefs and opinion is of course a religious one and one that cannot be called in question or adjudicated upon in the civil Court.¹⁴²

The Lahore High Court recited "the fundamental principle of there being no compulsion in religious affairs It is not the province or duty of the Court to pronounce on the truth of religious tenets or to regulate religious rites or ceremonies."¹⁴³ The Lahore High Court held that "every one has a right to follow the religion of his own liking and is at liberty to worship according to the dictates of his own conscience without being guided or governed in this respect by persons following a different religion."¹⁴⁴ In rejecting the *ulama's* petition, the Lahore High Court surveyed sources of Islamic law and concluded:

It is not difficult to infer from these authorities that Islam leaves non-Muslims free to profess and practise their religion and enjoy complete autonomy in regard to their religious tenets and institutions. . . . I have not come across a single instance in the Islamic history when the non-Muslim subjects . . . have been subjected to religious intolerance or their freedom to practise their religions has ever been curtailed or interfered with.¹⁴⁵

The Lahore High Court rejected the argument that the "subject to law" limitation of Article 20 meant Islamic law.¹⁴⁶ It

141. *Mobashir v. Bokhari*, 1978 P.L.D. (Lah.) 113 (Pak.).

142. *Mobashir*, 1978 P.L.D. (Lah.) at 142 (Pak.).

143. *Id.*

144. *Id.* at 146.

145. *Id.* at 185.

146. *Id.* at 155. According to the Court:

The implication is clear that Shariat Law except what is already made applicable by positive law is not included in the word law . . . The argument that law means Islamic Law and in case of conflict between Islamic Law and codified law, the Islamic Law prevails, is thus easily refuted

Id.

nevertheless engaged in an extensive review of primary religious texts and commentaries of jurists, and adopted those pronouncements which supported freedom of religious belief and practice.¹⁴⁷ The Lahore High Court concluded that granting the injunction against the Ahmadis "will amount to interfering with their religion, which Islam, the religion of tolerance, does not allow. . . . Islam leaves the non-Muslims free to profess and practice their religion."¹⁴⁸

While protecting the right of Ahmadis to practice their religion, the Lahore High Court did not question the validity of the Second Amendment, which it termed "a declaratory statute which by its very nature is retrospective in character."¹⁴⁹ That this recognition was a dictate of legal formalism and not rational reasoning is betrayed by the Lahore High Court's tongue-in-cheek remark that "[i]t is true that Legislature can pass any law and can declare even a man as a woman or conversely a woman as a man."¹⁵⁰ Furthermore, as a pointed reminder that the designation of Ahmadis as non-Muslims was the product of amoral power politics, the Lahore High Court observed that "[a] number of denominations were treated as infidels during the course of [Muslim] history by the then monarch or Caliph."¹⁵¹

On the question of the validity of the Second Amendment, the Lahore High Court was obliged to follow the position of the Supreme Court of Pakistan, which had rejected the proposition that the theory of unfettered legislative power has no place under a written federal constitution and that the federal legislature cannot employ its power to amend, abrogate, or destroy the "basic structure" and "essential features" of the Constitution.¹⁵² The Supreme Court of Pakistan, in *State v. Zia-ur-Rahman*,¹⁵³ a case unrelated to the Ahmadi issue, had held that as long as the

147. *Id.* at 168-88.

148. *Id.* at 188. To overrule the Lahore High Court's holding in *Mobashir*, section 2 of Ordinance XX expressly provided that "provisions of this Ordinance shall have effect notwithstanding any order or decision of any Court." Ordinance XX of 1984, 36 P.L.D. at 102 (Pak.). The implied reference to *Mobashir* was noted by the minority opinion in *Zaheeruddin. Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1746 (Pak.). Justice Shafiqur Rahman, however, noted that, "[n]evertheless it must be stated that it is a very exhaustive and illuminative judgment on the subject." *Id.*

149. *Mobashir*, 1978 P.L.D. (Lah.) at 151 (Pak.).

150. *Id.* at 154.

151. *Id.* at 170.

152. See generally Mahmud, *Praetorianism*, *supra* note 26, at 1262-73.

153. *State v. Zia-ur-Rahman*, 1973 P.L.D. (S.Ct.) 49 (Pak.).

procedure to amend the Constitution was followed, the judiciary cannot question the substance of an amendment¹⁵⁴ which the Court designated a nonjusticiable political question.¹⁵⁵ Consequently, during the second phase of judicial practice regarding freedom of religion the superior courts of Pakistan retreated from their position of unequivocal protection of freedom of religion of religious minorities, in deference to the constitutional amendment process, when they validated the constitutional designation of Ahmadis as non-Muslims. The courts remained silent about the implied covenant guaranteeing the freedom of religion to religious minorities and international human rights norms. Nevertheless, they acknowledged the discontinuous and contingent practice of historical Muslim political systems regarding religious minorities, and chose to highlight those pronouncements of primary religious texts that afford freedom of religious belief and practice.

C. Phase III: Complete Judicial Capitulation

The third phase of judicial conduct regarding religious freedom and religious minorities unfolded in the context of the institutionalization of praetorianism¹⁵⁶ and "Islamization"¹⁵⁷ of society and politics under the martial law regime of General Zia-ul-Haq,¹⁵⁸ whereby "[t]he military wrapped itself into the role of an ideological vanguard for a theocratic state."¹⁵⁹ Claiming a divine

154. *Zia-ur-Rahman*, 1973 P.L.D. (S.Ct.) at 70 (Pak.).

155. *Id.* at 76-77.

156. See Mahmud, *Praetorianism*, *supra* note 26, at 1282-94 (examining constitutional issues surrounding establishment of martial law regime and its efforts to institutionalize praetorianism).

157. See generally RASHIDA PATEL, *ISLAMISATION OF LAWS IN PAKISTAN?* (1986); RUBYA MEHDI, *THE ISLAMIZATION OF THE LAW IN PAKISTAN* (1994); Ann E. Mayer, *The Fundamentalist Impact on Law, Politics, and Constitutions in Iran, Pakistan, and the Sudan*, in *FUNDAMENTALISMS AND THE STATE: REMAKING POLITICS, ECONOMIES, AND MILITANCE* 110 (Martin E. Marty & R. Scott Appleby eds., 1993); Lucy Carroll, *Nizam-I-Islam: Processes and Conflicts in Pakistan's Programme of Islamisation, with Special Reference to the Position of Women*, 20 *J. COMMONWEALTH & COMP. POL.* 57 (1982); Daniel P. Collins, Note, *Islamization of Pakistani Law: A Historical Perspective*, 24 *STAN. J. INT'L L.* 511 (1988); David Taylor, *The Politics of Islam and Islamization in Pakistan*, in *ISLAM IN THE POLITICAL PROCESS* 181 (James P. Piscatori ed., 1983); *ISLAMIC REASSERTION IN PAKISTAN: THE APPLICATION OF ISLAMIC LAWS IN A MODERN STATE* (Anita M. Weiss ed., 1986); *ISLAM, POLITICS AND THE STATE: THE PAKISTAN EXPERIENCE* (Mohammad A. Khan ed., 1985).

