

The Importance of Religious Freedom and Strong Judicial Administration to Protect Religious Minorities

The news today is ripe with reports of religious intolerance and the attendant extremism that often results. Those circumstances, in both Western Republics and Islamic Republics, can be remedied and must be remedied, for religious freedom and democracy go hand in hand; each strengthening and reinforcing the other. Let me explain how they do so.

First, many believe the free exercise of religion can promote a more humanitarian, tolerant society. For example, most religions teach the importance of a power greater than one's self. The very nature of this vertical belief puts an adherent in a position where he or she comes to believe that the beginning and end of all creation, and the importance of life, transcend individual needs and wants. As one comes to understand that others are equally subordinated, there is a greater likelihood of horizontal involvement with other members of society. One can become more attuned to the horizontal equality that knits a community together, as well as the vertical belief in a higher power which instills a sense of humility. This "turning out" phenomenon increases the possibility of genuine concern for others and is important to a society which cares for those in need.

Second, most religions – but not all – promote civic virtue and influence believers to be law abiding. Democratic societies generally function because the vast majority of people are willing to obey the law without enforcement action by the state. Allowing, without impediment, people to exercise religious beliefs that tend to encourage acceptance of legal norms can therefore further a law-abiding culture, which is essential to democracy.

Third, religious freedom preserves an important opportunity for choice, which is a key component of liberty. When each religious community is free to proclaim its tenets and teach others, there will be a wider landscape of varying religious views and a broader spectrum of choices. As a result, each individual has a greater opportunity to make a choice that best fits his or her personal needs. Religious

freedom is therefore both an important end in itself as well as one of the cornerstones of self-determination, individual choice and pluralism. There is a profound liberty interest in being able to choose something as fundamental and personal as religion. Thus, with freedom to thrive, religions can help elevate the political process in society to a higher plane of democracy and individual freedom. It can also lead to a more stable society because freedom to choose a religion which best fits individual needs will result in a more satisfied society.

Finally, just as our collective viewpoint is enriched by ethnic and racial diversity, so too can diversity in religious cultures contribute to our political and social discourse. It is important to consider diverse perspectives in dealing with new challenges facing our society.

The challenges facing religious freedom will vary among countries and regions based on differences in culture, history, structure of government, and other factors. But its protection is fundamental, in my judgment, in assisting in the development of a democratic society.

I. The Role of the Judiciary in Promoting Religious Freedom in Pakistan – A Case Example

There are times when the right person is in the right position to cause a dramatic change in the course of the history of a country and its people's rights. I believe, and others may also, one of those times was June 19, 2014. It was on this day that former Chief Justice Tassaduq Hussain Jilani of Pakistan filed his opinion on behalf of the Supreme Court of Pakistan, blazing a new trail in his country's decades' long struggle dealing with minority religious rights.

It may seem odd that this has been such a problem in Pakistan. After all, Pakistan was divided off from India to protect the rights of the minority Muslims.

Indeed, the preamble to the 1973 Islamic Republic of Pakistan Constitution specifically directs that the principle of tolerance, including religious tolerance, "as enunciated by Islam, shall be fully observed." Thus, the courts of Pakistan, in

keeping with their duty to protect and enforce the Constitution, are required to ensure religious tolerance is fully observed.

Similarly, over 200 years ago, Americans were debating whether to accept a proposed Constitution. Religious tolerance became an issue. The result was the adoption of amendments after the Constitution was approved. The First Amendment prevented the Congress from adopting any legislation which would interfere with the free exercise of religion – meaning all religions: Islam, Jewish, Christian or others. Thus, the United States too has a similar constitutional requirement as to religious tolerance.

There was an important religious tolerance requirement directed toward Islam when the Prophet Muhammad signed a document with a delegation from the St. Catherine Monastery which included a direction to protect Christians.

It is true that Pakistan has chosen through the democratic process to adopt Islam as a foundation of government. It appears from the St. Catherine Monastery document, however, that tolerance on religious issues is mandatory – that is, a Christian may freely practice his or her religion without interference so long as it does not violate the law of the land.

