

Compelling People to Profess their Religious Beliefs: Comment on the Islamabad High Court’s Judgment in *Maulana Allah Wasaya v Federation of Pakistan* (PLJ 2018 Islamabad 316)

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Details of the Case

The full name of the case is *Maulana Allah Wasaya and others v. Federation of Pakistan through Secretary Ministry of Law and Justice*. The case number is Writ Petitions 3862, 3847, 3896 and 4093 of 2017 reported as PLJ 2018 Islamabad 316. The case was heard by Justice Shaukat Siddiqui of the Islamabad High Court on 9 March 2018.

Introduction

While deciding the *Carolene Products* case,¹ Justice Harlan Stone of the United States Supreme Court penned down the most famous footnote in American constitutional law.² In footnote four, he asserted: ‘... [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation

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¹ *United States v Carolene Products Company* 304 U.S. 144 (1938).

² David Schultz, ‘Carolene Products Footnote Four’ (The First Amendment Encyclopedia, 11 January 2020) <<https://www.mtsu.edu/first-amendment/article/5/carolene-products-footnote-four>> accessed 11 Jan 2020.

of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.’³

The footnote emphasised one of the fundamental principles of constitutional law - that a constitution embodies the fundamental rights of all citizens, the infringement of which is prevented by an impartial and independent judiciary. One way to ensure that those fundamental rights are enjoyed by all is to protect minority groups that are particularly vulnerable to abuse and discrimination by the majority. The United States’ judicial history reflects a strong implementation of this principle. For example, in 1954, the U.S. Supreme Court, in *Brown v Board of Education of Topeka*,⁴ abolished racial segregation in schools, ruling it as unconstitutional, and ensured implementation of its judgment by directing the dispatch of federal troops to the concerned state.

The superior courts of Pakistan, in most cases, have firmly adopted this principle of constitutional law and have protected the rights of minorities. The 2014 Supreme Court judgment⁵ by Justice Tassaduq Hussain Jilani is a prime example. In this landmark case, the Court took *suo motu* action for the protection of the rights of religious minorities. The judgment acknowledged that minorities have a special status in the Constitution of Pakistan⁶ and that the Supreme Court, being the apex court in a liberal democracy, is mandated to protect and defend the Constitution which protects the fundamental rights of its citizens.⁷ The Court further opined that textual pledges in the Constitution, although important, are not

³ *Carolene* (n 1).

⁴ 347 US 483 (1954).

⁵ *Suo Motu actions regarding suicide bomb attack of 22.09.2013 on the Church in Peshawar and regarding threats being given to Kalash tribe and Ismaileis in Chitral*, PLD 2014 SC 699.

⁶ *ibid* at 9.

⁷ *ibid* at 34.

enough to ensure that these rights would be honoured in practice.⁸ It therefore directed the federal and provincial governments to follow the guidelines laid down in the judgment on the protection of minority rights and to take a proactive lead to ensure that these rights are respected and enjoyed in practice.

Similarly, in the famous *Asia Bibi* case,⁹ the Supreme Court of Pakistan discussed the misuse of blasphemy laws against religious minorities. The court decreed that the state needs to protect its religious minorities and make sure that innocent people are not tried on charges of blasphemy. It referred to Articles 4, 37 (d) and 175(2) of the Constitution and Section 28 of the Criminal Procedure Code (CrPC),¹⁰ and ruled that it is not for the individuals, or a gathering (usually a mob), to decide whether the accused is guilty of blasphemy. It is only for the state to bring the machinery of law into operation and present the accused before a court of competent jurisdiction for a trial in accordance with the law.¹¹ By ensuring a fair trial for minorities in blasphemy cases the Supreme Court, once again, protected the constitutional rights of religious minorities.

However, contrary to the above-stated decisions of the Pakistani courts which protected the constitutional rights of religious minorities, the *Maulana Allah Wasaya v Federation of Pakistan* judgment¹² is a decision where the the judiciary did not stand as the ultimate defender of minority rights. In this case, the court seemed to have turned its back on minorities.

This case note examen of the *Maulana Allah Wasaya* judgment of the Islamabad High Court is divided into three parts. The first part states the facts which led to the judgment and contains the

⁸ *ibid* at 22.

⁹ *Mst. Asia Bibi v The State* PLD 2019 SC 64.

¹⁰ Pakistan Criminal Procedure Code 1898 (Act V of 1898).

¹¹ *ibid* at 15.

