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## Protecting Religious Minorities: The Courts' Abdication

*Tayyab Mahmud*

Even a cursory perusal of Pakistan's press and international reports on Pakistan over the last few years shows a dramatic increase in sectarian violence, inflammatory statements about different sects, and chronic demands to declare one or another sect outside the pale of Islam. Persecution and intimidation of minority sects and religions appears to be increasing with active or tacit approval of public authorities. Such developments are disturbing indeed, but they become alarming when they are validated by the superior judiciary. Pakistan's constitution, which enumerates guaranteed fundamental rights and provides for separation of state power, ensures judicial protection of vulnerable sections of the society against unlawful state action. Unfortunately, Pakistan's superior judiciary has seen fit to abdicate this role completely when it comes to the protection of religious minorities. This chapter examines the nature of this judicial abdication.

The point of departure is furnished by the July 3, 1993, pronouncement of the Supreme Court in the Dard Case.<sup>1</sup> It held that Ordinance XX of 1984, which amended the Pakistan Penal Code to make public practice of religion by Ahmadis a crime, does not violate freedom of religion as mandated by the constitution. Tracing the genesis of this pronouncement this chapter argues that the pronouncement is an impermissible variance of foundational constitutional jurisprudence of the country, the implied covenant of freedom of religion between religious minorities and the Pakistan movement, and the dictates of international human rights law.

This chapter is motivated by a desire to pierce through the deafening silence that surrounds the issue. While commentators note the "chronically

partisan nature of the issue and its political sensitivity in Pakistan,<sup>2</sup> it remains remarkable that with the sole exception of the Pakistan Human Rights Commission,<sup>3</sup> not a single non-Ahmadi voice has been raised publicly in Pakistan to question the persecution of Ahmadis. Given the need to preserve accurate historical records in a context where textbooks of history are often rewritten following changes in government, the pedagogical method chosen is that of letting the relevant texts speak for themselves. It is not the purpose of this chapter to elucidate or defend the religious doctrines of the Ahmadis. The argument simply is that sincerity and validity of religious beliefs is beyond the purview of legislative or judicial action, and that irrespective of the doctrinal framework of their beliefs, the Ahmadis should have the freedom to practice their religion without hindrance, as dictated by the constitution, international law, and the covenant between religious minorities and the Pakistan movement.

#### Ordinance XX and the Dard Case

Entitled "The Anti-Islamic Activities of the Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984, Ordinance XX"<sup>4</sup> amended the Pakistan Penal Code to make public practice of Ahmadi religion a crime. Dard responds to appeals by some Ahmadis challenging their prosecution and penalties, on the ground that the ordinance violates freedom of religion as guaranteed by Article 20 of the 1973 Constitution, which declares that "every citizen shall have the right to profess, practice and propagate his religion," and "every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions."

The minority opinion of Justice Shafiqur Rehman would have set aside the criminal conviction and sentences and found much of the ordinance *ultra vires* of the constitution. The Majority opinion by Justice Abdul Qader Chaudhry, however, dismissed all appeals. The bulk of this opinion is devoted to establishing that Ahmadis are not Muslims because their theological doctrines are at variance with beliefs of the majority of Muslims, disregarding the appellants' plea that this issue was not before the court and that protection of Article 20 is afforded to the Ahmadis irrespective of classification of their religious beliefs. The court argued that in prohibiting the use of distinguishing characteristics of Islam by the Ahmadis, the ordinance was in line with statutes that regulate commercial activity, target deceptive trade practices, and protect trademarks. The court then observed: "For 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."<sup>5</sup> The court acknowledged that freedom of religion

is not confined to religious belief only but extends to "essential and integral"<sup>6</sup> religious practices as well, but claimed that the appellants had not explained how the epithets and various public rituals are essential part of their religion. The crux of the problem, according to the court, is that the Ahmadis use epithets "in a manner which to the Muslim mind looks like a deliberate and calculated act of defiling and desecration of their holy personages, is a threat to the integrity of 'Ummah' and tranquility of the nation, and it is also bound to give rise to serious law and order situation, like it happened many a time in the past."<sup>7</sup> Therefore, the court argued, to allow Ahmadis to practice their religion publicly is "like permitting civil war."<sup>8</sup> The court rejected the distinction made by the appellants between positive law and Islamic law, while interpreting the phrase "subject to law" in Article 20. The court also took the position that due to the incorporation of the Objectives Resolution as substantive part of the constitution in 1985, injunctions of Islam as contained in Quran and Sunnah are adopted as "the real and the effective law," and are "now the positive law."<sup>9</sup>

