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**RELIGIOUS PERSECUTION IN
PAKISTAN :**

**THE AHMADI CASE AT THE
SUPREME COURT**

A Commentary

by

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for

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Once again for Mujeeb-ur-Rehman

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INTRODUCTION

On July 3, 1993, the Supreme Court of Pakistan decided Mujib-ur-Rehman Dard v. Pakistan (the Ahmadi case).¹ In dismissing eight appeals² brought by members of the Ahmadiyya Movement in Islam (Ahmadi Muslims),³ the Court refused to find Ordinance XX of 1984, which severely penalizes Ahmadi Muslims for holding their religious beliefs and practicing their religion,⁴ in violation of either Pakistan's Constitution or international human rights law. The five criminal defendants of this case were returned to jail for the remainder of their sentences imposed for wearing a religious badge containing the Kalima Tayyaba.⁵

This commentary describes Ordinance XX and shows why it violates the international human rights law provisions protecting religious freedoms. It then analyzes the Ahmadi case and shows why that decision also goes against these provisions. It concludes with an appeal to the government of Pakistan to comply with its obligation to ensure that all internationally recognized provisions for protecting religious freedom are fully implemented

¹C.A. 149/89, slip op. (Supreme Court, Jul. 3, 1993)(hereinafter Ahmadi case).

²Criminal Appeals Nos. 31K - 35K of 1988 (Judgement of High Court Baluchistan, Dec. 22, 1987); Civil Appeals Nos. 149/89 and 150/89 (Judgement of High Court Lahore, Sept. 25, 1984); and Civil Appeal No. 412 (Judgement of High Court Lahore, Sept. 17, 1991).

³Members of the Ahmadiyya Movement in Islam consider themselves to be a sect of Islam and from their point of view maintain basic Muslim practices and beliefs. Religious scholars of some other sects of Islam do not consider Ahmadi Muslims true Muslims, a fact irrelevant to the Ahmadi Muslims own beliefs.

⁴Ordinance XX was issued by dictator General Zia-ul-Haq on April 26, 1984 during the period (from July 7, 1977 - December 31, 1985) in which he had suspended the Constitution and governed under martial law powers. At the time of the termination of martial law powers, General Zia continued the effect of his martial law ordinances by promulgation of the Constitution (Eighth Amendment) Act of 1985, still in force in Pakistan. General Zia-ul-Haq did not himself consider Ahmadi Muslims to be Muslims and indicated great personal hostility towards them, including to this author in an interview at Army House, Rawalpindi, on May 5, 1986.

⁵The Kalima Tayyaba, a pronouncement of faith in Allah and Muhammad as His messenger, is cardinal to Muslims.

in Pakistan, not only for the Ahmadi Muslims but for all people of Pakistan and the world.

ORDINANCE XX VIOLATES FREEDOM OF RELIGION IN INTERNATIONAL HUMAN RIGHTS LAW

The issue in the Ahmadi case is whether Ordinance XX violates the Pakistan Constitution and the rights to religious freedom of Ahmadi Muslims. Before discussing the Ahmadi case it is necessary to understand Ordinance XX and then to relate it to international human rights law standards on religious freedoms.

Ordinance XX adds two new sections to the Pakistan Penal Code and provides prison terms of up to three years and unlimited fines for any member of the Ahmadiyya Movement in Islam (referred to in the Ordinance as the "Quadiani group" or "Lahori group") who uses certain words of address, who calls his or her place of worship a masjid (mosque), or who recites the azan (Muslim form of prayers) "as used by Muslims."⁶ It also provides prison terms of up to three years and unlimited fines for any Ahmadi who "poses himself as a Muslim" or who refers to his or her faith as Islam, or who preaches or propagates his or her faith or by "visible representations, or in any manner whatsoever outrages the religious feelings of Muslims."⁷ As is obvious, this Ordinance makes a rather drastic restriction of the rights of Ahmadi Muslims to profess and practice their religion.