¹² *Maulana Allah Wasaya v Federation of Pakistan* PLJ 2018 Islamabad 316.

main prayers of the petitioners. The second part discusses the ruling of the case. It highlights the salient features of the judgment which curbed the religious freedom of minorities, particularly of the Ahmadiyya Community in Pakistan. The third part then analyses how the judgment violates the fundamental rights of religious minorities - mainly the right to freedom of speech and freedom to practice their own religion. In conclusion, the case note emphasises how it is necessary that this judgment is reviewed and set aside so that it does not become a precedent for the future.

Facts of the Case

As per the facts narrated in the judgment, the Federal Government of Pakistan enacted the Elections Act, 2017, (the Act) on 2 of October 2017. Through the Act, the Government amended, consolidated and unified laws relating to the conduct of elections. The Act repealed all the election laws that were in force at the time.

The Act was challenged in several writ petitions filed before the Islamabad High Court. The main contention of the petitioners was that the Act did not contain provisions relating to Ahmadis, as were present in the repealed election laws. In particular, it was argued that the new Act did not incorporate provisions similar to Sections 7(b) and 7(c) of the repealed Conduct of General Elections Order, 2002 (hereinafter referred to as 'the Order'). Section 7(b) of the Order maintained the status of Ahmadis as provided in the Constitution, i.e. as non-Muslims and Section 7(c) excluded Ahmadis from a joint voters list and placed them in an electoral list of non-Muslims. The petitioners argued that the absence of such provisions in the Act allowed Ahmadis to change their status from a religious minority to Muslim and thus cause a threat to Islam and Pakistan.

They prayed that the government be ordered to conduct a thorough investigation through credible and honest officers of the law enforcement agencies to ascertain the 'elements and forces' behind the omission of Sections 7(b) and 7(c) from the Act, and that those

found guilty be punished. Fearing that these omissions were plotted by Ahmadis, the petitioners prayed that the government be directed to maintain a separate database of individuals who belonged to the Ahmadiyya community. The purpose for a distinct database was that in future, people belonging to that communities may not be allowed to enter the civil service and be posted in offices which are privy to sensitive information.

Meanwhile, the absence of such provisions in the Act caused countrywide protests. Several religious parties carried out rallies calling for the restoration of Sections 7(b) and 7(c) of the Order in the new Act. In particular, the protests at Faizabad paralysed the twin cities of Rawalpindi and Islamabad and brought the government machinery to a halt.¹³

Legal Issues and Ruling of the Court

In his judgment, Justice Shaukat Siddiqui of the Islamabad High Court discussed the status of minorities in Islam and the Constitution of Pakistan. He held that to protect the minorities as provided in Islam and the Constitution, the state needed to know the religious belief of every Pakistani citizen. The court ruled that every individual needed to declare their religious faith to obtain a passport, national identity card, birth certificate, and to be on the voters' list.¹⁴ It further held that the declaration of religion was a mandatory requirement for appointment in all government and semi-government institutions, especially the judiciary, armed forces, and civil services.¹⁵ This was necessary because according to the judge, every citizen of the country has a right to know what religious community the people holding key positions in the country belong to, and the

¹³ 'Anger Grows As Faizabad Interchange Blockade Enters 17th day' (*Saama TV News* 22 November 2017) <<https://www.samaa.tv/news/2017/11/anger-grows-faizabad-interchange-blockade-enters-17th-day/>> accessed on 24 Feb 2020.

¹⁴ *Maulana Allah Wasaya*, at 82.

¹⁵ *ibid.*

extent to which they will protect the ideology of Islam as the state religion.¹⁶ Therefore, failing to declare one's faith while collecting identity documents or applying for government jobs would result in a betrayal to the State and in an undue exploitation of the Constitution.¹⁷

Although these directives were declared mandatory for every Pakistani citizen, the judgment particularly targets one religious minority, the Ahmadiyya Community. A large portion of the 172-page judgment mainly discusses the Ahmadiyya issue in Pakistan. It discusses why the Ahmadis are heretics and, more prejudicially to Ahmadis, it portrays them as a threat to Islam and Pakistan. For instance, the judgment holds Ahmadis responsible for the separation of East Pakistan.¹⁸ It also refers to them as agents of anti-Pakistan lobbies operating in Pakistan.¹⁹

The judgment discusses how the Ahmadis conceal their identity to enjoy benefits - in particular, the high government offices available to the Muslim majority. While referring to Ahmadis, it states:

[M]ost of the minorities residing in Pakistan hold a separate identification in reference to their names and identity but according to the Constitution, one of the minorities do not hold a distinct identification due to their names and general attire which leads to crisis. Due to their names, they can easily mask their beliefs and become part of Muslim majority. Also, they can then gain access to dignified and sensitive posts resulting in accumulation of all benefits.²⁰

¹⁶ *ibid* at 81.

