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**MISUSE AND ABUSE OF LEGAL ARGUMENT BY
ANALOGY IN TRANSJUDICIAL
COMMUNICATION: THE CASE OF
ZAHEERUDDIN V. STATE**

*Amjad Mahmood Khan*¹

ABSTRACT

This article explores the risks and limits of transjudicial communication. In particular, I critique the scholarly contention that transjudicial communication can be built upon commonly accepted methods of legal reasoning. I argue that transnational courts do not uniformly understand or apply commonly accepted methods of legal reasoning, especially legal argument by analogy. As a result, transnational courts that utilize transjudicial communication can and do render specious, even destructive, judicial opinions. I analyze the case of *Zaheeruddin v. State*—a controversial decision by the Supreme Court of Pakistan that upheld the constitutionality of Pakistan’s anti-blasphemy ordinances. The Supreme Court of Pakistan poorly analogized to numerous U.S. Supreme Court authorities to bolster and legitimize its deeply flawed decision.

INTRODUCTION

In his 2009 majority opinion in *Graham v. Florida*, U.S. Supreme Court Justice Anthony Kennedy cited to foreign law as persuasive authority to hold that life-without-parole sentences for juveniles convicted of non-homicide crimes were unconstitutional.² In his 2003 majority opinion in *Lawrence v. Texas*, Justice Kennedy cited a decision by the European Court of Human Rights as persuasive authority to hold that a Texas statute criminalizing acts of sodomy was unconstitutional.³ The recent and rising trend of U.S. courts to rely on foreign

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² See *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).

³ See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

law for constitutional adjudication, particularly for contentious issues, illustrates more generally the globalization of modern constitutionalism. Indeed, as legal problems become more common across more common law systems in the world, courts increasingly rely on the legal opinions of outside jurisdictions as a powerful source of persuasive authority.

Professor Anne-Marie Slaughter describes such cross-court citation and deliberation on common legal problems as “transjudicial communication.”⁴ Her typology suggests the relative merits of this communication and even describes its increasing trend as an emergence of a new and promising “global community of courts.”⁵ Transjudicial communication, argues Slaughter, fosters cross-fertilization of legal ideas and becomes a “pillar of a compelling vision of global legal relations” where “national differences would be recognized, but would not obscure common legal problems nor block the adoption of foreign solutions.”⁶ For Slaughter, what helps develop this cross-fertilization of legal ideas is a common judicial identity and legal methodology, including among other tools, common methods of legal reasoning across legal systems.⁷

This article explores some of the risks and limits of transjudicial communication. I call into question Slaughter’s contention that common methods of legal reasoning necessarily advance cross-fertilization of ideas between courts of competing systems. I argue that transnational courts do not uniformly understand methods of legal reasoning. To this end, I focus my critique on one particular method of legal reasoning that Slaughter would deem to be “common” to transjudicial communication: legal argument by analogy. Proper legal argument by analogy is a less common, or a less consistently applied, judicial methodological tool to work with. To encourage transjudicial communication through legal argument by analogy is problematic not only because the mode of analogy itself is more rigorous than it appears, but also because legal argument by analogy carries special risks in the transjudicial setting.

Part I details Slaughter’s typology of transjudicial communication. Part II introduces the basic principles and methodology underlying legal argument by analogy. Here, I contrast the views of two prominent scholars of jurisprudence—Professor Cass Sunstein and

⁴ Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 101 (1994).

⁵ Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 192-93 (2003); see also Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 430-32 (2003).

⁶ Slaughter, *supra* note 4, at 132.

⁷ *Id.* at 125.

Professor Scott Brewer—concerning the rational force of legal argument by analogy. I also outline the basic problems associated with legal argument by analogy and highlight what Sunstein refers to as the “distinctive illogic of bad analogical reasoning.”⁸ Finally, Part III illustrates the troubling consequences of poor analogical reasoning in the transjudicial context by way of an analysis of *Zaheeruddin v. State*⁹—a controversial and extant 1993 decision by the Supreme Court of Pakistan that relies principally on U.S. constitutional and trademark law as persuasive authority.

PART I: SLAUGHTER’S TYPOLOGY OF TRANSJUDICIAL COMMUNICATION

A. *Horizontal and Vertical Communications*

Slaughter’s typology of transjudicial communication succinctly summarizes the characteristics and relative merits of certain courts citing and deferring to courts outside their national jurisdiction. She outlines two major types of transjudicial communication: horizontal and vertical. She defines horizontal communication as communication between courts of the same authority and stature across national and regional borders (e.g., the U.S. Supreme Court referencing decisions of the Supreme Court of Zimbabwe, or vice versa).¹⁰ Horizontal communication consists of a court’s tacit emulation of a court of another jurisdiction by way of cross-citation of decisions.¹¹ Horizontal communication usually operates as a “monologue” where neither the originating nor the sharing court has any direct and formal links, nor do they directly converse with one another.¹² The originating court is wholly unaware that its views have a foreign audience; the listening court manufactures the foreign audience.

Slaughter defines vertical communication as communication between courts of different statures across national and regional borders (e.g., the U.S. Supreme Court referencing decisions by the Inter-

⁸ CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 74 (1996).

⁹ *Zaheeruddin v. State*, (1993) 26 SCMR (SC) 1718, 1753–54 (Pak.). The Supreme Court of Pakistan voted four to one in favor of declaring Ordinance XX, two of Pakistan’s anti-blasphemy laws, to be constitutional. Justice Abdul Qadeer Chaudhry wrote the majority opinion. Justices Muhammad Afzal Lone, Saleem Akhtar and Wali Muhammad Khan joined the majority. Justice Saleem Akhtar wrote a concurring opinion. Justice Shafiqur Rahman, the Court’s Senior Justice, dissented from the majority opinion.

¹⁰ Slaughter, *supra* note 4, at 103.

¹¹ *Id.* at 104.

¹² *Id.* at 113.

American Court, or vice versa).¹³ Like horizontal communication, vertical communication consists of cross-citation between courts, but usually involves more formal deference on the part of a court of narrow jurisdiction towards a court of wider jurisdiction. Vertical communication can operate as a “dialogue” where both the originating and sharing courts recognize and acknowledge each other’s cross-citations.¹⁴

B. Functionality and Purpose

Slaughter highlights two generally desirable functions of transjudicial communication: cross-fertilization of legal ideas and increased legitimacy of individual judicial decisions. With respect to the first function—cross-fertilization of legal ideas—Slaughter points out how an originating court’s particular decision can often be “cast [into] transnational winds” in no predetermined direction.¹⁵ A listening court adopts the originating court’s decision either expressly as a means to bolster its own like-minded decision (i.e., actual citation of the originating court’s decision) or implicitly by adopting a parallel line of reasoning (i.e., incorporation without express citation).¹⁶ Functionally speaking, transjudicial communication allows a listening court to resolve particularly difficult legal issues through express or implied affirmation of legal arguments made by courts of foreign jurisdictions. In this way, transnational legal arguments cross-fertilize.

With respect to the second function—increased legitimacy of individual judicial decisions—Slaughter points out how transjudicial communication, whether horizontal or vertical, with express or implied citation, legitimizes a listening court’s decision.¹⁷ A listening court may intend to arrive at a correct statement of the law (assuming such a statement exists) or to persuade the court’s audience of lawyers, litigants and citizens (assuming a general indeterminacy in the law).¹⁸ Regardless, transjudicial communication confers authority upon what others might perceive as an irrational and illegitimate decision.

