Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications

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I. INTRODUCTION

Though blasphemy laws are not peculiar to Pakistan, they arguably exist in a more problematic and controversial form in that country than in others. Since their introduction in the 1980s, blasphemy laws have frequently captured the local and international headlines for the apparent injustice of their form and procedure, as manifested in the tragic human dramas that have been played out as a result.[1] This article attempts to provide the first exhaustive and analytical review of Pakistan's historical and continuing experience with blasphemy laws and argues that these laws were introduced for the less than bona fide political imperatives of an authoritarian regime. These laws continue to be a cause of grave concern because of their patent defects of form and procedure, which are exacerbated by Pakistan's current social and political milieu.

This article, *inter alia*, attempts to analyze and focus on the historical, formalistic, and design aspects of Pakistan's existing blasphemy laws from a comparative perspective. It argues that, quite apart from procedural inadequacies of the Pakistani legal system and its special socio-political circumstances, the very form and design of the blasphemy laws invite abuse.[2] Findings demonstrate that textual lacunae in the law enable its use as an instrument of misuse, hence leading to the argument that the abusive potential of the law exists even independently of social context. When the blasphemy laws are contextualized within the atmosphere of increasing religious intolerance pervading certain sections of the social fabric in Pakistan, however, their

1. *See*, *e.g.*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT OF THE U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (2005), *available at* http://www.thepersecution.org/ussdcirf/usirf2005.html (describing conditions for religious freedoms in countries of particular concern). *See generally* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, *available at* http://www.state.gov/g/drl/rls/hrrpt/ (providing reports on the status of internationally recognized human rights in foreign countries).

2. For details of these laws, *see infra* Part I.B.

subversive potential is revealed in its entirety. In effect, the blasphemy laws, in their current form, are an instance of legislation inherently open to abuse, operating in an environment that is at times unfortunately conducive to that abuse. This has also resulted in their emergence as a potent tool for the victimization of religious minorities and relegation of these minorities, in many instances, to the status of fearful pariahs subject to legally mandated persecution. The existence of blasphemy laws can be argued for in a society and under a constitutional framework that attaches a premium to the underlying sacred values that such laws may be promulgated to protect. This article, however, argues that the laws, in their current form, have caused, and continue to cause, several miscarriages of justice and are a stimulus for strengthening the negative and highly divisive forces of obscurantism, intolerance, and fanaticism in Pakistani society.

Whether there is a philosophical, moral, and legal justification for having blasphemy laws at all is a question which is evidently amenable to discussion and analysis within the theological realm from which such laws ostensibly stem. Therefore, evaluations of blasphemy laws under Islam, Christianity, Hinduism, etc., in spite of having areas of overlap at the higher philosophical level, are in many ways independent and discreet discussions with different reference points, justifications, qualifications, and practical manifestations. They emerge from different historical, theological, social, political, and legal experiences that precede, surround, and stem from the theological debates and jurisprudence of Islam, Christianity, Hinduism, etc. With the increasingly controversial and arguably problematic continuation of blasphemy laws in various Muslim and non-Muslim jurisdictions well into the twenty-first century, there is a greater need to closely listen to what religious legal scholars have to say. This article, however, does not concern itself with exploring the roots, justification, and nature of blasphemy laws within the Islamic theological, jurisprudential, and historical perspectives and experience, though that is a highly pertinent mode of enquiry within its own right.[3]

At another distinct and fundamental level, however,

3. From a purely theological and historical standpoint, there is a diversity of viewpoints on what exactly constitutes blasphemy, the significance and stringency of blasphemy laws, and the implementation responsibility and mechanisms for such laws within Islamic theological and legal scholarship.

blasphemy laws are assailable from a completely neutral and non-theological standpoint. This article argues that they are essentially a category of prohibitive laws that are meant to curtail certain kinds of speech and hence raise fundamental questions of freedom of speech, as well as of legitimate arenas of state proscription of certain kinds of speech for certain public interest and policy imperatives.[4] It basically boils down to whether—using a rather colloquial expression—through the existence and operation of such laws, truth and healthy discussion emerging in the "marketplace of ideas"[5] are being subjected to a "chilling effect." The theological arguments focus on the inherent undesirability and offensiveness of blasphemous speech in view of the sacred personages and ideas that it befouls and defames, hence deserving curtailment, deterrence, and punishment. This article, however, focuses on the additional aspect that the alleged blasphemer utters certain words that can be regarded as offensive to other fellow citizens and can create situations that breach the peace. Therefore, the State determines that the relative free speech value of utterance of such words is trumped by the damage caused to the sensitivities of others and/or even the potential for breach of peace which may be triggered by such provocation and annoyance.

In this sense, blasphemy is similar to other kinds of speech which may be restricted by the State on the basis of such a cost benefit analysis. In other words, blasphemous speech may be regarded as a kind of "hate speech"—a now internationally well-recognized category of speech that can be validly prohibited. Furthermore, it can be placed under its narrower sub-category of "fighting words." Both these types of speech have been identified and exhaustively discussed in various international legal jurisdictions that have contributed to the jurisprudence on the right of free speech as possible exceptions to the generic protection of that right.[6]

4. *See* Sydney Kentridge, *Freedom of Speech: Is It the Primary Right?*, 45 INT'L & COMP. L.Q. pt. 2, 253, 258–69 (1996) [hereinafter Kentridge, *Freedom of Speech*]. The author notes three main objectives identified by judges and jurisprudence writers for recognizing the value and importance of free speech. They are: (1) that freedom of speech encourages the self-fulfillment of individuals in society; (2) truth is likely to emerge from the free expression of conflicting views; and, (3) the integrity of democratic government requires that opinion and information about those who govern us or who would wish to govern us are available to the electorate. *Id.*

5. *See* Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

6. Various tests have emerged over the years in the United States in the area

In view of the above, an additional question that this article attempts to address is whether the text of the blasphemy laws, as well as their judicial interpretation in Pakistan, provides any room for assailing these laws from a purely non-theological perspective—in other words, as a kind of "hate speech." "Hate speech" has come to be internationally recognized as a category of speech which can be legally prohibited so long as it meets certain prerequisites that ensure protection of valid debate, discussion, and analysis. This article explores whether the blasphemy laws, as drafted and judicially interpreted in Pakistan, impinge upon valid and legitimate discourse, and, if they do or have the potential to do so, whether valid speech in Pakistan is consequently a victim of over-broad and over-reaching laws that can be regarded as draconian. Such an exercise cannot be undertaken with a starting point that accepts and adopts free speech as an absolute virtue, which in itself is a controversial and by no means universally accepted position. We start, therefore, by gauging the general level of protection of the right of free speech in Pakistan *vis-à-vis* the situation in some international jurisdictions in order to determine both the extent of such protection in Pakistan as well as the judicial approach to balancing free speech against any conflicting rights and public policy imperatives. With this backdrop, this article then proceeds to analyze whether the blasphemy laws, if they are judicially recognized in Pakistan as prohibiting a kind of "hate speech," embrace the paradigm of such a cost-benefit approach to speech protection and prohibition.

A. STRUCTURE OF THE ARTICLE

Part I of this article will introduce the nature and specifics of the Pakistani blasphemy laws. Part II will first briefly describe Pakistan's political history in order to provide a necessary context to the readers. It will then go on to discuss

of "hate speech." *See*, *e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that there is a right to advocate the use of force or other unlawful conduct "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce action"); Schenck v. United States, 249 U.S. 47, 52 (1919) (noting that speech should be punishable only when "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent"). *See also* Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917) (speech should not be punishable unless it constitutes a direct incitement to violence).

the authoritarian, illegal regime of General Zia-ul-Haq (Zia) and its impact on democratic institutions and culture in Pakistan. Finally, it will analyze the introduction of and political imperatives behind the promulgation of the blasphemy laws under Zia against the backdrop of his controversial program of Islamization of laws and institutions. It will also highlight and contrast the role played by Islam in Pakistan's early history with its blatant political use in Zia's era. Part III will present a statistical snapshot of the extent and nature of the problem created by the blasphemy laws and a detailed review of one of the most notorious and representative cases to arise in light of these laws. This section will discuss whether the Pakistani courts consider allegedly blasphemous speech that has been challenged under the blasphemy laws as "hate speech" and, if they do, whether they have historically considered the freedom of speech provided under Article 19 of the Pakistani Constitution as an applicable defense in such instances. If the Pakistani courts have indeed invoked Article 19 in blasphemy cases, have they undertaken a cost-benefit analysis of balancing the value of such speech against the public policy imperative of preventing any breach of peace? Part IV will conduct a comparative analysis of the blasphemy laws with the pre-Zia religious offenses under Pakistani criminal law and the fundamental design faults that make the blasphemy laws conducive to abuse. This article will then compare some examples of blasphemy laws in other jurisdictions with those of Pakistan and will further discuss how the blasphemy laws hold up when examined through the lens of the internationally recognized "doctrine of vagueness."

Having conducted an exhaustive review of the history, nature, and impact of the blasphemy laws on rights protection and society in Pakistan, Part V will attempt to place the freedom of speech under the Pakistani Constitution in the context of the balancing of speech *vis-à-vis* other rights and public policy imperatives in some leading international jurisdictions. This analysis will be conducted in order to gauge where Pakistan lies along the free-speech spectrum, ranging from free speech absolutism to total control of speech by an authoritarian state. The purpose is to provide an understanding of how the value assigned to certain rights *vis-à-vis* other rights and public policy imperatives may be a direct function of a country's history, politics, society, and ethos, as well as the structure of its constitutional framework. This part will then

draw upon the analysis done in the first four Parts to reach some conclusions regarding the design defects from which the blasphemy laws suffer, review the judicial approach to the adjudication of blasphemy law cases, and discuss both whether the courts, at any level, regard blasphemous speech as not just a religious offense but also "hate speech" and whether they regard Article 19 to be of any relevance in their adjudication. This Part will also discuss the potential for future abuse of these laws by presenting hypothetical scenarios, while highlighting that overbroad protection of speech presents its own set of issues. Part VI will analyze the death penalty for defilement of the Holy Prophet of Islam's (PBUH) name under one of the blasphemy laws, in the context of the international legal and human rights perspectives on capital punishment. Finally, Part VII will offer conclusions regarding the existing abuse of the blasphemy laws, their potential for future abuse, and suggest reforms for redressing the prevalent situation.

B. THE BLASPHEMY LAWS IN PAKISTAN

Chapter XV of the Pakistan Penal Code (PPC) is titled *Of Offences Relating to Religion*.[7] During the military regime of Zia, spanning the period from 1977 to 1988, five additional clauses[8] were inserted in this chapter through a series of

7. PAK. PEN. CODE, ch. XV [hereinafter PPC].

8. These are Sections 295-B, 295-C, 298-A, 298-B, and 298-C. Their text is reproduced below:

> **295-B** [President's Order 1 of (1982) Ordinance (1 of 1982) dated 18.3.1982]
>
> **Defiling, etc, of Holy Qur'an.** Whoever willfully defiles, damages or desecrates a copy of the Holy Quran or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.
>
> **295-C** [Criminal Law (Amendment) Act, (111 of 1986), S. 2.]
>
> **Use of derogatory remarks, etc; in respect of the Holy Prophet**. 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 Mohammed (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.
>
> **298-A** [Pakistan Penal Code (Second Amendment) Ordinance (XLIV of 1980), S.2]
>
> **Use of derogatory remarks, etc., in respect of holy personages.** Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles

martial law legal amendments. Of these, Section 295-C declares defilement of the name of Muhammad (PBUH), the Prophet of Islam, a criminal offense punishable by death.[9] This particular legal provision is the main focus of this article (hereinafter referred to as "Section 295-C"), although there are several levels of interplay between it and other blasphemy laws which are also analyzed (hereinafter collectively referred to as "the blasphemy

the sacred names of any wife (*Ummul Mumineen*), or members of the family (*Ahle-bait*), of the Holy Prophet (peace be upon him), or any of the righteous caliphs (*Khulafa-e-Raashideen*) or companions (*Sahaaba*) of the Holy Prophet (peace be upon him) shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

298-B [(Prohibition and Punishment) Ordinance XX of 1984]

Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places. (1) Any person of the Quadiani group or the Lahori group (who call themselves 'Ahmadis' or by 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-Muslimeen, 'Sahaabi' or 'Razi Allah Anho';

(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 '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 the 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.

