

Interplay of Majority/Minority Rights, Religious Freedom and the Role of Judiciary in Pakistan

This is the complete text of the talk delivered by Justice Tassaduq Hussain Jilani at an online event titled 'Rights of Minorities in Pakistan' on 2 February 2021. The event was organised by the [LSE South Asia Centre](#) in collaboration with the [LSESU Pakistan Development Society](#). A video recording of the event is available [here](#); the text below has been copyedited minimally for publication on this blog.

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In [this] presentation I [will] briefly explain what role religion has played historically in human affairs, how the union of state/politics and religion affected human behaviour and impacted human rights, why the discourse on religious rights has become one of the dominant themes in [the] contemporary age, and what role [the] judiciary in Pakistan has played in the interplay of such rights.

Historically, religion has played an important role both in shaping human morals and conduct, and in causing conflict and discord. Intolerance and violence in the name of faith has existed in all periods of human history, only [the] villains and victims have changed. In the West, the unity of State and Church led to state oppression, inquisitions, violence, and wars. In 1526, the Bishop of London was charged, tried, convicted, and hanged. The allegation against him was that he wanted to blow up the Parliament 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' ([Ward 2008](#): 185).

When Americans gained independence from colonial rule, they were conscious of the bitter memories of the unity of Church and State in England and therefore decided 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 'Establishment Clause' which, as now interpreted, effectively provides that government 'shall make no law respecting an establishment of religion'.

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We are living in an age of globalisation and an ongoing transition. This has led to greater cooperation and collaboration in various fields of human activity: economic, political, social, [outer] space research, scientific and medical research, and nuclear technology etc. This transition is paralleled by a declared commitment of the international community to promote and protect universal human rights which was reflected in the [UN Declaration](#) after the Second World War. The concern for protection of religious freedom and minority rights as also their enforcement [via the] judiciary came to surface [on] 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 [of] nations large and small. The nations realised that peace and tolerance would remain elusive [un]til discrimination among humans is eliminated. This led to the UN '[Declaration on Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief](#)' in 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](#) (in 1993) wherein the states committed to promote universal respect for observance and protection of all human rights and fundamental freedoms. It was declared:

1. that the universal nature of these rights and freedoms is beyond question;
2. that all human rights are universal and indivisible, interdependent and interrelated;
3. 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 [the] post-Second World War era, except the one-party states, were influenced while drafting their respective Constitutions by the vision and idealism reflected in international instruments to which reference has been made in the preceding paragraph. These Constitutions carry elaborate fundamental rights provisions as also their commitment to honour the international instruments/declarations on such rights.

Pakistan came into being in 1947 when India was divided into Muslim-majority areas constituting Pakistan, and Hindu-majority areas constituting India. But it was not possible for all the Muslims living in various parts of undivided India to migrate to Pakistan, and Hindus to migrate to India. Thus, in both these countries, Muslims and Hindus became minorities in the countries where the majority professed religion different from their respective faiths. The political leadership of both the countries was conscious of this factor in their populations and, in their respective Constitutions, they provided fundamental rights which catered to the rights of minorities. 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 ([Mahmud 1995](#): 51). The protection of the freedom of religious belief and practice of all communities was indeed the predominant right asserted in several propositions and resolutions passed by the [All India Muslim League](#) (AIML). [The] [Indian \[National\] Congress](#) in India stood for secularism to ensure that the State does not discriminate and remains neutral in the affairs of all religious groups and minorities. The Constitution of India was therefore *inter alia* inspired by this ideology.

However, the elaborate regime of fundamental rights and freedoms enshrined in the Constitutions 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 [the] not too distant past in Bosnia, Kosovo and some African countries where although there were specific rights available to minorities in the Constitution, on account of weak judiciary and lack of political will those rights could not be enforced.