158. See generally JALAL, *DEMOCRACY AND AUTHORITARIANISM*, *supra* note 45, at 100-21.

159. NOMAN, *supra* note 38, at 117.

mandate,¹⁶⁰ the military regime proceeded to reorder all aspects of public and private life in line with a fundamentalist conception of an Islamic state.¹⁶¹ The judicial system furnished a particularly fertile ground for "Islamization." Salient changes included the introduction of the *hudoob* penal code,¹⁶² curtailment of the scope of judicial review,¹⁶³ dismantling of the tenurial system of the superior judiciary,¹⁶⁴ establishment of military courts,¹⁶⁵ and establishment of Shari'at courts.¹⁶⁶ The changes made under the rubric of "Islamization:"

[D]id much to eliminate due process, to erode the independence of the judiciary, to place legal proceedings under the control of political leaders, and to convert courts into instruments of repression and intimidation.¹⁶⁷

It was in this context that a third round of anti-Ahmadi agitation unfolded. A resurgent *Tehrik i-Khatm-i-Nabuwat* [end of prophethood movement] raised new demands of sanctions against the Ahmadis,¹⁶⁸ announced plans for an All-Pakistan Conference to be held on April 27, 1984, and issued a warning that if the demands were not met, "direct action" would be

160. General Zia, in an interview with the British Broadcasting Corporation on April 15, 1978, commented, "I have a mission, given by God, to bring Islamic order to Pakistan." Interview with Zial-ul-Haq, British Broadcasting Corporation (Apr. 15, 1978), reprinted in NOMAN, *supra* note 38, at 141.

161. NOMAN, *supra* note 38, at 140-52 (discussing idea of military theocracy). The blueprint implemented by the military followed closely the design advocated by Sayyid Abul a'la Maududi. SAYYID ABUL A'LA MAUDUDI, *THE ISLAMIC LAW AND CONSTITUTION* (Khurshid Ahmad ed. and tran., 2d ed. 1960). See generally Charles J. Adams, *The Ideology of Mawlana Mawdudi*, in *SOUTH ASIAN POLITICS AND RELIGION* 371 (Donald Eugene Smith ed., 1966); Barbara D. Metcalf, *Islamic Arguments in Contemporary Pakistan*, in *ISLAM AND THE POLITICAL ECONOMY OF MEANING: COMPARATIVE STUDIES OF MUSLIM DISCOURSE* 132 (William R. Roff ed., 1987).

162. Prohibition (Enforcement of Hadd) Order, 1979, P.O. No. 4 (Feb. 9, 1979), 1979 P.L.D. (Central Statutes) 33 (Pak.). See generally Rubya Mehdi, *The Offence of Rape in the Islamic Law of Pakistan*, 18 INT'L J. SOC. L. 19 (1990); Evan Gottesman, *The Reemergence of Qisas and Diyat in Pakistan*, 23 COLUM. HUM. RTS. L. REV. 433 (1991-92).

163. See Mahmud, *Praetorianism*, *supra* note 26, at 1281-82.

164. *Id.*; NOMAN, *supra* note 38, at 124.

165. Mahmud, *Praetorianism*, *supra* note 26, at 1279-82.

166. Shariat Benches of Superior Courts Order, P.O. No. 22 (Dec. 2, 1978), 1978 P.L.D. (Central Statutes) 6 (Pak.).

167. MAYER, *ISLAM AND HUMAN RIGHTS*, *supra* note 30, at 35.

168. Kennedy, *supra* note 7, at 94. The demands included: (i) removal of Ahmadis from civil bureaucratic and military posts; (ii) closure of Ahmadi mosques; (iii) prohibition against Ahmadis calling the *azan* (call to prayer); (iv) prohibition of missionary activity by Ahmadis; (v) prohibition of publication or dissemination of Ahmadi literature; and (vi) confiscation of all Ahmadi literature. *Id.*

launched after April 30, 1984.¹⁶⁹ The martial law regime complied with the demands, and on April 26, 1984, Ordinance XX of 1984 was issued.¹⁷⁰

A constitutional petition was filed in the Lahore High Court challenging Ordinance XX as violating the constitutionally guaranteed fundamental right to profess, practice, and propagate religion. The Lahore High Court dismissed the petition on the ground that the Constitution had been effectively suspended since the declaration of martial law on July 5, 1977, and hence the legislative power of the martial law regime, which had enacted Ordinance XX, did not suffer from any limitations set out by the fundamental rights found in the Constitution.¹⁷¹ This was in line with the Pakistan Supreme Court's earlier validation of the imposition of martial law in 1977 under the doctrine of necessity, and its recognition of the unfettered legislative power of the extra-constitutional regime.¹⁷²

Ordinance XX was also challenged as violating principles laid down by the Qur'an and the *Sunnah* before the newly established Federal Shariat Court ("FSC").¹⁷³ The FSC dismissed the petitions and held that Ordinance XX was simply "consequential to the Constitutional Amendment of 1974 by which the [Ahmadis] . . . were declared non-Muslims."¹⁷⁴ The FSC accused the Ahmadis of disregarding their designation as non-Muslims by the 1974 constitutional amendment, and of outraging the

169. *Id.*

170. *Id.* at 95.

171. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1734 (Pak.) (discussing Constitutional Petition No. 2309 of 1984).

172. *Nusrat Bhutto v. Chief of Army Staff*, 1977 P.L.D. (S.Ct.) 657 (Pak.); see generally Mahmud, *Praetorianism*, *supra* note 26, at 1282-94; Mark M. Stavsky, *The Doctrine of State Necessity in Pakistan*, 16 CORNELL INT'L L.J. 341 (1983).

173. *Mujeeb-ur-Rehman v. Pakistan*, 1984 P.L.D. (F.S.C.) 136, 137 (Pak.). The credibility of the Shariat Court was rather low at this point, following the flip-flop on the *rajam* (stoning to death) issue. See *Hazoor Bakhsh v. Pakistan*, 1981 P.L.D. (F.S.C.) 145 (Pak.). In 1981, the Federal Shariat Court ("FSC") had decided that *rajam* was repugnant to injunctions of Islam. *Id.* The military regime expressed displeasure, arbitrarily changed the composition of the FSC, and the reconstituted court proceeded to hold in an extraordinary review that *rajam* was not inconsistent with Islam. *Pakistan v. Hazoor Bakhsh*, 1983 P.L.D. (F.S.C.) 255 (Pak.); see generally Ann E. Mayer, *The Shari'ah: A Methodology or a Body of Substantive Rules?*, in *ISLAMIC LAW AND JURISPRUDENCE* (Nicholas Heer ed., 1990) (discussing *Hazoor Bakhsh* case).

174. *Mujeeb-ur-Rehman*, 1984 P.L.D. (F.S.C.) at 137 (Pak.). It was a sign of the changed times that this ruling was issued by Chief Justice Aftab Hussain, author of the 1976 *Mobashir* opinion. *Mobashir v. Bokhari*, 1978 P.L.D. (Lah.) 113 (Pak.).

feelings of Muslims. The FSC insisted that in light of Ordinance XX the Ahmadis "can call their places of worship by any other name and call the adherents of their religion to prayer by use of any other method. This does not amount to interference with the right to profess or practise their religion."¹⁷⁵

Two months later, the FSC gave its detailed ruling on the issue.¹⁷⁶ The first 70 pages of the 106-page opinion are devoted to elaborating the doctrinal differences between the Ahmadis and other Muslim sects and schools in order to establish that the Ahmadis are non-Muslims.¹⁷⁷ The FSC held that "[t]he Ordinance, therefore, restrains them from calling themselves what they are not; since they cannot be allowed to deceive anybody specially [sic] the Muslim Ummah by passing off as Muslims."¹⁷⁸ According to the FSC, the effect of the Second Amendment was that Ahmadis "should have refrained from directly or indirectly posing as Muslims but they obstinately persevered in trying the patience of Muslim Ummah by acting contrarily."¹⁷⁹ If the Ahmadis "had taken steps to implement the Constitutional provisions the promulgation of this Ordinance might not have been required."¹⁸⁰ But "[i]f an Islamic State in spite of its being in power allows a non-Muslim to adopt the Shia'ar of Islam which affects the distinguishing characteristics of Muslim Ummah, it will be the failure of that State in discharge of its duties."¹⁸¹ The FSC dismissed arguments based on Article 18 of the Universal Declaration of Human Rights¹⁸² ("UDHR"), with the curious observation that "[t]here is nothing in this charter to give to the citizens of a country the right to propagate or preach his religion."¹⁸³ As for the Article 20 guarantees, the FSC took the posi-

175. *Mujeeb-ur-Rehman*, 1984 P.L.D. (F.S.C.) at 137 (Pak.).