The polemical tone of the judgment and repeated use of rhetorical questions by the court is remarkable. For example, the court asked: "Can then anyone blame a Muslim if he loses control on hearing, reading, or seeing such blasphemous material as has been produced by Mirza Sahib?"<sup>10</sup> The ordinance was upheld on the grounds that "if an Ahmadi is allowed by the administration or the law to display or chant in public, the Shar'i 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?"<sup>11</sup>

The Dard Case rests on some rather spurious assumptions and propositions, some express and others implied. These include: (1) that the Shariah is the supreme law of the land and can be deployed without any revision to provide answers to all problems confronting a state in modern times, including issues of constitutional governance and fundamental rights; (2) that owing to the incorporation of the Objectives Resolution as a substantive part of the constitution, the foundational jurisprudence of the court regarding freedom of religion becomes moot; (3) that the Pakistan movement and the founding fathers of the state legitimized restrictions on religious freedom; (4) that no protection needs to be furnished to beliefs and practices which are out of step with, and offend, the majority; (5) that the Ahmadi issue is primarily a law and order problem; and (6) that dictates of international human rights law are irrelevant to the question of freedom of religion. Such assumptions and propositions will be examined below.

#### Evolution of Freedom of Religion Jurisprudence

Freedom of religion jurisprudence in Pakistan is a three-phase journey from unequivocal protection of the freedom to validation of persecution and

discrimination. While the relevant judicial pronouncements of the three phases are fundamentally contradictory, the courts insist that these rest on identical constitutional principles and sources of Islamic jurisprudence.

### *Phase I: Principled and Unequivocal Protection*

The first phase was initiated on October 6, 1950, when the Constituent Assembly adopted an interim report of fundamental rights of the citizens of Pakistan whereby every citizen's right to freedom of conscience and to profess, practice, and propagate religion was guaranteed. Every duly qualified citizen was also declared to be eligible to appointment in the service of the state, irrespective of religion, race, caste, sex, descent, or place of birth. The superior courts followed this fundamental directive and provided unhesitating and unequivocal protection of freedom of religious belief. As early as 1952, the Chief Court of Sindh articulated a fundamental principle that:

[I]t is well-settled law, and one of the fundamental principles of the Muhammadan Law itself, that no Court can test or gauge 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 any Court to inquire 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 confirmed to the orthodox tenets of that particular faith.<sup>12</sup>

Following the first anti-Ahmadi agitation of 1952-53, a Court of Inquiry was constituted to determine the causes of the disturbances.<sup>13</sup> The 387-page report of this court is a remarkable document. The court 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."<sup>14</sup> The court found that this was an impossible task anyway, because "no two *ulama* have agreed before us as to the definition of a Muslim."<sup>15</sup> Due to the narrow sectarian definitions proffered before it, the court concluded that "[t]he net result of all this is that neither Shias nor Sunnis nor Deobandis nor Ahl-i-Hadith nor Barelvīs 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."<sup>16</sup>

The court surveyed the pronouncements of the leadership of the Pakistan movement regarding the status of religious minorities and the constitutional framework of the new country and concluded that the vision was one in which

religion was "to have nothing to do with the business of the State and to be merely a matter of personal faith for the individual."<sup>17</sup> The court particularly focused on the foundational text of the country's legislative history, namely Jinnah's presidential address to the first session of Pakistan's Constituent Assembly, which assured that

everyone 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 color, caste or creed, is first, second, and last a citizen of this State with equal rights, privileges and obligations, there will be no end to the progress you will make.... 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.<sup>18</sup>

The *ulema* took the position that Jinnah's conception of a modern state had become obsolete with the passing of the Objectives Resolution in 1949. The court, which found the *ulema's* response to Jinnah's conception of the state "unhesitatingly negative,"<sup>19</sup> was of the view, 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."<sup>20</sup>

The court determined that responsibility for the disturbances rested primarily on the leading forces of the anti-Ahmadi movement, for whom Islam "was a weapon which they could drop and pick up at pleasure to discomfort a political adversary."<sup>21</sup> The most perceptive of the court'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."<sup>22</sup> The court noted that religious groups had started the agitation with a "political motive,"<sup>23</sup> and had "purposely chosen an issue on which nobody would have the courage to oppose them."<sup>24</sup> Besides the religious groups, the Court of Inquiry assigned responsibility to some factions of the Muslim League, particularly the provincial leadership in the Punjab, which, the court concluded, had jumped

on the anti-Ahmadi bandwagon in order to gain political advantage in its power struggle with the central government.

