

**Constitutional Comparison and Analysis of Discrimination
against Religious Minorities in Pakistan and India**

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This article analyses the constitutional status of religious minorities within a comparative context of Pakistan and India. This is done by drawing a comparison between not only the discriminatory provisions in the two constitutions, but also between the provisions which seem accommodating towards religious minorities. It is explained that the constitution of India can be construed more favourably towards religious minorities, as opposed to the constitution of Pakistan. However, it is not suggested that there is no discrimination against religious minorities in India, but the focus is to outline the textual differences ingrained in the constitutions of both countries. It further lays out three ways in which the issue pertaining to the discrimination against religious minorities can be addressed, that is, political compromise, constitutional guarantees and international codes of conduct. The article emphasises the need to focus on provision of constitutional guarantees to safeguard the interest of the vulnerable classes of a society.

Introduction

When observing societies from a sociological aspect, it is not uncommon to find binaries in terms of a dominant group and the 'other(s)'. These classifications arise from how different factors such as gender roles, economic divides, races and religious affiliations are perceived in a society. Once the 'othering' of a particular group is initiated, mostly by the dominant group, it may result in increasing tensions between the same as well. In broad terms, there are three ways of addressing this issue: 'political

compromise, constitutional guarantees, and international codes of conduct'.¹

In the international domain, the concept of rights of the 'other', specifically rights of religious minorities, has gained significant importance over the years; the prime examples being Article 18 of the Universal Declaration of Human Rights (UDHR) 1948, pertaining to freedom of religion,² which is considered a non-derogable right;³ and also the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992.⁴ Along with the international community's recognition of the need to protect minorities from discrimination, came the acceptance of providing 'special measures' to protect their rights.⁵

While the international community generally, and the United Nations in particular, were making strategic moves towards ensuring guarantees to minorities (at least at a textual level), the unrest over the treatment of minorities, particularly religious

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¹ Tayyab Mahmud, 'Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice' (1995) 19 Fordham Int'l L.J. 40 1.

² Similar to Article 18 of the UDHR, freedom of religion is also provided under various other international conventions such as Article 19 of the European Convention on Human Rights and Fundamental Freedoms, Article 12 of the American Convention on Human Rights, Article III of the American Declaration of the Rights and Duties of Man and the Article 8 of the African Charter on Human and Peoples' Rights.

³ Mahmud (n 1) 15.

⁴ United Nations, 'UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (www.un.org 1992) <<http://www.un.org/documents/ga/res/47/a47r135.htm>> accessed 1 October 13. See also UN Human Rights Office of High Commissioner of Human Rights, 'Minorities under international law' (ohchr.org/) <<http://www.ohchr.org/EN/Issues/Minorities/Pages/internationalallaw.aspx>> accessed 13 October 2013.

⁵ UN Human Rights Office of High Commissioner of Human Rights, 'Pamphlet No.2: The UN Working Group on Minorities' (ohchr.org) <<http://www.ohchr.org/en/issues/minorities/pages/minoritiesguide.aspx>> accessed 13 October 2013 1.

minorities, seems to have persisted in both Pakistan and India. Be it incidents such as the false accusation of Rimsha Masih,⁶ the Badami Bagh incident⁷ in Pakistan or the rise of 'Hindu nationalism' leading to occurrences such as the Gujrat incident in India,⁸ both countries have a history of religious intolerance amongst the masses.⁹ This is particularly eye-catching since at the time of partition of the Indian Subcontinent and a little thereafter, the two nascent independent states, Pakistan and India, made several commitments aiming to protect religious minorities within their respective states. Three weeks prior to the partition of the Subcontinent, the Partition Council, consisting of top leadership of both the Indian National Congress and the All India Muslim League, issued a joint statement:

Both the Congress and the Muslim League have given assurances of fair and equitable treatment to the

⁶ Rimsha Masih was an uneducated minor Christian girl, who suffered from Down Syndrome. She was falsely accused of and arrested for committing blasphemy after being accused by a Muslim cleric. 'Blasphemy accused Rimsha's case sent to juvenile court', *Dawn News* (24 September 2012) <<http://beta.dawn.com/news/751636/court-rejects-order-to-hold-hearing-of-rimsha-masih-case-in-jail>> accessed 30 September 2013. The same cleric was set free 'for want of evidence'. 'Rimsha Masih Case: Cleric Set Free for want of Evidence', *Express Tribune* (18 August 2013) <<http://tribune.com.pk/story/591745/rimsha-masih-case-cleric-set-free-for-want-of-evidence/>> accessed 10 April 14.