176. *Majibur Rehman v. Pakistan*, 1985 P.L.D. (F.S.C.) 8 (Pak.).

177. *Majibur Rehman*, 1985 P.L.D. (F.S.C.) at 17-93 (Pak.).

178. *Id.* at 93.

179. *Id.* at 99. According to the Court, the Ahmadis' propagation of their beliefs: "[T]ouch the usual chord of the educated Muslims' distaste for the intense sectarianism and persistent rigidity of the Ulema and tend to draw them towards what they preach to be liberalism in Islam. This strategy . . . bears strong resemblance to the passing off by a trader of his inferior goods as the superior well known goods of a reputed firm.

Id. at 100.

180. *Id.* at 100.

181. *Id.* at 111.

182. Universal Declaration, *supra* note 1, art. 18, at 71.

183. *Majibur Rehman*, 1985 P.L.D. (F.S.C.) at 117 (Pak.).

tion that these are "subject to law and order," because the Ahmadis:

[C]ontinued to propagate their religion freely by publication of books, journals, etc. as well as among individual Muslim [sic] to create resentment which obviously was likely to create law and order situation [sic]. . . . In these circumstances the Ordinance appears to be covered by the exception in Article 20 about its being subject to the maintenance of law and order.¹⁸⁴

Further, the FSC dismissed the argument that an implied covenant existed between Jinnah and the Ahmadis regarding religious freedom with the comment that "[n]o covenant between the [Ahmadis] and [Jinnah] was shown to us that they shall be treated as Muslims, nor did this question arise at the time of establishment of Pakistan or during the lifetime of [Jinnah]."¹⁸⁵

While the majority opinion in *Zaheeruddin* followed the assumptions, arguments, and even the tone of the FSC in *Majibur Rehman*, and expressly adopted its holdings as its own,¹⁸⁶ the minority opinion expressly departed. In his minority opinion, Justice Shafiqur Rahman began by rejecting the position that, due to the incorporation of the Objectives Resolution as a substantive part of the Pakistan Constitution by virtue of Article 2-A, the whole Constitution, including the fundamental rights provisions, is controlled by and subordinate to injunctions of Islam.¹⁸⁷ Rely-

184. *Id.* at 119-20. Compare the restrictive construction of "subject to law" clause fashioned by the Supreme Court in *Sarfraz Hussain Bokhari v. District Magistrate, Kasur*, 1983 P.L.D. (S.Ct.) 172 (Pak.).

185. *Id.* at 98-99; Kennedy, *supra* note 7, at 91.

186. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1755-56 (Pak.). The Supreme Court rested this posture on its reading of Chapter 3-A of the Pakistan Constitution of 1973, which set up the parallel Federal Shariat Court system. PAK. CONST. (1973) arts. 203A-203H. This Chapter was inserted into the Constitution by the extra-constitutional military regime through Constitution (Amendment) Order, 1980, P.O. No. 1 (May 27, 1980), P.L.D. (Central Statutes) 89 (Pak.). *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1756 (Pak.). According to the Court, this chapter dictated that a finding by the FSC, if it is either not challenged in the Shariat Appellate Bench of the Supreme Court or upheld by the latter, is binding on the Supreme Court. *Id.* The Supreme Court noted that the *Mujibur Rehman* decision was challenged before the Shariat Appellate Bench of the Supreme Court, but the appellants had withdrawn the appeal, leading the Bench to hold that the "[j]udgment of the Federal Shariat Court shall rule the field." *Id.* at 1755 (quoting *Mujibur Rehman v. Pakistan*, 1988 P.L.D. (Shariat App. Bench) 167 (Pak.)).

187. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1742-44 (Pak.).

ing on his concurring opinion in *Hakim Khan v. Pakistan*,¹⁸⁸ Justice Rahman recalled that:

The provisions of Article 2-A were never intended at any stage to be self-executory or to be adopted as a test of repugnancy or of contrariety. It was beyond the power of the Court to have applied the test of repugnancy by invoking Article 2-A of the Constitution for striking down any other provision of the Constitution¹⁸⁹

Justice Rahman also rejected the proposition that, given the "subject to law" qualifier to the freedom of religion provision of the Constitution, Ordinance XX qualifies as law and therefore will hold good notwithstanding any apparent or substantial conflict with the right. Justice Rahman quoted *Jibendra Kishore v. Province of East Pakistan* in which Chief Justice Muhammad Munir stated:

I refuse to be a party to any such pedantic, technical and narrow construction of the Article in question, for I consider it to be a fundamental canon of construction that a Constitution should receive a liberal interpretation in favor of the citizen, especially with respect to those provisions which were designed to safeguard the freedom of conscience and worship.¹⁹⁰

Justice Rahman noted that Section 2 of Ordinance XX, which provides that "provisions of this Ordinance shall have effect notwithstanding any order or decision of any Court," is a reference to the *Mobashir* case, and termed the case "a very exhaustive and illuminative judgment on the subject."¹⁹¹ He declined, without discussion, to adopt the position that the FSC's holding in

188. *Hakim Khan v. Pakistan*, 1992 P.L.D. (S.Ct.) 595 (Pak.).

189. *Zaheeruddin*, 26 S.C.M.R. (S.Ct.) at 1743-44 (Pak.) (quoting *Hakim Khan*, 1992 P.L.D. (S.Ct.) 595 (Pak.)).

190. *Id.* at 1744 (quoting *Jibendra Kishore Acharyya Chowdhury v. East Pakistan*, 1957 P.L.D. (S.Ct.) 9, 41 (Pak.) [hereinafter *Jibendra Kishore*]). Concluding that *Jibendra Kishore* dealt with the issue "adequately and effectively," Shafiur Rahman again quoted Chief Justice Munir:

[C]onstitutional instruments should receive a broader and more liberal construction than statutes, for the power dealt with in the former case is original and unlimited and in the latter case limited, and constitutional rights should not be permitted to be nullified or evaded by astute verbal criticism, without regard to the fundamental aim and object of the instrument and the principles on which it is based.

Id. at 1745 (quoting *Jibendra Kishore*, 1957 P.L.D. (S.Ct.) at 42 (Pak.)).

191. *Id.* at 1746.

Majibur Rehman had precedential value because it had been affirmed by the Shariat Appellate Bench of the Supreme Court.¹⁹² Finally, he took the position that most of Ordinance XX was unconstitutional as violating freedom of religion, equal protection of the law, and freedom of speech.¹⁹³ He ended his opinion with the noteworthy statement that:

Our difficulty in handling these appeals has been that the respondents have by and large argued the matter as if the vires of the impugned portions of the Ordinance are being tested [more] for their inconsistency . . . with injunctions of Islam than for their inconsistency with the Fundamental Rights. This has brought in religious scholars volunteering to assist the Court generating [a] lot of avoidable heat and controversy at the argument and post argument stage.¹⁹⁴

This statement accurately characterizes both the doctrinal and practical dilemmas Pakistan's judiciary faces when confronted with the question of religious freedom: (i) whether the basic law of the land is the written Constitution or the injunctions of Islam; and (ii) how to keep the judicial process immune from extra-legal political realities of reassertion of religious fundamentalism and sectarianism. Furthermore, this statement raises questions about constitutional guarantees with respect to the rule of law in Pakistan, the independence of the judiciary, and the viability of Pakistan's courts as the protector of fundamental rights of citizens.

A recent book-length study of the courts and constitutional politics in Pakistan¹⁹⁵ advances two broad conclusions: (i) that the courts "tailor[ed] their decisions for expedience,"¹⁹⁶ and consequently imbued extraconstitutional state actions with "colors of constitutionalism . . . offering a veneer of legitimacy through the medium of legality."¹⁹⁷ and; (ii) that the courts concurrently "kept alive political ideals . . . [and] helped create a constituency for ideas of citizens' rights and state obligations."¹⁹⁸ This Article's examination of the genesis and development of

192. *Id.* at 1739.