¹⁷ *ibid* at 82.

¹⁸ *ibid* at 35.

¹⁹ *ibid*.

²⁰ *ibid* at 82.

Therefore, in the opinion of the judge, the ‘infiltration of Qadianis²¹ by posing themselves as Muslims, in the State institutions and key posts, including the high constitutional offices’ was to be addressed.²² For this, he decreed to create a distinction between names adopted by the Ahmaddiya community and the Muslim majority. He held that Ahmadis ‘...should be either stopped from using the names of ordinary Muslims or in the alternative Qadiani, Ghulam-e-Mirza or Mirzai must form a part of their names and be mentioned accordingly.’²³ Furthermore, he deemed it necessary for the government to know the correct religious belief of every individual so that it should not be possible for them to hide their real identity and recognition.²⁴

Moreover, fearing that many Ahmadis might have concealed their faith to be treated as a mainstream Muslim, the judge narrated that the ‘identity of majority of the (Ahmadiyya) community is intentionally kept hidden so as to enable them to infiltrate within the State institutions by posing themselves as Muslims.’²⁵ Therefore, he directed the government to ‘take immediate steps for conducting an inquiry concerning alarming and visible difference in the population record of Qadianis/Ahmadis available with the NADRA and figures collected through recent census in this regard.’²⁶

The judgment, in conclusion, with regard to Ahmadis, directs the Parliament to make necessary legislation and requisite amendments to the existing laws so as to ensure that all the terms which are specifically used for ‘Islam’ and ‘Muslims’ are not used by

²¹ A derogatory term used to refer Ahmadis.

²² *Maulana Allah Wasaya* case, at 54.

²³ *ibid* at 76.

²⁴ *ibid* at 82.

²⁵ *ibid* at 53.

²⁶ *ibid* at 82.

the persons belonging to any of the minorities for the purpose of hiding their real identity or for any other purpose.²⁷

Analysis on the Impact of the Judgment

The judgment of the Islamabad High Court violates the fundamental principle of constitutional law by which the judiciary is mandated to protect minorities and not expose them to the wrath of the majority. The Islamabad High Court, rather than protecting the fundamental rights of citizens irrespective of their religion, with this judgment limits minorities from enjoying their rights. Moreover, it goes against the spirit of previous judgments of the superior courts of Pakistan where they have interpreted the Constitution in order to protect the rights of minorities

The judgment seems to strip religious minorities from the little religious freedom they have. It risks obliterating from the society what remains of the values of tolerance and acceptance. In a society where people are dragged out of their homes and brutally killed for the kind of names they have on their CNICs or for belonging to a different sect,²⁸ ordering that certain classes of people bear their identities on their sleeves is tantamount to exposing the members of those classes of people to extreme and imminent violence.

The judgment violates several fundamental rights and principles of policy as embedded in the Constitution of Pakistan, 1973. Astonishingly, the judgment violates the Constitutional right of fair trial²⁹ as it was passed *ex parte*. The judge only heard the arguments of the petitioners. He also appointed several religious scholars as *amici curiae*, all Muslims as per Article 260³⁰ of the

²⁷ *ibid.*

²⁸ 'At Least 20 Shias Pulled off Bus, Shot Dead in Northern Pakistan' *Dawn* (16 August 2012) <<https://www.dawn.com/news/742618/several-forced-off-buses-killed-in-northern-pakistan>> (accessed on 24 Feb 2020).

²⁹ Article 10-A, Constitution of Pakistan, 1973.

³⁰ Article 260, Constitution of Pakistan, 1973.

Constitution, who presented material written by different people regarding the beliefs of the Ahmadiyya community. However, no one was heard from the side of the minorities, in particular the Ahmadis, against whom the judgment was passed. Ironically, the judgment reproduces parliamentary proceedings which show how representatives of the Ahmadiyya community were heard by the Parliamentary committee before being declared as non-Muslims. However, the judge himself did not think it necessary to hear them. The judgment therefore resembles anything but a judicial order. In fact, it reads like an opinion piece reflecting a deep-rooted bias and prejudice against non-Muslims in general and the Ahmadiyya community in particular.