C. Communicating Through What is Common

What sets up and perpetuates transjudicial communication? By virtue of their common institutional mission to apply and interpret the law, common law courts are uniquely positioned to engage in transjudicial communication. What makes such communication more

¹³ Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1104 (2000).

¹⁴ *Id.*

¹⁵ Slaughter, *supra* note 4, at 118.

¹⁶ *Id.* at 119.

¹⁷ *Id.*

¹⁸ *Id.*

or less frequent or elaborate depends on how transnational courts build upon common methods of legal reasoning.¹⁹ Specifically, Slaughter refers to the use and invocation of clear legal rules and case precedence.²⁰ The common enterprise of “balancing rights and duties, individual and community interests, and the protection of individual expectations,” argues Slaughter, “transcends any cultural or ideological differences between different common law systems.”²¹ Once the common enterprise begins, a global community of courts might develop whereby courts further acknowledge a common set of principles that define their own mutual relations.²² The prerequisite to such a development, however, is the pursuit of transjudicial communication through common methods of legal reasoning.

PART II: ONE (NOT SO) COMMON METHOD OF LEGAL REASONING: LEGAL ARGUMENT BY ANALOGY

A. *Assessing What is Common*

Slaughter’s typology assumes that transnational courts might benefit from cross-citation and cross-fertilization of legal ideas because they share common ways to arrive at judicial decisions. Thus, if Court B of Country B cites prior precedence from its own jurisdiction, formulates and applies legal rules, and articulates coherently its reasoning and conclusion, it would be permissible, indeed even desirable, for it to cite to case law of Court A of Country A as persuasive authority, assuming that Court A shares the same methods of legal reasoning. But even if Courts A and B share the same judicial methodology, they may not consistently utilize the methodology in the same manner.²³ Indeed, transjudicial communication cannot readily be built upon inconsistently applied methods of legal reasoning.

To help illustrate this point, consider one method of legal reasoning courts frequently use in their decisions: legal argument by analogy.²⁴ The use of legal argument by analogy by courts of different jurisdictions or countries may ostensibly appear to be common. Upon further scrutiny, however, legal argument by analogy is not commonly

¹⁹ *Id.* at 125.

²⁰ *Id.* at 126.

²¹ *Id.* at 127.

²² Slaughter, *supra* note 5, at 194. See also ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 69 (Princeton Univ. Press 2004).

²³ Note here that my point applies no less to courts within the same country and jurisdiction (e.g., Courts A1 and A2).

²⁴ What Slaughter describes rather vaguely as “the ability to formulate a rule of general applicability and to generate coherent distinctions between the outcome in the case at hand and divergent outcomes in apparently similar cases.” Slaughter, *supra* note 4, at 126.

utilized in the same manner and is in fact poorly understood and applied.

B. Legal Argument by Analogy: Purpose and Methodology

Judges render legal arguments by analogy when they make claims or derive conclusions about uncertain factual issues by comparing the relevant similarities and differences between those issues and the issues of another distinct case or concept.²⁵ More generally, legal argument by analogy is “the use of examples in the process of moving from premises to conclusions in an argument.”²⁶ In common law systems, the “examples” used by judges are legal precedents or prior cases; more precisely, common law judges reason from precedential analogies, particularly in constitutional cases.²⁷ In order to resolve their doubts and disputes about factual issues, judges run through examples to discern who or what might be similarly or dissimilarly situated.²⁸

Professor Sunstein summarizes the structure of legal argument by analogy in four steps:

- (1) Some fact pattern *A* has a certain characteristic *X*, or characteristics *X*, *Y*, and *Z*; (2) Fact pattern *B* differs from *A* in some respects but shares characteristics *X*, or characteristics *X*, *Y*, and *Z*; (3) The law treats *A* in a certain way; (4) Because *B* shares certain characteristics with *A*, the law should treat *B* the same way.²⁹

Two cases may be different from each other in innumerable ways; what renders them *analogous* is when there are no *relevant* differences between them—that is, any differences between the two cases do not themselves make a difference with respect to the actual precedents attached to them.³⁰ Precedents are narrow conclusions of law that judges make based on their choice of distinctive facts in a fact pattern. For example, Jehovah’s Witnesses and Muslims have significant differences in their beliefs and practices, but for purposes of protecting the free exercise of their religion in the United States, both groups may be analogously situated. If in one case a court upholds a regulation that permits a Jehovah’s Witness to distribute literature in a

²⁵ See MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 87 (1988).

²⁶ Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925, 934 (1996).

²⁷ *Id.*

²⁸ *Id.* at 937.

²⁹ SUNSTEIN, *supra* note 8, at 65.

³⁰ *Id.* at 67.

town entirely owned by a private company,³¹ in a subsequent case a court should uphold a regulation that permits a Muslim to do the same, notwithstanding the numerous differences in the beliefs and practices of Jehovah's Witnesses and Muslims. The judge in the second case—the case of the Muslim—would deem such differences irrelevant in arriving at her decision. In this manner, the first and second cases would be analogous.

If legal argument by analogy requires two cases to be relevantly similar with no relevant differences between them, and a judge must decide when differences prove relevant based on her own convictions, then the method itself can be characterized as subjective. Sunstein identifies this subjectivity as an inherent limitation to legal argument by analogy. He argues that legal argument by analogy “operates without anything like a deep or comprehensive theory that would account for the particular outcomes it yields. . . the judgments that underlie convictions about the relevant case are incompletely theorized.”³² By incompletely theorized agreements, Sunstein means that judges suggest general principles that capture their convictions and render cases analogous, but they do not test those principles against specific examples outside the universe of the facts of the case at hand.³³ A judge's generally articulated principle may fail when held up against such examples, but so long as the general principle explains the case and analogy at hand, a judge can—and indeed should—invoke it. For Sunstein, the principal virtue of legal argument by analogy is that judges who disagree at the level of comprehensive theory may nevertheless be able to agree on low-level analogies among cases.³⁴ Society benefits when judges reach practical agreement against a background of moral controversy through legal argument by analogy.³⁵

If Sunstein's depiction of the inherent limitations of legal argument by analogy is accurate—that legal arguments by analogy are based on incompletely theorized agreements that have low formal effi-

³¹ See *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that the managers of a company-owned town could not curtail the religious liberty of a Jehovah's Witness distributing religious literature).

³² SUNSTEIN, *supra* note 8, at 68.

³³ *Id.* at 36. See also Cass R. Sunstein, *Commentary: Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995).

³⁴ Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1181 (1999) (arguing that “the practice of reasoning by analogy from prior decisions has advantages, both epistemic and institutional, that exceed its rational force.”).

³⁵ *Id.* See also SUNSTEIN, *supra* note 8, at 36. Sunstein argues that incompletely theorized agreements allow for greater collaboration in the face of disagreements and are practically significant in terms of generating relevant laws.

cacy but that are nonetheless socially useful—then legal argument by analogy can well be used as a common method of legal reasoning for transjudicial communication. So long as courts adhere to the generally understood structure of legal argument by analogy of the kind Sunstein sets forth, common law judges should be free to analogize to foreign cases in their domestic jurisprudence regardless of the depth of the general principles they articulate. Thus, it is essential to determine whether legal argument by analogy has more rational force than what Sunstein concedes.

C. *Intellectual Honesty in Legal Argument by Analogy*

Sunstein is not wholly skeptical about the rational force of legal argument by analogy. He identifies what he deems to be inherent limitations to the method while also recognizing the method to be the best that judges and lawyers have to work with. Professor Brewer identifies scholars such as Sunstein who stake faith in legal argument by analogy by foregoing the need to rationally articulate and justify judges' use of relevancy in their analogical arguments as "mystics."³⁶ In the name of practicality and utility, mystics blindly accept what they deem to be an inherent subjectivity in legal argument by analogy.