193. *Id.* at 1746-48.

194. *Id.* at 1749.

195. NEWBERG, *JUDGING THE STATE*, *supra* note 83, at 8.

196. *Id.* at 7.

197. *Id.* at 8.

198. *Id.*

freedom of religion jurisprudence in Pakistan supports the first conclusion. The second conclusion is valid for the first two decades of the State's existence and only partly true during the Fourth Republic. Over the last fifteen years, however, the courts have completely capitulated before majoritarian religious forces and abdicated their role as guardians of the constitutional right of freedom of religious belief and practice. This survey of judicial practice warrants the conclusion that the assumptions and propositions of *Zaheeruddin* are patently mistaken: (i) given the diametrically opposed conclusions about Ahmadis' right of religious practice drawn by *Mobashir* and *Zaheeruddin*, supposedly from the same corpus of Islamic law, the *Shari'ah* must be viewed as, at best, a methodology, and not as a code of substantive rules;¹⁹⁹ the texts considered authoritative contain inconsistent and contradictory pronouncements regarding freedom of religion and rights of religious minorities, and any use of these authorities is inherently contingent, leading to indeterminate outcomes; (ii) incorporation of the Objectives Resolution as a substantive part of the Constitution does not automatically overrule the foundational jurisprudence regarding religious freedom. The Resolution was a political compromise, full of internal inconsistencies and contradictions. The Resolution expressly envisages that minorities are free to "profess and practice their religions,"²⁰⁰ and the legislative history of the Resolution is replete with assurances that it was not intended to curtail religious freedom;²⁰¹ (iii) there is no one specific concept of the Islamic State,

199. See Joseph Schacht, *Problems of Modern Islamic Legislation*, 12 *STUDIA ISLAMICA* 108 (1960); Ann E. Mayer, *supra* note 173, at 177; AZIZ AL-AZMEH, *ISLAM AND MODERNITIES* 12 (1993). The author notes that "Islamic law is not a code. This is why the frequently heard call for its 'application' is meaningless, most particularly when calls are made for the application of *shari'a* — this last term does not designate law, but is a general term designating good order, much like *nomos* or *dharma*." *Id.*; ABDULLAH A. AN-NA'IM, *TOWARDS AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* xiv (1990) ("Shari'a is not the whole of Islam but instead is an interpretation of its fundamental sources as understood in a particular historical context.").

200. MAHMOOD, *CONSTITUTIONAL FOUNDATIONS*, *supra* note 11, at 46.

201. *Id.* at 46-51. The *Zaheeruddin* majority conveniently ignored *Hakim Khan v. Pakistan*, 1992 P.L.D. (S.Ct.) 595 (Pak.). The *Hakim Khan* Court, after an extensive discussion, rejected the proposition that the Objectives Resolution has "an overwhelming position in the Constitution . . . [and is] in control of the Constitution," giving the courts the power to strike down provisions of the Constitution that are in conflict with injunctions of Islam. *Id.* at 612. The Court held that due to the Resolution's incorporation as a substantive part of the Constitution:

[T]he role of the Objectives Resolution . . . has not been fundamentally trans-

but several,²⁰² and there has never been any consensus in Pakistan on the desirability or nature of an "Islamic State;"²⁰³ (iv) constitutional governance and rule of law mandate that responsibility for the breakdown of law and order be placed upon those who take the law into their own hands; and (v) the constitutional guarantee of freedom of expression and belief applies "not only to 'information' or 'ideas' that are favorably received or re-

formed from the role envisaged for it at the outset; namely that it should serve as beacon light for the Constitution-makers . . . [A]ccordingly now when a question arises whether any of the provisions of the 1973-Constitution exceeds in any particular respect, the limits prescribed by Allah Almighty . . . this inconsistency will be resolved . . . by the National Assembly itself . . . through the amendment process laid down in the Constitution itself.

Id. at 619-20; see Asif S.K. Khosa, *The Ineffective Effect of Article 2-A, Constitution of Pakistan*, 42 ALL PAKISTAN LEGAL DECISIONS 50, 50 (1990); Charles H. Kennedy, *Repugnancy to Islam-Who Decides?: Islam and Legal Reform in Pakistan*, 41 INT'L & COMP. L.Q. 769 (1992).

202. See, e.g., EDWARD MORTIMER, *FAITH AND POWER* 406 (1982). Mortimer surveys six different theoretical models of the Islamic State to show that despite common characteristics, each model is unique and fashioned by a host of local, political, historical, and economic factors. *Id.* Mortimer concludes that "[w]estern notions about 'Islam' as a geopolitical force . . . are fundamentally misplaced . . . [I]t is more useful, in politics at any rate, to think about Muslims than to think about Islam." *Id.*; JALAL, *DEMOCRACY AND AUTHORITARIANISM*, *supra* note 45, at 239 ("Islam as religion has been open to far too many conflicting interpretations to serve as a stable ideological anchor for the state"); see generally LEONARD BINDER, *ISLAMIC LIBERALISM: A CRITIQUE OF DEVELOPMENT IDEOLOGIES* (1988); HAMID ENAYAT, *MODERN ISLAMIC POLITICAL THOUGHT: THE RESPONSE OF THE SHI'1 AND SUNNI MUSLIMS TO THE TWENTIETH CENTURY* (1982); JOHN ESPOSITO, *ISLAM AND POLITICS* (3d ed. 1991); ISLAM, *POLITICS AND THE STATE: THE PAKISTAN EXPERIENCE* (Mohammad Asghar Khan ed., 1985).

203. See JALAL, *DEMOCRACY AND AUTHORITARIAN*, *supra* note 45, at 220-21 (noting that "invok[ing] Islam as an ideological monolith in the state-sponsored discourse . . . did not alter the basic fact that the meaning attached to Islam in religious and cultural practices in locality and region differed in essentials from the monolithic ideological protestations"); BINDER, *supra* note 23, at 10-109 (discussing four distinct conceptions of state-building that competed during process preceding passage of first Constitution in 1956, and commenting that document represented pragmatic bargain after ideological purities were compromised); Wayne A. Wilcox, *Ideological Dilemmas in Pakistan's Political Culture*, in *SOUTH ASIAN POLITICS AND RELIGION* 339 (Donald E. Smith ed., 1966) (examining ideological controversy surrounding concept of Islam and Islamic State, with reference to impact of Pakistan's complex and variegated social structure and many different intellectual and cultural traditions); ERWIN I.J. ROSENTHAL, *ISLAM IN THE MODERN NATIONAL STATE* 203 (1965). Rosenthal comments that:

It is difficult to decide whether the vagaries of the process of framing a workable constitution are due to the so-called Islamic ideology being open to as many different interpretations as movements, parties and people use the term, almost like a magic wand, or to a more deep-rooted disagreement about the aims and objects of an independent Muslim state and nation in the subcontinent which has produced this ambiguous ideology.

Id.

garded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population."²⁰⁴

IV. *FREEDOM OF RELIGION AS MANDATED BY INTERNATIONAL LAW*

Pakistan's judicial treatment of international legal norms of freedom of religion remains incomplete, inconsistent, and arbitrary.²⁰⁵ In order appreciate how far Pakistan's judicial practice has strayed from applicable norms, one must retrace the evolution of international standards of freedom of religion, Pakistan's pioneering role in developing such standards, and the applicability of these standards in domestic courts.