⁷ In the Badami Bagh incident, a violent mob looted and subsequently burnt over one hundred houses and shops belonging to the Christian community after one of the Christian residents of the area, Sawan Masih, was accused of committing blasphemy. 'Alleged Blasphemy: Mob Burns Scores of Christian Homes in Lahore' *Express Tribune* (9 March 2013) <<http://tribune.com.pk/story/518244/alleged-blasphemy-mob-burns-100-christian-homes-in-lahore>> accessed 15 March 2013. Sawan Masih was sentenced to death. 'Blasphemy: Christian Sentenced to Death in Joseph Colony Case' *Dawn News* (28 March 2014) <<http://www.dawn.com/news/1095974/blasphemy-christian-sentenced-to-death-in-joseph-colony-case>> accessed 11 April 2014.

⁸ Smita Narula, 'Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India' (2003) 16 *Harv. Hum. Rts. J.* 41 2.

⁹ Ratna Kapur, 'Normalizing Violence: Transitional Justice and the Gujrat Riots' (2006) 15 *Colum. J. Gender & L.* 885 14.

minorities after the transfer of power. The two future Governments re-affirm these assurances. It is their intention to safeguard the legitimate interests of all citizens irrespective of religion, caste or sex. In the exercise of their normal civic rights all citizens will be regarded as equal and both the Governments will assure to all people within their territories the exercise of liberties such as freedom of speech, the right to form associations, the right to worship in their own way and the protection of their language and culture.¹⁰

In order to show compliance to these commitments, Pakistan made gestures such as incorporating a white band in the national flag representing religious minorities in the country; and the Constituent Assembly adopted the Objectives Resolution in 1949 which accounted for providing religious and cultural freedom to religious minorities. However, as the subsequent textual analysis will illustrate, Pakistan fell short of fulfilling its commitment. On the other hand, India declared itself a secular state, so as not to reflect bias in favour of the Hindu majority residing in the country; and the Indian Constitution mostly seems coherent to this effect.

Despite such gestures and assurances during the early years, and the social tensions existing in both countries today, the Constitution of the Islamic Republic of Pakistan, 1973 (the 'Pakistani Constitution') appears more discriminatory in nature as compared to the Constitution of India, 1949 (the 'Indian Constitution') as far as religious minorities are concerned. The Pakistani Constitution contains provisions which discriminate not only against religious minorities in Pakistan in general, but comprises of certain provisions which have led to greater discrimination specifically against Jamat Ahmaddiya in comparison with other religious minorities in Pakistan.¹¹ It is

¹⁰ Mahmud (n 1) 5.

¹¹ Jamat Ahmaddiya, referred to as the 'Quadiani Group' and 'Lahori Group' in the Pakistani Constitution, were declared as non-Muslims in 1974 under the Second Amendment of the Constitution, whereas they are still deemed as Muslims in India as well as several Muslim countries in the world, including

pertinent to note here that I only limit the analysis to a textual one in order to determine the level of commitment which both UN members, that is Pakistan and India, have made via their respective constitutions to the persecution of religious minorities. Even though minorities, whether ethnic or religious, have been targeted internationally by private individuals in contemporary times, it is important to ensure that the government is not a party to such acts. It is therefore germane to undertake a constitutional analysis so as to illustrate not only the religious identities of both countries, but also the commitment levels of the respective governments by examining the ‘supreme law of the land’, that is, the respective constitutions.¹² Furthermore, the analysis is only restricted to the 1973 Constitution of Pakistan and not the earlier two Pakistani Constitutions of 1956 and 1962, as the pre-1973 era has often been termed as one with ‘unequivocal protection’ of minority rights by the State,¹³ and also because this paper primarily deals with the current state of affairs.

In order to clarify the assertion made in the preceding paragraph, the constitutional status of religious minorities in Pakistan and India will be analyzed by examining both the Pakistani and the Indian constitutions. Part I of the paper draws a

Bangladesh. The anti-Ahmadi movement initiated in the early 1950s in Pakistan, which sought a declaration of them being non-Muslims and that all Ahmadis, including Muhammad Zafarullah Khan, who was the Foreign Minister at the time, to be discharged from government offices. Allen McGrath, *The Destruction of Pakistan’s Democracy* (OUP 1999) 92-93. This movement, primarily led by Maulana Maudoodi and adopted by the Pakistan National Alliance (consisting of Jamat e Islami, Jamiat Ulama e Islam and Jamiat Ulema Pakistan), gained further momentum in the early 1970s. Ayesha Jalal, *The State of Martial Rule: The Origins of Pakistan’s Political Economy of Defence* (Sange-Meel Publication 1999) 318-19.