Brewer points out that a mystical belief in legal argument by analogy neglects to consider the actual rational force behind the method. Specifically, he argues that the general principles through which judges analogize cases are not necessarily based on incompletely theorized agreements, as Sunstein would contend, but rather on a clearly defined scheme of argument that is formally cognizable and that can be evaluated and critiqued. Brewer reconstructs the conventional structure of legal argument by analogy with three distinct components.

The first component is what he characterizes as "abduction in the context of doubt."³⁷ A judge who is equipped with a set of legal propositions based on fact patterns from prior cases, but who has before her a new competing fact pattern that might potentially cast doubt on the scope of those propositions, might seek to make consistent her set of propositions with the new competing fact pattern by discovering a rule that encapsulates both the prior and present fact patterns. If given this rule (R), then the set of propositions (P) could logically apply to the new competing fact pattern (F). The judge, thereby, first discovers and then tentatively accepts R to be an inference to the best legal explanation of how to apply P to F (i.e., the judge abduces R).³⁸ Having derived R, the judge next applies R to examples

³⁶ Brewer, *supra* note 26, at 951.

³⁷ *Id.* at 962.

³⁸ *Id.*

outside the context of the case at hand to test its validity. In so doing, the judge implicitly provides some justification (J) for why she chose R (the judge's justification could reflect her convictions, the standards of her community, etc.). Brewer identifies this process of confirming or disconfirming R as the second component of legal argument by analogy. Finally, once the judge confirms the validity of R (to the extent she can), she applies R to trigger the application of P to F and thus completes her analogy. Brewer refers to R as the "analogy-warranting rule" and to J as the "analogy-warranting rationale."³⁹

Put differently, if a judge analogizes two items, be they cases or judgments, then she should show how the relevant shared similarities between the items logically relate to some other inferred similarity between the items. When she articulates this relation, she is said to be using an analogy-warranting rule. A judge does not arbitrarily make an analogy; some reason motivates her analogical choice. The reason is the analogy-warranting rationale. Brewer introduces the following formal scheme to explain his logical form of legal argument by analogy:

Where x, y, z are individuals and F, G, H are predicates of individuals:

Step 1: z has characteristics F, G, \dots

Step 2: x, y, \dots have characteristics F, G, \dots

Step 3: x, y, \dots also have characteristic H .

Step 4: The presence in an individual of characteristics F, G, \dots provides sufficient warrant for inferring that H is also present in that individual.

Step 5: Therefore, there is sufficient warrant to conclude that H is present in z .⁴⁰

The analogy-warranting rules and rationales that undergird legal argument by analogy for Brewer undercut Sunstein's formulation of incompletely theorized agreements. Brewer formalizes the nexus between a judge's unexpressed convictions and her analogical choice. By virtue of analogy warranting rules and rationales, a judge can formally construct the general principles that drive her particular analogical choice. In so doing, a judge's analogical choice may be critically evaluated. Sunstein's formulation of incompletely theorized agreements takes for granted a judge's convictions and provides no basis or mechanism to assess the validity of her analogical choice. With Brewer's formulation, beyond the utility of its craft and convenience, legal argument by analogy may actually be subject to rational scrutiny.

³⁹ *Id.* at 965.

⁴⁰ *Id.* at 966.

Intellectual honesty cautions a judge from venturing down a path of analogical decision-making that might not be able to withstand rational scrutiny. Such honesty tempers the use of an otherwise convenient tool of legal reasoning and makes it more difficult for judges to employ valid analogical arguments in judicial opinions. While judges in common law systems might consistently apply legal argument by analogy—that is, while the invocation of the method might be common, as Slaughter suggests, and the structure of analogical argument itself “invariant,”⁴¹ as Brewer suggests—the successful *application* of legal argument by analogy is not very common.

D. Poor Analogical Reasoning

Notwithstanding their contrasting formulations of the rational force behind legal argument by analogy, both Sunstein and Brewer would agree with the basic characteristics that underlie poor analogical reasoning. Two main problems often emerge when judges employ legal argument by analogy. First, judges often simply announce that a particular case or fact pattern is analogous to the case or fact pattern at hand without concretely describing the relationship between the two cases or fact patterns.⁴² That is, they invoke the nominal force of legal argument by analogy without parsing through the precise relationships between the source and target cases or fact patterns. Any argument for the analogical relationship is left unexpressed. Sunstein refers to this as a problem of “bad formalism.”⁴³ Second, judges do not adequately defend judgments about relevant similarities and differences.⁴⁴ More frequently, judges gloss over the relevant differences between the source and target cases or fact patterns and overlay their similarities.

PART III: LEGAL ARGUMENT BY ANALOGY AND *ZAHHEERUDDIN V. STATE*

So far, I have defined Slaughter’s typology for transjudicial communication and have questioned her assumption that common methods of legal reasoning may encourage cross-fertilization of legal ideas. I have shown that legal argument by analogy is ill-perceived as a loose, convenient tool for judges. Rather, legal argument by analogy is formally structured, rigorous, and, in its most robust form, subject to rational scrutiny. While commonly invoked by common law courts, legal argument by analogy is less commonly applied to intellectually honest ends. Transjudicial communication, therefore, should not be

⁴¹ *Id.* at 965.

⁴² SUNSTEIN, *supra* note 8, at 77.

⁴³ *Id.* at 73.

⁴⁴ *Id.*

encouraged on the basis of a method of legal reasoning that is uncommonly understood and applied.

To help support these contentions, I analyze a seminal constitutional decision by the Supreme Court of Pakistan: *Zaheeruddin v. State*. The controversial 1993 majority opinion illustrates the significant risks and consequences of employing legal argument by analogy in the transjudicial context.

A. *Zaheeruddin v. State: Background*

On July 3, 1993, the Supreme Court of Pakistan dismissed eight appeals brought by members of the Ahmadiyya Muslim Community⁴⁵ who were arrested under Ordinance XX and Pakistan Penal

⁴⁵ The Ahmadiyya Muslim Community is a contemporary messianic movement founded in 1889 by Mirza Ghulam Ahmad (1839–1908), who was born in the small village of Qadian in Punjab, India. See THE COLUMBIA ENCYCLOPEDIA (2003), available at <http://www.encyclopedia.com/doc/1E1-Ahmadiyy.html> (last visited June 30, 2011). In 1889, Ahmad announced that he had received divine revelation authorizing him to accept the *baya* or allegiance of the faithful. See Ahmadiyya Muslim Community, *The Ahmadiyya Movement in Islam: An Overview*, available at <http://alislam.org/introduction> (last visited June 30, 2011). In 1891, he claimed to be the expected *mahdi* or reformer of the latter days, the Awaited One of the world community of religions, and the messiah foretold by the Prophet Muhammad in the seventh century. See THE COLUMBIA ENCYCLOPEDIA (2003). Ahmad's teachings, incorporating Indian, Sufi, Islamic, and Western elements, attempted to revitalize Islam in the face of the British raj, Protestant Christianity, and resurgent Hinduism. See *id.* Thus, Ahmad introduced the Ahmadiyya Muslim Community as a revivalist movement within Islam and not as a new religion.