A. *Evolution of Modern International Legal Norms on Freedom of Religion*

As it has since antiquity, freedom of religion remains a central question in international law.²⁰⁶ The U.N. General Assembly's adoption of the UDHR in 1948 represented the first significant step in constructing a universal norm for protecting freedom of religion.²⁰⁷ Taking its lead from the Charter of the United Nations, which emphasizes non-discrimination on the basis of religion in its main articles addressing human rights,²⁰⁸ Article 18 of the UDHR provides that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, freedom, either alone or in community with others and in public or private, to manifest his religion or

204. *Handyside Case*, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

205. See *supra* notes 156-204 and accompanying text (discussing judicial treatment of religious freedom in Pakistan).

206. See generally Stephen C. Neff, *An Evolving International Legal Norm of Religious Freedom: Problems and Prospects*, 7 CAL. W. INT'L L.J. 543 (1977).

207. Universal Declaration, *supra* note 1, at 71; see generally THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY (Asbjorn Eide et al. eds., 1992).

208. U.N. CHARTER art. 1. Article 1 of the Charter states that one of the purposes of the United Nations is to "promot[e] and encourag[e] respect for human rights and . . . fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.* Article 55 provides that: "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.* art. 55; see generally Brice Dickson, *The United Nations and Freedom of Religion*, 44 INT'L & COMP. L.Q. 327 (1995).

belief in teaching, practice, worship and observance.²⁰⁹

The colloquy that took place between the representatives of Saudi Arabia and Pakistan during the discussion of the Draft UDHR²¹⁰ is very instructive. The Saudi delegate took the position that the draft was based largely on the patterns of culture dominant in the West, patterns frequently "at variance with the patterns of culture of Eastern States."²¹¹ He particularly took issue with Article 18's construction of freedom of conscience as including the right to change one's religion.²¹² According to the Saudi delegate, the right to change one's religion was not recognized in Islamic law, and he castigated representatives of Islamic countries who voted for the provision as a betrayal of their constituency.²¹³ The representative of Pakistan, however, characterized the adoption of the UDHR as an "epoch-making event," and "thought it necessary to set out very clearly his delegation's position as to that part of article 19" which "dealt with the freedom of conscience, including freedom to change one's religion."²¹⁴ He said that "the Moslem religion had unequivocally proclaimed the right to freedom of conscience and had declared itself against any kind of compulsion in matters of faith or religious practices. The Pakistan delegation would therefore vote for article 19, and would accept no limitation on its provisions."²¹⁵

Subsequent to the adoption of the UDHR, the right to free-

209. Universal Declaration, *supra* note 1, art. 18, at 74.

210. *Continuation of the Discussion on the Draft International Declaration of Human Rights*, U.N. GAOR 3d Comm., 3d Sess., 182d plen. mtg. at 1-2, U.N. Doc. A/777 (1948).

211. *Id.* at 49. Article 19 in the Draft became art. 18 in the UDHR. Universal Declaration, *supra* note 1, art. 18, at 74.

212. Universal Declaration, *supra* note 1, art. 18, at 74.

213. DAVID LITTLE ET AL., *HUMAN RIGHTS AND THE CONFLICT OF CULTURES: WESTERN AND ISLAMIC PERSPECTIVES ON RELIGIOUS LIBERTY* 35-36 (1988).

214. *Continuation of the Discussion on the Draft Universal Declaration of Human Rights*, *supra* note 210, at 1-2.

215. *Id.* According to the Pakistani delegate:

The Koran expressly said: "Let he who chooses to believe, believe, and he who chooses to disbelieve, disbelieve," and it formally condemned not lack of faith but hypocrisy. The Moslem religion was a missionary religion: it strove to persuade men to change their faith and alter their way of living, so as to follow the faith and way of living it preached, but it recognized the same right of conversion for other religions as for itself.

Id.; see John Kelsay, *Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights*, in DAVID LITTLE ET AL., *HUMAN RIGHTS AND THE CONFLICT OF CULTURES: WESTERN AND ISLAMIC PERSPECTIVES ON RELIGIOUS LIBERTY* (1988).

dom of conscience and religion was enshrined in various multi-lateral treaties and United Nation's declarations.²¹⁶ The Geneva Conventions memorialized the rights of both civilians and prisoners during periods of war to profess and practice their religions.²¹⁷ Article 18 of the International Covenant on Civil and Political Rights²¹⁸ provides that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.²¹⁹

Similarly, the American Declaration of the Rights and Duties of Man,²²⁰ the European Convention on Human Rights and Fundamental Freedoms,²²¹ the American Convention on Human Rights,²²² and the African Charter on Human and Peoples' Rights,²²³ provide that every person has the right to freely

216. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 34, 6 U.S.T. 3316, 3347, 75 U.N.T.S. 135, 164; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 24, 27, 38, 58, 86 and 93, 6 U.S.T. 3516, 3535, 3536, 3542, 3555, 3372, 3577, 75 U.N.T.S. 287, 304, 306, 312, 324, 342, 346-48; International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 18, 999 U.N.T.S. 171, 178, 1977 Gr. Brit T.S. No. 6 (Cmd. 6702), at 11 (entered into force Mar. 23, 1976); O.A.S. Res. XXX, adopted at the Ninth International Conference of American States, art. III, in 1 ANNALS ORGANIZATION AM. STS. 130, 130 (1949); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 221, 230, Europ. T.S. No. 5, at 5.

217. *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 216, art. 34, 6 U.S.T. at 3347, 75 U.N.T.S. at 164; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 216, arts. 24, 27, 38, 58, 86 and 93, 6 U.S.T. at 3535, 3536, 3542, 3555, 3372, 3577, 75 U.N.T.S. at 304, 306, 312, 324, 342, 346-48.

218. International Covenant on Civil and Political Rights, *supra* note 216, art. 18, 999 U.N.T.S. at 178, 1977 Gr. Brit. T.S. No. 6, at 11.

219. *Id.*

220. O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, art. III, in 1 ANNALS ORGANIZATION AM. STS. 130, 130 (1949).

221. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 216, art. 9, 213 U.N.T.S. at 230, Europ. T.S. No. 5, at 5.

222. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 12, O.A.S.T.S. No. 36, at 5, 9 I.L.M. 673, 679 (entered into force July 18, 1978).

223. African Charter on Human and Peoples' Rights, June 27, 1981, art. 8, 21 I.L.M. 59, 60 (1982) (entered into force Oct. 21, 1986).

profess a religious faith and to manifest and practice it both in public and in private.

International efforts to codify freedom of religion culminated in the adoption, by consensus, of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief²²⁴ ("Declaration"). Although it lacks the binding nature of an international agreement, the Declaration is "regarded throughout the world as articulating the fundamental rights of freedom of religion and belief."²²⁵ The Declaration gives specific content to the general statements of the rights of freedom of belief and freedom from discrimination based on religion or belief contained in the major human rights instruments. The "savings clause" of the Declaration preserves the standards set forth in the Universal Declaration and the International Covenants by providing that "[n]othing in the present Declaration shall be construed as restricting or derogating from any right defined in the UDHR and the International Covenants on Human Rights."²²⁶ Because it is enunciated in normative terms, elevating the rights and freedoms in question to normative status, the Declaration has a certain legal effect, "under the criteria deriving from international legal decisions."²²⁷ Articles 4 and 7 leave no doubt that the U.N. General Assembly intended the Declaration to be normative and not merely hortatory.²²⁸ Under Article 4, states are required to "make all efforts to enact or rescind legislation" and to take other effective measures to prohibit discrimination on the basis of religion or be-

224. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1981) [hereinafter Declaration]; see Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L. L. 487 (1988).

225. Implementation of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, U.N. Commission on Human Rights, U.N. ESCOR, 44th Sess., at 1, U.N. Doc. E/CN.4/1988/44/Add.2 (1988); see Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 39th Sess., at 48-49, U.N. Doc. E/CN.4/Sub.2/1987/26 (1986).