Freedom of religion is one of the fundamental rights protected in international law. The United Nations Charter especially emphasizes non-discrimination on the basis of religion in its main articles addressing human rights.⁸ The Universal Declaration of Human Rights (the Universal Declaration)⁹ provides the essentials of freedom of religion:

⁶Pakistan Penal Code Section 298B.

⁷Pakistan Penal Code, Section 298C. Ordinance XX also amends the Code of Criminal Procedure relating to penalty schedules and the West Pakistan Press and Publications Ordinance.

⁸U.N. Charter, Arts. 1 and 55.

⁹G.A. Res. 217 A (III), U.N. Doc. A/811 at 1 (1948)(hereinafter Universal Declaration). The Pakistani jurist Sir Muhammad Zafrulla Khan, himself an Ahmadi, was one of the participants in the drafting of the Universal Declaration. He later became a justice of the International Court of Justice, serving as its President or Vice President from 1958-61 and 1970-73.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.¹⁰

Protection of freedom on religion is reinforced in Article 18 of the International Covenant on Civil and Political Rights (the International Covenant)¹¹ and by the Declaration on the Elimination of All Forms of Religious Intolerance and Discrimination Based on Religion or Belief (the Religious Declaration)¹² promulgated by the General Assembly to further delineate rights. The Religious Declaration provides the most detail of the international standards, and affirms the right:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to the extent necessary article and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

¹⁰Universal Declaration, Art. 18.

¹¹1999 U.N.T.S. 171, art. 18. Freedom of religion is also protected by article 19 which provides for freedom of opinion and expression and for the right to receive and impart information through any media.

¹²G.A. Res. 36/55 of November 25, 1981.

(h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.¹³

Under international standards, freedom of religion is considered a non-derogable right.¹⁴ International human rights standards also protect religious groups from advocacy of "hatred that constitutes incitement to discrimination, hostility or violence."¹⁵

The three international instruments safeguarding religious freedoms all provide for some limitations on the right to manifest a belief (that is to display or publicly show or reveal a religion) when "necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."¹⁶ Allowable limitations include requiring permits for religious processions in public streets¹⁷ or requiring a Social Security number even when against particular religious views.¹⁸ Limitations are not permissible regarding the right to maintain or change a religion or belief.¹⁹ Limitations may not be imposed

¹³Religious Declaration, article 6.

¹⁴International Covenant, article 4. "The freedom to hold religious beliefs and opinions is absolute." Braunfeld v. Brown, 366 U.S. 599 (1961).

¹⁵International Covenant, Article 20.

¹⁶Religious Declaration, Article 1. This provision is identical to Article 18 of the Covenant which specifically protects religious freedom. It echoes Article 29 of the Universal Declaration containing a general "limitation" provision.

¹⁷See, e.g. Cox v. New Hampshire, 312 U.S. 569 (1941), cited in The Ahmadi case, majority op. at 17.

¹⁸See, e.g. Bowen v. Roy, 476 U.S. 693 (1986).

¹⁹See, e.g. Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices, U.N. Sales No. E.60.XIV.2, U.N. Doc. E/CN.4/Sub.2/200/Rev. 1 (1960) at p. 16; Regina v. Big M Drug Mart Ltd. [1985] S.C.R. 295: "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses."

in order to provide a theological preference limiting rights of one group over another or to satisfy the call of religious groups opposed to the fundamental beliefs of another group. Limitations may not in themselves foster bigotry or be imposed in support of bigotry of others more influential with a particular government.²⁰

It is patently obvious that Ordinance XX violates these international standards because it penalizes Ahmadi Muslims for believing they are Muslim and for worshipping and assembling as they wish. It attempts to deny Ahmadi Muslims from saying the Azan or even from using the term "azan". It denies to them even the language and terminology of their religion. Because it provides criminal penalties and fines for protected right it clearly subjects Ahmadi Muslims to persecution because they are Ahmadi.