298-C [(Prohibition and Punishment) Ordinance XX of 1984]

Person of Quadiani group, etc., calling himself Muslim or preaching or propagating his faith. Any person of the Quadiani group or the 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 or in any manner whatsoever outrages the religious feelings of 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.

9. PPC ch. XV sec. 295-C.

laws"). The remaining blasphemy laws, except for Section 295-B, largely involve certain distinctive characteristics and dimensions that have an exclusive impact on the Ahmadis,[10] an additional aspect of the problem that will be discussed.

II. THE POLITICS OF ISLAMIZATION DURING THE ZIA REGIME

This section begins by describing the events preceding the imposition of martial law by Zia in order to illustrate the illegitimate credentials of his regime. It then moves on to review the Zia era and to contextualize the enactment of the blasphemy laws within the broader political context and legislative trends of that era in an attempt to argue that the passage of these laws was largely motivated by Zia's aspirations for political entrenchment.[11]

A. POPULIST POLITICS DISPLACED BY AN ILLEGITIMATE REGIME

The emergence of Zulfiqar Ali Bhutto's populist Pakistan People's Party (PPP) on the political scene in the 1970s was a watershed event in Pakistan's political evolution.[12] Considering

10. Ahmadis claim to be a sect of Islam. *See* Lahore Ahmadiyya Movement in Islam vs. Qadiani/Rabwah Jamaat, http://aaiil.org/text/books/others/misc/lahoreahmadiyyamovementislamvsqadianirabwahjamaat.shtml (last visited Mar. 8, 2008). Their basic departure from mainstream Islam, in addition to certain other differences, is that they regard a certain Mirza Ghulam Ahmad of Qadiaan—a religious figure from the mid to late nineteenth century—as a prophet, in contrast to mainstream Muslims who regard Prophet Muhammad (PBUH) as the last prophet of God and thereby a closure to any further prophets being sent by God to guide humanity. *Id.* There are two different schools within the Ahmadi belief system, namely the Lahore Ahmadiyya Movement and the Rabwah Jamaat (also referred to as the Qadianis), which, *inter alia*, disagree over the definition of prophethood and what exactly constitutes finality of prophethood. *Id.* The very assertion by Ahmadis of their being Muslims is the main contention between them and mainstream Muslim scholars and clerics who do not recognize them as Muslims. *Id.* The Ahmadis have also been categorized as non-Muslims under the Pakistani Constitution. *Id.*

11. *See generally* AYESHA JALAL, THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN'S POLITICAL ECONOMY OF DEFENCE 295–328 (Cambridge Univ. Press 1990); HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN 579–708 (Oxford Univ. Press 2001); OMAR NOMAN, THE POLITICAL ECONOMY OF PAKISTAN 1947-85, 117–56 (Kegan Paul Int'l. 1990); NADEEM QASIR, PAKISTAN STUDIES: AN INVESTIGATION INTO THE POLITICAL ECONOMY 1948-1988, 110–28 (Oxford Univ. Press 1991); MOHAMMAD WASEEM, POLITICS AND THE STATE IN PAKISTAN 349–420 (1st ed. Progressive Publishers 1989).

12. Zulfiqar Ali Bhutto emerged on the political arena when he was inducted into President Iskander Mirza's cabinet after Mirza's imposition of martial law on

the country's tumultuous past, commentators give Bhutto credit for undertaking various measures to curb the influence of the hitherto dominant military-bureaucratic oligarchy. They emphasize the gargantuan forces that Bhutto faced.[13] At the same time, they argue that Bhutto's eventual demise resulted from both the legacy of "political structures . . . persistently impaired by the precedent set by previous military rule," as well as his government's failure "to abide by the framework of legitimate civilian rule."[14] Other commentators place the blame on Bhutto for transforming his civilian government into a highly autocratic regime, betraying his charismatic promises to bring about a progressive, participatory government, thereby paving the way for Zia's martial law.[15]

Bhutto's paradoxical personality seems to have characterized his politics, which were distinguished by mass populism that galvanized—for the first time in the country's

October 8, 1958, in cohorts with the Commander-in-Chief of the Army, General Muhammad Ayub Khan. *See* KHAN, *supra* note 11, at 434–37 (noting that Bhutto created an "entirely new" party with support of students and professionals; its "main plank" resembled a "socialist manifesto," including nationalization of industries and banks). Despite the ouster of Mirza on October 27, 1958, the Army Commander-in-Chief and now President, General Khan, retained Bhutto. *Id.* Bhutto held various positions in Ayub's cabinet, including becoming Foreign Minister in 1963, but eventually left the cabinet as a "disillusioned young man." *Id.* at 435. Ayub stepped down on March 25, 1969, succeeded by the Army Commander-in-Chief General Yahya, who immediately placed the country under martial law and assumed the office of President on April 1, 1969. *Id.* at 371. Under Yahya, Pakistan held general elections on December 7, 1970, for the National Assembly, and on December 17, 1970, for the Provincial Assemblies. *Id.* at 381–83. Bhutto's newly formed Pakistan People's Party (PPP) emerged with a large majority in both elections. *Id.* at 381–82. A series of events led to East Pakistan, now Bangladesh, declaring independence on March 25, 1971. *Id.* at 385–404, 406. Following Pakistan's military debacle in the region in the same year, Bhutto succeeded Yahya as President and Chief Martial Law Administrator. *Id.* at 438. Pakistan did not hold new elections for the National Assembly after the division of the country. *Id.* at 448. No elections were held under either the Interim Constitution of 1972 or the Constitution of 1973, which resulted in the same National Assembly, elected prior to the split, remaining intact until August 14, 1977. *Id.* at 509. On August 12, 1973, the National Assembly elected Bhutto as Prime Minister. *Id.* at 510. For further coverage of events leading to Pakistan's breakup in 1971 and Bhutto's emergence as a politician, *see generally id.* at 375–438.

13. *See generally* JALAL, *supra* note 11, at 310–16 (explaining that, following the military's debacles, effecting change required maintaining support of a coalition with extremely varied ideologies and interests while working within the entrenched institutional balance of power by cooperating with the military and the civil bureaucracy).

14. *See* NOMAN, *supra* note 11, at 58.

15. *See generally* LAWRENCE ZIRING, PAKISTAN IN THE TWENTIETH CENTURY: A POLITICAL HISTORY 371–422 (Oxford Univ. Press 1997).

history—huge disadvantaged sections of society.[16] Controversial nationalization policies, strong-arm tactics, and political intolerance, however, characterized his later years.[17] While attempting to keep the military out of politics through the creation of his own civilian militia, Bhutto had the dubious distinction of further institutionalizing the use of the state's coercive arm to quell the growing unrest triggered by his policies and style of governance. This eventually led to increasingly disruptive street agitations against Bhutto, led by a coalition of nine political parties called the Pakistan National Alliance (PNA).[18] These represented, among others: the disgruntled, religiously inclined lower-middle classes, which had always found Bhutto's rhetoric disturbingly secular; the urban-middle classes, which were frustrated with Bhutto's scant regard for civil liberties and inept handling of growing inflation; and regional political movements that felt oppressed by Bhutto's brutal centrist rule.[19] All these disparate oppositions cohesively rallied against Bhutto after what many believed were rigged elections in 1977, giving rise to a grave constitutional crisis.[20] However, just when it seemed that a political solution was within reach, Zia marshaled his troops.[21]

The 1977 martial law that ousted Bhutto's government gave birth to Zia's eleven-year-long authoritarian rule over Pakistan.[22] Most importantly, Zia assumed for himself the power of amending the Constitution. Judges of the superior courts were required to take a loyalty oath under the Provisional Constitutional Order,[23] which amounted to a pledge of allegiance to the new military order, to the exclusion of the earlier constitutional system.[24] At the same time, the oath was used to purge independent-minded judges who refused the oath or were not invited to take it.[25] Bhutto's highly controversial trial and execution, in the face of strong domestic and international protest, is perhaps the most ignominious episode

16. *See* NOMAN, *supra* note 11, at 101–02.
17. *See* KHAN, *supra* note 11, at 522–24.
18. *Id.* at 554.
19. *See* NOMAN, *supra* note 11, at 67–68, 110–11.
20. *Id.*
21. *See* KHAN, *supra* note 11, at 541–79; NOMAN, *supra* note 11, at 118.
22. PROVISIONAL CONSTITUTION ORDER, 1982 art. 16 (Pak.).
23. Provisional Constitution Order, Chief Martial Law Administrator's Order No. 1 of 1981 (Pak.), *reprinted in* PLD 183, 183–91 (1981) (Pak.).
24. *See* KHAN, *supra* note 11, at 648.
25. *Id.* at 648–51.

from Zia's early years.[26] Zia's regime curtailed fundamental rights and political activity on a day-to-day basis, as well as in deep institutional ways. Other prominent fallouts of the Zia era include the militarization of society, the emergence of drug barons as a potent political force, and language-based politics.[27] Throughout this period, Zia received strong support from the United States and other Western powers owing to the Russian invasion of Afghanistan and the resultant jihad that made Zia a necessary ally for the West.[28]

After eight years of rigid clampdown on political activity, Zia reluctantly and only ostensibly relinquished limited powers to a timid new government in 1985.[29] This government was elected on a non-party basis in a strategically depoliticized environment. Most of the country's leading politicians had been marginalized in one way or another—they were banned, constrained, restricted, or compelled to boycott the elections because they had no faith in its freedom and fairness.[30] Zia's martial law is distinct from previous martial laws in one significant respect. While his predecessors drastically and irrevocably brought closure to short periods of constitutional rule through outright abrogation of constitutions, Zia put the only consensus-based constitution of the country—the Constitution of 1973—into cold storage, resurrecting it at a later stage, but with crucial structural changes to enhance executive power.[31] To many who categorize Zia's regime as Machiavellian, the particular set of amendments to the Constitution of 1973 that Zia brought about through the new Assembly epitomizes his stratagems to further entrench his rule.[32]

A careful perusal of the voluminous legislative debates surrounding the introduction of these amendments reveals an

26. *See generally id.* at 596–628. For an account of the events leading up to Bhutto's execution, including the role played by Zia, *see* WASEEM, *supra* note 11, at 358–65.

27. *See* KHAN, *supra* note 11, at 700.

28. *See* WASEEM, *supra* note 11, at 366; Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assembles under the Pakistani Constitution and its Discontents*, 23 ARIZ. J. INT'L & COMP. L. 615, 627–28 (2006) [hereinafter Siddique, *Jurisprudence of Dissolutions*].

29. *See* PAULA R. NEWBERG, JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN 188–90 (Cambridge Univ. Press 1995).

30. *Id.*

31. *See* ZULFIKAR KHALID MALUKA, THE MYTH OF CONSTITUTIONALISM IN PAKISTAN 271–73 (Oxford Univ. Press 1995).

32. *See id.* at 271–74; NEWBERG, *supra* note 29, at 190–91; KHAN, *supra* note 11, at 676–79; Siddique, *Jurisprudence of Dissolutions*, *supra* note 28, at 628.

intriguing story and displays a very strong public indictment of Zia, even as his regime continued. During general discussion on the floor of the Assembly, many of the members conducted an exhaustive, and at times emotional, analysis of Pakistan's constitutional debacles. They came up with a severe critique of Zia's reneging on his promise to hold elections in time, his resultant low credibility, and what they considered to be the various failings of his regime.[33] They highlighted Zia's track record and openly suggested that his proposed amendments to the Constitution, giving the President unprecedented powers to dissolve Assemblies on a subjective evaluation of their performance, were *mala fide* and a façade for the perpetuation of his rule as an overlord over a weak parliamentary system.[34] Others stated categorically that Zia was introducing amendments of an un-Islamic nature to the Constitution, since they attempted to concentrate power in an individual.[35] While reviewing the debate, it is fascinating to see anti-Zia arguments stemming and converging from both secular-democratic and Islamic-democratic perspectives. One thing which clearly emerges is that state-sponsored religion, more than ever, had come to play a significant role in mainstream Pakistani politics.