226. Declaration, *supra* note 224, art. 8.

227. *Analytical Compilation of Comments and Views on the Implementation of the Declaration on the Right to Development*, U.N. Commission on Human Rights, 11th Sess. at 5, U.N. Doc. E/CN.4/AC 39/1988/L.2 (1988). The document is an analytical compilation of views regarding the significance of the Declaration on the Right to Development, and was prepared by the Secretary General. *Id.*

228. Declaration, *supra* note 224, arts. 4, 7, at 171-72.

lief.²²⁹ Article 7 imposes a more categorical obligation, by providing that “[t]he rights and freedoms set forth in the present Declaration shall be accorded in national legislations in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.”²³⁰ Article 1 affirms the right to freedom of thought, conscience, and belief, and the right to manifest one’s religion or belief.²³¹ Article 2 prohibits discrimination on the basis of religion or belief.²³² The freedom of thought, conscience, and religion should be distinguished from the freedom to manifest religion or belief. No limitations upon the freedom of thought and freedom to profess a religion or belief are permissible.²³³ In contrast, the freedom to manifest one’s religion or beliefs may be subject to restraints imposed to protect other human rights and the various societal interests recognized by international human rights instruments.²³⁴

The use or threat of coercion to compel persons to recant or to convert, which would impair the freedom to profess a religion or belief of one’s choice, is also forbidden. To attain the core aim of the Declaration, the protection of the right to profess any religion or belief, coercion should be interpreted to include mental or psychological means of compulsion as well as physical means, and must extend to such practices as conditioning the receipt of public benefits or services upon renunciation or acceptance of religious belief.²³⁵ Article 1 of the Declaration permits restraints prescribed by law that are necessary for the

229. *Id.* art. 4, at 171-72. Article 4 states that:

1. All states shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political, social and cultural life.

2. All states shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

Id.

230. *Id.* art. 7, at 172.

231. *Id.* art. 1, at 171.

232. *Id.* art. 2, at 171.

233. See Karl J. Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 209, 213-14 (Louis Henkin ed., 1981) (distinguishing right to adhere to one’s own “conscience” from right to outwardly manifest one’s beliefs).

234. *Id.* at 214.

235. See Sullivan, *supra* note 224, at 493-96.

protection of public safety, order, health, morals, and the fundamental rights and freedoms of others. Given the breadth and vagueness of these terms, analyses of specific restrictions must guard against interpretations that would eviscerate the safeguards created and magnify uncertainties concerning the resolution of conflicts. Article 6 sketches the contours of the basic right to religious freedom that is broadly stated in Article 1.²³⁶

The companion principle to the freedom to manifest religion is the right to be free from discrimination on grounds of religion or belief.²³⁷ The Declaration prohibits distinctions that have adverse effects on human rights in addition to those that are implemented for the purpose of impairing or nullifying such rights. In barring unintentional as well as intentional acts of discrimination, Article 2 expands its protection by permitting the inference of purpose from effect.²³⁸ The definition set forth in

236. Declaration, *supra* note 224, art. 6, at 172. The article stipulates that, subject to provisions of article 1(3):

the right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.

Id.

237. *Id.* art. 2, at 171. The article provides:

1. No one shall be subject to discrimination by any State, institution, group of persons or person on grounds of religion or belief.
2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Id.

238. See THEODOR MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A*

Article 2(2) of the Declaration refers not to discrimination alone, but to "intolerance and discrimination."²³⁹ Article 4(2) suggests a distinction between the two in calling for legislative action to prohibit discrimination while exhorting states to take "all appropriate measures" to combat intolerance.²⁴⁰

Core rights are fundamental rights that cannot be violated under any circumstances. International law currently recognizes twelve non-derogable core rights, including the right to freedom of religion and prohibition of discrimination on the basis of religion.²⁴¹ The core rights are binding on all states, whether the states are signatories to a particular convention or not, as principles of customary international law.²⁴² Non-core rights are those human rights that may be limited or suspended by a state. Such derogation is permissible in two circumstances: (i) during war or public emergencies; and (ii) in order to protect national security, public health, safety, morals, or the rights and freedoms of others.²⁴³

While freedom of thought, conscience, religion, and belief are non-derogable, the freedom to manifest one's religion or beliefs may be subject to limitations. The Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Rights clarify, in general terms, the scope and nature of limitation clause provisions and set forth several principles.²⁴⁴ A limitation that is justifiably "necessary" is

CRITIQUE OF INSTRUMENTS AND PROCESS 13-14 (1986) (explaining that, within scope of Convention, discriminatory effects may inherently point to discriminatory intent); Jack Greenberg, *Race, Sex and Religious Discrimination in International Law*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 322 (Theodor Meron ed., 1984) (contrasting with U.S. Supreme Court decision in *Washington v. Davis*, which held that discriminatory effect without purpose does not violate Constitution).

239. Declaration, *supra* note 224, art. 2(2), at 171.

240. See *id.* art. 4(2), at 172.

241. See The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, *reprinted in* 7 HUM. RTS. Q. 3, 12 (1985) [hereinafter Siracusa Principles].

242. *Id.*

243. *Id.*

244. *Id.*; Richard B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072, 1073-75 (1985); Daniel O'Donnell, *Commentary by the Rapporteur on Derogation*, 7 HUM. RTS. Q. 23 (1985); *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as State of Siege or Emergency*, U.N. Commission on Human Rights, U.N. ESCOR, 35th Sess., Agenda Item 10, at 18-19, U.N. Doc. E/CN.4/Sub.2/1982/15 (1982); Alexandre Kiss, *Commentary by the Rapporteur on the Limitation Provisions*, 7 HUM. RTS. Q. 15 (1985) [hereinafter Kiss].

one that responds to a pressing public or social need, pursues a legitimate governmental purpose, and is proportionate to the governmental purpose.²⁴⁵ A limitation "prescribed by law" cannot be applied so as to jeopardize the essence of the right limited.²⁴⁶ The limiting law may not be vague, arbitrary, or unreasonable in content or application.²⁴⁷ To guarantee the appropriateness of the law, adequate safeguards and effective legal remedies must be available against illegal or abusive application of the law.²⁴⁸ Limitations must not discriminate on the basis of religion.²⁴⁹ The limitation clauses are to be interpreted strictly in favor of the right at issue.²⁵⁰ Finally, the limitation must not lower the protection for any human right to a greater extent than what is permissible under international law.²⁵¹

The limitation clause provisions apply to several broadly defined areas. "Public safety" means protection against danger to the safety of persons or their physical integrity, or serious damage to their property.²⁵² A limitation for the protection of public morals must be "essential to the maintenance of respect for fundamental values of the community."²⁵³ It must not be arbitrary, and must allow for challenges and remedies against abuse.²⁵⁴ "Public Order" is defined as "the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded."²⁵⁵

The Constitution of Pakistan affords the State the power to suspend some enumerated fundamental rights during emergencies.²⁵⁶ The rights subject to suspension are listed in the Constitution, and these do not include the freedom of religion enunciated in Article 20.

245. Siracusa Principles, *supra* note 241, at 4.

246. *Id.* at 5.

247. *Id.* at 4.

248. Kiss, *supra* note 244, at 18.

249. Siracusa Principles, *supra* note 241, at 4.

250. *Id.*

251. *Id.* at 5.

252. *Id.* at 6.

253. *Id.*

254. Kiss, *supra* note 244, at 16.

255. Siracusa Principles, *supra* note 241, at 5.

256. PAK. CONST. (1973) art. 233.

B. *Domestic Applicability of International Human Rights Norms*

Common law jurisdictions historically consider the law of nations to be part of the law of the land.²⁵⁷ While theoretical debates continue unabated regarding the relationship between international and municipal law, significant practical developments have taken place in this area. Before international fora, Pakistan has taken the position that Ordinance XX is consistent with all relevant international normative instruments.²⁵⁸ Of particular relevance to the Pakistan judiciary's role in protecting freedom of religion are the judicial colloquia on the domestic application of international human rights norms. These colloquia provide an important forum for judges of common law jurisdictions to develop frameworks and standards of application of international norms in domestic jurisdictions.