Chief Justice Jillani reaffirmed Islam and Pakistan’s foundational promise in the Pakistan Supreme Court’s June 19, 2014 opinion. In it, Chief Justice Jillani reminded all citizens that “the very genesis of our country is grounded in the protection of the religious rights of all, especially those of minorities,” and declaring that “[i]t is imperative that the right to freedom of religion be restored as an individual and infeasible right.”

The Supreme Court of Pakistan identified religious tolerance as a critical human right protected by Pakistan’s constitution – a right that the judiciary must take a proactive lead to promote. The opinion addressed a series of complaints in which religious minorities were abused, and their places of worship attacked. Attacks on all religious groups, and their places of worship, are protected by Pakistan’s blasphemy law, a provision of the penal code. In its decision, the Supreme Court held that not only was relief necessary, but that the federal government must

take steps to promote a culture of religious and social tolerance, through law enforcement and education on a national scale.

Sometimes cases present difficult issues – such as whether to accommodate religions which use drugs as a sacrament. However, guidance on how to decide those issues stems not from our personal beliefs, but from our constitution. Both the Pakistani and United States judiciaries are enjoined to be religiously tolerant. The result is that whether I am in San Diego or Islamabad, I am allowed to practice my religion. I identify this issue because religion excites so many in both countries. Yet court decisions in Pakistan as well as the United States must show, by Constitutional direction, religious tolerance. This understanding results in the judiciary promoting a culture of tolerance.

Although the judicial branches of our countries may take the first step in implementing constitutional directives through the issuance of orders, realization of the constitutional guarantees are often hindered by cultural or political resistance to those orders. As a result, successful implementation of court orders often rely on assistance from the executive or legislative branches of government.

Chief Justice Jilani quickly realized this imperative in the June 2014 order. Chief Justice Jilani there explicitly refers to the United States' experiences in dealing with the judiciary's need for executive support by citing a case decided by the United States Supreme Court in 1954, *Brown v. Board of Education of Topeka*. Although *Brown* concerned constitutional protection for racial minorities, especially Americans of African descent, its principles are analogous to other social minorities – even religious minorities. The Pakistan Supreme Court recognized this in its reliance on *Brown*. The thrust of the *Brown* decision called attention to the need for a fundamental change in the socio-economic structure and political atmosphere of American society that could ensure equal rights for all races. It was a turning point, especially for certain geographical regions, where communities had long-standing practices of racial segregation and separate, unequal public facilities for different races. Those communities were resistant to change. To implement the Supreme Court's directive, more than a court order was needed.

The support of the United States' President and Congress, the sword and purse of the country, were needed to oversee those changes not only to integrate racial minorities into historically white schools, but also to begin the process to ensure that racial minorities were afforded equal opportunity in other public accommodations as well. In other words, the executive and legislative branches of national government, armed with a comprehensive strategy, were needed to ensure full acceptance of the Court's guarantee.

Although many communities and schools followed the court's opinion peacefully, others resisted. This resistance, in some cases, was violent, despite the Supreme Court's directive. As a result, the Court's order was not immediately enforceable in many communities, and others were hesitant to proceed. After one year of confusion and inaction, the Court issued a second opinion in *Brown v. Board of Education* to deliver a more directive strategy to implement its holding.

The impact of *Brown v. Board of Education* was not limited to racial integration in public schools. The Court's order struck at the heart of longstanding cultural discrimination that impinged upon constitutional guarantees. These could not be resolved overnight. It took time, work and the influence of the executive and legislative leadership to ensure that protection for minorities would endure. The effort continues today.

Participation by the other branches will also be required to implement the religious freedom order in Pakistan. To rectify the found constitutional violation, the Supreme Court of Pakistan's June 2014 order called for an Executive Task Force to develop a strategy of religious tolerance to meet the requirement of Pakistan's 1973 Constitution. The central Executive Task Force was to bring local organizations together to address issues of religious freedom across the country. The task force was to work to ensure that actions are taken to enforce minority religious rights and to educate law enforcement, judges and Pakistan's citizens on the right to liberty of conscience secured in its constitution. The Supreme Court described what will be necessary to protect these rights and ensure compliance with its order. The Court specifically mentioned the need for revised curricula in schools, discouragement of hate speech in social media, a National Council for minorities' rights to monitor progress of the practical realization of these rights and safeguards, a Special Police

Force to protect places of worship, and appropriate law enforcement to ensure the Court's judgment is carried into effect.