B. ISLAM AS A POLITICAL SLOGAN AND LEGITIMIZING DEVICE—ISLAMIZATION IN THE LEGISLATIVE ARENA

The scale of Zia's Islamization and his aim to convert Pakistan into a theocracy was unparalleled in Pakistan's political history and can be contrasted with the pluralistic, progressive, and non-theocratic ethos of the Pakistani state apparent in various speeches by Mr. Muhammad Ali Jinnah—the founding father of Pakistan.[36] Immediately after he assumed power, Zia proclaimed his commitment to imbuing the state and all sectors of its citizens' lives with the spirit and, more importantly, the practice of Islam: "Pakistan, which was created in the name of Islam, will continue to survive only if it sticks to Islam. That is why I consider the introduction of the Islamic

33. *See, e.g.*, THE NATIONAL ASSEMBLY OF PAKISTAN DEBATES: OFFICIAL REP. IV, 1964–66 (1985) at 601–03, 1246–50, 1252–53, 1273–76, 1282–83, 1364, 2087–90, 2127–28, 2241–43, 2293, 2295–96, 2370–71, 2389, 2403–04.

34. *Id.* at 1817, 2360–61, 2392–93, 3102.

35. *Id.* at 65–66, 486–88, 1099–100.

36. *See generally* QUAID-I-AZAM MOHAMMED ALI JINNAH: SPEECHES & STATEMENTS 1947-1948, 17–18 (Oxford Univ. Press 1989) [hereinafter JINNAH: SPEECHES & STATEMENTS].

system an essential pre-requisite for the country."[37]

There cannot be a more remarkable contrast than the one between Zia's assertion above and Jinnah's vision of the Pakistani state, as epitomized in the following excerpt from one of his most celebrated speeches:

> You are free; you are free to go to your temples, you are free to go to your mosques or to any other place of worship in the State of Pakistan. You may belong to any religion or caste or creed—that has nothing to do with the business of the State . . . Now, I think we should keep that in front of us as our ideal and you will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State.[38]

There is increasing and widespread consensus that Zia's appeal to religion was a popular legitimacy-gaining ploy[39] and that, almost from the beginning, the Zia regime recognized the tremendous potential of Islamic idiom as a political resource.[40] Zia's recourse to religion in the interests of political expediency was not unprecedented, as examples of the use of religion as a political tool were to be found as far back as the independence movement.[41] Some commentators argue that the rhetoric of the independence movement employed religious terms in an attempt to give at least the appearance of unity to an otherwise

37. *See* KHAN, *supra* note 11, at 579.

38. JINNAH: SPEECHES & STATEMENTS, *supra* note 36, at 28–29 (addressing the Constituent Assembly of Pakistan on his election as the first President of the Constituent Assembly, Aug. 11, 1947).

39. *See* Charles H. Kennedy, *Islamization and Legal Reform in Pakistan*, 1979–1989, 63 PAC. AFF. 62, 72 (1990) [hereinafter Kennedy, *Islamization and Legal Reform*] (arguing that legitimacy remained Zia's perennial challenge and that his Islamization program was partly designed to provide an Islamic justification for his regime); Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1042–47 (1991).

40. *See* NOMAN, *supra* note 11, at 150–56.

41. Muhammad Ali Jinnah, in his address to the Sindh Bar Association on January 25, 1948, urged the Muslims to prepare themselves to "sacrifice and die in order to make Pakistan [a] truly great Islamic State." *See* HINA JILANI, HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT IN PAKISTAN, 1998, PAKISTAN: PROSPECTS FOR DEMOCRACY 41 (Maktaba Jadeed Press 1998). Author Ayesha Jalal finds this a radical departure from Jinnah's other speeches from that time and proposes, as one possible explanation, that the travails of office as Pakistan's first Governor-General may have weakened Jinnah's resolve to take the path of least resistance on matters to do with religion. *See* JALAL, *supra* note 11, at 279–80. The other explanation, she asserts, could be that the definition of an "Islamic State" in Jinnah's personal lexicon was wholly unique. However, even if the truth lies somewhere in between, Jalal is of the view that the conclusion must still be that Jinnah—the secularist—was above all else a hardened politician, ready to take refuge in Islam to survive the cross-fire of provincialism and religious extremism. *Id.*

fragmented people and facilitated state control over a "society with highly localized and fragmented structures of authority."[42] The legacy of using Islam for political purposes has persisted into independent Pakistan. Despite the commitment, by and large, to steer clear of a theocracy, religion— "the leitmotif of an otherwise variegated culture"[43]—has continued to be used as an instrument for engendering unity, garnering support for unpopular regimes, and preventing backlashes that invariably arise against any regime that appears unacceptably un-Islamic.[44]

The groundwork for Zia's appeal to Islam had already been laid in the PNA's opposition to Bhutto.[45] Some commentators argue that the roots of the PNA's demands for an "Islamic revival," implemented in the form of the "Nizam-e-Mustafa" (system of the Prophet Muhammad), lay in various trends in international and domestic politics in the 1970s.[46] The oil boom of 1973 spurred external financing for Islamic political parties in Pakistan, whose socio-economic interests were adversely affected by Bhutto's policies.[47] The fundamentalist Jamaat-i-Islami (JI), in particular, fomented the "religious sensibilities of a people dispirited by military defeat" in the 1971 debacle that resulted in the separation of Pakistan and the creation of Bangladesh, claiming that Pakistan's disintegration was attributable to the "state's lack of Islamic morality."[48] It was thus natural for Zia to capitalize on this ready-made constituency and more importantly to employ its rhetoric: "It was convenient that the use of Islamic symbolism by the three religious constellations in the nine-party [PNA]—the [JI], the [JUI] and the [JUP]—had become the best remembered expression of the movement"[49] and hence the perfect precedent for Zia to declare a return to Islam as an anathema for the "degenerate Pakistani society."[50]

Zia zealously employed his appeal to religion to justify the

42. *See* JALAL, *supra* note 11, at 277–78. For further review of the role of Islam in the independence movement, see NOMAN, *supra* note 11, at 3–26.

43. *See* JALAL, *supra* note 11, at 278.

44. *See generally* JALAL, *supra* note 11, at 277–328; and NOMAN, *supra* note 11, at 144–156.

45. *See* JALAL, *supra* note 11, at 317–20.

46. *Id.* at 318.

47. *Id.* at 317.

48. *Id.*

49. *Id.* at 320. JUI and JUP stand respectively for Jamiat-e-Ulema-e-Islam and the Jamiat-e-Ulema-e-Pakistan. *Id.*

50. *Id.* at 319.

dictatorial authority he had arrogated to himself. He attacked free democratic elections as a secular institution, deemed democracy incompatible with the supremacy of divine law, and declared that political parties were prohibited in an Islamic state, since they promote sectarianism.[51] The unprecedented presidential authority Zia conferred upon himself via the 1985 constitutional amendments was also justified by recourse to religion: since Muslims believed in "one God, one prophet and one book,"[52] being ruled by one man was consistent with their mentality.[53]

A new brand of Islamic obscurantism and, to many, a facile, opportunistic use of religion to legitimize *realpolitik*, brought about the introduction of flawed and highly controversial personal morality and blasphemy laws, the empowerment of courts to declare any law un-Islamic, and the concurrent curtailment of courts' jurisdiction in matters concerning fundamental rights and civil liberties.[54] These steps caused jurisdictional and doctrinal confusions in many areas of law.

The Islamization program inevitably encompassed the Islamization of laws as well as the judiciary. It is significant, therefore, that the Islamic Ideology Council, formed six weeks after the coup and entrusted with the task of preparing an outline of an Islamic state, had a panel on Islamic Law.[55] One of the most decisive steps towards the Islamization of the legal system was the creation of a parallel judicial apparatus, comprising the Federal Shariat Court (FSC) [56] and the Shariat Appellate Bench of the Supreme Court (SAB).[57] The FSC was authorized and mandated to ensure the conformity of all legislation to the Quran and Sunnah[58] and to strike down any law it considered repugnant to either.[59] Moreover, an appeal against a decision of the FSC was possible only to the SAB.[60] The composition of the FSC[61] and the SAB[62] itself cemented the formalization of the role of the "Ulema"—Islamic religious

51. *See* NOMAN, *supra* note 11, at 143–44.
52. *Id.*
53. *Id.*
54. *See* KHAN *supra* note 11, at 627–28, 663–66.
55. *See* NOMAN, *supra* note 11, at 118.
56. *See* CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN art. 203C (1).
57. *Id.* art. 203F (3).
58. *Id.* art. 203D (1).
59. *Id.* art. 203D (3).
60. *Id.* art. 203F (1).
61. *Id.* art. 203C (3A).
62. *Id.* art. 203F (a) & (b).

scholars—in this new graft onto the existing judicial system.[63] The FSC was, at times, used for promoting independent-minded judges of the high courts.[64] The implications of the powers vested in the FSC appear in the analysis of the death penalty for commission of blasphemy under one of the blasphemy laws, discussed later in the article.[65]

Apart from the alterations to the structure of the judicial system and the enactment of the blasphemy laws, the controversial Hudood (Islamic Criminal) laws governing areas of personal morality also formed a very important part of Zia's Islamization program.[66] Significant changes were made to the law, which were vociferously questioned by moderate elements in society, including rights groups and political and legal commentators. They highlighted what they found to be the introduction of cruel and unusual punishments, such as stoning to death, amputation, and whipping. These punishments could be meted out as a result of prosecutions, trials, and convictions under laws that they argued suffered from several substantive and procedural issues, thus creating a huge potential miscarriage of justice. This was quite apart from their fundamental protest that the Hudood laws were inherently *mala fide*, as they had been essentially introduced to support an illegal and unpopular regime, and were discriminatory against

63. Thus the composition of the FSC and SAB in itself assured the adoption of a conservative rather than a modernistic and progressive interpretation of the Quran and Sunnah. Interview with Khawaja Harris Ahmad, Advocate, Supreme Court of Pakistan, in Lahore, Pak. (Aug. 25, 2007) [hereinafter Interview with Khawaja Harris Ahmad].

64. *See* KHAN, *supra* note 11, at 638, 641. In effect, the FSC indirectly performed legislative functions by: (a) reviewing existing laws to see if they were in conformance with the *Sharia* and, if not, declaring in which case such laws ceased to exist after a stipulated time period; and (b) laying down guidelines and formulations to direct what the laws should be, which guidelines and formulations were in turn required to be kept in consideration by the legislature. Thus they played a significant role in the promulgation of various criminal laws under Zia. *See* Interview with Khawaja Harris Ahmad, *supra* note 63.

65. *See infra* Part VI.