The court outlined the evolution of the human rights principles in international law whereby every person has "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 or observance."<sup>25</sup> The Court foresaw negative repercussions for Pakistan's standing in the international community if the anti-Ahmadi demands had been acceded to, and "feared that" Pakistan risked being "ostracized from International Society."<sup>26</sup>

Three years later Pakistan's first constitution, the 1956 constitution, guaranteed that every citizen has the right to profess, practice, and propagate his religion and that every sect of a religious denomination has the right to establish, maintain, and manage its religious institutions.<sup>27</sup> The Supreme Court augmented this guarantee in 1957, when it rejected the argument that because fundamental rights are subject to law, they may be revoked by legislation. The court took the position that:

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.... [T]he makers of the Constitution ... could not possibly have intended to empower the legislature to take away from the Muslims the right to profess, practice, 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 favor of the citizen, especially with respect to those provisions which were designed to safeguard the freedom of conscience and worship.<sup>28</sup>

While the court recognized that the 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 does not mean that such institutions may be abolished altogether by the Law."<sup>29</sup>

While the 1962 Constitution initially omitted fundamental rights, these were reinstated by the First Amendment Act of 1964, which recited the fundamental right of freedom of religion identical to the one in the 1956 Constitution. In line with this constitutional guarantee, in 1969 the Lahore High Court specifically rejected the right of anybody to call Ahmadis non-Muslims, and held that there were no grounds for a declaration that Ahmadis are not Muslims or for an injunction against Ahmadis calling themselves Muslims.<sup>30</sup> In responding to the petitioners' argument that freedom of religion protects their right to call Ahmadis non-Muslims, the Court pointed out that this "overlooks 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 terrorizing them."<sup>31</sup> The court quoted relevant passages from the Quran and concluded that "freedom of thought and conscience could not have been guaranteed in clearer terms."<sup>32</sup> The 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."<sup>33</sup>

#### Phase II: Contraction of Protection

During the second wave of anti-Ahmadi agitation in 1974, when faced with the threat of "direct action" the Bhutto regime capitulated and placed the issue before the parliament.<sup>34</sup> The parliament amended the constitution to provide that Ahmadis were non-Muslims.<sup>35</sup> Apparently, not satisfied with the classification of Ahmadis as non-Muslims, in 1976, a group of ulama brought a suit seeking an injunction against the Ahmadis which would proscribe their practice of calling their place of worship *masjid*, to call the *azan*, to perform *namaz*, and to recite the Quran. The Lahore High Court responded in the Mobashir Case that:

It is the policy of the State to protect all religions but to interfere with none...the right of conscience, i.e., the right of individual members of a community to hold certain religious beliefs and opinions is of course a religious one and one that cannot be called in question or adjudicated upon in a civil court.<sup>36</sup>

The 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."<sup>37</sup>

The court held that "everyone 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."<sup>38</sup> The court in rejecting the petition, surveyed sources of Islamic law and concluded that:

It is not difficult to infer from these authorities that Islam leaves non-Muslims free to profess and practice their religion and enjoy complete autonomy in regard to their religious tenets and institutions....I have not come across a single instance in Islamic history where the non-Muslim subjects...have been subjected to religious intolerance or their freedom to practice their religion has ever been curtailed or interfered with.<sup>39</sup>

An extensive review of Islamic history and relevant jurisprudence led the court to conclude that to grant 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."<sup>40</sup>

While protecting the right of Ahmadis to practice their religion, the court did not question the validity of the Second Amendment of the constitution, which it designated as a declaratory statute. That this recognition was a dictate of legal formalism and not rational reasoning is betrayed by the court's tongue-in-cheek remark that: "It is true that Legislature can pass any law and can declare even a man as a woman or conversely a woman as a man...."<sup>41</sup> Furthermore, the court noted that "[a] number of denominations were treated as infidels during the course of [Muslim] history by the then monarch or caliph."<sup>42</sup> However, on the question of the validity of the amendment, the court was obliged to follow the position of the Supreme Court, 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.<sup>43</sup> Instead, the Zia-ul-Rehman Case had held that as long as the procedure to amend the constitution had been followed, the judiciary cannot question an amendment.<sup>44</sup>

### *Phase III: Validation of Persecution*

The third round of anti-Ahmadi agitation in 1984 unfolded in the context of the martial-law sponsored "Islamization." New demands for sanctions

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against the Ahmadis were raised, accompanied by a warning of "direct action." The martial law regime complied quickly by promulgating Ordinance XX.