¹² Written constitutions are generally deemed as the ‘supreme law of the land’. For instance, Article VI of the American Constitution expressly states it as such. Similar is the presumption about the Pakistani and Indian Constitutions. *Haqnawaz v Province of Punjab* 1997 MLD 299; Umeshwar Prasad Varma, *Law, Legislature and Judiciary* (Mittal Publications 1996).

¹³ Mahmud, (n 1) 7.

comparison between the preambles and introductory provisions¹⁴ of both constitutions by highlighting how the Pakistani Constitution, for a substantial time period, reflected a bias against religious minorities. Part II presents a discussion on Fundamental Rights enlisted in the two constitutions, and discusses provisions in both constitutions which appear to be prejudicial towards religious minorities, as well as provisions which seem accommodating towards them. Part III examines the Principles of Policy in the Pakistani Constitution to demonstrate the bias reflected in favour of the Muslim majority ideology,¹⁵ as opposed to religious minorities in the country.¹⁶ A similar absence of focus on religious minorities as a vulnerable group is also found in the Directive Principles of State Policy in the Indian Constitution; hence both constitutions seem on an equal footing as far as the Directives are concerned. Part IV explores the remaining articles of both constitutions to illustrate how additional discriminatory provisions are embedded in the Pakistani Constitution, which are either absent or indistinctive in the Indian Constitution. The aim here is not to claim that there is little or no discrimination against religious minorities in India (as opposed to Pakistan) but rather to illustrate only the textual differences entrenched in the two constitutions. Such an analysis is of significant importance as a written constitution is deemed as ‘...the source and the touchstone of all governmental powers...’¹⁷ Hence, in societies where substantial religious cleavages exist, as is the case in both Pakistan and India, it is pertinent for the respective constitutions to provide protection to the vulnerable classes of society, especially at a time where

¹⁴ Introductory provisions refer to Part I of both the Pakistani and Indian Constitutions.

¹⁵ As defined by Article 260 of the Pakistani Constitution and discussed in Part IV of the paper.

¹⁶ One must note that the same parliamentary members who framed the Pakistani Constitution were the ones who passed the Second Amendment (within a year of drafting the Pakistani Constitution) which declared Ahmadi’s as non-Muslims.

¹⁷ Justice (R) Fazal Karim, *Judicial Review of Public Actions*, (vol 1 of 2, Pakistan Law House 2006) 19.

efforts are being made for protection of minorities' rights internationally.

Part I: Preamble and Introductory Provisions

The Preamble of the Pakistani Constitution, also known as the 'Objectives Resolution', was incorporated as a substantive part in the form of Article 2A via the 8th Amendment in 1985 by the then President, Zia-ul-Haq. Although this provision is mainly known for incorporating Islamic principles or ideology in the Pakistani Constitution for governing the country, it also deals with religious minorities. The Objectives Resolution proposes steps to be adopted by the state to enable religious minorities to 'freely...profess and practice their religions'. However, when it was incorporated as a substantive part of the Pakistani Constitution in the form of Article 2A, the word 'freely' was omitted. It may be argued that this omission did not have a tangible impact as Article 2A also talks about safeguarding the 'legitimate interests of minorities'.¹⁸ However, one must analyze the usage of the term 'legitimate'. This term is highly subjective as it enables the government to prohibit certain religious practices of minorities. For instance, Sections 298B and 298C of the Pakistan Penal Code, 1860 (the 'PPC'),¹⁹ the effect of which '...is to make the very act of publicly discussing or practicing the Ahmadi faith a criminal activity',²⁰ can be argued to be a consequence of this vague usage of terminology. It was only under the 18th Constitutional Amendment, passed in 2010, that the term 'freely' was reinserted into Article 2A.

With regards to the impact of the earlier omission of 'freely' from Article 2A, one may argue that since it was not a

¹⁸ Protection of 'legitimate... interests of minorities' also falls under Article 36 in the Pakistani Constitution under the head of 'Principles of Policy'. However, as provided under Article 30 of the Pakistani Constitution and discussed in Part III of the paper, these Principles are non-justiciable.

¹⁹ These provisions have been discussed in greater detail in Part II of the paper.