Members of the Ahmadiyya Muslim Community (“Ahmadis”) profess to be Muslims. They contend that Ahmad meant to revive the true spirit and message of Islam that the Prophet Muhammad introduced and preached; he meant to relieve Islam from all misconstrued or superstitious teachings that had tainted it for fourteen centuries. See M. Nadeem Ahmad Siddiq, *Enforced Apostasy: Zaheeruddin v. State and the Official Persecution of the Ahmadiyya Community in Pakistan*, 14 LAW & INEQ. 275, 279 (1995). Orthodox Muslims, particularly Sunnis, believe that Ahmad had proclaimed himself as a prophet, thereby rejecting a fundamental tenet of Islam: *Khatme Nabuwwat* (literally to orthodox Muslims, a belief in the “finality of prophethood”). See YVONNE Y. HADDAD & JANE I. SMITH, MISSION TO AMERICA: FIVE ISLAMIC SECTARIAN COMMUNITIES IN NORTH AMERICA 52 (1993). Ahmadis respond that Mirza Ghulam Ahmad was a non law-bearing prophet subordinate in status to Prophet Muhammad; he came to illuminate Islam in its pristine beauty and to reform its tainted image, as predicted by Prophet Muhammad. See Siddiq, *supra*, at 280. For Ahmad and his followers, the Arabic *Khatme Nabuwwat* does not refer to the finality of prophethood in a literal sense—that is, to prophethood's chronological cessation—but rather to its culmination and exemplification in Prophet Muhammad (*i.e.*, *Khatme Nabuwwat* signifies the “seal of prophethood”). See *id.* According to Ahmadis, the belief that the Prophet Muhammad is the last prophet in chronology does not exalt his spiritual status, as does

Code (PPC) Sections 295 and 298—the so-called “anti-blasphemy laws.”⁴⁶ The collective complaint in the case, *Zaheeruddin v. State*,

the belief that the Prophet Muhammad is the seal of prophets and the “last word” on prophets. M.G. Farid, ed. *THE HOLY QUR’AN* n.2359 (1981) (quoting commentary written by Mirza Bashiruddin Mahmud Ahmad, the Ahmadiyya Community’s Second Caliph and son of Mirza Ghulam Ahmad). According to his followers, contrary to accusations leveled against him, Ahmad came to crystallize the teachings of Islam and thereby elevate the status of Prophet Muhammad. *Id.*

According to Ahmadi sources, the Ahmadiyya Muslim Community currently has branches in over 195 countries and a worldwide membership exceeding tens of millions, with large concentrations of Ahmadis in India, Pakistan, Ghana, Burkina Faso, and The Gambia. See Ahmadiyya Muslim Community, *The Ahmadiyya Movement in Islam: An Overview*. There are roughly four million Ahmadis living in Pakistan. See Siddiq at 283.

⁴⁶ See PAK. PENAL CODE §§ 298B, 298C [hereinafter ORDINANCE XX].

According to § 298B:

- (1) Any person of the Quadiani group or the Lahori group (who call themselves ‘Ahmadis’ or any other name) who by words, either spoken or written, or by visible representation
 - a. refers to, or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (*peace be upon him*), as ‘Ameer-ul-Mumineen,’ ‘Khalifat-ul-Mumineen,’ ‘Kilafat-ul-Muslimeen’ ‘Sahaabi’ or ‘Razi Allah Anaho’;
 - b. refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (*Peace be upon him*), as ‘Ummul-Mumineen’;
 - c. refers to, or addresses, any person, other than a member of the family (‘Ahle-bait’) of the Holy Prophet Muhammad (*peace be upon him*), as ‘Ahle-bait’; or
 - d. refers to, or names, or calls, his place of worship as ‘Masjid’;
 shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

- (2) Any person of the Quadiani group or Lahori group (who call themselves as ‘Ahmadis’ or by any other name) who by words, either spoken or written, or by visible representation, refers to the mode or form of call to prayers followed by his faith as ‘Azan’ or recites Azan as used by Muslims, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

According to § 298C:

Any person of the Quadiani group or Lahori group (who call themselves ‘Ahmadis’ or by any other name), who, directly or indirectly, poses himself as a Muslim, or calls or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of

was that Pakistan's anti-blasphemy laws violated the constitutional rights of religious minorities. The court dismissed the complaint on two main grounds. First, the court held that Ahmadi religious practice, however peaceful, angered and offended the Sunni majority in Pakistan; to maintain law and order, Pakistan would, therefore, need to control Ahmadi religious practice. Second, Ahmadis, as non-Muslims, could not use Islamic epithets in public without violating company and trademark laws. Pakistan, the court reasoned, had the right to protect the sanctity of religious terms under these laws and the right to prevent their usage by non-Muslims.

In his majority opinion, Justice Abdul Qadeer Chaudhry relied almost exclusively on U.S. constitutional and trademark law to arrive at his decision to uphold the constitutionality of Pakistan's anti-blasphemy laws. Justice Chaudhry's legal arguments by analogy demonstrate the court's striking inattention to the relevant distinctiveness of U.S. constitutional and trademark law.

B. Trademark Analogy

Pakistan's anti-blasphemy laws subject those who "indirectly or directly pose as a Muslim" through "[written or verbal] words" or "verbal representation" to fine, imprisonment, or capital punishment. In his majority opinion, Justice Chaudhry identified the legal significance of protecting the sacredness of Islamic terms through Pakistan's anti-blasphemy laws. He relied on the company laws of Britain, India, and Pakistan as well as U.S. trademark law to justify prohibiting Ahmadis from using Islamic epithets or practices to exercise their faith. In arriving at this conclusion, he analogizes to U.S. trademark law thus:

[intentionally] using trade names, trade marks, property marks or descriptions of others in order to make [third parties believe] that they belong to the user thereof amounts to an offence, and not only the perpetrator can be imprisoned and fined but damages can be recovered and [an] injunction to restrain him issued. This is true of

either description for a term which may extend to three years and shall also be liable to fine.

See also PAK. PENAL CODE § 295C (part of the Criminal Law Amendment Act of 1986, which amended the punishments enumerated in §§ 298B and 298C to include death).

Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (*peace be upon him*) shall be punished with death, or imprisonment for life, and shall be also liable to fine.

goods of even very small value. For example, the Coca Cola Company will not permit anyone to sell, even a few ounces of his own product in his own bottles or other receptacles, marked Coca Cola, even though its price may be a few cents. . . The principles involved are: do not deceive and do not violate the property rights of others. . . The [Ahmadis] who are non-Muslims want to pass off their faith as Islam? . . . [a] [Muslim] believer. . . will not tolerate a Government which is not prepared to save him of such deceptions or forgeries. . .⁴⁷

Justice Chaudhry's analogical argument may be formally represented as follows:

- (1) Pakistan has exclusive right to protect the sacredness of Islamic words, names, and epithets (i.e., it has exclusive right over its product).
- (2) Coca Cola, too, has exclusive right over its product.
- (3) Coca Cola will not permit any user to sell its product or to deceive others into thinking Coca Cola's product belongs to the user.
- (4) Pakistan should also not permit anyone to use Islamic words, names, and epithets or to deceive others into thinking such Islamic words, names, and epithets belong to that person.
- (5) Ahmadis use Islamic words, names, and epithets even though they are non-Muslims.
- (6) Therefore, Pakistan should prohibit Ahmadis from using Islamic words, names, and epithets.

For Justice Chaudhry to proceed logically from step (3) to step (4), he must commit himself to the analogy-warranting rule that if commercially valuable property can be protected under company and trademark law, then religion can be protected under company and trademark law. Justice Chaudhry makes his analogy-warranting rationale for this rule clear: both commercially valuable property and religion should be free from deceptive use.