Not surprisingly, Ordinance XX has already been denounced by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities as a violation of human rights. The UN Sub-Commission, expressing its "grave concern" at the promulgation of Ordinance XX, found 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.²¹

The UN Sub-Commission alerted the UN Commission on Human Rights that there was a great potential of a mass exodus of Ahmadi Muslims from Pakistan due to their persecution. The Sub-Commission also asked that the Government of Pakistan "repeal

²⁰Rather than limit religious groups when there is hostility or bigotry based on religious intolerance, governments are obligated to defend the group suffering intolerance and to provide them with effective remedies for redress. See, e.g. U. N. Commission on Human Rights resolution 1993/25, op. paras 3, 5, and 6, U.N. Doc. E/1993/23 at p. 111, 112 (points out the obligation of states to provide "effective remedies where there is intolerance or discrimination based on religion or belief" and to "combat hatred, intolerance and violence" motivated by religious intolerance).

²¹U.N. E.S.C. Sub-Comm'n on Prevention of Discrimination and Protection of Minorities: res. 1985/21, op. para. 1, U.N.Doc. E/CN.4/1986/5 at 102.

Ordinance XX and restore the human rights and fundamental freedoms of all persons in its jurisdiction."²²

In adopting its resolution 1985/21, the UN Sub-Commission had clearly rejected justifications presented by the government of Pakistan for the limitations imposed on Ahmadi Muslims by Ordinance XX. While claiming that Ahmadi beliefs led to violence, the government asserted that it acted "to restrain certain Ahmadi practices which offend orthodox Muslims."²³ The real gravamen of the Pakistani position at that time was that Ahmadis offend because Ahmadis consider themselves Muslim, which of course, they have the right to do under international standards. In defending Ordinance XX, then President General Zia-ul-Haq told this author "Ahmadis offend me because they consider themselves Muslim. . . . Ordinance XX may violate human rights but I don't care."²⁴

Laws and acts that discriminate, rather than preventing violence, are themselves instigators of religious-based violence. As stated Mrs. Elizabeth Odio Benito in her Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion and Belief,²⁵ intolerance of the religious beliefs of others leads to an "unfavorable attitude of mind towards persons or groups" but also can lead to the "stirring up of hatred against or persecution of individuals or groups of a different religion."²⁶ She goes on to point out that intolerance may be "institutionalized and based on legislation"²⁷ and identifies Pakistan's treatment of Ahmadi Muslims that motivated Sub-Commission resolution 1985/21 as one example of government action arising from prejudice and bigotry

²²Id., op. para. 3.

²³Statement of Pakistan (Right of Reply), 42 U.N. E.S.C. Commission on Human Rights, U.N. Doc, E/CN.4/1986/SR.31 at p. 3. The government of Pakistan had also circulated Memorandum on the Ahmadiyya Question which states "It was found necessary to specify and identify, in Ordinance XX, those practices of the Ahmadis which portray them as Muslims and, when publicly manifested, cause grave affront to the religious sentiments of Muslims (to say nothing of the confusion they create in their minds)."

²⁴Author's interview with General Mohammad Zia-ul-Haq, in Rawalpindi at Army House (May 5, 1986).

²⁵U.N. Doc. E/CN.4/Sub.2/1987/26.

²⁶U.N. Doc. E/CN.4/Sub.2/1997/26 at p. 3.

²⁷Id.

that had given rise to outright hatred, persecution and repression.²⁸

THE AHMADI CASE

Pakistan's Constitution protects the right of individuals to "profess, practice and propagate [] religion"²⁹ and the right of religious groups "to establish, maintain and manage its religious institutions."³⁰ Article 20 of the Pakistan Constitution has been singled out by the United Nations Rapporteur as being one of the few that "conforms to the standard proclaimed in article 6 (b) of the Declaration on the Elimination of All Forms of Intolerance and the Discrimination Based on Religion and Belief."³¹ The two earliest civil actions in the Ahmadi case had been brought in 1984 to challenge Ordinance XX in light of these provisions of the Constitution. The actions were dismissed in the lower courts on the grounds that the Constitution was then suspended.³² In the consolidated Ahmadi case many hoped that the Supreme Court would restore basic rights of Ahmadi Muslims by finding Ordinance XX unconstitutional in light Article 20 of the Constitution.