²⁰ Osama Siddique and Zahra Hayat, 'Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan - Controversial Origins, Design Defects and Free Speech Implications' (2008) *Minnesota Journal of International Law* 339.

supra-constitutional provision,²¹ it did not have an overarching effect.²² Prior to its incorporation in the Pakistani Constitution in the form of Article 2A, the Objectives Resolution was a non-substantive part of the Constitution and it only contained a ‘general commitment to create an Islamic society...’²³ Scholars have argued that through its constitutional jurisprudence in the early 1990’s, the Supreme Court conclusively ruled that Article 2A did not operate as an overarching provision to trump other provisions of the Constitution.²⁴ However, examples to the contrary, such as the much debated *Zaheeruddin Case* also stand to this day.²⁵ Therefore, the effect of Article 2A was such that laws now had to be in accordance with Islam²⁶ and Article 2A was given an overarching effect in the context of religious minorities in Pakistan.²⁷ Even though the 18th Amendment re-inserted the term ‘freely’ in Article 2A, ‘correcting [a] historic wrong’,²⁸ none of the other discriminatory provisions of the Pakistani Constitution were removed, amended or rectified; thus implying that the pre-amendment jurisprudence, as well as the respective biases and discrimination, still prevail. It must also be noted here that Article 2 of the Pakistani Constitution declares Islam as the ‘state religion’. While this provision is not discriminatory in itself, it may be seen as the foundation of several other mooted articles, which shall be discussed subsequently.

²¹ *Hakim Khan v Government of Pakistan* PLD 1992 SC 595; *Kaneez Fatima v Wali Muhammad* PLD 1993 SC 901.

²² In the context of Article 2A, an over-arching effect implies the ability of the said Article to ‘control the other provisions of the Constitution’. Karim (n 17) 32-34.

²³ Martin Lau, *The Role of Islam in the Legal System of Pakistan*, (, Leiden: M. Nijhoff 2006) 6.

²⁴ (n 21); Karim (n 17) 6.

²⁵ *Zaheeruddin v The State* 1993 SCMR 1718. See also Mahmud, (n 1) 1.

²⁶ Lau (n 23) 70.

²⁷ *Zaheeruddin* (n 25).

²⁸ Nasir Iqbal, ‘CJ Lauds Parliament for Correcting Historic Wrong’, *Dawn News* (9 June 2010) <<http://archives.dawn.com/archives/32657>> accessed 1 September 2013.

On the other hand, the Preamble of the Indian Constitution declares India to be a ‘secular democratic republic’ and the introductory provisions do not provide a counterpart to Articles 2 and 2A of the Pakistani Constitution. Based on the fact that India is a secular state, unlike Pakistan, one may assume that the Indian Constitution will not contain restrictions against minorities on religious grounds, at least not in the form present in the Pakistani Constitution. Additionally, the Preamble of the Indian Constitution also seeks to grant equality and religious liberty to citizens, rather than merely sanctioning ‘legitimate’ practices. It appears that, at least textually, the only ‘constitutional’ basis for discrimination which may stem from religious grounds in light of the Preamble would be against non-citizens.

Part II: Fundamental Rights

Subject to certain restrictions, Articles 19 of both constitutions grant citizens the freedom of speech. In the Pakistani Constitution, speech may be restricted ‘in the interest of the glory of Islam’, (art 19) a religious limitation that is entirely absent from the free speech provision under the Indian Constitution. In fact, Article 19 of the Pakistani Constitution can be used to derive legitimacy for the current blasphemy laws in Pakistan, as amended by General Zia-ul-Haq during the 1980s, which are deemed as infringing upon not only religious freedom but freedom of expression as well.²⁹ Furthermore, these laws, as amended by Zia through Ordinance XX, were held to violate the freedom of

²⁹ The blasphemy laws in Pakistan come under the head of ‘Offences Relating to Religion’, Chapter XV of the PPC. This chapter contains some highly debated provisions such as Sections 295B and 295C, which pertain to defiling of Holy Quran and the Holy Prophet respectively; Section 298B and 298C, which criminalizes Ahmadis for using ‘Islamic’ terminology for their religious practices and personages, by making such acts punishable with imprisonment for up to three years and fine; and Section 289C, which criminalizes Ahmadis ‘pos[ing]’ as Muslims or propagating their faith in a manner which offends Muslims. See also Siddique (n 20) 338-39; ‘Timeline: Accused under the Blasphemy Law’, *Dawn News* 18 August 2013 <<http://www.dawn.com/news/750512/timeline-accused-under-the-blasphemy-law>> accessed 13 October 2013.

religion by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities.³⁰

Articles 20 to 27 of the Pakistani Constitution and Articles 25 to 30 of the Indian Constitution contain Fundamental Rights directly related to religion. For instance, Article 20 of the Pakistani Constitution deals with the freedom to profess and practice religion ‘subject to law, public order and morality’ (art 20). The term ‘subject to law’ is vague. There can be three possible interpretations of this clause: ‘law’ here may refer to other provisions of the Pakistani Constitution; to the laws enacted by the legislature; or it may refer to both. Since constitutional jurisprudence stands at a higher pedestal as compared to laws promulgated by the legislature,³¹ one may take the position that constitutional law, especially Fundamental Rights, cannot be subjected to lower forms of laws.³² Even if this view is accepted, there are multiple discriminatory provisions within the Pakistani Constitution which may be used for legitimizing restrictions on Article 20.