Justice Chaudhry's analogy-warranting rule is fallacious on several fronts. First, no foreign jurisdiction cited in *Zaheeruddin*—British, Canada, or the U.S.—treats restrictions on commercial speech in the same way as restrictions on religious freedom.⁴⁸ In fact, in the U.S. context, federal trademark law makes clear that religious prayers and names cannot be trademarked.⁴⁹ Second, Islam, unlike Coca Cola,

⁴⁷ *Zaheeruddin*, (1993) 26 SCMR at 1753–54 (Pak.).

⁴⁸ Siddiq, *supra* note 45, at 296 n.99 (citing KAREN PARKER, RELIGIOUS PERSECUTION IN PAKISTAN: THE AHMADI CASE AT THE SUPREME COURT 10 (1993)).

⁴⁹ *Id.* at 296–97.

is not a registered company, and religion itself is not commercially valuable property because religious terms are used generically.⁵⁰ Third, company and trademark law protect a company's rights to a unique product; that Islamic terminology is somehow unique to Islam is an inaccurate assumption since many Islamic terms have emanated from other monotheistic religious traditions, such as Christianity and Judaism.⁵¹ This last point begs the question whether Pakistan itself has violated company and trademark law under its own Supreme Court's standard.

C. *Public Order and Safety Analogies*

i. *Cantwell v. Connecticut*⁵²

The *Zaheeruddin* court's main holding was that Pakistan's anti-blasphemy laws can constitutionally restrict Ahmadi religious practice in order to maintain public order and safety and to safeguard the religious sentiments of Pakistan's majority Sunni population. In arriving at this holding, Justice Chaudhry again invoked U.S. federal law. The Court cited *Cantwell v. Connecticut* to argue that the freedom to profess one's religion may be legally restricted. Justice Chaudhry analogizes thus:

The fundamental right. . . is the 'freedom to profess religion' but it has been made 'subject to law, public order and morality.' The court [in *Cantwell*] [has] held that this right embraces two concepts: freedom to believe and freedom to act. . . The latter cannot be absolute. . . and remains subject to regulation for the protection of

⁵⁰ See K.M. Sharma, *What's in a Name? Law, Religion, and Islamic Names*, 26 DENV. J. INT'L L. & POL'Y 151, 188 (1997-1998) ("Religion as an abstract sentiment or idea is manifestly unpatentable. References to trademarks and company law are, thus, totally inappropriate in that religion is not a commercial property, nor is Islam a registered corporate entity.").

⁵¹ Siddiq, *supra* note 45, at 299.

⁵² *Cantwell v. Connecticut*, 310 U.S. 296 (1939). In *Cantwell*, defendant Jehovah's Witnesses were arrested and later convicted after they distributed religious materials in a New Haven neighborhood. Defendants claimed their activities, which included the distribution of books and pamphlets, did not fall within Connecticut General Statute § 6294, which prohibits "[any] person from soliciting money, services, subscriptions or any valuable thing for any alleged religion, charitable, or philanthropic cause from [someone] other than a member of the organization for whose benefit such person is soliciting. . . [without approval by] the secretary of the public welfare council. . ." The Court held that § 6294 deprived defendants of their liberty without due process of law in contravention of the First and Fourteenth Amendments. *Id.* at 303. In so holding, the Court in dicta commented that religious conduct might be subject to regulation for the protection of society so long as the regulation does not violate protected freedoms. *Id.* at 304.

society. . .The phrase ‘subject to law’. . .does neither invest the legislature with unlimited power to unduly restrict [nor] take away the Fundamental Rights guaranteed in the Constitution, nor can they be completely ignored or by-passed as non-existent. A balance has thus to be struck between the two, by resorting to a reasonable interpretation, keeping in view the peculiar circumstances of each case.⁵³

Justice Chaudhry’s analogical argument may be formally represented as follows:

- (1) Pakistan has a free exercise clause in its Constitution.
- (2) The U.S., too, has a free exercise in its Constitution.
- (3) The U.S. Supreme Court in *Cantwell* indicated that the U.S. legislature could restrict the freedom to act insofar as it is for the purpose of protecting society and does not take away one’s fundamental rights.
- (4) The Pakistani legislature could also restrict the freedom to act insofar as it is for the purpose of protecting society and does not take away one’s fundamental rights.
- (5) Pakistan’s anti-blasphemy laws are designed for the protection of society and do not take away one’s fundamental rights.
- (6) Pakistan’s anti-blasphemy laws, therefore, could restrict Ahmadi religious practice to protect Pakistani society.

For Justice Chaudhry to proceed logically from step (3) to step (4), he must commit himself to the analogy-warranting rule that if a legislature can restrict religious practice in the name of public order and safety through a neutral licensing statute,⁵⁴ then it can also regulate religious practice in the name of public order and safety through non-neutral anti-blasphemy laws. The analogy-warranting rationale here appears to be that legislatures should be allowed to determine for themselves when it is reasonable to restrict religious practice to protect society.

Justice Chaudhry’s analogy-warranting rule is problematic insofar as it ignores the broad protection for religious freedom given in *Cantwell*. In considering the constitutional challenge to the Connecticut licensing statute before it, the U.S. Supreme Court held that a state statute that prohibits the solicitation of funds for religious, chari-

⁵³ *Zaheeruddin*, (1993) 26 SCMR at 1758 (Pak.).

⁵⁴ This was not the case in *Cantwell*. The Court struck down the Connecticut statute as unconstitutional because it was not neutral.

table and philanthropic purposes without a license is unconstitutional.⁵⁵ A state may impose a time, place, and manner restriction on religious practice, but only through a general (non-neutral) and non-discriminatory piece of legislation.⁵⁶ Insofar as the grant of a license to solicit money for a religious cause was left to the discretion of a Connecticut state official, the Connecticut licensing statute was discriminatory, “burdened the exercise of [religious] liberty,” and thus unconstitutional.⁵⁷ The court in *Cantwell* clearly did not intend to allow legislatures to restrict religious freedom through non-neutral ordinances. The Supreme Court of Pakistan nevertheless analogized to *Cantwell* to legitimize its decision to uphold the constitutionality of Pakistan’s anti-blasphemy laws. The *Cantwell* analogy provides a telling illustration of how legal argument by analogy can be misused and abused in the transjudicial context.

ii. *Reynolds v. United States*⁵⁸

Justice Chaudhry analogizes to *Reynolds v. United States* to further bolster his contention that non-neutral ordinances may restrict religious liberty. He writes thus:

The Supreme Court of America in the case of *Reynolds Vs. United States* [sic] held that ‘Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. . .Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.’ After taking the above view, the Supreme Court felt justified to ban polygamy, as it was being practiced by Mormons sect on the ground that it was a duty imposed on them by their religion and was not a religious belief or opinion. It must be noted that the observations in the last part of the above [quote] are peculiar to America where the people and not Allah are the sovereign.⁵⁹

⁵⁵ See *Cantwell*, 310 U.S. at 306-07.

⁵⁶ *Id.* at 304.

⁵⁷ *Id.* at 307.

⁵⁸ *Reynolds v. United States*, 98 U.S. 145 (1878). In *Reynolds*, a member of the Mormon Church, according to the dictates of his faith, practiced bigamy and was charged and arrested pursuant to U.S. Revised Statutes Section 5352, which outlawed bigamy. The Court affirmed the conviction arguing that a federal statute may interfere with religious practice so as not “to permit every citizen to become a law unto himself.” *Id.* at 167.

⁵⁹ *Zaheeruddin*, (1993) 26 SCMR at 1758 (Pak.).