A constitutional petition was filed in the Lahore High Court, challenging the ordinance as violating the constitutionally guaranteed fundamental right to profess, practice, and propagate religion. The court dismissed the petition on the grounds that since the 1973 constitution was in abeyance, the legislative power of the martial law regime, which had enacted Ordinance XX, was not encumbered by the fundamental rights recited in the constitution.<sup>45</sup> This was in line with the Nusrat Bhutto Case which had validated martial law and recognized unfettered legislative power of the extra-constitutional regime.<sup>46</sup>

The ordinance was again challenged as violating principles laid down by the Quran and the Sunnah before the newly established Federal Shariat Court (FSC). A short order, ironically issued by the author of Mobsashir, held that Ordinance XX was simply "consequential to the Constitutional Amendment of 1974 by which the [Ahmadis]...were declared non-Muslims,"<sup>47</sup> accused Ahmadis of disregarding the Constitution with impunity and outraging the feeling of Muslims, and insisted that 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 practice their religion."<sup>48</sup>

Two months later the FSC gave its detailed ruling in the Mujteeb-ur-Rehman Case,<sup>49</sup> which set the style, tone, and rationale followed closely by Dard. The first 70 pages of the 106 page opinion are devoted to elaborating the doctrinal differences between the Ahmadis and most Muslim sects and schools, leading to the finding that "the Ordinance, therefore, restrains them from calling themselves what they are not; since they cannot be allowed to deceive anybody, especially the Muslim Ummah by passing off as Muslims."<sup>50</sup> According to the court, after passage of the Second Amendment, 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."<sup>51</sup> Consequently, "[i]f an Islamic State in spite of its being in power allows a non-Muslim to adopt the Shar'i of Islam which affects the distinguishing characteristics of Muslim Ummah, it will be the failure of the State in discharge of its duties."<sup>52</sup> As for the Article 20 guarantees, the court took the position that these are "subject to law and order," and because the Ahmadis "continued to propagate their religion freely by publication of books, journals, etc. as well as among individual Muslims to create resentment which obviously was likely to create law and order situation...." In these circumstances the Ordinance appears to be covered by the exception in Article 20 about its being subject to maintenance of law and order.<sup>53</sup>

Two positions forwarded by the FSC regarding international law and the posture of the Pakistan movement toward religious minorities warrants

particular attention, because they were implicitly adopted by Dard. The FSC held international law to be irrelevant to the issue with the curious observation that: "There is nothing in this charter [the Universal Declaration of Human Rights (UDHR)] to give to the citizens of a country the right to propagate or preach his religion."<sup>54</sup> Contrary to the FSC's position, however, the UDHR, 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,<sup>55</sup> 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 belief in teaching, practice, worship and observance.

Similarly, the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man, the European Convention on Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and People's Rights provide that every person has the right freely to profess any religion, and to manifest and practice it both in public and private. Finally, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief [the Declaration]<sup>56</sup> gives specific mention to the right of freedom of religion. It requires states to "make all efforts to enact or rescind legislation" and to take other effective measures to prohibit discrimination on the basis of religion or belief and provides that: "the rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice." 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.<sup>57</sup> However, a limitation is justifiably "necessary" only if it responds to a pressing public or social need, pursues a legitimate governmental purpose, and is proportionate to the governmental purpose. A limitation "prescribed by law" cannot be applied so as to jeopardize the essence of the right limited. The limiting law may not be vague, arbitrary, or unreasonable in content or application. To guarantee the appropriateness of the law, adequate safeguards and effective legal remedies must be available against illegal or abusive application of the law. Limitations must not discriminate on the basis of religion. The limitation clauses are to be interpreted strictly and in favor of the right at issue. Finally, the limitation must not lower the protection for any human right to a greater extent than that which is permissible under international law.

