

“Inter-play of Majority and Minority Religious Rights and the Role of Judiciary”

By Justice Tassaduq Hussain Jilani

Former Chief Justice of Pakistan

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Honorable chair, distinguished delegates and Ladies & Gentlemen!

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

Historically religion has played an important role both in shaping human morals and conduct and in causing conflict and discord. Intolerance and violence in the name of faith has existed in all periods of human history, only villains and victims have changed. In the West the unity of state and church led to state oppression, inquisitions, violence and wars. In 1526, the Bishop of London was charged, tried, convicted and hanged, the allegation was that he wanted to blow up the Parliament House because the protestants had won majority in the Parliament. “In his final play, Henry VIII, Shakespeare has his Archbishop predict that the future Elizabeth will rule by a mixture of ‘Peace, plenty, love’ and a just measure of’ terror’. (5.4.47)”¹

When Americans gained independence from the colonial rule they were conscious of the bitter memories of the unity of church and state in England and therefore decided that the state shall have nothing to do with religion. Jefferson lobbied for, as he put it, “a wall of separation between church and state,” but other Founding Fathers sought no more than a constitutional provision forbidding the government from enshrining a national religion. They wanted religious freedom, and feared religious persecution that would result if the government were permitted to endorse one religion over another. When all was said and done, the framers of the Constitution inserted into the First Amendment a provision known as the

¹ Terrorists and Equivocators by Ian Ward

“Establishment Clause,” which as now interpreted, effectively provides that government “shall make no law respecting an establishment of religion.”²

This constitutional provision in US has been a constant check on the state and society to protect freedom of religion and belief. Any attempt to transgress this provision has been resisted by the court through the power of judicial review. The US Supreme Court invoked this constitutional provision to disallow the Regents prayer which the State of New York had adopted for recitation in the public schools.³ Speaking for the court Justice Hugo L. Black said “A union of government and religion tend to destroy government and degrade religion.”

Ladies and Gentlemen!

We are living in an age of globalization and an ongoing transition. This has led to greater cooperation and collaboration in various fields of human activity; economic, political, social, space research, scientific and medical research and nuclear technology etc. This transition is paralleled by the declared commitment of the International Community to promote and protect universal human rights which include religious rights. The process of convergence on human rights issues started with the UN declaration after the Second World War. The concern for protection of religious freedom and minority rights as also their enforcement through judiciary came to surface at the global stage during the Holocaust. The courts in Germany on account of their timidity set the stage for Nazi atrocities. The United Nations in its charter after pledging to save humankind from the scourge of war affirmed its faith in universal human rights, in the dignity and worth of human persons, in the equal rights of men and women and the nations large and small. The nations realized that the peace and tolerance would remain elusive till

² The Supremes' Greatest Hits by Michael G. Trachtman

³ Engel Vs Vitale

discrimination among humans is eliminated. This led to the U.N. “Declaration on Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief” (1981). Decades after the adoption of the UN charter, notwithstanding the differences which nations may have in other fields there has been a reaffirmation of consensus on human rights which is evident from the Vienna declaration of the world conference on Human Rights (1993) wherein the states committed to promote universal respect for observance and protection of all human rights and fundamental freedoms. It was declared;

- a. That the universal nature of these rights and freedoms is beyond question;
- b. That all human rights are universal and indivisible, interdependent and interrelated;
- c. That the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

Many of the states which acquired independence in post Second World War era, except the one party states, were influenced while drafting their respective constitutions by the vision and idealism reflected in the international instruments to which reference has been made in the preceding paragraph. These constitutions carry elaborate fundamental rights provisions as also their commitment to honor the international instruments/declarations on such rights. The two concepts of good governance and the rule of law are intertwined. An independent, fair and effective judiciary enforcing the rule of law is a sine qua non for good governance. The elaborate regime of fundamental rights and freedoms enshrined in the constitution would remain mere textual pledges unless there is an independent judiciary to enforce those rights. A rather telling example of such a state of affairs was seen in

recent times in Bosnia Kosovo and some other African countries where although there were specific rights available to minorities in the constitution but on account of weak judiciary and lack of political will those rights could not be enforced.

Surveying the state of religious freedom around the world, Mr. Thomas Reese of the U.S Commission commented that, “In China and Vietnam, although communist ideology no longer governs the economy, it still opposes religion, especially if it is outside Communist control. Officials fear any popular organization that gathers people together and has respected leaders outside their control.

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

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

[...]