On the contrary, Article 25 of the Indian Constitution does not employ such obtuse terminology since the grounds on which the freedom to profess and practice religion may be restricted have been expressly stated.³³ However, while clause (1) of the provision subjects the freedom to ‘public order, morality and health’, clause (2) of the same juxtaposes some thought-provoking exceptions. While Article 25(2)(a) excludes financial, political and secular activities which may be affiliated with religious practices from the ambit of clause (1), Article 25(2)(b) provides that clause (1) cannot be used to hinder ‘social welfare’ and opening of ‘Hindu religious institutions’ for ‘all classes and sections of Hindus’. This illustrates that although clause (2)(a) grants substantially wide powers to the government, which may be used for curtailing the freedom granted

³⁰ Mahmud, (n 1).

³¹ This view was expressed by Justice Shafiur Rehman in the *Zaheeruddin* (n 25).

³² *ibid* (n 21).

³³ This provision is the equivalent of Article 20 of the Pakistani Constitution.

in clause (1), clause (2)(b) of Article 25 of the Indian Constitution explicitly emphasizes on minimizing the caste based cleavages present within the Hindu majority of the country. Therefore, even though this provision may be partly used to regulate religious minorities in India, on one hand, it seems to attempt to strengthen the Hindu populace on the other.

On a positive note, both constitutions do not impose any special religion based taxes. In fact, according to Article 21 of the Pakistani Constitution, no special taxes ‘...which are to be spent on the propagation or maintenance of any religion other than his own’ may be imposed, thus it imposes an explicit prohibition.

Both constitutions also appear to be accommodating towards education and the incorporation of religion within it. Neither of the constitutions makes it mandatory for students to participate in any religious rituals in educational institutions or receive education with regards to a religion other than their own. Nor do they allow discrimination against educational institutions which are owned or affiliated with religious minorities.³⁴ However, Article 22(3) of the Pakistani Constitution makes admissions to educational institutions, and allowing religious groups to teach their faith in institutions maintained by them, ‘subject to law’. As discussed, this term is problematic as it is broad and also because of the presence of discriminatory provisions within the Pakistani Constitution itself. However, given the current circumstances, propagation of violent religious views may be curtailed by the government in order to counter terrorism in the country by interpreting this provision accordingly. Thus, such a restriction may be used even for the protection of the populace, including religious minorities. Regardless, it is necessary for the government to exercise caution and restraint while circumscribing any Fundamental Right.

No such restriction is present in the Indian Constitution in case of religious education. However, for admission in educational

³⁴ Constitution of the Islamic Republic of Pakistan 1973, art 22; Constitution of India 1949, art 28(3), 30(2) (respectively).

institutions, Article 29(2) of the Indian Constitution states that admission cannot be denied ‘on grounds *only* of religion, race...’ which is somewhat precarious (emphasis added). *Prima facie*, as long as there are grounds other than religion present, then such a rejection would be valid. If there are no other grounds, then religious affiliation of the candidate will theoretically not play any part as far as admissions are concerned. Notwithstanding, such provisions can incentivize the respective officials to conjure up frivolous technicalities in order to deny admissions of candidates belonging to a religious minority or a religious group opposed by the respective official(s). Such a situation could have been avoided had the drafters not included ‘only’.

Other Fundamental Rights in the Pakistani Constitution which seem accommodating towards religious minorities include the right against discrimination in access to public places (art 26); and rejection of citizens for ‘service of Pakistan...on the ground *only* of race, religion...’ (art 27 (emphasis added)). The latter provision, like Article 29(2) of the Indian Constitution, contains ‘only’, which may be argued to be somewhat problematic as it may incentivize formulation of unnecessary technicalities, as discussed in the preceding paragraph.

Article 23 of the Pakistani Constitution pertains to the right of citizens to acquire and manage movable and immovable property. While this Article provides a right of acquiring property to all citizens, Article 26 of the Indian Constitution, which also provides for the right to property, lays extra emphasis on the subject with regards to religious minorities by identifying them as a separate vulnerable social group. This is not to suggest that the right to property as provided in the Pakistani Constitution discriminates against religious minorities, but the difference has been pointed out to illustrate a peculiarity in how both constitutions have been phrased. When analysing from a comparative point of view, it may be more appropriate to identify vulnerable groups, such as women (who are often deprived of their properties by their male family members) and religious minorities. However, arguably, identifying religious minorities separately in

the constitution may lead to exacerbation of the religious cleavages in the country.