In contemporary times, [the] Court's role has become all the more important because of the rise of populism, religious extremism and intolerance in many [nation-]states. The basic elements of this ideology are racism and racial Darwinism. This ideology is an extreme form of a broader movement — anti-pluralism — that now comes in many shapes. The culture of [the] RSS [[Rashtriya Swayamsevak Sangh](#)] in India (whose one stalwart, [Nathuram Vinayak Godse](#), killed [Mahatma Gandhi](#)), Trumpian nationalists, authoritarian populists and [ISIS](#) [Islamic State of Iraq & Syria] are all different versions of anti-pluralism.

These movements are reactions against the diversity, fluidity and interdependent nature of modern life. Anti-pluralists yearn for a return to clear borders, settled truths and stable identities. They kill for a fantasy, a world that shines in their imaginations but never existed in real life. The struggle between pluralism and anti-pluralism is one of the defining struggles of our times, and it is being fought on every front.

In Pakistan, although Islam is the state religion, yet the people in the very preamble of the Constitution have sought a pluralist society by committing 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), Article 37 (d) mandate of the State to ensure inexpensive and expeditious justice. The State has been defined in Article 7 to mean federal and provincial governments, the Provincial Assemblies and other authorities which have the power to impose taxes. These institutions are constitutionally required to establish and maintain such institutions that ensure civic and social justice and a judicial system that can provide speedy and inexpensive remedy if the State violates its mandate. Notwithstanding the functions of the aforementioned institutions of the State, the common perception is that the primary responsibility to provide justice to the people is that of the Judiciary; [this] is because the Fundamental Rights enshrined in the Constitution can be enforced through the High Courts under Article 199 of the Constitution, or [by] directly approaching the Supreme Court under Article 184(3) of the Constitution.

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 Pakistan, Quaid-e-Azam [Muhammad Ali Jinnah](#), was conscious of this multi-religious complexion of the State. In his [first address](#) 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 an onerous responsibility to enforce the rule of law and constitutional values. A case in point is the one in which I, as Chief Justice of Pakistan, took *suo moto* notice of the [Church Blast case](#) in which 81 Christians were killed while they were praying.

I initiated the proceedings on a letter from 'Justice Helpline' (an NGO) in which it was alleged that the culprits of the Church blast had still not been brought to justice and no solace had been provided to the bereaved families. In the same case, I also took notice of a newspaper report that the Kalash Tribe and Ismailis in Chitral were being persecuted and coerced to convert to a different sect within Islam or face death. The Court, after hearing the State functionaries and members of the minority communities in Pakistan, gave a detailed judgment.

The [judgment](#) which I was called upon to author, 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 black except by piety (taqwa) and good action.

The 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 expression, 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 a right to profess, 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 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, firstly, that the right to religious freedom is available to all, whether Muslims or non-Muslims. [‘In other words, Muslims do not have a superior or special right to belief over non-Muslims. Rather there is an “Equal Religious Protection Clause” under Article 20 for all Pakistani Citizens.](#)’ This is indeed a principle of radical implications.

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 [as well]. Thirdly, even within religious communities, sects have a right to belief against their own co-religious denominations. Fourthly, the right to belief encompasses [‘three distinct rights, i.e., Right to Profess, Right to Practice and Right to Propagate.’](#)

Recalling 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 observed 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 [UN Covenant on Civil and Political Rights](#) (1966) and intellectuals like [\[John\] 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 apologise so that the society may move on in harmony and tolerance. It was also meant to demonstrate how Parliaments can take initiative and exert liberating influence in society.