Justice Chaudhry's analogical argument may be formally represented as follows:

- (1) Pakistan accords its legislature the power to reach actions subversive of good order.
- (2) The U.S., too, accords its legislature the power to reach actions subversive of good order.
- (3) The U.S. Supreme Court in *Reynolds* indicated that state statutes can interfere with religious practices.
- (4) Pakistan's anti-blasphemy laws can also interfere with religious practices.
- (5) Pakistan's anti-blasphemy laws, therefore, can interfere with Ahmadi practices.

For Justice Chaudhry to proceed logically from step (3) to step (4), he must commit himself to the analogy-warranting rule that if a court can uphold the constitutionality of statutes of general applicability that restrict polygamous acts already deemed to be criminal and odious under domestic law, then the court can also uphold the constitutionality of non-neutral ordinances that restrict religious practices not deemed to be criminal or odious under domestic law, but that are nonetheless criminal or odious in the eyes of a majority population. The analogy-warranting rationale is embedded in the final line of the extended quote above—namely that a sovereign nation should be allowed to restrict the activities of a religious group that offend the sentiments of a nation's majority people.

Once again, Justice Chaudhry's analogy-warranting rule fails to withstand rational scrutiny. The statutes banning polygamy predated the religious practices at issue in *Reynolds*.⁶⁰ They were of general application and did not target any particular group.⁶¹ The practice of polygamy had already been criminalized in the United States.⁶² The *Reynolds* court held that certain religious groups were not exempt from generally applicable laws that restricted practices that had already been criminalized in the United States. The situation at issue in *Zaheeruddin* was entirely different. Pakistan's anti-blasphemy laws explicitly criminalized the activities of Ahmadis in Pakistan. These practices, which include calling an Ahmadi place of worship a '*masjid*' or mosque, reciting the '*Adhan*' or call for prayer and reciting the Arabic greeting '*Assalamo Alaikum*' ("peace be upon you"), were never previously made to be illegal.⁶³ Indeed, practicing the basic tenets of

⁶⁰ Siddiq, *supra* note 45, at 303.

⁶¹ *Reynolds*, 98 U.S. at 146, 164.

⁶² *Id.*

⁶³ See Amjad Mahmood Khan, *Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations*, 16 HARV. HUM. RTS. J. 217, 220-29 (2003).

Islam in Pakistan can hardly be said to be subversive of public order or to be odious. What the Supreme Court of Pakistan found to be subversive in *Zaheeruddin* was the transformation of basic Islamic practice into blasphemy. But blasphemy had never previously been made to be illegal in Pakistan prior to the passage of the very laws at issue in the case.⁶⁴ Thus, Pakistan's anti-blasphemy laws are not generally applicable laws.⁶⁵ As such, *Reynolds* is simply inapposite authority.

iii. *Hamilton v. Regents of the University of California*⁶⁶

Having established that Pakistan's anti-blasphemy laws may legally restrict Ahmadi religious practice, Justice Chaudhry proceeds to offer a more expansive argument for restricting religious freedom in the name of public safety by citing to *Hamilton v. Regents*. He quotes *Hamilton* and analogizes thus:

In *Hamilton Vs. Board of Regents of University of California* [sic], where students appealed to the Supreme Court that the act of the university to make a regulation for compulsory military training was contrary to their religious belief, the court rejected that contention, holding that the 'Government owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and assure the enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend the Government against all enemies.' [This] go[es] to show that freedom of religion would not be allowed to interfere with the law and order or public peace and tranquility. . . No one can be allowed to insult, damage or defile the religion of any other class or outrage their feel-

⁶⁴ *Id.*

⁶⁵ For the Supreme Court of Pakistan itself to make this determination is problematic, especially considering that in a case that expressly overruled *Reynolds*, *Patrick v. Le Fevre*, the Second Circuit acknowledged the "judiciary's incapacity to judge the religious nature of an adherent's belief." *Patrick v. Le Fevre*, 745 F.2d 153, 157 (2d Cir. 1984).

⁶⁶ *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934). In *Hamilton*, defendant university regents made a course in military science compulsory for all University of California school students. The university regents suspended a few Christian students who refused to take the prescribed course because of their religious and conscientious objections to war. The Court held that the regents' order requiring compulsory military training did not violate the Due Process Clause of the Fourteenth Amendment. To maintain peace and order, the government could compel citizens against their will to take their place in the ranks of the army of their country and risk the chance of being shot down in its defense. *See id.* at 262-63.

ings. . .Whenever or wherever the state has reasons to believe that the peace and order will be disturbed or the religious feelings of others may be injured, so as to create law and order situation, it may take such minimum preventive measures as will ensure law and order.⁶⁷

Justice Chaudhry's analogical argument might be formally represented as follows:

- (1) The Pakistani government owes a duty to protect its people and maintain law and order, and Pakistani citizens in turn owe a reciprocal duty to defend the government against enemies.
- (2) The U.S government, too, owes a duty to protect its people and maintain law and order, and U.S. citizens in turn owe a reciprocal duty to defend the government against enemies.
- (3) The U.S. Supreme Court in *Hamilton* indicated that religious freedom can yield to a compelling government need.
- (4) In Pakistan, too, religious freedom can yield to a compelling government need.
- (5) The Pakistani government had a compelling need to ensure that the religious feelings of others are not injured.
- (6) The religious liberty of Ahmadis, therefore, can yield to the Pakistani government's compelling need to ensure that the feelings of others are not injured.

For Justice Chaudhry to proceed logically from step (3) to step (4), he must commit himself to the analogy-warranting rule that if a sovereign nation can maintain peace and order by curtailing the religious freedom of students through compulsory military training, then it can also do the same by curtailing the religious freedom of religious minorities through anti-blasphemy laws. Again, Justice Chaudhry makes his analogy-warranting rationale explicit in the *Zaheeruddin* opinion itself: "no one can be allowed to insult, damage or defile the religion of any other class or outrage their feelings."

Justice Chaudhry's analogy-warranting rule is deeply flawed. The U.S. Supreme Court upheld the compulsory military training requirement by the University of California school system because the requirement applied to *all* students of a particular age attending the University who had not yet completed certain levels of education. The requirement was a *neutral* university regulation and not a non-neutral state or federal statute. In refusing to take a compulsory military sci-

⁶⁷ *Zaheeruddin*, (1993) SCMR at 1764 (Pak.).

ence class at the University of California, the students could not assert a liberty interest under the Fourteenth Amendment because the purpose of the university regulation was to effectuate the state's authority to train its citizens to serve in the United States army.⁶⁸ The regulation was never intended to restrict the free exercise of religion.⁶⁹ Justice Chaudhry misconstrues *Hamilton* as restricting religious liberty in the name of military security. More strikingly, he draws parallels between a neutral university regulation and non-neutral federal anti-blasphemy laws. He curiously equates Pakistan's concerns about not injuring the feelings of its majority Sunni population with the U.S.'s concerns about having adequately trained military soldiers to defend the country.

*iv. Cox v. New Hampshire*⁷⁰

To complete his argument for upholding the constitutionality of Pakistan's anti-blasphemy laws in the name of public safety and order, Justice Chaudhry analogizes to *Cox v. New Hampshire* thus:

Justice Hughes in *Willis Cox v. New Hampshire* also enlightened the same subject [of restricting the free exercise of religion in the name if public order] to say: 'A statute requiring persons using the public streets for a parade or procession to procure a special license therefore from the local authorities does not constitute an unconstitutional interference with religious worship or the practice of religion, as applied to a group marching along a sidewalk in single file carrying signs and placards advertising their religious beliefs.'⁷¹

⁶⁸ *Hamilton*, 293 U.S. at 260.

⁶⁹ *See id.* at 266 (Cardozo, J., concurring) ("Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion. . .").