The first colloquium, held in February 1988 at Bangalore, adopted what have come to be known as the Bangalore Principles.²⁵⁹ The Bangalore Principles emphasize the universality of fundamental human rights norms and urge application of such norms in domestic cases in order to enhance administration of justice and the protection of individual rights and freedoms. The Bangalore Principles were later supplemented by the Harare Declaration of Human Rights in 1989,²⁶⁰ the Banjul Affirmation

257. See BLACKSTONE, 4 COMMENTARIES 67 (1809).

258. *Summary Record of 31st Meeting of Commission on Human Rights*, 42nd Sess., 31st mtg. at 3, U.N. Doc. E/CN.4/1986/SR.31 (1986). For example, before the Commission on Human Rights of the U.N.E.S.C., Pakistan took the position that:

The purpose of Ordinance No. 20 was merely to resolve a situation which had led to much violence and to restrain certain Ahmadi practices which offended orthodox Muslims, its provisions were fully consonant with article 29 of the Universal Declaration [of Human Rights], article 18, paragraph 3, of the International Covenant on Civil and Political Rights and article 1, paragraph 3, of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The Ordinance's provisions affected none of the freedoms announced in article 6 of that Declaration, and the restrictions it imposed were only of the sort to be found in the legislation of other States.

Id. at 3.

259. I DEVELOPING HUMAN RIGHTS JURISPRUDENCE: THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS ix-x (Judicial Colloquium in Bangalore, 1988).

260. Harare Declaration of Human Rights, *reprinted in* II DEVELOPING HUMAN RIGHTS JURISPRUDENCE: A SECOND JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS 11 (Judicial Colloquium in Harare, 1989). The Harare Declaration acknowledged that:

Fundamental human rights and freedoms are inherent in mankind. . . . But

in 1990,²⁶¹ and the Abuja Confirmation in 1991.²⁶²

In his address before the Bangalore Colloquium, Justice Muhammad Haleem, the then Chief Justice of Pakistan, made some remarkable observations. After tracing the evolution of modern international human rights norms, he proposed that "all rules of general international law created for humanitarian purposes constitute *jus cogens*."²⁶³ He took the position that:

The relationship between international law and municipal law is a question of determining what are the most appropriate judicial means of achieving, in state legal systems, the aims and intentions lying behind the rules established by international law. . . . A state has an obligation to make its municipal law conform to its undertakings under treaties to which it is a party.²⁶⁴

He expressed the opinion that:

fine statements in domestic laws or international and regional instruments are not enough. Rather it is essential to develop a culture of respect for internationally stated human rights norms which sees these norms applied in the domestic laws of all nations and given full effect. They must not be seen as alien to domestic law in national courts.

Id.

261. The Banjul Statement of Affirmation of the Bangalore Principles and Harare Declaration of Human Rights, *reprinted in* III DEVELOPING HUMAN RIGHTS JURISPRUDENCE: A THIRD JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS 3 (Judicial Colloquium in Banjul, 1990). The Banjul Affirmation again acknowledged that:

[F]undamental human rights and freedoms are inherent in humankind. . . [and] any truly enlightened social order must be based firmly on respect for individual human rights and freedoms, peoples' rights and economic and social equity.

Id.

262. The Abuja Confirmation of the Domestic Application of International Human Rights Norms, *reprinted in* IV DEVELOPING HUMAN RIGHTS JURISPRUDENCE: FOURTH JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS ix (Judicial Colloquium in Abuja, 1991). The Abuja Confirmation:

Reaffirmed the principles stated in Bangalore, amplified in Harare, and affirmed in Banjul. These principles reflect the universality of human rights - inherent in humankind - and the vital duties of the independent judiciary in interpreting and applying national constitutions and laws in the light of those principles.

Id.

263. Muhammad Haleem, *Domestic Application of International Human Rights Norms*, *in* IV DEVELOPING HUMAN RIGHTS JURISPRUDENCE: A FOURTH JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS 101 (Judicial Colloquium in Abuja, 1991).

264. *Id.* at 101.

A valid domestic jurisdiction defense can no longer be founded on the proposition that the manner in which the state treats its own national is ipso facto a matter within its domestic jurisdiction . . . [because a] matter is essentially within the domestic jurisdiction of the state only if it is not regulated by international law or if it is not capable of regulation by international law. In the modern age of economic and political interdependence, most questions which, on the face of it, appear to be essentially domestic ones are, in fact, essentially international.²⁶⁵

Justice Haleem regarded the domestic application of human rights norms "as a basis for implementing constitutional values beyond the minimum requirements of the Constitution. The international human rights norms are in fact part of the constitutional expression of liberties guaranteed at the national level. The domestic courts can assume the task of expanding these liberties."²⁶⁶ He acknowledged that:

The exercise of judicial power to create an order of liberties on a level higher than the respective constitutions is now considered to be an ingredient of judicial activism. The present thinking at the international level supports an expanded role of domestic courts for the observance of international human rights norms. This reappraisal enables domestic courts to extend to citizens, via state constitutions, greater protection of internationally recognized rights.²⁶⁷

While Pakistan's Constitution has been singled out as being one of the few that "conform to the standard proclaimed in Article 6(b) of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief,"²⁶⁸ the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities expressed "grave concern" at the promulgation of Ordinance XX, and found that it openly:

Violates the right to liberty and security of the persons [sic]; the right to freedom from arbitrary arrest and detention, the

265. *Id.*

266. *Id.* at 103.

267. *Id.* at 103-04.

268. *Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion or Belief*, U.N. Sub-Commission on Prevention and Protection of Minorities, 39th Sess., at 31, U.N. Doc. E/CN.4/Sub.2/1987/26 (1986).

right to freedom of thought, expression, conscience and religion, the right of religious minorities to profess and practise their own religion, and the right to an effective legal remedy.²⁶⁹

Furthermore, the Sub-Commission expressly asked the Government of Pakistan to “repeal Ordinance XX and to restore the human rights and fundamental freedoms of all persons in its jurisdiction.”²⁷⁰ The Sub-Commission’s Report specifically called attention to the “independence of the judiciary . . . as [a] general principle of law of civilized nations [and an] essential element of the effective legal remedy required of all nations.”²⁷¹

The examination of freedom of religion jurisprudence in Pakistan in Part III, above, demonstrates clearly that, far from choosing the road of judicial activism in deploying international human rights law to expand protection of vulnerable sections of the society, Pakistan’s superior judiciary has chosen the path of least resistance to the whims and caprices of dominant political forces. While in the earlier phase of robust protection, the courts took pains to observe the emerging international norms of freedom of religion, in later phases, when these norms conflicted with the abdication of judicial protection of religious minorities, they were conveniently ignored. Notwithstanding its self-image as a vigilant guardian of human rights,²⁷² observers have correctly concluded that “the judiciary in Pakistan does not always enjoy the independence which is consistent with performance of judicial duties as a professional function.”²⁷³ Instead of protecting citizens, Pakistan’s courts have “struck bargains with

269. *The Situation in Pakistan*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 41st Sess., at 102, U.N. Doc. E/CN.4/Sub.2/1985/57 (1985) [hereinafter *Situation in Pakistan*]; see *Implementation of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religious Belief*, U.N. Commission on Human Rights, 44th Sess., Item 23, at 2-6, U.N. Doc. E/CN.4/1988/45/Add.1 (1988); see Berberian, *supra* note 12, at 678-89 (analyzing provisions of Ordinance XX and compliance with international derogation standards).

270. *Situation in Pakistan*, *supra* note 269, at 102.