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

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

In Pakistan, lawyers and judges have been assassinated for defending Christians and other minorities falsely accused of blasphemy. The assailants and those making false accusations are rarely punished.”⁴

In Pakistan, although Islam is the state religion, yet the people in the very preamble of the constitution have committed themselves to create a state “Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed.” There is a full chapter on Fundamental Human Rights which include, inter alia, the Right to Life (Article 9), Safeguard Against Arrest and Detention (Article 10), Right to Fair Trial (Article 10-A), Inviolability of Dignity of Man (Article 14), Freedom to Profess and to Manage Religious Institutions (Article 20), Equality of Citizens (Article 25).

The fundamental right of religious freedom is of particular significance. Because in Pakistan, there are believers of religions other than Islam and there are sects within Islam. The founder of the country Quaid-e-Azam Muhammad Ali Jinnah was conscious of this pluralistic complexion of the state. In his first speech to the Constituent Assembly he declared, “You are free; you are free to go to your temples, you are free to go to your mosques or to any other place of worship in this State of Pakistan...You may belong to any religion or caste or creed- that has nothing to do with the business of the State.” But despite the vision of the founder of the country and the textual guarantees in the Constitution, minorities in Pakistan, have at times been subjected to discrimination and violence. In such situations courts have played their role in the enforcement of the rule of law. A recent case in point is the one in which I, as Chief Justice of Pakistan, took suo motu notice of such incidents and authored the judgment.⁵ The proceedings were

⁴ Religious freedom is under attack around the world by Thomas Reese.

⁵ 2014 PLD 699 SC

initiated firstly on a letter from “Justice Helpline” an NGO, regarding an attack on a church in Peshawar in which 81 persons died but the culprits had still not been brought to justice and the victims had not been compensated. Secondly on a newspaper report that the Kalash Tribe and Ismaeli’s in Chitral were being coerced to convert to a different sect within Islam or face death. The court after hearing the state functionaries and members of the minority committee in Pakistan, gave a detailed judgment. It starts with an inspirational quote from Prophet Muhammad (PBUH);

“All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over white except by piety (taqwa) and good action.”⁶

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

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

⁶ The Last Sermon (Khutbah) of Prophet Muhammad (PBUH) PLD 2014 SC 705

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

While interpreting Article 20 of the Constitution, the court held that the right to religious freedom is available to all, whether Muslims or non-Muslims. The judgment was called a judicial “bombshell” by a jurist⁷ and while explaining its implications he added “in other words, Muslims don’t have a superior privilege right to belief than non-Muslims but there is an ‘Equal Religious Protection Clause’ under Article 20 for all Pakistani Citizens. This is indeed a principle of radical implications. Moreover, Article 20 confers further rights. Secondly, the ‘right to profess and practice is conferred not only on religious communities but also on every citizen’. In other words, every citizen can exercise such a right to belief against the dominant religious views of its own community also. Thirdly, even within religious communities, sects have a right to belief against their own co-religious denominations. Fourthly, the right to belief has ‘three distinct rights i.e. Right to Profess, Right to Practice and Right to Propagate.’”

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

⁷ Faisal Siddiqi in Dawn.

that, “The very genesis of our country is grounded in the protection of religious rights of all especially those of minorities.” Explaining the international and historical dimension of the right to religious freedom the court referred to Article 18 of the U.N. Covenant on Civil and Political Rights (1966) and intellectuals like Stuart Mill and Voltaire to bring home the point that the right to religious freedom is historically and globally well established and any denial would be violative of the accepted human rights norms of the 21st century. I intentionally referred to the resolution of apology passed by the Parliament of British Columbia to express their regret for the discrimination meted out to the Chinese immigrants in Canada with a view to send a message that if a community or a nation has collectively wronged a minority it should have a moral courage to apologize so that the society may move on in harmony and tolerance. It was also meant to demonstrate that Parliaments can exert liberating influence in society.

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

instituted to make us happy in this life and the next. But what is required to make us happy in the life to come” to be just.””

Making a comparative analysis of how judiciaries in different jurisdictions have dealt with the rights of minorities, ethnic or religious, the Supreme Court said, “In 1954 the U.S. Supreme Court in the case reported as *Brown v. Board of Education of Topeka*⁸ abolished segregation in schools and ensured implementation of its judgment by directing the dispatch of federal troops to the concerned State. In the said judgment, the U.S. Supreme Court came a long way from its earlier judgment in *Dred Scott V. Stanford*⁹ where a colored was refused a status of a citizen.”

The court was of the view that minorities in Pakistan, as in several transitional democracies, are a vulnerable section of society because of their social and economic limitations. They cannot effectively espouse their grievances and to them the constitutional guarantees are mere hollow promises signifying nothing in practical terms. They and their places of worship have been subjected to violence. Their dilemma is exasperated both by the absence of sufficient political will to provide remedies and by a weak law enforcement machinery. This is further confounded by lack of empathy in the general public. In such a milieu court intervention in terms of Article 184 (3)¹⁰ of the Constitution was deemed imperative and any refusal would tantamount abdication of our constitutional mandate of being custodians of people’s rights.