66. The Hudood Laws were enacted through as many as four Presidential Ordinances and one Presidential Order, namely, Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), *reprinted* in 31 PLD 1979 Central Statutes 51 (1979); Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979), *reprinted* in 31 PLD 1979 Central Statutes 56 (1979); Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (VI of 1979), *reprinted* in 31 PLD 1979 Central Statutes 44 (1979); Execution of the Punishment of Whipping Ordinance, 1979 (IX of 1979), *reprinted* in 31 PLD 1979 Central Statutes 60 (1979); and, Prohibition (Enforcement of Hadd) Order, 1979 (P.O. 4 of 1979), *reprinted* in 31 PLD 1979 Central Statutes 33 (1979).

the rights of women, and were inherently retrogressive and unrepresentative of the true spirit of Islam.[67] Women's rights groups in Pakistan and abroad in particular have continued to regularly document, analyze, and protest against the various aspects of these laws which they believe to be discriminatory against women. The critique has come both from a doctrinal and ideological perspective,[68] as well as through exhaustive empirical studies of the several problems of these laws. Their criticism targets discriminatory evidentiary rules, as well as the consequence of the equation of rape with adultery. The latter has led to the conversion of complaints of rape into prosecutions for adultery, when the accusers fail to bring sufficient evidence to prove rape due to inadequate investigative and evidentiary mechanisms, quite apart from the incidence of malicious prosecutions.[69]

It is evident, therefore, that the blasphemy laws form a part of a larger pattern in which the subjugation of legislation to political expediency has subverted the processes of justice in

67. *See* Kennedy, *Islamization and Legal Reform*, *supra* note 39; *see also* ASMA JAHANGIR & HINA JILANI, THE HUDOOD ORDINANCES: A DIVINE SANCTION? 18, 21–22, 32–33 (Rhotas Books 1990) (castigating Zia's Islamization of laws as an attempt to consolidate his power, analyzing the adverse impact of these laws and their implementation mechanisms in an equally adverse socio-political and legal environment, and commenting on how extension of religious sanctity to these laws makes any criticism of them tantamount to heresy).

68. *See* Fauzia Gardezi, *Nationalism and State Formation: Women's Struggles and Islamization in Pakistan*, *in* ENGENDERING THE NATION-STATE, 79–80 (Neelam Hussain, Samiya Mumtaz, & Rubina Saigol eds., Simorgh Women's Resource and Publication Centre 1997) (arguing that Zia's Islamization of laws is unprecedented in Pakistan's history and discussing their impact on shaping gender relations and the nature of the State); *see also* Saba Gul Khattak, *Gendered and Violent: Inscribing the Military of the Nation-State*, *in* ENGENDERING THE NATION-STATE 38 (focusing on the impact of the military upon civil society in terms of perpetuating gender ideologies, exploring the specific issues of engendering the nation-state and how the processes of engendering are directly connected to violence and defense even when the language they use is one of "caring," and examining the militarization of civil society and its unquestioned "normal" status *vis-à-vis* democracy); Saadia Toor, *The State, Fundamentalism and Civil Society*, *in* ENGENDERING THE NATION-STATE 111–12 (arguing that Zia's legal interventions continue to have an impact long after his demise because, quite apart from their being an imposition from above by a repressive and authoritarian regime which held power through domination, the effect of Islamization on Pakistani civil and political society has been far greater than usually acknowledged). Other commentators have squarely described the Islamization agenda as one meant to systematically reduce the power and participation of women in the public sphere and such dilution of their role as not just a mere side-effect as such. *See* Anita M. Weiss, *Women's Position in Pakistan: Sociocultural Effects of Islamization*, 25 ASIAN SURV. 863, 876–77 (1985).

69. *See* JAHANGIR & JILANI, *supra* note 67, at 13–15.

Pakistan. This is the first major criticism of the blasphemy laws, which, as has been discussed, are not the product of a pluralistic and participatory democratic discourse. Instead, they are essentially the legislative interventions of a military dictator who adopted a theocratic rhetoric and agenda for clearly self-serving motivations. Therefore, quite apart from their flawed design, which we shall soon discuss, the very genesis and ethos of the blasphemy laws are highly tainted.

III. EXTENT OF THE PROBLEM

It should be stated at the outset that the bulk of the blasphemy cases are decided at the trial court level, and there is no reliable, publicly-available record of the same.[70] There are, however, some publicly-available reports generated by Pakistani and international human rights groups that discuss some of these cases. Some cases, however, have been appealed, and most of these have been reported in Pakistani law reports; the statistics provided below have been calculated from these reported cases. While a review of the reported cases alone does not communicate a complete picture of the frequency of incidence of blasphemy prosecutions, it does convey the complex issues involved and the various defects and shortcomings that characterize both these prosecutions as well as the laws that generate them—in turn conveying a very real sense of how blasphemy laws in Pakistan have been prone to abuse in various instances.

A. GENERAL STATISTICS AND BROAD SPECTRUM OF ABUSE

The information in this section is based on reported case law spanning the period from 1980—when the first Zia-era

70. We contacted the Home Department and the Law Department of the Government of Punjab to access data pertaining to registration of cases under various offenses of the PPC. It transpired that the Government of Punjab had only started compiling such data last year and that the collected data was very generic. More specific to our query, the data did not show the number of cases registered under the various blasphemy provisions but lumped it with data pertaining to other kinds of offenses under the omnibus category of "religious offenses." In other words, there was neither yearly data over a longer period of time for us to do a trend analysis, nor was it provision-specific for us to gauge which provisions were being more frequently invoked compared to others. The non-availability and non-specificity of such data further underlines the low level of importance that the Government has historically attached to the documentation and analysis of, *inter alia*, blasphemy offenses.

amendment was inserted into the PPC—through the first quarter of 2007 (except for Tables A & B, which also include reported cases under pre-Zia religious offenses dating back to 1960). The tables below emerge from an exhaustive review of reported cases over this period, pertaining both to the pre-Zia offenses that form part of the PPC, as well as the blasphemy laws introduced by Zia.

TABLE A: Incidence of Religious Offense Cases from 1960-2007, at Court and Province levels (including both pre-Zia offenses under the Pakistan Penal Code as well as the Blasphemy Laws)

Total No. of Cases		**104**				
High Court Cases	Total number of High Court Cases	Lahore	Karachi	Peshawar	Quetta	Azad J & K (High Court + Shariat Court)
	91	62	21	6	1	1
Cases at the Apex Court Level	Total number of Apex Court Cases	Supreme Court of Pakistan	Federal Shariat Court of Pakistan	Supreme Court of Azad J & K		Shariat Court of Azad J & K
	13	10	1	1		1

TABLE B: Incidence of Pre-Zia Offenses and Blasphemy Cases from 1960-2007, by Code Section[71]

Section	No. of Cases[72]
295	12
295-A	39
295-B	29
295-C	16
295-C & other Chapter 15 provisions	41
296	0
297	5
298	5
298-A	5
298-B	4
298-C	19

TABLE C: Incidence of Pre-Zia Offenses and Blasphemy Cases from 1980-2007, by Year

Year	No. of Cases	Year	No. of Cases	Year	No. of Cases
1980	1	1990	1	2000	8
1981	0	1991	3	2001	6
1982	0	1992	5	2002	5
1983	0	1993	7	2003	8
1984	0	1994	4	2004	4
1985	0	1995	3	2005	6
1986	0	1996	5	2006	8
1987	3	1997	3	2007	3
1988	5	1998	4		
1989	3	1999	2		

TABLE D: Incidence of pre-Zia Offenses and Blasphemy Cases from 1980-2007, by Decade

71. The sections added to Chapter 15, PPC, during the Zia regime (i.e. the blasphemy laws) are highlighted.

72. The total number of cases calculated on the basis of this table is greater than 104, due to the fact that the same case may invoke more than one provision of Chapter 15, PPC, and will therefore be counted multiple times. The table explicitly states the number of times Section 295-C was invoked, along with other provisions, but does not do this for the rest of the Chapter 15, PPC provisions.

Decade	No. of Cases
1980-89	12
1990-99	36
2000-	48

Table B shows that there are forty-one reported cases that involve Section 295-C. Of these forty-one cases, twelve cases involved a decision on the merits of the case, twenty-one cases involved a decision on bail applications, six cases involved applications to quash the proceedings, and two were constitutional petitions that involved adjudication on certain aspects of the blasphemy laws. As far as the religious profile of the accused is concerned, of the forty cases (the constitutional petition before the FSC that challenged the constitutionality of the punishment of "life imprisonment" under Section 295-C on account of it being against the injunctions of Islam is excluded), in fifteen cases the accused were Ahmadis, in five they were Christians, and in the remaining twenty they were Muslims. Therefore, in fifty percent of the cases, the accused were non-Muslims. This is a very large proportion given the otherwise minute size of these religious denominations in Pakistan's population, which is roughly ninety-seven percent Muslim.[73]

Of the thirty-nine cases that involved the adjudication of an actual blasphemy charge and/or conviction (again excluding the two constitutional petitions), sixteen constitute implication exclusively under Section 295-C, and in twenty-three cases the accused were charged in conjunction with some other blasphemy laws. A review of these cases divulges certain disturbing features. Of the twelve cases that were decided on the merits, the accused were acquitted in eleven and in only one was a sentence of life imprisonment confirmed. In all of the eleven cases of acquittal on merits, the appellate courts pointed out weaknesses, inconsistency, and lack of veracity of evidence as a major determinative factor persuading them to return a verdict in favor of the accused. Additionally, in seven of these eleven cases, the court also pointed out various procedural violations and problems with the investigative, prosecutorial, and trial processes that proved instrumental in defeating or weakening

73. *See* POPULATION ASSOCIATION OF PAKISTAN, POPULATION OF PAKISTAN, http://www.pap.org.pk/statistics/population.htm#tabfig-1.1 (last visited Mar. 8, 2008).

the prosecution's case. Very significantly, in eight out of these eleven cases, the courts found *mala fides*—such as personal enmity, religious rivalry, property disputes, etc.—to have played an important role in the implication of the accused, thus destroying or weakening or putting into question the credibility of the prosecution's case.

Of the twenty-one cases involving bail applications, bail was granted in eleven cases, denied in nine cases, and in one case the matter was remanded to the trial court to determine the suitability of granting bail on evidence. Of the six applications to quash the proceedings, applications were allowed in three cases and denied in the others. Even though the merits of the cases were not dealt with in any detail in the bail applications, the courts noted prima facie weakness of evidence in all eleven cases in which bail was granted; process violations, etc., were found in one case, and the possibility of personal vendetta as possible motive for implicating the accused was noted by the courts in three cases. In the three cases where the proceedings were quashed, the courts noted weakness of evidence, procedural violations and weakness of evidence, as well as the possibility of personal enmity as an ulterior motive, respectively. Even in one case where the proceedings were not quashed, the court criticized process delays and incompetent police investigation. Looking collectively at these cases, it turns out that in twenty-four (sixty percent) of the forty cases, weakness and lack of integrity of evidence was an issue; in nine (twenty-two percent) of the forty cases, process violations and/or weaknesses in investigation, prosecution and/or trial processes was an issue; and in twelve (thirty percent) of the forty cases they found *mala fide* intent and vendetta to be a major or important factor in the implication of the accused. This snapshot thus underlines the evidentiary and procedural issues that have plagued blasphemy prosecutions and convictions in Pakistan. It can be logically deduced that for every reported case, there are several unreported ones, which were evidently so weak and baseless that they got dismissed at the trial stage and thus never made it to appeal.

Tables C and D show a definite upward trend in the incidence of blasphemy cases (note that for many cases filed over the years, there is no accessible public data). This is in spite of the fact that the blasphemy laws have increasingly come under criticism both domestically and internationally. This trend emphasizes the fact that rather than receding in the face

of increasing adverse public opinion, the blasphemy laws pose a greater problem today than during the time of Zia, when there was a greater level of official sanction and support for these laws and a political and legislative atmosphere officially infused with an Islamization drive.

This article has essentially focused on the story told by the reported cases. The available secondary sources, however, also tell a highly disturbing story about the actual experiences of scores of accused under the blasphemy laws—those whose cases, though they were reported, do not divulge these details or those which remain unreported. In certain instances, attempts have been made by vigilantes on the lives of those accused under trial, some of whom have lost their lives; many have been maltreated and abused while under trial and/or in custody, and others have received serious threats and/or have had to relocate from their homes or even go into exile outside Pakistan, even though they were ultimately acquitted by the Pakistani judicial system.[74] That is a severe indictment of the laws as they stand. The statistics tell a compelling story. The following case-study further humanizes it.