Even though a few quantitative differences in Fundamental Rights exist between the two constitutions, qualitatively these variances have a far-reaching impact with regards to religious minorities in Pakistan as compared to India. The free speech provision of the Pakistani Constitution is the primary provision which has led to considerable hardships for religious minorities in the form of Sections 295B, 295C and 298A of the Pakistan Penal Code, and particularly for Jamat Ahmadiyya by means of Sections 298B and 298C.

Part III: Principles of Policy/Directive Principles of State Policy³⁵

Although analysing Directives stated in both constitutions may be considered a futile effort as they are not enforceable in courts,³⁶ the state still has to work in accordance with these Directives.³⁷ Furthermore, they can also assist in determining the intent of the framers or the general commitment level of the constitution regarding various issues, including rights and status of religious minorities. When analysing the principles outlined in both constitutions, it is evident that they lack the emphasis that ought to have been added regarding religious minorities. For instance, Article 32 of the Pakistani Constitution states that special representation should be given to ‘peasants, workers and women’ in local governments; however, religious minorities have not been mentioned as a separate vulnerable group. Similarly, Article 33 of

³⁵ ‘Principles of Policy’ is the title of Part II Chapter 2 of the Pakistani Constitution which contains Articles 29 to 40. The corresponding set of principles in the Indian Constitution are found under Part IV titled ‘Directive Principles of State Policy’, containing Articles 36 to 51.

³⁶ Constitution of the Islamic Republic of Pakistan 1973, art 30; Constitution of India 1949, art 37.

³⁷ Constitution of the Islamic Republic of Pakistan 1973, art 29(1) and (3); Constitution of India 1949 art 37.

the Pakistani Constitution provides that ‘parochial, racial, tribal, sectarian and provincial prejudices’ should be discouraged by the state, yet there is no mention of prejudices against religions other than Islam,³⁸ which is a significant issue in Pakistan today.

Another problematic Directive in the Pakistani Constitution is one which deals with the ‘legitimate’ interests of minorities, (art 36) discussed in Part I of the paper. Similarly, according to Article 38(d), the state is to ‘provide basic necessities of life... irrespective of sex, caste, creed or race’ to citizens who are unable to attain them on their own. Once again, religion and hence religious minorities have been excluded from the list of classifications, despite the increase in religion based disputes in Pakistan. Furthermore, while it may be argued that ‘all such citizens’ may include religious minorities as well; however, the aim of these principles is to direct the attention of the state towards the issues explicitly mentioned. Additionally, when the principles identify particular groups while identifying issues, it reflects that the state ought to focus more on such groups while addressing the relevant issues. Although there is no bar which excludes religious groups, the fact that a particular group has not been mentioned does not shed direct light on their needs or social stature in the country. For instance, it is common knowledge that Pakistani women are victims of gender based discrimination in several domains, thus this factor has been accounted for in several Directives by explicitly mentioning gender. However, the same has not been done for religious minorities despite their depreciating social status in Pakistan.

Similarly, in several Directives, the Indian Constitution draws classifications on the basis of gender and age. However, Article 46 of the Indian Constitution deals with the state promoting education and welfare of scheduled tribes, scheduled castes and other ‘weaker sections’ of the society. Hence, if any religious minority fulfils this criterion, then it ought to be covered under the said provision. Nonetheless, stating ‘weaker sections’ generally

³⁸ As defined by Article 260 of the Pakistani Constitution and discussed in Part IV of the paper.

instead of specifically mentioning religious minorities makes the omission similar to those in the Pakistani Constitution, which mentions ‘all such citizens’, although the latter is arguably wider. Thus, as the comparison illustrates, both constitutions appear to be on an equal footing in terms of the Principles or Directives of State Policy.

Part IV: Other Constitutional Provisions

Constitutional provisions which can be deemed to be alienating religious minorities can be found in other articles of the Pakistani Constitution as well. The primary example of this is that one of the qualifications to attain the post of the President (art 41(2)) and the Prime Minister ((91)(3)) of Pakistan is to be a Muslim,³⁹ thereby making all non-Muslims ineligible.

The Indian Constitution, on the contrary, does not impose any religious qualification for such posts. In fact, the oath Indian government officials have to take is to ‘swear in the name of God/solemnly affirm...’,⁴⁰ thereby providing an option in order to cater to all religious groups, including atheists and agnostics.