Courts have traditionally been viewed as conservative institutions which preserve status quo. But I have always believed that superior courts & particularly the

⁸ 347 US 483 (1954)

⁹ 60 US 393 (1857)

¹⁰ 184(3) – “without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of part II is involved, have the power to make an order of the nature mentioned in the said Article.”

Supreme Court though such judgments in a democracy can be catalyst for social change. The seminal judgment of the U.S. Supreme Court in Browns case and that of the Pakistan Supreme Court¹¹ underpins the belief that the judiciary can eliminate discrimination and bias through their judgments and thereby promote tolerance which is one of the important elements of democracy.

The Supreme Court in a democracy has to protect liberal institutions. Any declaration made, and the principle of law laid down by the court have a trickledown effect on other institutions of the State. The directions in the judgment¹² for the creation of a task force to promote religious tolerance, to provide for appropriate curricula in Schools and Colleges consistent with the constitutional values, the elimination of hate speeches from social media, the creation of a National Council for Minority Rights and a special force to protect places of worship of minorities were all geared towards sensitizing the Muslim majority and for promoting liberal institutions without which democracy remains dysfunctional.

The Supreme Court in a transitional democracy has an educative role to play, it has to act as a pedagogical institution disseminating the constitutional aspirations, explaining the role of various institutions and thereby promoting constitutional literacy amongst the public. People's awareness of the values and issues is essential to preserve democratic values. Because it is the people who have to protect their rights, their liberties and their honor. For as Justice Learned Hand rightly said, "Liberty lies in the hearts of men and women; When it dies there, no

¹¹ In suo motu case no 1 of 2014

¹² Supra.

constitution, no court can save it; no constitution, no law, no court can even do much to help it.”¹³

The judgment is not only reflective of a strong vision of a global and pluralistic society but also carries a word of caution that unless the constitutional values are given effect in letter and spirit, the vision of the founder would merely remain a dream. The court declared, “The cherished goal of creating a more pluralistic society where fundamental rights are respected would continue to elude us unless we realize that we are living in a world of globalized interdependence, a world of interconnectivity, of cyber space, of shrunken distances, of cross border migration, and a world of rapidly changing cultural identities. We are all members of one race of humans with common challenges, and we cannot confront these challenges without forging a common alliance. This paradigm shift in the world around us can be achieved at the international and domestic levels only by discouraging sectarian, radical and ethnic biases which are violative of shared values and fundamental rights and by the promotion of and strict compliance with these values and rights.”

But the religious freedom and rights have their limits in a pluralistic society governed by law and the constitution. One may ask what are those limits? This issue is pertinent because countries have frequently been confronted with issues of conflict between religious freedom and the fundamental values of the Constitution. In Pakistan a typical case of this nature was the Hisba Bill case wherein the Provincial Legislature of Khyber Pakhtoonkhwa passed a law popularly known as Hisba Bill i.e. a law through which a medieval system of civil administration and accountability based on a rather myopic view of tenets of Islam was sought to be enforced. The Federal Government on account of political expediency did not intervene and instead filed a Reference in the Supreme Court wherein the Court

¹³ Spirit of Liberty by Learned Hand

declared the offending provisions of the said Bill to be ultra vires of the fundamental rights provisions of the Constitution and directed the Governor of the Province not to grant assent. The judgment is important for more than one reason; first it laid down that religious freedom is not absolute and it has to conform to other laws and the Constitution; second that in the event of a conflict between a law which is being projected as religious and the fundamental right provisions of the Constitution, the latter shall prevail; third it was a case in which political issues were brought to the Court because the political leadership was shy of the extreme right. It could not resolve the issue in the political domain fearing backlash from fundamentalist lobby and filled a Reference in Court.

Yet another case of conflict between religious freedom and fundamental rights is from the South Africa jurisdiction. In 1996, by an Act of the Parliament corporal punishment was banned in schools. The constitutionality of this statute was challenged by an association committed to the promotion of Christian education values. The body controlled about 200 schools in South Africa. The ground urged before the Court was that the ban was violative of Biblical tenets and therefore, the statute infringed their right to freedom of religion. The petition was dismissed both by the High Court and the Constitutional Court. The court found that “a multiplicity of intersecting constitutional values and interests are involved in the present matter--- some overlapping, some competing, including the right of the child to human dignity, to freedom and security of the person, and to be protected from maltreatment, neglect, abuse or degradation. In terms of the South African Constitution, [a] child’s best interests are of paramount importance in every matter concerning the child.¹⁴”

¹⁴ The Relationship of Religion or Belief Norms to other Human Rights by Johan D. Van Der Vyver

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