The Supreme Court opinion seems to indicate that now is a critical time for Pakistan to engage its government and citizens in a galvanized movement to recognize the fundamental rights of religious minorities guaranteed by its own constitution. I suggest that the declaration of the Supreme Court marks a watershed moment in Pakistan's history and development as a powerful nation in a globalized world of interdependence. But effective movement toward national religious tolerance, a value considered essential by Pakistan's founders, will require government leadership. The required executive supervisory task force can implement the Supreme Court's direction in a comprehensive and evenhanded manner for all of Pakistan's people.

As was the case after *Brown*, Pakistan will confront some difficulties in implementing the June 2014 order. For many communities it will require a major cultural shift that likely will struggle for acceptance even with the help of an Executive Task Force to support and monitor progress toward religious tolerance.

Pakistan has a law that prohibits blasphemy against any religion. Historically, the law has not been enforced to protect the views or practice of religious minorities. Following an attack on a Christian church, as discussed in the Court's June 2014 order, police officers conceded that they believed the law did not protect from attack or desecration places of worship for religious minorities. The common view was that the blasphemy law applies only to attacks on Islam. Even though the law was made clear by the Supreme Court, the prevailing misunderstanding by police and all others will take time to correct.

Change will not happen overnight as a result of one court order, but the Pakistan Supreme Court's recent decision, if supported and guided by the required Executive Task Force, can provide the necessary catalyst to accomplish lasting reform. An Executive Task Force is to oversee efforts in all sectors – education, media, law enforcement, places of worship – and is to monitor the progress of those efforts throughout the country. Although implementing an edict of the judicial

branch is often a difficult task in any diverse nation, it has been done successfully when supported by the will of the people and the rule of law.

II. The Second Requirement for Real Implementation of the Rule of Law

The Pakistan Supreme Court's order demonstrates the dual roles of the judiciary and the other government branches in engendering religious tolerance within a society. But how can the judiciary better promote religious tolerance?

First and foremost, the judiciary can promote religious tolerance by acting from a position of judicial independence – independence from other governmental departments and independent from powerful people, religious leaders, and others who would interfere with a judiciary acting independently. Unfortunately, the way outside interests desire judges to act frequently results in court action which is less than tolerant. Thus, as a part of promoting religious tolerance, judges must be able to act with tolerance from the strength of an independent judiciary.

In 1991, the Conference of Chief Justices of Asia and the Pacific began work on stating the principles that are the foundation of independence. Work continued at the 1993 and 1995 Conferences. Then, at the 1997 Conference in Beijing, China, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region was adopted. It has been signed by thirty-two chief justices throughout the Asia-Pacific region, including Pakistan. Those countries represent about two-thirds of the world's population.

This remarkable effort raises a question for each judge: in addition to talking about judicial independence, what am I doing to promote it?

Over 200 years ago, when the adoption of the United States Constitution was being debated, Alexander Hamilton made an important observation. In Federalist Paper No. 78, he argued that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.” But Hamilton realized that the maintenance of its independence is much more difficult for the judiciary than for the

other branches. He referred to courts as the least dangerous branch and said they only have judgment.

It is the influence of the judiciary's judgments that ensures independence. If Hamilton is correct, and I think he is, how well a judiciary functions as an objective, non-corrupt, fair, and rational decision-making and tolerant institution will determine the extent of its judicial independence.

A country's citizens will not want an independent judiciary unless they believe that judicial independence will benefit them by increasing their access to justice, and will be tolerant of their rights. If a country's citizens do not believe that the judiciary is independent, but rather perceive it to be influenced by other branches of government or non-government entities, they will not resort to it for dispute resolution. Instead, they will attempt to circumvent the legal process and resort to corruption, bribery, and intimidation. If a government knows that the people want an independent judiciary, it is far more likely that the government will support it.