⁷⁰ *Cox v. New Hampshire*, 312 U.S. 569 (1941). Justice Chaudhry also briefly analogizes to *Jones v. Opelika*, 316 U.S. 584 (1942), to underscore the same propositions he gleans from *Cox*. In *Cox*, defendant Jehovah's Witnesses were arrested for marching near city hall carrying religious literature and signs with religious messages without having obtained a license to do so. They claimed that New Hampshire Public Law Chapter 145 § 2, which prohibited a "parade or procession" upon a public street without a special license, was invalid under the Fourteenth Amendment. The Court affirmed the lower court judgment, holding that the regulation of the streets for parades and processions was a traditional exercise of control by the state. The Court also found that the New Hampshire statute was not aimed at any religious or free speech restraint. *Cox*, 312 U.S. at 573-74.

⁷¹ *Zaheeruddin*, (1993) SCMR at 1764 (Pak.).

Remarkably, the passage cited does not appear anywhere in the *Cox* opinion. Nevertheless, taking the fictitious quote as truth for a moment, Justice Chaudhry's analogical argument may be formally represented as follows:

- (1) Pakistan allows for the free exercise of religion.
- (2) The U.S., too, allows for the free exercise of religion.
- (3) The U.S. Supreme Court in *Cox* [allegedly] upheld statutory restrictions upon religious activities conducted in public streets, in a parade or procession, without a special license.
- (4) Pakistan, too, can promulgate statutory restrictions upon the religious activities of those publicly manifesting their faith without a special license.
- (5) Pakistan's anti-blasphemy laws restrict the religious activities of Ahmadis in the name of public order.
- (6) Pakistan's anti-blasphemy laws, therefore, do not unconstitutionally interfere with Ahmadi religious practice.

Justice Chaudhry's analogy here is particularly problematic since he does not concede that Ahmadis may practice their faith publicly if they secure a special license (the missing logical inference from step (4) to step (5)). Notwithstanding this omission, for Justice Chaudhry to proceed logically from step (3) to step (4), he must commit himself to the analogy-warranting rule that if a court can uphold the constitutionality of a neutral statute that impliedly restricts the free exercise of religion only for a specific time, place, and manner, then a court can also uphold non-neutral anti-blasphemy ordinances that expressly restrict the free exercise of religion for however long the religious practice in question disrupts public order. The analogy-warranting rationale is that a legislature should have statutory authority to regulate public disturbances owing to religion.

Justice Chaudhry's analogy-warranting rule to *Cox* is questionable. The *Cox* court never legitimates interference with religious worship or practice as the *Zaheeruddin* court suggests. The New Hampshire statute sets forth a time, place, and manner regulation and not a prohibition of religious practice.⁷² Judge Hughes states clearly that the regulation of street parades must be applied "without unfair discrimination," and that appellants taking part in the parade at issue were "not prosecuted. . .for maintaining or expressing religious beliefs."⁷³ Far from restricting religious practice, the statutory requirement of obtaining a special license for a parade or procession was "to prevent confusion by overlapping parades or processions, to secure

⁷² *Cox*, 316 U.S. at 576.

⁷³ *Id.*

convenient use of the streets by other travelers, and to minimize the risk of disorder.”⁷⁴ Pakistan’s anti-blasphemy laws are not intended to restrict public practice of religion when such practice interferes with public order and safety. Rather, they are intended to criminalize the entire range of activities of the Ahmadiyya Muslim Community (and other minority religious groups) in Pakistan.

D. The Implications of Legal Argument by Analogy in Zaheeruddin
i. Persuasive Authority as Controlling Authority

One possible response to my critique of Justice Chaudhry’s legal arguments by analogy in *Zaheeruddin* may be that the Supreme Court of Pakistan relied on U.S. judicial precedent only as persuasive authority, not controlling authority, to uphold the constitutionality of Pakistan’s anti-blasphemy laws. Because domestic parties cannot invoke foreign cases as controlling authority, the practical effect of poor analogical reasoning in Pakistan may not be as pronounced or significant.

This response may be well taken had the Supreme Court of Pakistan cited at least *some* domestic authority as controlling in *Zaheeruddin* to support its central holdings. But, incredibly, Justice Chaudhry did not invoke a single Pakistani case to hold that Pakistan could restrict Ahmadi religious practice in order to maintain public order and safety and that Pakistan had the right to protect the sanctity of religious terms under company and trademark law. Instead, he relied exclusively on foreign judicial precedent, particularly U.S. constitutional and trademark law. Justice Chaudhry, therefore, effectively used foreign judicial precedent as controlling authority in Pakistan. When a court gives controlling significance to target cases of a foreign jurisdiction, the success or failure of legal argument by analogy becomes that much more critical. Domestic parties may find it difficult to distinguish foreign case law in subsequent litigation; indeed, they must trust judges to rationally articulate the methodology and reasoning behind adopting foreign legal pronouncements.

ii. Analogizing to U.S. Law in a Shari’a-Based Common Law Regime

Pakistan is one of a handful of Muslim countries to use a common law system. But the features of Pakistan’s common law system are as peculiar as the analogical mode of reasoning Pakistani judges often utilize. English is one of Pakistan’s official languages (the other, Urdu). Pakistan’s Constitution is written in English and all court documentation and litigation are recorded and conducted in English.

⁷⁴ *Id.* at 575-76.

Many of Pakistan's guiding constitutional principles, however, emanate from Islamic law (*shari'a*), based largely in part on the *ulema's* (class of Muslim clerics) Quranic textual interpretations in Arabic and Urdu.⁷⁵ Pakistan's judicial system has several court systems with overlapping and sometimes competing jurisdictions. Pakistan has separate civil and criminal systems with special courts for banking, antinarcotics, and antiterrorist cases, as well as the Federal Shariat Court for certain Hudood offenses (i.e., Islamic laws for serious crimes).⁷⁶ The appeals process in the civil system progresses from Civil Court, District Court, High Court, and the Supreme Court. In the criminal system, the progression is Magistrate, Sessions court, High Court, and the Supreme Court. Decisions by the Federal Shariat Court may be appealed directly to the Supreme Court, which has a separate Shariat Appellate Branch consisting of three Muslim judges and two members of the *ulema*.⁷⁷

Because Pakistan's Constitution incorporates elements of Islamic law,⁷⁸ common law decisions emanating from Pakistan's civil and criminal systems, apart from the Federal Shariat Court, often also invoke *shari'a*. In *Zaheeruddin*, for example, Justice Chaudhry compared in detail Ahmadi ideology vis-à-vis traditional Sunni Muslim ideology to illustrate how Ahmadi practice is inimical to Islam. To help legitimize his decision, Justice Chaudhry made several references to Pakistan's *shari'a* and even formally adopted a decision rendered by the Federal Shariat Court.⁷⁹ Thus, the *Zaheeruddin* opinion, like many federal constitutional decisions in Pakistan, is an admixture of common law and *shari'a* principles.⁸⁰ Given this context, Justice

⁷⁵ See Siddiq, *supra* note 45, at 295.

⁷⁶ Bernard J. Hibbits, *Pakistan: Courts and Judgment*, JURIST LEGAL INTELLIGENCE (2003).

⁷⁷ PAKISTAN CONST., art. VII, § 3A, cl. 203(F).

⁷⁸ For example, the repugnancy clause states: "No law shall be repugnant to the teachings and requirements of Islam as set out in the Qur'an and Sunnah [actions of the Holy Prophet], and all existing laws shall be brought into conformity therewith." See PAKISTAN CONST., art. IX, § 227(1). In addition, the Objectives Resolution of 1949, made part of Pakistan's Constitution in 1985, states: "Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah." See PAKISTAN CONST., art. I, § 2(a), *amended* by Presidential Order No. 14 (1985).