By holding international law irrelevant to the issue, the FSC also ignored the position of Justice Muhammad Haleem, the then-Chief Justice of Pakistan, who stated that:

A valid domestic jurisdiction defense can no longer be founded on the proposition that the manner in which a 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.<sup>58</sup>

He 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."<sup>59</sup>

The FSC also ignored the fact that while Article 20 of Pakistan's Constitution has been singled out as being one of the few that conform to the standards proclaimed in the Declaration,<sup>60</sup> the United Nations Sub-Commission on 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 person; the right to freedom from arbitrary arrest and detention; the right to freedom of thought, expression, conscience and religion; the right of religious minorities to profess and practice their own religion and the right to an effective legal remedy.<sup>61</sup>

Furthermore, the Sub-Commission expressly asked the Government of Pakistan to "repeal Ordinance XX and restore the human rights and fundamental freedoms of all persons in its jurisdiction."<sup>62</sup>

The FSC also dismissed the argument of an implied covenant between the Pakistan movement and minorities regarding religious freedom with the comment that "no covenant between the [Ahmadis] and [Jinnah] was shown to us that they shall be treated as Muslims nor this question arose at the time of establishment of Pakistan or during the lifetime of [Jinnah]."<sup>63</sup> This position ignores the fact that guarantees of freedom of religious belief and



practice were issued by the All-India Muslim League throughout the phase of the struggle for self-rule for India. When Jinnah summarized the Muslim position regarding constitutional changes in his famous Fourteen Points, point number seven provided for "full religious liberty, i.e. liberty of belief, worship and observance, propaganda, association and education, shall be guaranteed to all communities."<sup>64</sup> The Muslim League took the position in 1931 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."<sup>65</sup> Resolutions adopted at Lahore in 1940 by the League envisaged 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."<sup>66</sup> In his presidential address to the 30th Session at Delhi in April 1943, Jinnah acknowledged that: "the 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 have said before, any civilized Government will do it and ought to do it."<sup>67</sup>

In light of the above, the implied covenant between religious minorities and the leadership of the Pakistan movement may be summarized as follows: (1) freedom of religion and opinion will be guaranteed and equal rights of citizenship will be enjoyed by all irrespective of religious beliefs; (2) the state will have a republican form of government with a sovereign legislature unencumbered by medieval formulations of the Shariat, and (3) the legislative agenda of a representative legislature will be to facilitate development of the society in tune with the modern world.

Given the foregoing it is the author's contention that all the major assumptions and propositions of Dard are patently mistaken. The diametrically opposed conclusions about Ahmadis' right of religious practice by Mobashir and Dard, purportedly grounded on the same sources of Islamic jurisprudence, show that Shariat is a methodology, not a code of substantive rules,<sup>68</sup> and it can furnish answers to the problems of a modern state only if developed and adopted through a constitutional and democratic legislative process. Second, the incorporation of the Objectives Resolution as a substantive part of the constitution rests upon the Eighth Amendment which is not valid under the guidelines enunciated by Zia-ul-Rehman.<sup>69</sup> Besides, it does not perforce overrule the foundational jurisprudence regarding religious freedom. The Objectives Resolution was a political compromise, full of internal inconsistencies and contradictions. Furthermore, the Resolution

expressly envisages the right of minorities "to freely profess and practice their religions," and the legislative history of the Resolution is replete with assurances that it was not intended to curtail religious freedom.<sup>70</sup> Third, the distorted and selective use of the historical record of the Pakistan movement in general, and that of the implied covenant of religious freedom in particular, has only resulted in chronic political instability, erosion of democratic governance, and a general contraction of rights of all citizens. Finally, there has never been any consensus in Pakistan about the desirability or nature of an "Islamic State."

#### Conclusion

Repression of and discrimination against minorities is as old as recorded history itself. Religious minorities are no exception to this phenomenon. Increasingly aware of the immorality and dysfunctionality of this practice, however, humankind over the ages has searched for principles and procedures to combat and eliminate it. This search has ended in the modern times with three complementary avenues: political compromise, constitutional guarantees, and international human rights. At the dawn of its life as an independent state, Pakistan subscribed to all three of these instrumentalities to guarantee freedom of belief and religion. Politically, there existed a covenant between religious minorities and the leadership of the Pakistan movement; one that issued from the repeated and unequivocal assurances to religious minorities that they shall enjoy all political and social rights as equal citizens of a free state and that religious beliefs and affairs of the state shall be kept separate. Constitutionally, each successive constitution of Pakistan guaranteed every citizen the right to profess, practice, and propagate his or her religion, and every religious denomination and every sect thereof the right to establish, maintain, and manage its religious institutions. Internationally, Pakistan spearheaded the codification of the universal human right of freedom of thought, conscience, and religion.