The majority in the Ahmadi case, however, issued a ruling that is far outside acceptable bounds and sullies the judicial history of Pakistan. This majority chose to ignore the Pakistani Constitution as well as international human rights law standards of freedom of religion and to instead deliberate on whether or not the Ahmadi Muslims are theologically Muslims from the point of view of the religious beliefs held by this majority.³³ According to the majority analysis, Ahmadis are only entitled to their religious belief that they are Muslim and the practices

²⁸Id. at 9, 11-12.

²⁹Const. Pakistan, Art. 20 (a).

³⁰Id., Art. 20 (b). Article 20 contains a limitation provision similar to provisions in the international instruments.

³¹E. Odio Benito, op. cit., U.N. Doc. E/CN/4/Sub.2/1987/26 at p. 31.

³²Ahmadi case, slip op. at 6.

³³Justice Shafiur Rahman would have set aside the convictions and sentences of the criminal defendants and would have partly allowed the civil appeals. Justice Shafiur Rahman found much of Ordinance XX ultra vires to the Constitution. Rahman, J., sep. op. at p. 21-23.

they carry out in their belief that they are Muslim if theologically correct. If not theologically correct, then the Ahmadis' right to believe themselves Muslim may be curtailed and their right to live as a Muslim may be prohibited. The bulk of the majority case (Ahmadi case, Majority op. pp. 19 - 33) was devoted to showing that the Ahmadi Muslims are not theologically correct.

The majority determines that Ordinance XX has as its purpose

"to prevent unscrupulous and fraudulent non-Muslim from using the effective and attractive features of Islam in order to attract other non-Muslims not to Islam but to their own heretic fold."³⁴

The majority then provides a series of decisions from other jurisdictions on the issue of acceptable limitations to religious practices.³⁵ These decisions essentially duplicate the concept of limitations set out above from the international human rights instruments relevant to religious freedoms or support the right of the high court to rule on the constitutionality of national laws relating to religion. Not one of these decisions from other jurisdictions addresses the types of limitations and criminalization of religious beliefs and practices found in Ordinance XX and can not be properly cited to defend such limitations. Indeed, if these cases were correctly read, they would all support a finding that Ordinance XX, by criminalizing prayer, religious terminology and the inherently benign practice at issue in this case (wearing the Kalima Tayyaba), clearly provides for unacceptable limitations. The majority, however, decides, with no further analysis, that the limitation on Ahmadi beliefs and practices contained in Ordinance XX are acceptable and therefore the Ordinance does not violate the Constitution.

More distressing than the impossibly flawed reasoning, however, is the ominous ridicule of Ahmadi beliefs and individual Ahmadis in the opinion.³⁶ The majority overtly demonstrates

³⁴Majority op. at p. 8, adopting the analysis of the Federal Shariat Court in Mujibur Rehman v. Federal Government of Pakistan, P.L.D. 1985 F.S.C. 8.

³⁵Majority op., pp. 10 - 18.

³⁶The majority opinion, pages 19 - 33 is essentially a diatribe against Ahmadi beliefs and has no place in a judicial ruling. Note that the UN Sub-Commission resolution on the Ahmadi situation in Pakistan calls attention to the "independence of the judiciary . . . as [a] general principles of law of civilized nations [and] an essential element of the effective legal remedy required of all nations." UN Sub-Commission res. 1985/21, preamb.

intolerance and hatred based on religious beliefs and actually incites direct violence against Ahmadis by stating

"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?"³⁷

and then comparing the situation to that of Salman Rushdi, under a death order by certain Islamic leaders because they consider his writing blasphemous.³⁸ The majority also further denigrates Ahmadi Muslims by referring to them as "hyper-sensitive."³⁹

In defending the limitations to religious speech of Ordinance XX, the majority also seriously confuses the issue of freedom of religious expression and national regulation of commercial speech by commercial enterprises. (Majority op. pp. 3 - 6). The Court assumes that religious speech is the same as commercial speech and cites a number of provisions in foreign jurisdictions allowing restrictions on commercial speech and protection of certain words and phrases through application of copyright laws. The allowed restrictions on commercial speech are used by the majority to defend restriction on religious terminology used by Ahmadi Muslims.