⁷⁹ *Zaheeruddin*, (1993) SCMR at 1752 (Pak.).

⁸⁰ Interpreting a constitution in a manner consistent with principles of faith is characteristic of even the American legal system. Sanford Levison has described two dominant faith-based positions regarding constitutional interpretation in the U.S.: Protestant and Catholic. The Protestant position treats the text of the U.S. Constitution alone as the source of all constitutional doctrines and the individual citizen as the text's ultimate interpreter. The Catholic position treats the U.S.

Chaudhry's deference to U.S. federal constitutional law proves deceptive insofar as many of the salient features of the U.S. constitution, such as the Establishment and Due Process Clauses, are simply alien to *shari'a* as understood and applied in Pakistan.⁸¹

E. The Deleterious Effects of Zaheeruddin

As my various critiques illustrate, Justice Chaudhry ignored the relevant dissimilarities between U.S. and Pakistani constitutionalism, made poor analogical choices, and drew illogical inferences by analogy. From a purely legal perspective, the decision is intellectually dishonest and dubious. Unfortunately, however, the consequences of *Zaheeruddin* cut much deeper on a human level.

Pakistani governmental and law enforcement officials have used *Zaheeruddin* to justify nearly two decades of institutionalized, state-supported persecution of religious minorities. In particular, Pakistan's anti-blasphemy laws criminalize the existence of the Ahmadiyya Muslim Community. By upholding the laws' constitutionality, *Zaheeruddin* legitimized and further entrenched Pakistan's anti-blasphemy regime. While the decision purported to combat threats to public safety, the opposite effect has been true. Ahmadis have fallen victim to patent discrimination and sectarian violence.⁸² In 1994, within only a year after *Zaheeruddin* was decided, seventeen blasphemy cases, resulting in one conviction, were registered against Ahmadis.⁸³ Since 1994, blasphemy cases registered against Ahmadis now number in the hundreds. In 2010 alone, 45 Ahmadis have been formally charged in criminal cases (including blasphemy) for profess-

Constitution and unwritten tradition as the source of all constitutional doctrines and the U.S. Supreme Court as the text's ultimate interpreter. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 29 (Princeton Univ. Press 1988). When a judge reasons by analogy using a source case with one faith-based interpretive bias and a target case with another, she may be necessarily constrained in her selection of relevant shared characteristics between cases. This inhibition becomes especially problematic in the transjudicial context when a court like the Supreme Court of Pakistan analogizes to source cases with *both* Protestant and Catholic interpretive biases even as it uses its own *shari'a*-based interpretive bias. Given this complexity, it is not surprising to note Justice Chaudhry's misconceived analogical choices in *Zaheeruddin*.

⁸¹ A.K. BROHI, *FUNDAMENTAL LAW OF PAKISTAN* 342 (1958).

⁸² For example, on May 28, 2010, armed gunmen from the Tehrik-e-Taliban Pakistan massacred 86 Ahmadis while they offered Friday prayers at their mosques in Lahore. See Zahid Hussain & Rehmat Mehsud, *Militants Attack Tiny Pakistani Sect*, WALL ST. J., May 29, 2011.

⁸³ 1995 BUREAU OF DEMOCRACY, HUMAN RTS. AND LABOR ANN. REP. ON HUMAN RTS. ABUSES: PAKISTAN.

ing their religion.⁸⁴ As of December 2010, three Ahmadis languish in prison having been convicted and sentenced to death for committing blasphemy.⁸⁵ The offenses charged in Ahmadi cases have included wearing an Islamic slogan on a shirt, planning to build an Ahmadi mosque in Lahore, and distributing Ahmadi literature in a public square.⁸⁶

Among the many benefits Slaughter cites in her typology for transjudicial communication is the potential for greater compliance with international human rights norms. She writes:

Increasing cross-fertilization of ideas and precedents among constitutional judges around the world is gradually giving rise to increasingly visible international consensus on various issues. . . To the extent that pockets of global jurisprudence are emerging, they are most likely to involve issues of basic human rights. Courts may well feel a particular common bond with one another in adjudicating human rights cases. . . because such cases engage a core judicial function in many countries of the world. They ask courts to protect individuals against abuse of state power. . .⁸⁷

Zaheeruddin seriously undermines Slaughter's contention. Not only did Justice Chaudhry seek to limit the free exercise of religion in Pakistan by upholding the constitutionality of Pakistan's anti-blasphemy laws, he disingenuously invoked U.S. constitutional and trademark law to justify his holding. In fact, he employed transjudicial communi-

⁸⁴ 2011 BUREAU OF DEMOCRACY, HUMAN RTS. AND LABOR ANN. REP. ON INT'L RELIGIOUS FREEDOM: PAKISTAN (2010)

⁸⁵ *Id.*

⁸⁶ *See id.* The persecution of Ahmadis is part of the widespread mistreatment of religious minorities in Pakistan under its anti-blasphemy ordinances. Christians, for example, are also subject to severe religious persecution. *See* Hearing on Pakistan's Anti-Blasphemy Laws Before Tom Lantos Human Rights Comm'n, 111th Cong. (2009) (testimony of Amjad Mahmood Khan), *available at* <http://www.mkausa.org/View-document/1219-Congress-Testimony-Amjad-Khan-10-08-09>. A telling case concerns Ayub Masih, a Christian jailed for making favorable comments about Salman Rushdie, the author of the controversial *Satanic Verses*. A Pakistani court sentenced him to death on April 27, 1998, a year after he survived an attempt on his life during trial. The case was on appeal to the Lahore High Court when Masih's chief defender, Roman Catholic Bishop John Joseph, committed suicide outside the courtroom to protest Masih's death sentence. His act sent shockwaves through the minority Christian community across Pakistan, which protested violently against the anti-blasphemy ordinances immediately thereafter. *See* Dexter Filkins, *Pakistan's Blasphemy Law Under Heightened Scrutiny*, L.A. TIMES, May 9, 1998, at A1.

⁸⁷ Slaughter, *supra* note 22, at 78-79.

cation to insulate the Supreme Court of Pakistan from possible foreign criticism of his decision. *Zaheeruddin* is a glaring example of Pakistan's failure to abide by the provisions of her own Constitution and her legal commitments under Article 18 of the Universal Declaration of Human Rights ("UDHR"), Articles 18, 19, 20 and 27 of the International Covenant on Civil and Political Rights ("ICCPR") and other binding peremptory norms related to freedom of religion.⁸⁸ This notorious decision is a quintessential example of the very "abuse of state power" Slaughter incorrectly assumes transnational courts would uniformly seek to protect through transjudicial communication.

CONCLUSION

In his majority opinion in *Printz v. United States*, Justice Antonin Scalia remarked: "Comparative analysis [is] inappropriate to the task of interpreting a constitution."⁸⁹ One factor that makes comparative analysis inappropriate is the inherent difficulty for judges to properly employ legal argument by analogy. I have demonstrated that legal argument by analogy is inconsistently understood and applied, and when used transjudicially, can lead to destructive outcomes, particularly with contentious and weighty constitutional cases like *Zaheeruddin* in Pakistan. Legal argument by analogy in the transjudicial context prompts judges to affirm their own country's legislative or public mandate more than it prompts them to tether to international norms. In short, legal argument by analogy is an ill-perceived instrument to further judicial globalization.

⁸⁸ Khan, *supra* note 63, at 230.

⁸⁹ *Printz v. United States*, 521 U.S. 898, 921 (1997).