Referring to the heavy toll that humans had to pay historically on account of religious intolerance and the lessons 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, while concurrently preserving and protecting this right at a communal level, where the latter does not infringe on the former. For, according to French writer, historian and philosopher Voltaire in his [Treatise on Tolerance](#) (1763), "religion is instituted to make 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 US Supreme Court in the case reported as [Brown v. Board of Education of Topeka](#) abolished segregation in schools and ensured implementation of its judgment by directing the dispatch of federal troops to the concerned State. In the said judgment, the US Supreme Court came a long way from its earlier judgment in [Dred Scott v. Stanford](#) where a coloured 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 political leadership and the general public. In such a milieu Court intervention in terms of [Article 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.') of the Constitution was deemed imperative and any refusal would tantamount [to] abdication of the Supreme Court's 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, and particularly the Supreme Court, through its judgments in a democracy can be a catalyst for social change. The seminal judgments of the US Supreme Court in Brown's case and that of the [Pakistan Supreme Court](#) in which I was called upon to author the judgment underpin the belief that the judiciary can eliminate discrimination and bias through their judgments and thereby promote tolerance, which is one of the essential elements of democracy.

I held that 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 trickle-down effect on other institutions of the State. For instance, the directions in the judgment for the creation of a task force to promote religious tolerance, to provide for appropriate curricula in schools and colleges consistent with 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 sensitising the Muslim majority and for promoting liberal institutions without which democracy remains dysfunctional.

The Supreme Court, besides deciding cases, 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. Textual guarantees provided in the Constitution are not enough to save democracy and its values. A civic culture and educated population are imperative to sustain democracy. People's awareness of the Constitutional values and issues is essential to preserve democratic culture and democratic institutions because it is the people who have to protect their rights, their liberties and their honour. For as Justice Learned Hand rightly said, '[Liberty lies in the hearts of men and women; when it dies there, no Constitution, no court can save it; no Constitution, no law, no court can even do much to help it.](#)'

The anthem of the Supreme Court of Pakistan, which was created by me, titled 'Justice For All', was made part of the judgment for two reasons; firstly, because it is a poignant reminder of the vision of the founder of the country and the ideals which reverberated the movement for the creation of Pakistan. Secondly, the anthem cautions the nation that if the values which went into the making of the country are not lived by, the nation would bear a heavy cost. This anthem is perched along with its mosaic rendering on the full wall beside the entrance gate of the [Supreme Court](#) [of Pakistan, in Islamabad]. The anthem reads as follows:

JUSTICE FOR ALL

Judicial Anthem

The Toil, the sweat, the tears and the blood,

Make up the labour for the land begot.

The freedom is won, but the chains are clung,

There are miles to cover.

The voyage is tough and the weather is rough,

The odyssey begins; The Founder declares his vision

Of Democracy, Faith, Tolerance and Compassion.

Discriminate the State shall not

Thou may belong to any religion, creed or caste.

Oh! The vision is distorted, the march is thwarted,

Castle in the sand, babes in the woods,

Recipes of fall abound in the books.

The nation is cut, the land is bled

When the message is lost, a die is cast,

The wages are loud, Beware of the clouds.

Long live the message, the Lamp and the rays

That glow The Temple, which holds the scales,

Pinning the dreams, the hopes and the oath

Of Justice for All.

The judgment strongly canvasses that the vision of the founder of the nation as reflected in the poem and the constitutional rights/values are in tune with a pluralistic world and people must honour and live by those as members of one human race. The [Court declared](#) that, 'The cherished goal of creating a more pluralistic society where Fundamental Rights are respected would continue to elude us unless we realise that we are living in a world of globalised interdependence, a world of interconnectivity, of cyberspace, 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 multi-religious 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 Pakhtunkhwa 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 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 Rights 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 [the] fundamentalist lobby and filed 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 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 infringes 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.](#)'

Before I part I may add that the 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 a 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 the rights of different communities are respected, each one of you has a role to play as a citizen. We are bound by the ideals that teach us what it means to be citizens. Countries have witnessed persecution, tyranny and intolerance only because the citizens did not play this role, leaving the demagogues, the fundamentalists and the religious zealots to have their way. We tend to forget that from womb to tomb we have a common destiny and unless we learn the virtues of empathy and tolerance, the march of folly would continue and humans would continue to pay heavy cost.

The views expressed here are those of the author and do not represent the views of the 'South Asia @ LSE' blog, the LSE South Asia Centre or the London School of Economics and Political Science.

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