The mere fact that the court requires Pakistani citizens to declare their faith while applying for government and semi-government jobs, and for obtaining a passport and CNIC, is a blatant violation of the fundamental rights of freedom of speech³¹ and freedom of religion³² as enshrined in the Constitution. The Supreme Court of Pakistan has held that the rights to freedom of speech and freedom of religion are negative rights,³³ which usually oblige inaction,³⁴ i.e. the holder of a negative right is entitled to non-interference from the State.³⁵ The Court reasoned that:

Negative rights place a duty on the state not to interfere in certain areas where individuals have rights. The right holder can thereby exercise his right to act a certain way or not to act a certain way and can exercise his or her freedom of choice within the existing right. For instance, the freedom to profess religion and to manage religious institutions (Article 20) encases the right to both profess a certain religion and not to

³¹ Article 19, Constitution of Pakistan, 1973.

³² Article 20, Constitution of Pakistan, 1973.

³³ *Province of Sindh v M.Q.M.*, PLD 2014 SC 531 at 44.

³⁴ *ibid.*

³⁵ *ibid.*

do so. It also places a duty on the State not to interfere with the religious beliefs and ideologies of individuals. Similarly, the freedom of speech and expression (Article 19) encases the right of an individual to express his views and opinions and engage in dialogue without fear of misplaced sanctions and State intervention, but simultaneously possesses the right to remain silent.³⁶

It is clear that while these rights provide freedom to any individual to openly express himself and practice his religion, they also entitle him to remain silent and to decline to profess allegiance to a certain religion.³⁷

Therefore, in light of the above-mentioned principle settled by the superior courts of Pakistan, the Islamabad High Court should not have interfered with the rights of an individual and obligate him or her to declare their religion. It is the choice of every individual whether they want to declare their religion or not. If they want to remain silent about it, they can, and the state cannot interfere and obligate them to do so.

Moreover, the judgment is flawed as it violates Article 4, read with Article 14, of the Constitution. The directions to declare one's religion while applying for jobs or for obtaining certain identity documents violate the fundamental guarantee of the dignity of a person and the right of privacy contained in Article 14 of the Constitution. The mere fact that an individual has to disclose their religion, invades their privacy, and it is a settled principle of law that intrusion into privacy of a person injures their dignity and puts them in serious danger of being blackmailed³⁸. Therefore, these directions

³⁶ *ibid.*

³⁷ It is pertinent to note here that this is a settled principle in the U.S. too: an individual's right to speech includes his right to speak freely or refrain from speaking at all. See *Wooley v Maynard* 430 U. S. 705 (1977) and *West Virginia Board of Education v Barnette* 319 U.S. 624 (1943).

³⁸ *Benazir Bhutto v President of Pakistan* PLD 1998 SC 388.

also violate Article 9 (security of a person) of the Constitution. As mentioned above, they will have the ineluctable effect of putting the lives of hundreds of thousands of people in grave, imminent danger thereby affecting both their right to life and liberty.

The directions contained in the judgment violate Article 25 (equality of citizens) of the Constitution by discriminating on the basis of the religion of certain citizens. It is important to note that the concept of reasonable classification cannot be invoked or relied upon to demean a 'class' of persons by subjecting them to ghettoisation, or for oppressing them and exposing them to danger in a society which is already riddled with extreme forms of religious violence and extremism. Essentially, the judgment asks non-Muslims, especially the Ahmadis, to stick their necks out and be clear targets of persecution by the majority.

The directions of the judge that government jobs be distributed according to one's religion blatantly violate Article 27 of the Constitution which provides safeguards against discrimination in the government services on the basis of race, caste, sex, residence and religion. They also violate several principles of policy including those contained in Articles 33, 36, and 39, which provide that the state shall discourage sectarian prejudices among the citizens, protect minorities and enable all citizens to participate in armed forces without any discrimination.

Lastly, the judgment fails to provide any law or set a precedent for the courts by which it can prevent Ahmadis from using a 'Muslim' name, or in fact make it compulsory for them to use 'Qadiani,' 'Ghulam-e-Mirza' or 'Mirzai' as a part of their name. The judge ignores that all religious minorities keep names which are indistinguishable from names that Muslims keep. An example is the honorable Mr Jamshed Rahmatullah, a former judge of the Lahore High Court and a Christian.

Conclusion

In conclusion, the judgment of *Maulana Allah Wasaya v Federation of Pakistan* (PLJ 2018 Islamabad 316) is a classic example of a case where basic principles of constitutional law are violated. It shows a judge going against his basic constitutional responsibility of protecting minorities by producing a judgment which infringes upon the fundamental rights of religious minorities as provided in the Constitution. The superior judiciary of Pakistan should responsibly review this judgment because if such orders are implemented, they will set a precedent for the future which may be detrimental to the rights of religious minorities in Pakistan.

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