No jurisdiction cited in the Ahmadi case treats restriction on commercial speech in the same way as restrictions relating to freedom of religion. None of these jurisdictions, as indicated above, would allow the restrictions on religious speech allowed by Ordinance XX. Citing these commercial speech limitations appears to be an attempt by the majority to appear learned. The result is the opposite -- the justices have regrettably but severely jeopardized their credibility in a way that would be comic if the potential outcome in Pakistan were not so tragic.

Further comment on this decision is pointless -- the majority approach is so irreparably flawed that it contradicts the whole notion of religious freedom. As established under international human rights law Ahmadi Muslims have the right to believe and practice as they do regardless of whether another sect of Islam or any other religion agrees with Ahmadi theology. Furthermore, the Pakistan Constitution can clearly be construed

para. 3.

³⁷Majority op. at 33.

³⁸Id.

³⁹Majority op. at. 35.

to conform with this international mandate.⁴⁰ There is simply no excuse for this legal atrocity.

RECOMMENDATIONS FOR PAKISTAN

Pakistan is obliged to comply with international human rights standards regardless of the ruling in the Ahmadi case. The fact that its Supreme Court would issue such an opinion as this is an indication of the serious efforts that need to be made in that country to understand and fully implement the international standards. The government should immediately order the release of all Ahmadi Muslims held under the provisions of Ordinance XX, and should instruct its officers to do nothing further to implement Ordinance XX. Fines collected from Ahmadi Muslims should be returned to them. The government should make very clear that it will not tolerate religious intolerance of any type, in particular actions taken by anyone against the beliefs, persons or property of Ahmadi Muslims or any other religious group. The government should immediately implement its obligation to provide an effective remedy for Ahmadi Muslims and any other religious group that suffers from any form of intolerance or discrimination.

The author is not unaware of the strength of religious feelings in Pakistan and the serious difficulties facing the government as it seeks to preserve the unity of Pakistan. The Ahmadi Muslims are not the only religious group to generate hostility with other Muslims sects or other religions. The Sikri group, the Deobandi group and Shi'a Muslims are but a few of other Muslim groups who have faced vehement hatred from other Muslims. Sikh, Christian, Hindi, Parsi, and Buddhist groups have also felt hatred and discrimination. Pakistan has suffered from ethnic animosity as well. All of these hatreds are fueled by official actions such as those directed against the Ahmadi Muslims, and can not but serve to further tear apart the social cohesion necessary to maintain national unity.

⁴⁰The author points out that a prior amendment to the Pakistan Constitution declared the Ahmadi Muslims to be non-Muslim. While the author is not in favor of such declarations by governments in any circumstance, that declaration by itself does not set up a regime in which the Ahmadi Muslims are restricted in their own beliefs and practices, and hence is not a direct violation of their rights. It does, however, foster animosity and hatred of Ahmadi Muslims and for those grounds is hostile to international human rights standards which require States to foster harmony and brotherhood among peoples of all or no religion.

In early September, 1993, the government of Pakistan set up a National Minorities Commission composed of five members of the government and nine non-governmental members drawn from various religious groups. The Commission has been asked to report on laws and practice that discriminate, and ways to protect religions and their places of worship. This is clearly a step in the right direction for Pakistan. It is hoped that the Commission will be given every facility to carry out its mandate, that the Commission's recommendations will reflect international human rights standards, and that the government of Pakistan will implement these recommendations. In this light, the government of Pakistan should consider inviting the United Nations Special Rapporteur on Religious Intolerance to visit Pakistan and to meet with this new Commission.