One explanation for such requirements imposed by the Pakistani Constitution is that Pakistan is an Islamic Republic and hence only Muslims are deemed qualified to govern the country. Another possible explanation is that ‘Pakistan, is a “minority nation”, that is one that has never quite overcome the belief that it is “the nation of the Indian Muslims”’.⁴¹ Thus, it seems that since the Muslim majority of Pakistan still views itself as a minority in the undivided India, it is attempting to restrict certain posts to itself. On the contrary, India has had presidents belonging,

³⁹ As defined by Article 260 of the Pakistani Constitution.

⁴⁰ Article 60 provides the same for President; Article 69 for the Vice President; Article 159 for the Governors of States and Third Schedule for Ministers, Parliamentarians, Judges, Auditor General and candidates for elections.

⁴¹ Gyanendra Pandey, ‘India and Pakistan, 1947-2002’ 37.11 Economic and Political Weekly (March 16, 2002) 1027.

amongst others, to Muslim and Sikh communities, both religious minorities in India.

Arguably, the Pakistani Constitution takes special care of minorities by establishing a quota for them in each provincial assembly as illustrated in the following table provided under art 106(1):

Province	Percentage of seats allotted to religious minorities out of the total number of seats⁴²	Percentage population of religious minorities⁴³
Balochistan	4.62%	1.25%
Khyber Pakhtunkhwa	2.42%	0.56%
Punjab	2.16%	2.79%
Sindh	5.36%	8.69%

This table depicts that Punjab, which is the most densely populated province in Pakistan,⁴⁴ has the lowest percentage of seats allocated to minorities. On the other hand, Sindh, which is the second most densely populated province,⁴⁵ has the highest and substantially greater percentage of seats allocated to minorities. It is quite clear that this allocation is not proportional to the population of each province, which can be deemed as problematic in areas where religious minorities are significantly under- as well as over-represented.⁴⁶ Another problem is that since the percentages have been fixed in the Pakistani Constitution, the proportion of non-Muslims in the provinces may not correspond with the prescribed

⁴² All percentages have been rounded off to two decimal places.

⁴³ As per the Population Census Organization <<http://www.census.gov.pk/Religion.htm>> accessed 30 July 2013.

⁴⁴ Population Census Organization 'Population by Province/Region Since 1951', <<http://www.census.gov.pk/ProvinceRegion.htm>> accessed 30 July 2013.

⁴⁵ *ibid.*

⁴⁶ While over-representation of the religious minorities can be seen as a factor favouring them, the same may lead to further discontent amongst the Muslim majority in the respective provinces.

percentages due to factors such as increase in population and migration. As a result, the religious minorities may be under- or over-represented, both situations being arbitrary and hence unjust.

In the Indian Constitution, although quotas have not been prescribed for religious minorities in particular, they have been prescribed for scheduled castes and tribes in *panchayats* (art 234D), municipalities (art 234T), House of People (art 330) and Legislative Assemblies (art 331). Even though they are not religious minorities, one must observe that seats are reserved on the basis of proportion of the tribe or caste's population to the total population of the village, municipality or state, as the case may be. This mechanism may be more effective in the Pakistani context as opposed to allocating a fixed percentage of the total seats.

Both constitutions contain provisions allowing for public interest litigation. Article 184(3) of the Pakistani Constitution pertains to judicial review and may be invoked in two ways: a petition may be filed in the Supreme Court, or the Supreme Court may itself take *suo motu* notice of an issue which involves the infringement of a Fundamental Right and is a matter of public importance. Furthermore, it is not necessary for the aggrieved party to file the petition, that is, it can be filed by any person. Hence, either members of religious minority groups in Pakistan or any member(s) of Pakistan's civil society may file a petition; or the Supreme Court may take action on its own regard as well under this provision. The primary provision that may be used would be Article 20, which grants individuals in Pakistan the freedom to 'profess, practice and propagate' their religion. This provision can be used as a check on other articles which may be deemed discriminatory or incoherent with this guarantee. A similar *suo motu* power also vests with the Indian Supreme Court under Article 32 of the Indian Constitution. Furthermore, Article 199 of the Pakistani Constitution and Article 226 of the Indian Constitution grant the respective High Courts writ jurisdictions (*habeas corpus*, *mandamus*, prohibition, *quo warranto* and

certiorari).⁴⁷ Such petitions may only be filed by an aggrieved party. Thus, if any of these are applicable owing to religious discrimination, then the aggrieved party may file a writ in the High Court to seek the respective remedy as well. Although rights of religious minorities are not explicitly mentioned in any of these provisions, they can, nonetheless, be used for protection of any targeted group.