B. SALAMAT MASIH AND ANOTHER VERSUS THE STATE

One of the most highly publicized and notorious blasphemy cases in Pakistan is *Salamat Masih v. the State*,[75] which is highly demonstrative of how Section 295-C has been abused and the various defects from which it suffers. The case involved Salamat Masih—a thirteen-year-old Christian boy sentenced to death for blasphemy in 1995 for scrawling offensive words on the wall of a mosque. Of the two co-accused—Rehmat Masih and Manzoor Masih—the latter was murdered by religious extremists during trial. Salamat and Rehmat were sentenced to death on February 9, 1995 by a Sessions Court in Lahore but were successful in their appeal to the Lahore High Court.[76] The

74. *See* Naeem Shakir, *The Impact of Shari'ah Laws on Minorities in Pakistan*, PAK. CHRISTIAN POST, *available at* http://www.pakistanchristianpost.com/erdetails.php?id=47; Press Release, Amnesty International, Pakistan: Blasphemy Acquittal Welcome but Law Must Be Amended (Aug. 16, 2002), *available at* http://web.amnesty.org/library/Index/ENGASA330262002?open&of=ENG-PAK; HUMAN RIGHTS COMM'N OF PAK., STATE OF HUMAN RIGHTS IN 2004, 117 [hereinafter STATE OF HUMAN RIGHTS IN 2004]; CTR. FOR LEGAL AID, ASSISTANCE AND SETTLEMENT, BLASPHEMY CASE LIST (2004) http://www.claasfamily.org/bcl.htm (last visited, Mar. 8, 2008).

75. Salamat Masih v. State, (1995) 28 P.Cr.L.J. 811 (Lahore) (Pak.).

76. *Id.*; AZIZ SIDDIQUI, *Law of the Mullah*, NEWSLINE, Feb. 1995, at 60; HUMAN

High Court judgment[77] is a stinging critique of the Sessions Court judgment, which was held to display a gross disregard of evidentiary requirements, as well as being based on tenuous grounds.

Charges against the accused were registered in 1993 at the complaint of Hafiz Muhammad Fazl-e-Haq, who claimed to be a khateeb,[78] and the Imam[79] at a mosque in a village in central Punjab.[80] The complainant alleged that about a year prior to the registration of the case, "objectionable words about the Holy Prophet" were discovered scrawled in the toilet of this mosque.[81] After some time, a piece of paper containing "derogatory words about the Holy Prophet" was thrown at the door of the mosque; later, similar pieces of paper were thrown near the area designated for ablutions.[82] Additionally, the complainant alleged that "objectionable words" were also written on a poster displaying the "Kalima Tayyaba."[83] On the evening of May 9, 1993, the complainant and the "lambardar"[84] allegedly saw the three accused writing words "derogatory to [the Holy Prophet]" as well as "other religiously provocative words" on the wall of the mosque, in addition to other places, with a piece of brick.[85] According to the complainant, he and the lambardar attempted to apprehend the accused, but they ran away, whereupon the complainant and other witnesses "immediately wiped out these objectionable words."[86] The complainant produced the material containing the objectionable writings before the police (claimed to have kept in his possession for a year), which took two pieces of paper into its possession.[87]

The investigation was conducted by Sub-Inspector Aman Ullah of the Police,[88] who arrested Salamat and Manzoor from

RIGHTS COMM'N OF PAK., STATE OF HUMAN RIGHTS IN 1993, 40–41 [hereinafter STATE OF HUMAN RIGHTS IN 1993]; HUMAN RIGHTS COMM'N OF PAK., STATE OF HUMAN RIGHTS IN 1995, 105–07 [hereinafter STATE OF HUMAN RIGHTS IN 1995].

77. *Salamat Masih*, 28 P.Cr.L.J. at 811.

78. The person who gives sermons at a mosque.

79. Prayer leader.

80. *Salamat Masih*, 28 P.Cr.L.J. at 814.

81. *Id.*

82. *Id.*

83. The Muslim creed: "There is no God but Allah and Muhammad is the Prophet of Allah." *Id.*

84. The village headman. *Id.*

85. *Salamat Masih*, 28 P.Cr.L.J. at 814.

86. *Id.*

87. *Id.*

88. He also appeared as the prosecution's fourth witness. *Id.*

their houses on the same day that a case was registered against them. Rehmat Masih voluntarily surrendered five days later.[89] After completion of the investigation, the "challan"[90] was submitted to the court, and the trial of the accused before the Additional Sessions Judge of Lahore began. On November 8, 1993, Salamat Masih was granted bail, while on January 12, 1994 the other two accused were also released on bail. Their case was then shifted from Gujranwala, where they belonged, to Lahore, due to security concerns.[91] On April 5, 1994, a hearing of the case was held in the District and Sessions Court. Upon leaving the courtroom, the accused—along with an escort—were attacked by three gunmen. While Salamat Masih and Rehmat Masih were seriously injured, Manzoor Masih died on the spot.[92]

Salamat and Rehmat's trial continued. Of the four prosecution witnesses, the first—the complainant—stated under oath that in view of the danger to his life, he no longer wished to pursue the case.[93] Despite this, the trial court had held that the material in the First Information Report (hereinafter F.I.R) initially registered by the complainant would continue to be treated as evidence against the accused.[94] The High Court, however, declared this witness "an unreliable witness" and rejected his testimony.[95]

The prosecution's second witness testified that as he was emerging from the mosque with the complainant and the third witness, he saw Salamat Masih writing something on the wall with a stone, while the two co-accused stood nearby.[96] He

89. *Salamat Masih*, 28 P.Cr.L.J. at 814.

90. Police Report (report containing findings of the police investigation).

91. The trial had started receiving a lot of attention both from local public and religious parties as well as foreign correspondents and observers. *See* Interview with Khawaja Harris Ahmad, *supra* note 63.

92. STATE OF HUMAN RIGHTS IN 1995, *supra* note 76, at 105; AMNESTY INT'L, PAK.: USE AND ABUSE OF BLASPHEMY LAWS (1994), *available at* http://web.amnesty.org/library/index/ENGASA330081994.

93. *Salamat Masih*, 28 P.Cr.L.J. at 814–15.

94. *Id.* at 817.

95. *Id.* at 824. The High Court noted that given that the prosecution's first witness had withdrawn his testimony while under oath, his admission under cross-examination that the event that he had alleged as having taken place, had indeed taken place, was of no worth and did not advance the prosecution's case in any manner. The fact that he had withdrawn the case once and then subsequently applied to be allowed to pursue the case (which application was allowed in the interest of justice) showed that he was an unreliable witness. Other factors such as failure in reporting the alleged incident for two days, and holding onto the blasphemous chits for a year, further confirmed his unreliability. *Id.*

96. *Id.* at 815.

claimed that he could not "express those words keeping in view the sanctity."[97] He also claimed that "some unknown persons used to throw Chits in the toilets," but, as he and the other respondents were unaware of their identity, they did not take any action.[98] During cross-examination, this witness admitted that the first time he saw the two pieces of paper obtained from the complainant was two days after the registration of the case.[99] He also admitted that Rehmat Masih was a resident of a village one-and-a-half miles from his own, where the alleged incident occurred.[100]

The prosecution's third witness repeated his predecessor's story, also claiming to be unable to repeat before the court the allegedly offensive words on the wall.[101] However, whereas the second witness claimed that only Salamat was writing on the wall, the third claimed to have seen all three accused writing on the walls with stones.[102] According to the High Court, this was a "serious contradictions [*sic*] which reflects on the veracity of these witnesses and makes their statements doubtful."[103] Moreover, the court also questioned the second witness's statement that five or six offensive words were written on the wall by noting: "if his statement is read in consonance with the statement of [the third witness] it becomes unbelievable and ridiculous" that despite all three accused writing on the wall, the words collectively amounted to only five or six.[104]

Asma Jahangir, counsel for the appellants, argued that the prosecution's case and trial court verdict suffered from several serious flaws. She elaborated that since the first witness had stated on oath to the trial court that he did not wish to pursue the case and had been declared a hostile witness on grounds of intentionally suppressing the truth, his statement, which comprised the F.I.R, lost all evidentiary value. In addition, all

97. *Id.*
98. *Id.*
99. *Id.* The prosecution's third witness admitted the same. *Id.* at 816.
100. *Id.* at 815.
101. *Id.* at 816. This raises a unique problem; can any Muslim ever repeat aloud any blasphemous words about the Holy Prophet, even when required by a court? If not, can any oral blasphemy be proceeded against if requisite testimony cannot be adduced from witnesses? What would then be the quantum of evidence required in such cases? Similarly, a problem would also always arise with any written words that have been subsequently erased or removed, if witnesses cannot repeat those words before a court. *See* Interview with Khawaja Harris Ahmad, *supra* note 63.
102. *Salamat Masih*, 28 P.Cr.L.J. at 816.
103. *Id.* at 825.
104. *Id.*

that the second and third prosecution witnesses posited was that something had been written by the accused on the wall, while saying nothing about the derogatory/defamatory nature of the writing. She further noted a glaring contradiction between the accounts of these two witnesses. According to her, it was highly noteworthy that the alleged derogatory words on the wall of the mosque were wiped out immediately by the witnesses and were not reproduced and stated in Court by the witnesses—consequently, only the impressions and opinions of the witnesses were made the basis of the conviction. She maintained that the prosecution had failed to show any nexus between the appellants and the objectionable pieces of paper allegedly found by the complainant a year before registration of the current complaint; and the fact that the chits had been kept by one of the prosecutors for a whole year and produced for the first time on the date the F.I.R. was registered undermined the credibility of the prosecution's case. At the same time, she drew the court's attention to the fact that the other prosecution witnesses had admitted under oath to having never seen the chits before that date, concluding that it was highly suspicious that the F.I.R. had been registered two days after the accused were allegedly seen scrawling blasphemous writings on the mosque wall.[105]

Of the eight amicus curiae requested by the court to render assistance in the case, seven argued that the prosecution's case was unsupported by evidence and resulted in baseless convictions.[106] They also criticized the negligence of the lower judicial authorities in delivering a guilty verdict on such tenuous grounds.[107] The view of one of the *amicus curiae*, Khawaja Sultan Ahmad, is quoted below:

> [T]he investigating agency, the Public Prosecutor and the trial Court . . . failed to perform their respective duties in a case based on a serious charge. The police did not take remand of the accused and [did] not [try] to take their samples of handwriting to compare the same with the writing on the chits. The Court framed erroneous charge[s] with regard to the recovery of [the] chits . . . . Deputy District Attorney failed to perform his duty, [and] did not confront the prosecution witnesses with each fact of the F.I.R. . . . . The P.Ws. did not state anything regarding any word defiling the sacred name of the Holy Prophet (peace be upon him) and despite that the learned trial Court

105. *Id.* at 817–18.
106. *Id.* at 818–23.
107. *Id.*

convicted the appellants.[108]

In light of all the above, the High Court declared the prosecution's witnesses as having "bitterly failed to prove the case of the prosecution"[109] and acquitted the appellants forthwith.