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

During the first two decades of Pakistan's history, the superior courts admirably fulfilled their assigned role as guardians of constitutionally guaranteed freedom of religion. They refused to make the content, sincerity, or validity of religious belief a justiciable matter and rejected the position that

because the fundamental right of freedom of religion is subject to the law, it may be taken away by legislation.

Ironically, the end of the phase of robust judicial protection of freedom of religion coincided with adoption of a consensus constitution in 1973 by a representative legislature. When the morally timid and politically isolated regime acceded to the demands of the second anti-Ahmadi agitation, and shepherded the adoption of the constitutional amendment declaring Ahmadis a non-Muslim minority, the superior courts refused to question the validity of this action. Here the courts fell into the jurisprudential hole they had dug for themselves when they had recognized unfettered constitutional legislative power of the legislature and had refused to invalidate constitutional amendments 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 constitutional amendment, they refused to proscribe public religious practice by the Ahmadis and insisted that the right to hold certain religious beliefs and opinions cannot be called into question in a court of law.

Over the last decade, this slide along the slippery slope culminated in complete abdication of the judicial function and capitulation in the face of usurper regimes and religious orthodoxy. By recognizing validity, legitimacy, and unfettered legislative power of the extra-constitutional regime in 1977, the courts had become the mechanisms behind their own impotence. The degeneration of the judiciary was accelerated by introduction of the parallel Shariat court system, the Provisional Constitutional Order of 1981, and the Eighth Amendment of 1985. For over a decade, during the phase of military-sponsored "Islamization," proponents of regressive and medieval models of Shariat enjoyed a monopoly over the discursive space regarding public policy. This, coupled with the general atmosphere of repression and fear, resulted in the superior courts conveniently choosing to engage in polemical diatribes against the Ahmadis, justify immoral and unlawful state action, and embrace a regressive model of the genesis and goals of the polity.

Complexities of modern life do not lend themselves to simple or single-factor explanations. The superior judiciary does not bear all responsibility for the dismal state of the fundamental human right of freedom of religion in Pakistan. But it remains the constitutionally designated guardian of guaranteed rights. It is imperative that the superior judiciary retrace its steps to provide robust and unequivocal protection of religious freedom in tune with the symphony of the constitutional mandate, international legal obligations, and terms of the covenant with religious minorities. This is indispensable, if Pakistan's judiciary is to regain its prestige, integrity, and power and reclaim its role as the guardian of constitutional governance and the law.

## Notes

1. Dard and others v. Pakistan, Criminal Appeal 149/89 [hereinafter "Dard case"].
2. Charles H. Kennedy, "Towards the Definition of a Muslim in an Islamic State: 'The Case of the Ahmadiyya in Pakistan,'" in Dharendra Vajpeyi and Yogendra Malik, eds., *Religious and Ethnic Minority Politics in South Asia* (Delhi: Manohar Press, 1989), pp. 71-108, p. 71.
3. See for example, Human Rights Commission of Pakistan, *State of Human Rights in Pakistan* (Islamabad: Human Rights Commission, 1994).
4. *PLD 1984 Central Statutes*, 102.
5. Dard case, majority opinion, p. 6.
6. *Ibid.*, p. 16.
7. *Ibid.*, p. 19.
8. *Ibid.*, p. 33.
9. *Ibid.*, p. 29. For a discussion of the recent use of the Objectives Resolution see Charles H. Kennedy, "Repugnancy to Islam—Who Decides? Islam and Legal Reform in Pakistan," *International and Comparative Law Quarterly*, Vol. 41, no. 4 (October 1992), pp. 769-787.
10. Dard case, majority opinion, p. 33.
11. *Ibid.*, p. 33.
12. Moulta Bux v. Charuk and Others, *PLD 1952 Sind* 54.
13. See Leonard Binder, *Religion and Politics in Pakistan* (Berkeley: University of California Press, 1961).
14. Government of Punjab, *Report of the Court of Inquiry Constituted Under Punjab Act II of 1954 to Inquire into the Punjab Disturbances of 1953* (Lahore: Superintendent of Government Publications, 1954), p. 189.