The first way to promote citizens' desire for an independent judiciary is to create an atmosphere in which the public has confidence in the integrity of judges' decisions. If this is not done, citizens will tolerate more illegality and decreasingly respect their country's laws, as they are increasingly exposed to others' disrespect for the laws and intolerance. If a country's people are continually exposed to unjust judicial outcomes resulting from political or financial pressures, lack of tolerance, or other illegitimate influences, they will not expect to be treated fairly when bringing their complaints to the judicial system. Corruption in, and distrust of, the legal system will breed more of the same. When the public perceives that either the government or those individuals or groups who are favored by the government are receiving special treatment from the judiciary, the government and judiciary lose authority. Particularly in a republic, the government is legitimated by the support of its people. A judiciary that does not independently review the actions of the other branches detracts from the people's belief in their government's legitimacy.

By focusing on making the judiciary more independent, it assists in creating a culture of tolerance, and promotes religious tolerance. This is the reason for and basis of the study of judicial administration: making justice more functional in

providing decisions promptly. The foundation of judicial administration is teaching judges modern techniques, such as case management and mediation, to be more effective.

This focus provides the judiciary with the ability to secure acceptance of the people needed to have the indispensable support required for judicial independence, including the need for protection of our freedom of religion and belief.

But let me focus for a minute on another important phase of the judicial administration model: court annexed win-win mediation.

As important as the trial before a competent and effective decision maker is, we must understand it only settles the dispute – not the cause or result – and the ill feelings of the participants usually remain.

A better way should be encouraged. In most advanced countries, court annexed mediation has flourished as a quicker and less expensive way to settle a dispute. And, indeed, where a trial usually increases intolerant feelings between litigants, mediation results in the opposite. Why? Because true mediation does not depend on how a judge would rule, but guides the parties to find common ground where they can agree – win-win mediation.

Many years ago, I worked with then Justice Jilani of the Lahore High Court establishing the first court annexed mediation experiment in Pakistan. It was in the family court. The result of the experiment was astounding, especially when others insisted mediation would not work in Pakistan.

At the end of the pilot program, 67% of the cases that went voluntarily into mediation settled. And, importantly, of those who had filed for divorce, 25% reunited successfully. There is an important need for mediation of disputes in Pakistan, and in every country.

Mediation teaches tolerance with those with whom you disagree. It allows a process where families are reunited, where business associates are able to return to work together again and where neighbors can regain their friendship. It is the basis

of a tolerant society. It is a culture of tolerance and it can be promoted effectively by the judiciary and result in more religious tolerance.

There is no country that should be more effective in mediating settlement of disputes than countries that have embraced Islam. Why? Because mediation is very Islamic, as stated in the Qur'an and the Hadith.

III. Conclusion

The societal and individual value of the free exercise of religion is vital to our continuing effort to provide the best in the democratic institution. It is a topic that deserves our individual and joint attention. The June 2014 Order from the Pakistan Supreme Court signals a pivotal moment in which the fundamental rights of religious worship and conscience may achieve their full expression. As the Supreme Court expressed, an Executive Task Force is likely needed to guide this effort through the cultural shift and education that will be crucial to lasting change. Pakistan's efforts at this critical time will allow it to be a leader in a region that desperately needs an example of how religious pluralism can benefit society as a whole. It also sets an example for other Islamic countries. Can this be the beginning of the long road to a world free of religious intolerance and its resultant death and pain, and the ushering in of a religiously tolerant society? I sincerely hope so.

But there is another critical problem. There is no practical right to freedom of religion and belief without a prompt judgment from an independent judiciary. Because of the reported two decades delay in the Pakistan trial courts, the need becomes clear to focus not only on judicial independence, but also on strengthening judicial administration for practical results.

Thus, the reason for the twin themes of this annual perpetual lecture series becomes clear. Real progress can occur when the best minds focus on these interlocking vital needs: developing freedom of religion and belief and strengthening judicial administration for practical results.