The High Court judgment also alluded to the possibility of a personal vendetta having motivated the charges, though it did not state this explicitly. The judge merely noted that the defense had alleged a "background of strained relations between [the prosecution's second witness] on one side, and Manzoor Masih and Salamat Masih on the other,"[110] as well as a background of previous enmity between the accused and the third witness, even though the latter denied it.[111] In his statement, Salamat Masih denied the allegations against him, claiming that they were motivated by a quarrel between him and the nephew of the prosecution's second witness; Salamat also claimed enmity with that prosecution witness regarding the theft of a tree.[112] Rehmat Masih also pleaded personal enmity as a motive for his implication in the case, claiming that he had collected the signatures of the Christian community and lodged

108. *Id.* at 823. Another important point raised by the amicus curiae Khawaja Sultan Ahmad was that a perusal of the chits showed that after the name of the Holy Prophet, a letter of the Urdu alphabet (which denotes in commonly used abbreviated form the salutation "May peace be upon him") had been added which clearly divulged that the writing was not only that of a Muslim but indeed of an educated and experienced person. Hence, it could not be ruled out that the chits had been fabricated by a saboteur in order to frame the accused. *Id.* It thus appears from this as well as other examples, that the credibility of witnesses for blasphemy cases tends to be suspect and the evidentiary content weak—yet, the same witnesses and evidentiary content form the basis for death sentences by lower courts. In light of this, a pre-trial investigation of witnesses was proposed by human rights activists, to the effect that prior to the registration of an F.I.R., the witnesses quoted in the complainant's application be investigated. The justification for this proposal was found in Islamic law, since that is the purported basis for the blasphemy law—as mandated by a Federal Shariat Court judgment dated October 30, 1990, the offense of blasphemy falls within the purview of "hadd" [Islamic] punishments. Taking this as their premise (though not necessarily agreeing with it), the proponents of the pre-trial investigation argued that the Quran ordains a pre-trial credibility verification of witnesses, called "*tazkiat-us-shaoor*" for all offenses declared within the purview of "hadd" punishments—since blasphemy was declared a "hadd" offense too, it merited the same pre-trial investigation. Interview with Mr. Abid Hassan Minto, Senior Advocate, Supreme Court of Pakistan, in Lahore, Pak. (Aug. 20, 2007) [hereinafter Interview with Abid Hassan Minto].

109. *Salamat Masih*, 28 P.Cr.L.J. at 826.

110. *Id.* at 825.

111. *Id.*

112. *Id.* at 817

a report against a local teacher who had refused to teach Christian children. According to Rehmat, the teacher had "threatened to teach him a lesson at [a] proper time"[113] and had formed a group against him.[114] Rehmat claimed that the responsibility for Manzoor Masih's murder and his own injuries lay with these people.[115]

While not determinative of whether personal enmity did indeed motivate the charges, these statements at least imply the possibility that it did, especially in light of the weakness of the prosecution case. Moreover, the fact that the High Court incorporated these considerations in the rationale for its judgment can be seen as lending further credibility to the appellants' claims.

A division bench of the Lahore High Court heard the case over seven days amid violent demonstrations and barrages of threats to the accused, the judges, and the defense lawyers by gangs of zealots collected on court premises and on the Mall Road—the central and most prominent boulevard in the provincial capital of Lahore where the High Court for the province of Punjab is situated.[116] Apart from the slogans demanding death for the accused that were being vociferously raised during the siege of the court, Salamat and Rehmat Masih continued to receive individual death threats. A religious organization, "Jamaat Alh-e-Sunnat," announced a prize of a million rupees for the killing of Salamat and Rehmat, while another, "Muttahida Ulema Council" of Sargodha, offered 300,000 rupees for the same task.[117] In the face of these threats, as well as the earlier attack, it was clear that Salamat and Rehmat could not continue to live in Pakistan even if they were acquitted; their families—as well as twenty other Christian families of the locality, village Ratta Dhotran in Gujranwala—had already fled their village. Upon their acquittal by the

113. *Id.* at 816.

114. *Id.* at 817. Rehmat Masih also alleged that the teacher had protested that a loudspeaker that Rehmat Masih had had installed in the local church disturbed his students. The teacher had allegedly removed the loud speaker even though, according to Rehmat Masih, it had been installed after obtaining official permission and in consultation with the respectable elders of the village and was kept closed for the duration of Muslim prayers, so as to not cause any disturbance. Rehmat Masih also said that not only was Salamat Masih not his relative, he was not even acquainted with him. *Id.* at 816–17.

115. *Id.* at 817.

116. STATE OF HUMAN RIGHTS IN 1995, *supra* note 76, at 105.

117. At the current exchange rate this amounts to roughly U.S. $16,666 and U.S. $5,000, respectively.

Lahore High Court on February 23, 1995, Salamat and Rehmat Masih fled to Germany, where they had received an offer of asylum.

The outcry did not end with their departure. The government, defense counsel, and churches were all accused of complicity, and street rioting continued. A National Solidarity Council was established, bringing together twenty-one religious parties; it issued angry statements and organized a day-long, countrywide strike. With the accused beyond their reach, the prosecution and its allies directed their outrage at the defense counsel and the panel of judges. Even during the trial, the defense attorney's car was vandalized and her driver manhandled, resulting in police protection. The subsequent attempts at victimization were far more serious—four attempts were made on her, her sister Hina Jilani (another prominent human rights lawyer), and their family's lives. In the most serious of the four, seven members of a religious organization broke into Hina Jilani's house early in the morning of October 19, 1995, equipped with a "haversack filled with instruments good for shooting, slaying and strangulation."[118] Fortunately, the police were alerted, and the house was surrounded. The culprits, however, escaped, and even though four were later arrested, the principal culprit remains unapprehended.

Meanwhile, Justice Arif Iqbal Bhatti, the senior member of the Lahore High Court bench that acquitted Salamat and Rehmat Masih, continued to receive death threats. On October 10, 1997, an individual posing as a client gained access to Justice Bhatti's chambers, where the former judge practiced law subsequent to his retirement. The individual opened fire at Mr. Bhatti, who was hit by five bullets, sustaining injuries to his face and stomach. The assailant reportedly left the office quite calm, and local police allegedly reached the scene more than ninety minutes after the occurrence. Mr. Bhatti's younger brother, who had chambers close by, was immediately informed of the shooting and rushed to Mr. Bhatti's office. Mr. Bhatti was alive but critically injured. It is said that due to security arrangements pertaining to a visit from Queen Elizabeth, Mr. Bhatti was unable to reach hospital on time and died en route.[119]

118. Aziz Siddiqui, *Terror Remains Untamed*, DAWN WIRE SERVICE, Oct. 25, 1997, *available* at http://www.lib.virginia.edu/area-studies/SouthAsia/SAserials/Dawn/1997/25Oct97.html.

119. Sajid Iqbal, *Former LHC Judge Bhatti Gunned Down in Lahore*, DAWN WIRE SERVICE, Oct. 11, 1997, at 1.

Mr. Bhatti's family claimed that the murder was a result of the acquittal granted to Salamat and Rehmat Masih by the Lahore High Court division bench in 1995. A source in the police department quoted Justice Bhatti's family as accusing unidentified activists of a religious party for involvement in the murder, claiming that after the announcement of the verdict in the Masih case, Mr. Bhatti had been receiving threatening and abusive calls from some activists of that religious organization.[120]

In many ways, the above case epitomizes the various defects and shortcomings that plague the blasphemy laws and the adjudication of these cases in Pakistan. Quite apart from the design flaws (discussed in detail in the following section), procedural issues, the propensity for misuse of blasphemy laws for *mala fide* purposes, the social and political pressures that impede the objective and fair adjudication of blasphemy cases, and the vulnerability of the accused, especially if they belong to a minority, further confound and aggravate the situation. These are complex and intertwined aspects of the larger problem, though this article will focus on the design flaws, while occasionally touching upon some of the additional aforementioned factors during the course of the discussion.

IV. ORIGINS OF CHAPTER 15 OF THE PAKISTAN PENAL CODE: A COMPARATIVE PERSPECTIVE

In order to more fully understand the import and ramifications of the blasphemy laws, it is necessary to conduct a comparative analysis of Chapter 15 of the PPC— "Of Offences Relating to Religion"—prior to and subsequent to Zia's amendments introducing the blasphemy laws.

A. THE PURPOSE BEHIND CHAPTER 15: PRE AND POST-ZIA VERSIONS - FROM PROTECTING ALL RELIGIONS TO PROTECTING ONE

The origins of this chapter lie in the Indian Penal Code (XLV of 1860)[121] enacted for the Indian subcontinent in October 1860 by the British colonial government.[122] Before the

120. *Id.*

121. INDIA PEN. CODE, Act XLV of 1860 (Krishen Lal & Co. Law Publishers, 1929) [hereinafter INDIA PEN. CODE].

122. *See* MUHAMMAD MAZHAR HASSAN NIZAMI, THE PAKISTAN PENAL CODE WITH

enactment of this code, the three Presidency towns of Calcutta, Bombay and Madras fell within the purview of English Criminal Law, while large portions of the rest of the country were subject to the Mohammedan (Islamic) Criminal Law.[123] In light of the fact that the blasphemy laws introduced by Zia in the PPC during his regime formed part of a larger aim to "Islamize" the country's judicial system, the following observations made by the Indian Law Commission—formed in 1837 and responsible for drafting the Indian Penal Code[124]—provide an interesting contrast:

> [I]t appears to us that none of the systems of penal law established in British India has any claim to our attention except what it may derive from its own intrinsic excellence. All those systems are foreign. All were introduced by conquerors differing in race, manners, language and religion from the great mass of people. The criminal law of the Hindus was long ago superseded, throughout the greater part of the territories now subject to the Company, by that of the Mohammedans, which is certainly the last system of criminal law which an enlightened and humane Government would be disposed to receive.[125]

Thus one basis for the introduction of the Indian Penal Code was to replace what the British considered an unsuitable system of Islamic (Mohammedan) law. The fact that the Indian Penal Code contained a chapter titled "Of Offences Relating to Religion" (Chapter XV) (hereinafter "Chapter 15")[126] must therefore be explained with reference to factors other than the retention of components of Mohammedan law. In the preface to Chapter 15, the Law Commissioners outlined their main motive for its inclusion in the Indian Penal Code:

> The principle on which this chapter has been framed is a principle on which it would be desirable that all governments should act but from which the British Government in India cannot depart without risking the dissolution of society; it is this, that every man should be suffered to profess his own religion, and that no man should be suffered to insult the religion of another.[127]

The Law Commissioners thus attach a greater importance to protecting religious sensibilities in British India than elsewhere. Whereas it is merely "desirable" for all governments to follow this principle, it is stated that the British Government

COMMENTARY 269 (All Pakistan Legal Decisions 1974).

123. *Id.*
124. *Id.*
125. *Id.* at a2.
126. INDIA PEN. CODE, *supra* note 121.
127. *Id.* at 1322.

in India cannot depart from it "without risking the dissolution of society." The obvious reason for this difference appears to be the fact that the British colonial government was faced with the challenge of establishing its writ over a religiously heterogeneous society, comprising, *inter alia*, Muslims, Hindus, Christians, Jains, Buddhists, Parsis, and Sikhs. Therefore, it would appear that the purpose of Chapter 15 was the maintenance of order in a multi-religious society and the containment of attacks targeted at *any* religion. Moreover, given the fact that Muslims formed a minority in the Indian subcontinent prior to its partition, it appears plausible that part of the motivation for the inclusion of this chapter was the protection of the religious rights of minorities. In a recent Lahore High Court judgment, Justice Ali Nawaz Chohan corroborated this viewpoint: "Historically speaking, [these laws were] enacted by the British to protect the religious sentiments of the Muslim minorities in the subcontinent before partition against the Hindu majority."[128]

The blasphemy laws added to Chapter 15 during the Zia era represent the antithesis of both the possible motivations for the inclusion of Chapter 15 in its original form in the Indian Penal Code—i.e. the maintenance of order in a multi-religious society necessitating protection of *each* creed from attack on its beliefs and practices, as well as the protection of minority faiths. The underlying motivation for the blasphemy laws is the protection of Islam—the religion of the overwhelming majority in Pakistan—as they pertain only to offenses against Islam, as opposed to applying generally to all religions as did the original clauses in Chapter 15. Furthermore, they lack any nexus with the prerequisite of a causation of any breach of peace, and in that sense are strict liability offenses.