15. *Ibid.*, p. 219.
16. *Ibid.*, p. 219.
17. *Ibid.*, p. 201.
18. Quoted in Stanley Wolpert, *Jinnah of Pakistan* (New York: Oxford University Press, 1984).
19. Punjab Court of Inquiry Report, p. 203.
20. *Ibid.*, p. 203.
21. *Ibid.*, p. 254.
22. *Ibid.*, p. 257.
23. *Ibid.*, p. 257.
24. *Ibid.*, p. 258.
25. *Ibid.*, p. 233.
26. *Ibid.*, p. 282.
27. 1956 Constitution, Article 18.
28. Jibendra Kishore v. Province of East Pakistan, *PLD* SC 9, pp. 41-42.
29. *Ibid.*, pp. 42.
30. Shorish Kashmiri v. Province of West Pakistan, *PLD* Lahore 289.
31. *Ibid.*, p. 307.
32. *Ibid.*, p. 309.
33. *Ibid.*, p. 308.
34. See Anwar H. Syed, *The Discourse and Politics of Zulfiqar Ali Bhutto* (New York: St. Martin's Press, 1991), pp. 198-200.
35. The Constitution (Second Amendment) Act, 1974 (49 of 1974), Section 3.
36. Mobashir v. Bokhari, *PLD* Lahore 113, p. 142.
37. *Ibid.*, p. 142.
38. *Ibid.*, p. 146.
39. *Ibid.*, p. 185.
40. *Ibid.*, p. 189.
41. *Ibid.*, p. 154.
42. *Ibid.*, p. 170.
43. See Tayyab Mahmud, "Practorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan," *1993 Utah Law Review* 1225, pp. 1262-1273.
44. State v. Zia-ur-Rehman, *PLD* 1973 SC 49.
45. Mujib-ur-Rehman v. Pakistan, Criminal Appeals no. 160/1984 and 158/1984, Lahore High Court (September 25, 1984), quoted in Dard case, p. 6.
46. Nusrat Bhutto v. Chief of Army Staff, *PLD* 1977 SC 657. Also, see Tayyab, "Practorianism" and Mark M. Stavsky, "The Doctrine of State Necessity in Pakistan," *16 Cornell International Law Journal* 341.
47. Mujeeb-ur-Rehman v. Pakistan, *PLD* 1984 FSC 136, p. 137.
48. *Ibid.*, p. 137.
49. Mujeeb-ur-Rehman v. Pakistan, *PLD* 1985 FSC 8.
50. *Ibid.*, p. 93.
51. *Ibid.*, p. 99.
52. *Ibid.*, p. 111.

53. *Ibid.*, pp. 119-20.

54. *Ibid.*, p. 117.

55. Article 1 of the United Nations Charter lists among the purposes and principles of the United Nations "promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." 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."

56. General Assembly Resolution 36/55 (1981).

57. See the "Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Rights," reprinted in *Human Rights Quarterly* Vol. 7 (1985), p. 3.

58. Muhammad Haleem, "Domestic Application of International Human Rights Norms," in *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms* (1988), p. 101.

59. *Ibid.*, p. 103.

60. Elizabeth Odio Benito, rapporteur, *Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion and Belief* (UN Document E/CN.4/Sub.2/1987), p. 31.

61. United Nations Subcommittee on Prevention of Discrimination and Protection of Minorities, "Resolution 1985/21" (UN Document E/CN.4/1986/5), p. 102.

62. *Ibid.*, paragraph 3.

63. Mujeebur Rehman, pp. 98-99.

64. Quoted in Khalid bin-Sayeed, *Pakistan: The Formative Phase, 1857-1948* 2nd edition (London: Oxford University Press, 1968), p. 72.

65. Quoted in Syed Sharifuddin Pirzada, ed., *Foundations of Pakistan: All India Muslim League Documents* Vol. 2 (Islamabad: 1970), p. 184.

66. Quoted in *Ibid.*, p. 341.

67. Quoted in *Ibid.*, p. 425.

68. See Ann Elizabeth Mayer, "The Shari'ah: A Methodology or a Body of Substantive 'Rules?'" in Nicholas Heer, ed., *Islamic Law and Jurisprudence* (1990).

69. See Tayyab Mahmud, "Practorianism," pp. 1290-94.

70. See Hakim Khan v. Pakistan PLD 1992 SC 595, pp. 613-15.