271. *Id.*

272. See Muhammed A. Zullah, *Human Rights in Pakistan*, 18 COMMONWEALTH L. BUL. 1343 (1992). The author, then Chief Justice of Pakistan, catalogues the efforts of the superior courts to protect and enhance human rights. *Id.*

273. LAWASIA HUMAN RIGHTS COMMITTEE, *Lawyers in Pakistan, Extracts from a Report on Their Independence and Freedom*, N.Z. L.J. 92, 96 (1984). The compiler, who visited Pakistan in 1983, commented that one result of the lack of judicial independence is that “the top legal ability is found not on the Bench but at the Bar.” *Id.*

the state."²⁷⁴ Such bargains, in turn, have "endowed judicial action with political consequentialism."²⁷⁵ Their decisions "reflected 'ground realities,' including [the] mood of [the] masses [and the] preferences of the power structure."²⁷⁶ A major casualty of this process is the integrity and legitimacy of the judiciary itself as it is subjected to unprecedented public criticism and denunciations.²⁷⁷ Mindful of the sinking prestige of the judiciary, some scholars have urged that "[p]rudence in the service of self-preservation may now require a new voice of assertion rather than self-restraint."²⁷⁸ Any new judicial voice of assertion regarding freedom of religion and rights of religious minorities, however, is quite unlikely. What is likely is that the courts will continue to abide by the majoritarian and authoritarian political currents.

CONCLUSION

At the dawn of its life as an independent state for the Muslim-majority areas of the Indian subcontinent, Pakistan subscribed to three instrumentalities to guard against repression of, and discrimination against, religious minorities. Politically, a covenant was formed between religious minorities and the leadership of the Pakistan movement. This covenant was the result of repeated and unequivocal assurances to religious minorities that they would enjoy all political and social rights as equal citizens of a free state, and that religious beliefs and affairs of the State would be kept separate. Constitutionally, each successive constitution of Pakistan guaranteed every citizen the right to profess, practice, and propagate his religion, and every religious denomination, and every sect thereof, the right to establish, maintain, and manage its religious institutions. Internationally,

274. NEWBERG, JUDGING THE STATE, *supra* note 83, at 13.

275. *Id.*

276. MUSHAHID HUSSAIN & AKMAL HUSSAIN, PAKISTAN: PROBLEMS OF GOVERNANCE 55 (1993).

277. See, e.g., Zahid Hussain, *The Judiciary on Trial*, NEWSLINE (Karachi), Feb. 1993, at 26; I.A. Rehman, *Crisis of Justice*, NEWSLINE (Karachi), Feb. 1993, at 34; Shahzada Zulfiqar, *Judges in the Dock*, NEWSLINE (Karachi), Mar. 1994, at 66; Hasan Mujtaba, *Crisis in the Court*, NEWSLINE (Karachi), Apr. 1994, at 55; Zohra Yusuf, *In the Name of the Law*, HERALD (Karachi), Apr. 1994, at 81; I.A. Rehman, *Judging the Judges*, NEWSLINE (Karachi), June 1994, at 87; Aamer A. Khan, *Judges in the Dock*, HERALD ANNUAL (Karachi), Jan. 1995, at 95.

278. NEWBERG, JUDGING THE STATE, *supra* note 83, at 250.

Pakistan spearheaded the codification of the universal human rights of freedom of thought, conscience, and religion.

This promising beginning, however, did not last long. As successive political crises resulted in the erosion of constitutional governance and the growth of praetorianism, guarantees of religious freedom and equality yielded to political expedience, intolerance, and religious orthodoxy. The oversight role of Pakistan's superior judiciary, with regard to the constitutionally guaranteed right to freedom and equality of religion, particularly as it relates to the Ahmadis, mirrors this general regression and decay.

During Pakistan's first two decades, the superior courts fulfilled their assigned role as guardians of constitutionally guaranteed freedom and equality of religion. Mindful of the implied covenant, cognizant of international human rights norms, and alert to constitutional mandates, they refused to make the content, sincerity, or validity of religious belief a justiciable matter, and rejected the position that the fundamental right of freedom of religion may be taken away by legislation because it is subject to the law. During this initial period, the courts saw through the political motive of the anti-Ahmadi movements, whereby Islamic political groups and leaders who lacked popular support and secure political constituencies attempted to capture a political living space for themselves. It treated representations of Islamic law as open-textured, contingent, amenable to indeterminate results, and, therefore, not useful as a doctrinal guide for judicial pronouncements.

Ironically, the end of the phase of robust judicial protection of the freedom of religion coincided with the adoption of a consensus Constitution in 1973 by a representative legislature. When a morally timid and politically isolated regime acceded to the demands of the second anti-Ahmadi agitation, and shepherded the adoption of a constitutional amendment declaring Ahmadis a non-Muslim minority, the superior courts refused to question the validity of this development. Here the courts fell into the jurisprudential hole they had dug for themselves when they recognized the unfettered constitutional legislative power of the legislature, and refused to invalidate constitutional legislation that undermined the basic structure and essential features of the Constitution. Nevertheless, during this phase, even when the courts felt obliged to subscribe to the terms of the constitu-

tional amendment, they refused to proscribe public religious practice by the Ahmadis. Instead the Court insisted that the right to hold certain religious beliefs and opinions could not be called into question in a court of law. While the courts were silent about the implied covenant and international law, they did seek support from a selection of authoritative texts of Islamic law that buttressed their holdings of freedom of belief and practice for religious minorities.

During the third and current phase, the deterioration continued, culminating in the complete abdication of judicial protection of freedom of religion, and the capitulation of the judiciary in the face of authoritarianism and the political rise of religious orthodoxy. By recognizing the validity, legitimacy, and unfettered legislative power of the extraconstitutional regime in 1977, the judiciary became party to its own impotence. The judiciary's degeneration was accelerated by the introduction of the parallel *Shari'at* courts, assaults on the autonomy and independence of judges, and wholesale changes in the Constitution to facilitate a centralized executive state.

During the decade-long phase of military-sponsored "Islamization," proponents of regressive and medieval models of *Shari'ah* enjoyed a monopoly over public policy discourse. This development, coupled with the general atmosphere of repression and fear, resulted in the superior courts conveniently choosing to engage in polemical diatribes against Ahmadis. It also resulted in the toleration of unconstitutional state conduct, and the acceptance of a regressive model of the genesis and goals of the polity. When faced with the question of rights of religious minorities, the courts questioned the very existence of the implied covenant of freedom of religion, rejected international law as irrelevant to the issue, and held that the Pakistan Constitution must yield to injunctions of regressive and medieval constructs of Islam. In contradiction to their express holdings in the second phase, authoritative Islamic pronouncements were now represented as allowing, even requiring, the state to suppress the practice of religion by religious minorities.

Judicial review is the power of the courts to declare a governmental measure either contrary to, or in accordance with, the constitution or other governing law. Such a judicial pronouncement either renders the measure invalid and void or vindicates its validity. An independent judiciary's review of govern-

mental acts is an essential feature of democratic governance, because it facilitates orderly functioning of different organs of the state, and maintains the efficacy of constitutional guarantees of individual and collective rights. This picture of judicial practice holds true, however, only in settings where constitutional governance, guarantees of fundamental rights, separation of powers, and independence of the judiciary form stable components of the political culture.

In many post-colonial settings, however, these ideals have remained elusive. Chronic political instability, born of factors outside the control of judiciaries, precludes stable constitutional governance, and renders the judicial branch insufficiently insulated from political forces. Consequently, dominant political forces assert a determinative influence over judicial pronouncements. Because the judiciary must remain sensitive to changing political currents, judicial pronouncements are fraught with inconsistencies and unpredictability. In turn, the identification and application of sources of controlling norms are indeterminate and contingent. The judiciary's deference to dominant political forces makes it a party to the erosion of its own independence and legitimacy. This sustained erosion renders the judiciary less able to furnish protection of rights and freedoms to vulnerable sections of society.