Consider the language of the original sections in Chapter 15 of the Indian Penal Code:

> **295**
>
> Whoever destroys, damages or defiles *any place of worship, or any object held sacred by any class of persons* with the intention of thereby *insulting the religion of any class of persons* or with the knowledge that *any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion*, shall be punished with imprisonment of either description for a term which may extend to two

128. Muhammad Mahboob v. State, (2002) 54 P.L.D. 587, 597 (Lahore) (Pak.).

> years, or with fine, or with both.[129]
>
> **298**
>
> Whoever, with the deliberate intention of *wounding the religious feelings of any person*, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both. [130]

In 1927, Section 295-A was inserted into the PPC, by the Criminal Law Amendment Act of (XXV of 1927):

> **295-A**
>
> Whoever, with deliberate and malicious intention of outraging *the religious feelings of any class of His Majesty's subjects*,[131] by words, either spoken or written, or by visible representations, *insults or attempts to insult the religion or the religious beliefs of that class*, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[132]

The italicized phrases clearly indicate the generic application of Sections 295, 298, and 295-A to all religions. The blasphemy laws, as indicated earlier, however, pertain specifically to the protection of Islam. Section 295-B, for instance, pertains only to the defilement of the Holy Quran, the Islamic religious text;[133] Section 295-C pertains exclusively to derogatory remarks against Muhammad (PBUH), the prophet of Islam,[134] whereas Section 298-A pertains only to defilement of Islamic holy personages.[135] Sections 298-B and 298-C, also added during the Zia regime, pertain specifically to Ahmadis, a religious sect that considers itself Muslim but is constitutionally declared beyond the fold of Islam. Section 298-B makes it a criminal offense for Ahmadis to use Muslim nomenclature for their holy personages, as well as to refer to their call for congregational prayers as "Azan," the term Muslims use for their call to prayers. Section 298-C makes it a criminal offense for an Ahmadi to directly or indirectly profess himself as a

129. *See* INDIA PEN. CODE, *supra* note 121, at 1324 (emphasis added).
130. *Id.* at 1341–42 (emphasis added).
131. Replaced with "the citizens of Pakistan" by Adaptation Order 1961, art. 2 (w.e.f. Mar. 23, 1956).
132. *See* INDIA PEN. CODE, *supra* note 121, at 1328 (emphasis added).
133. For the text of Section 295-B, see *supra* note 8.
134. For the text of Section 295-C, see *supra* note 8.
135. For the text of Section 298-A, see *supra* note 8.

Muslim and, *inter alia*, to "in any manner whatsoever outrage the [religious] feelings of Muslims."[136]

The blasphemy proceedings against Ahmadis make apparent the wide-ranging implications of these sections for the freedom of expression and religion of Ahmadis in Pakistan. Though this is a complex area deserving of a separate, exhaustive study, from this cursory review it emerges that given the Ahmadis' consideration of themselves as Muslim and the fact that they share a variety of religious terms and practices with Muslims, the effect of Sections 298-B and 298-C is to make the very act of publicly discussing or practicing the Ahmadi faith a criminal offense.

It is also important to mention here certain arguments that have been raised recently to broaden the ambit of Section 295-C in order to incorporate blasphemy against other prophets as an offense.[137] While this could potentially address the criticism that Section 295-C is religiously discriminatory in terms of its protective ambit, it has the potential of further increasing the incidence of blasphemy charges, given the many flaws in the law.

B. REQUIREMENT OF INTENT

1. The Pre-Zia Offenses: Intent a Vital Prerequisite

Another fundamental difference between the original sections of Chapter 15 of the Indian Penal Code and the blasphemy laws is the elimination of any requirement of intent, deliberate or malicious.[138] The 1860 and 1927 versions of the Indian Penal Code greatly emphasize the intention of the

136. For the text of Section 298-B & 298-C, see *supra* note 8.

137. *See* Riaz Ahmad v. State, (1994) 46 P.L.D. 485, 494–95 (Lahore) (Pak.) where some Christian parties supported Section 295-C as it maintained peace in society by upholding the sanctity of the name of the Holy Prophet (PBUH). While criticizing human rights organizations which opposed Section 295-C, they said that Section 295-C was not in violation of any human rights and further requested that it be amended so that those defiling the name of Jesus Christ could also be similarly punished. This, they said, would bring Section 295-C in line with Section 295-A which protected the religious feelings of all religions. The Court cited the earlier FSC case of Muhammad Ismail Qureshi, where it had been observed that a clause be added to Section 295-C to make defamation of other prophets, an offense with the same punishment. The Court then observed that this was a matter under active consideration of the Government. *See* Muhammad Ismail Qureshi v. Pakistan, (1991) 43 P.L.D. 10 (Fed. Shariat Ct.) (Pak.).

138. *See* INDIA PEN. CODE, *supra* note 121.

accused, as evidenced by their inclusion of the following requirements in the relevant provisions: "with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion"[139] in Section 295; "with the deliberate and malicious intention of outraging the religious feelings of any class of His Majesty's subjects" in Section 295-A;[140] and "with the deliberate intention of wounding the religious feelings of any person" in Section 298.[141]

Moreover, it is evident from the Law Commissioners' commentaries on the Indian Penal Code that proof of intent was a *prerequisite* to the application of these sections. Commenting on Section 295, for instance, the Law Commissioners state that "it must be distinctly proved that there was an intention on the part of the accused to insult the religion of a class of persons,"[142] and that "where there is no intention to wound the religious susceptibilities there will be no offence."[143] Similarly, the Law Commissioners' commentary on Section 298 contains a detailed exposition of the intent requirement.[144] It distinguishes between "a deliberate intention of wounding"[145] and one "conceived on the sudden in the course of discussion"[146] and holds that only the former makes the defendant liable to conviction. It suggests that a deliberate, premeditated intention to wound could be inferred if "a party were to force himself upon the attention of another, addressing to him, an involuntary hearer, an insulting invective against his religion,"[147] but not if it was apparent that the party uttered the words "on the spur of the occasion, in good faith, simply to further his argument—that he did not take advantage of the occasion to utter them in pursuance of a deliberate purpose to offend,"[148] even if he were "conscious at the

139. *Id.* at 1324.
140. *Id.* at 1328.
141. *Id.* at 1341.
142. *See* NIZAMI, *supra* note 122, at 270 ("Under this section it must be distinctly proved that there was an intention on the part of the accused to insult the religion of a class of persons. This intention could be ascertained from the nature of the act done. Where there is no intention to wound the religious susceptibilities there will be no offence.")
143. *Id.*
144. *Id.* at 274.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*

moment of uttering them that they were likely to wound the feelings of his auditors."[149]

2. Legal Interpretations: Judicial Emphasis on the Intent Requirement in the Pre-Blasphemy Laws Era

The important case of *Punjab Religious Book Society, Lahore v. State* contains a detailed exposition of the intent requirement *vis-à-vis* Section 295-A.[150] The Book Society petitioned to have set aside an order of the Home Department, declaring that a book published by the society contained matter "calculated to outrage the religious feelings of the Muslims of Pakistan and publication of which is punishable under section 295-A of the Pakistan Penal Code." The book—titled "Mizan-ul-Haq"[151] —was a comparison between Islam and Christianity, and the court observed that:

> [A]s was but to be expected the object of the author, who was a Christian, was to show that Christianity was a true religion and Islam was not. The author did not deny that his object was to show the superiority of Christianity over Islam, but he has said at more places than one that he had no intention of injuring the feelings of Muslims whom at places he called his brethren.[152]

The reasoning underlying the court's finding that Section 295-A did not apply to the allegedly offensive material stems from its interpretation of the "deliberate and malicious intent" requirement in Section 295-A. In a paragraph that illustrates the liberality of the court in the early post-independence era, the Lahore High Court noted that:

> [T]he intention contemplated by Section 295-A of the [PPC] is not just the ordinary intention that one finds mentioned with regard to almost all other offences made punishable by that Code but a deliberate and malicious intention to do the thing mentioned therein. . . . [I]n section 295-A . . . the Legislature hedged "intention" with "deliberately" and "maliciously" because it was providing punishment for insulting or attempting to insult the religion or religious beliefs of a person and it is well-known that when followers of a religion try to show that their religion is the best in the world, words which will not be palatable to

149. *Id.*

150. The Punjab Religious Book Society v. State, (1960) 12 P.L.D. 629 (Lahore) (Pak.). *See also* Muhammad Khalil v. State, (1962) 13 P.L.D. 850 (Lahore) (Pak.). This case deals with similar facts, and confirms the interpretation of the Section 295-A intent requirement employed by the court in the *Punjab Religious Book Society*.

151. Literal translation: Balance of Truth.

152. *Punjab Religious Book Society*, 12 P.L.D. at 631.

> the followers of other religions are difficult to avoid and if it were not made necessary that the intention to do the things mentioned in the section should be deliberate and malicious the door would have been closed on all religious discussions.[153]

The court noted further that the "laws of Pakistan, like those of every other civilized country, do not forbid religious discussions and preaching," and, therefore, if "a person engaged in a religious discussion is merely attempting to show that the religion he is advocating is the best in the world, he is not doing anything to which the law takes exception."[154] The court, in fact, went as far as to say that, in the attempt to establish the superiority of one religion over another:

> [T]hings may be said or written which will outrage the religious feelings of followers of other religions. When a person does that, the law will presume that he intended to insult the religious beliefs of the followers of other religions. But even so the ingredients of Section 295-A of the [PPC] will not have been satisfied because they can be satisfied only if it is established that the intention to insult the religious beliefs was deliberate and malicious.[155]

The presumption that the intention to outrage religious feelings was deliberate and malicious would be raised only when the conduct objected to "is extremely offensive and has no reliable source to justify its acceptance as correct" or when it indicates that the "argument in favour of one religion has sunk to the level of abuse to another."[156]

3. Absence of the Intent Requirement in Blasphemy Laws: Judicial Approaches and Resultant Injustices

This degree of emphasis on the intent requirement represents a direct contrast to the blasphemy laws, which contain no reference to the intention of the accused. The absence of an intent requirement in Sections 295-B, 295-C, and 298-A has made it possible for blasphemy charges that may otherwise have failed the mens rea test to spawn lengthy trials continuing to the appellate level.

The case of Dr. Younas Sheikh—sentenced to death on August 18, 2001 for violation of Section 295-C by a Sessions Court in Islamabad, but eventually acquitted in 2003—is highly

153. *Id.* at 637.
154. *Id.* at 637–38.
155. *Id.* at 638.
156. *Id.*

illustrative in this regard.[157] On October 2, 2000, Maulana Abdul Rauf, leader of a local religious organization,[158] leveled blasphemy charges against Dr. Sheikh.[159] Rauf based his accusation on a petition signed by eleven of Dr. Sheikh's students, claiming that Dr. Sheikh had insulted the Holy Prophet (PBUH) during the course of a lecture. The F.I.R deemed the following statements made by Dr. Sheikh during the course of answering some questions by his students in class as blasphemous: Prophet Mohammad was a non-Muslim until the age of forty; he had not been circumcised until the age of forty; he married for the first time at the age of twenty-five, when he was neither a prophet nor a Muslim, and that therefore his "nikah" (marriage contract) was not solemnized; at age forty his armpit and under-naval hair was not removed; and his parents were non-Muslims.[160]

According to Mr. Abid Hassan Minto, a senior advocate of the Supreme Court of Pakistan who has successfully defended many accused in blasphemy cases and who also acted as the defense attorney in the Younas Sheikh case,[161] Dr. Sheikh's allegedly blasphemous remarks were delivered in response to a student's question regarding practices prevalent among Arabs before the advent of Islam.[162] Mr. Minto argued that, regardless of the actual truth of the remarks, they were based on common sense and would be perceived by most as a logical or even definitional response to the question—that before the advent of Islam, practices in Saudi Arabia, including those of the Holy Prophet (PBUH) and his family were "a-Islamic," was a truism.[163]

It is clear that had the requirement of intent entrenched in the original pre-Zia offenses under the PPC existed in Section 295-C, the basis for registering charges against Dr. Sheikh would have been considerably weaker, if not altogether absent. The remarks were delivered in the course of a lecture and in

157. Nadeem Iqbal, *Only Death Will Do*, NEWSLINE, June, 2001, *available at* http://www.newsline.com.pk/NewsJune2001/humanR.htm.