Article 260(3), inserted in 1985 under Chapter 5 titled 'Interpretations', is a unique albeit problematic provision in the Pakistani Constitution. Clause (a) provides a negative definition of 'Muslim' by spelling out beliefs (mainly beliefs of Jamat Ahmaddiya) which a 'Muslim' cannot have, while clause (b) provides a list of religious groups who are not constitutionally Muslims.⁴⁸ The Indian Constitution does not define or set parameters for being a part of any religion. The non-existence of such definitions in the Indian Constitution makes it easier to 'be a Muslim' or to be affiliated with any other religion in India as opposed to Pakistan, as in India, choosing one's religion is a private matter while in Pakistan, the Constitution defines which religion one belongs to, regardless of one's beliefs.

According to Article 340 of the Indian Constitution, the President may appoint a commission to investigate the conditions of socially and educationally backward classes and suggest steps to make improvements in their conditions. Thus, if religious discrimination leads a particular minority to such a state, then it ought to come up in such an investigation, and therefore, necessary measures or policy changes may be adopted by the government to tackle the issue. While an objection may be raised against the possibility of the President's personal religious biases leading to

⁴⁷ *Habeas corpus*, literally meaning 'bring the body', requires an arrested person to be produced in court. This is used as a check against preventive detention. *Mandamus* is an order via which the court mandates a governmental body to do or refrain from doing something, while prohibition is when the court specifically prohibits an illegal act. *Certiorari* allows for judicial review.

⁴⁸ The list includes Christian, Hindu, Sikh, Buddhist or Parsi community, Quadiani Group and Lahori Group. It is interesting to note that the list does not include Jews.. Hanafi is not a sect but a legal school of thought.

non-formation of such a commission even in cases of dire need, it is pertinent to note that the President may belong to any religious group and presidents keep changing. However, this is an optional provision and not binding in nature. Nonetheless, since it is a part of the Constitution, it theoretically has a greater standing than any such optional statutory provision. Also, this provision constitutionally validates the exercise of this power by the President, hence making the Indian Constitution seemingly textually friendly towards oppressed segments of a society. On the other hand, the Pakistani Constitution is devoid of such a provision. If such a provision had existed in the Pakistani Constitution, maybe there would have been no need for the Supreme Court to intervene by exercising its *suo motu* jurisdiction to address minority issues. However, there is nothing in the Pakistani Constitution which prohibits the President, or any other governmental body, from forming such a committee either.

Conclusion

India, being a secular country, is perceived as one where the non-Hindu population is discriminated against and persecuted. Prime examples include the various post-partition Hindu-Muslim riots in India including the 2002 incident of Ahmedabad in which several Muslims were burnt alive;⁴⁹ as well as the Sikhs in India suffering through ‘acute frustration’.⁵⁰

While the constitutions of Pakistan and India seem to accommodate religious minorities in some provisions, the Pakistani Constitution is constitutive of certain provisions which, either expressly or impliedly, discriminate against religious minorities, more so than the Indian Constitution. Furthermore, there is added discrimination against the Jamat Ahmaddiya as compared to other religious minorities in Pakistan. Such provisions, which either expressly discriminate against religious

⁴⁹ Pandey (n 41).

⁵⁰ Marvin W. Mikesell and Alexander B. Murphy, ‘A Framework for Comparative Study of Minority-Group Aspirations’ *Annals of the Association of American Geographers* (Dec. 1991) 582.

minorities or provide the possibility for the government to adopt such measures at its discretion, are embedded in the Preamble, Fundamental Rights, Principles of Policy and some of the remaining articles of the Pakistani Constitution as well. The main implication of having such provisions in the constitution is that it allows for other discriminatory and harmful laws, such as the blasphemy laws (as enacted in Pakistan), to be given constitutional validity rather than protecting the affected religious minorities.

As opposed to this, in a country where the constitution makes no such distinctions, any affected religious minority may seek enforcement of its respective rights from the judiciary, within the scope of the law. While attitudes of the populace towards different religions and their followers may vary across time, the nature of constitutions, including provisions encompassing discrimination against religious minorities, tends to be stagnant and therefore have a far-reaching impact, which is highly problematic. What is even more problematic is the fact that despite the international recognition of the need to protect religious minorities, those efforts are not being translated effectively, textually, in Pakistan and India. Considering the growing discontent amongst the populace, it becomes even more important for both democracies to deal with these lacunas. With an international law framework already in place, the same ought to be incorporated within the constitutional framework, as relying on 'political compromise'⁵¹ alone for the protection of minorities is not only unreliable but also insufficient.

⁵¹ Mahmud (n 1) 1.