158. The organization's name translated as "Conference for the Preservation of the Finality of Prophethood."

159. First Information Report (FIR), Police Station: Margela, Islamabad, Case of Dr Younus Shaikh (Oct. 2, 2000), *available at* http://www.rationalistinternational.net/Shaikh/fir_dr_shaikh.htm.

160. *Id.*

161. Mr. Abid Hassan Minto represented Dr. Younas Sheikh in the Lahore High Court.

162. Interview with Abid Hassan Minto, *supra* note 108.

163. *Id.*

response to specific queries by some students, and it could thus be argued that the defendant had not "entered into the discussion with the deliberate purpose of so offending"[164] his students. Furthermore, since the remarks were delivered in response to questions from the students, he did not "force himself upon the attention of [his listeners]."[165] Consequently, there was no basis for declaring the latter "involuntary hearer[s]."[166] As a teacher attempting to clarify a point to his students, "he [had] uttered [the remarks] on the spur of the occasion, in good faith, simply to further his argument."[167] However, all these defense arguments were unavailable to the defendant, since Section 295-C makes desecration of the Prophet's (PBUH) name the basis for a blasphemy conviction, regardless of the intention of the accused.

Another case highlighting the drastic consequences of the absence of the intent requirement in Section 295-C is that of Anwar Masih.[168] The accused was arrested in Faisalabad on January 2, 1993, on charges of "argu[ing] loudly, abusing Muslims and blaspheming."[169] The complainant alleged that in the course of an argument with Mohammad Aslam, a shopkeeper, Anwar Masih had uttered blasphemous words. According to a witness, an argument between Masih and Aslam had turned acrimonious, and "both used objectionable words about each other's prophets and religion."[170] From the Law Commissioners' commentary pertaining to Section 298 in the Indian Penal Code (XLV of 1860), it is apparent that utterances made during the course of an argument or quarrel do not constitute blasphemy. Had these qualifications been incorporated into Section 295-C as well, Anwar Masih would have had various defenses available to him. He could, for one, have asserted that since the argument was about a minor debt he owed to the shopkeeper,[171] "he [had not] entered into the discussion with the deliberate purpose of . . . offending [the latter]"[172] and "that he did not take advantage of the occasion to

164. *See* NIZAMI, *supra* note 122, at 274.
165. *Id.*
166. *Id.*
167. *Id.*
168. For a detailed account of the case, see STATE OF HUMAN RIGHTS IN 1995, *supra* note 76, at 20.
169. *Id.*
170. *Id.*
171. *Id.*
172. *See* NIZAMI, *supra* note 122, at 274.

utter them in pursuance of a deliberate purpose to offend."[173] Furthermore, according to the Human Rights Commission of Pakistan (HRCP), he was a mentally unbalanced drug addict,[174] which, had there been an intent requirement in Section 295-C, could have formed the basis of a clemency appeal.

When Anwar Masih's trial was finally concluded in 1998, his conviction was revised from a violation of Section 295-C to one of Section 295-A. Since he had already served the designated punishment as an under-trial detainee, he was released.[175] His eventual acquittal should not, however, occlude the fact that he was detained for six years, facing the prospect of a possible death sentence.

The conviction by lower courts of mentally imbalanced persons, as it transpired in the case of *Arshad Javed,*[176] can be seen as an extreme example of the absence of the intent requirement, where the strict liability nature of Section 295-C manifests itself very strongly. In this case, a finding of not guilty by reason of insanity would have been the only just outcome.[177] On February 9, 1993, the Additional Sessions Judge, Bahawalpur, convicted Arshad Javed under Section 295-C and sentenced him to death.[178] In addition, he was sentenced to three years rigorous imprisonment for claiming to have read and agreed with *The Satanic Verses*, Salman Rushdie's controversial novel that is banned in Pakistan.[179] The charges against the accused included having declared the following in front of a procession of university students protesting against *The Satanic Verses*:[180] "I am Hazrat Isa.[181] I have no father. The Day of Judgment would fall on 21-2-1989. *The Satanic Verses* written by Salman Rushdie is correct."[182]

Javed's brother filed an application before the court, stating that Javed was mentally ill; multiple independent medical examinations subsequently ordered by the trial court reported that Javed exhibited typical symptoms of Mania—an effective

173. *Id.*
174. *See* STATE OF HUMAN RIGHTS IN 1993*, supra* note 76, at 41.
175. *See* Shakir, *supra* note 74.
176. State v. Muhammad Arshad Javed, (1995) 13 M.L.D. 667, 669 (Lahore) (Pak.).
177. *See id.*
178. *Id.*
179. AMNESTY INTERNATIONAL 1994*, supra* note 92.
180. *Muhammad Arshad Javed*, 13 M.L.D. at 669.
181. The Prophet Jesus Christ. *Id.*
182. *Muhammad Arshad Javed,* 13 M.L.D. at 669.

disorder resulting in elation of mood, pressure of speech and increased energy and a grandiose association with God—and was insane,[183] that he was "suffering from Hypomania and is not yet fit to stand trial,"[184] and that he had "totally lost his mental balance."[185] However, two years after the registration of the case, one of the medical boards declared after a second examination that the accused was fit for trial, at the conclusion of which he was sentenced to death.[186]

Overturning the conviction, the High Court noted that the defense had not properly pleaded the case before the trial court, "inasmuch as the plea of insanity was neither seriously put to the prosecution in cross-examination nor . . . specifically taken in his statement . . . ."[187] Moreover, it noted that except for the application made by the accused's brother, "no other evidence was brought on record by the defence to show that the accused was suffering from insanity."[188] After quoting the legal provisions regarding the defense of insanity[189] and various cases elucidating the requirements of the defense, the court concluded that the convict had been unaware of the nature of the act he had committed and hence fell within the ambit of the insanity defense. The Court observed that "a bare reading" of the F.I.R sufficed to show that the accused was "mentally deranged."[190] The Court further noted that since the provocative speech he had made before "a spirited crowd was by itself an act which no person with normal mental capacities would do," and because no one in the procession reacted to his statements indicated that they did not take him seriously.[191] The Court stated that despite the second opinion furnished by one of the medical boards declaring the accused fit for trial, there was "persuasive material on record to suggest that the convict was insane." This evidence included medical reports, an affidavit an acquaintance of the convict's family stating that most of the elders in his maternal and paternal families suffered from bouts of insanity, and the fact that the accused did not seriously defend his case

183. *Id.* at 670.
184. *Id.* at 671.
185. *Id.* at 675.
186. *Id.* at 676.
187. *Id.* at 672.
188. *Id.*
189. PPC § 84; Evidence Act art. 121 (1984), *see* SHAUKAT MAHMOOD & NADEEM SHAUKAT, LAW OF EVIDENCE 1483–84 (Legal Research Centre 2004).
190. *Muhammad Arshad Javed*, 13 M.L.D. at 675.
191. *Id.*

and chose not to appeal against his conviction.[192] The Court thus found him to be exempt from criminal liability.

There are other examples where mentally unstable persons have found themselves implicated in blasphemy prosecutions. In *Saifullah Khan v. State*, the Peshawar High Court issued a scathing indictment of an Additional Sessions Judge's refusal to grant bail to the accused, despite the opinion of a medical board which had found the accused to be mentally unfit for trial.[193] The medical board found that the accused was "suffering from bipolar disorder with psychotic features," needed "treatment with medication," could not understand the proceedings of the court or defend himself, and was therefore unfit to plead.[194] Counsel for the state did not dispute the report of the medical board, consisting of "medical experts of high repute." The accused—a shopkeeper—was charged under Sections 295-B and 298. According to the F.I.R, he allegedly came out of his shop holding a calendar which he tore and threw in a waste drum, started abusing God, and threw a copy of the Quran in a waste basket after defiling it.[195] The High Court deemed the denial of bail a "denial of justice" and opined that "the shocking aspect of the matter" was that the trial judge had "allowed religious sentiments to prevail on her judicial mind instead of deciding the bail petition on the basis of settled principles."[196] Concluding that the accused was indisputably insane, the Court declared that his case fell squarely within the legal provisions of an insanity defence.[197]

It is thus apparent that the trial court in both the above cases ignored the applicability of an insanity defense under Pakistani law, which is based on the "M'Naghten rule" and states that: "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."[198] Lower courts have therefore proven unreliable in blasphemy trials to the extent

192. *Id.* at 676.
193. Saifullah Khan v. State, (2006) 58 P.L.D. (Peshawar) 140, 141 (Pak.).
194. *Id.* at 142.
195. *Id.* at 141.
196. *Id.* at 142–143.
197. *Id.* at 143–144. See S.M.NAZIM, CODE OF CRIMINAL PROCEDURE 1898 at 575–576 (2007) for the text of the penal code provisions on insanity with commentary.
198. *Muhammad Arshad Javed*, 13 M.L.D. at 672; *see also* M'Naughten's Case, (1843) 8 Eng. Rep. 718 (H.L.).

that even when a defense such as insanity, which applies even to offenses without an explicit mens rea requirement, is available to the accused, they have still handed down convictions. While there is no guarantee that such patently unjust convictions would be eliminated if a mens rea requirement were inserted into the blasphemy laws, it is arguable that the chances of such convictions would be lowered. This would be especially useful for situations where the accused is not insane, yet did not intend to defile the Quran, the Prophet, or any holy personages.

4. Judicial Omissions to Read Intent into Blasphemy Laws: A Departure from Precedent

The above examples of trial courts ignoring the intent requirement are not entirely excused by the absence of such an element in the blasphemy laws, as there are instances of appellate courts reading an intent requirement into these, as well as other, laws. In *Engineer Iftikhar Ahmad Khilji*,[199] for example, the petitioner sought direction from the court to the respondent, forbidding him from defacing postal stamps with black ink, since they contained, *inter alia*, verses of the Quran. The petitioner argued that the respondent's actions fell within the ambit of section 295-B, which pertains to defilement of the Holy Quran. The court dismissed the petition, stating that the reason for defacing stamps was not to disrespect or insult the Quranic verses printed on them, but to stop revenue leakage by preventing their reuse; "no intention of malice, hatred or ridicule" was involved, and Section 295-B was not implicated "at all." [200]

The absence of an explicit intent requirement is apparent from a reading of Section 295-C, which makes it a capital offense to "defile the sacred name of the Holy Prophet" by "words, either spoken or written or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly." There is no requirement that the defilement be intentional, or even "willful," as in Section 295-B. Nor is there any requirement that the religious feelings of any individual be hurt by the accused's act. Section 295-C is, therefore, a per se, strict liability offense, carrying a maximum penalty of death.

199. Engineer Iftikhar Ahmad Khilji v. Deputy Post Master Gen., (2004) 6 Y.L.R. (Azad J & K) 1736 (Pak.).

200. *Id.* at 1737.

However, this particular provision has not received any meaningful judicial attention in terms of mandating an intent requirement through judicial interpretation, as was the case in the aforementioned judicial interpretation of Section 295-B. In such circumstances, it is interesting to assess the rationale for the loyalty of courts to the strict wording of Section 295-C, thereby abstaining from incorporating an intent requirement into it, in order to circumscribe its ambit.

There are few exceptions to the judicial trend in blasphemy cases of not imputing an intent requirement into Section 295-C. In *Akbar v State*,[201] the Sind High Court granted bail to the accused, who was charged under Sections 295, 295-A, and 295-C, and stated that the words/act complained of did not appear to be derogatory towards the Prophet (PBUH), and that the criminal intention of the accused had yet to be established at the trial.[202] Another clear example is *Mirza Mubarak Ahmed v State*,[203] where the fact pattern is typical of blasphemy cases against the Ahmadis. The accused was charged with writing a letter offering blessings upon the Holy Prophet (PBUH) as well as Mirza Ghulam Ahmed,[204] who, according to the F.I.R, was an infidel; thus, by blessing Ghulam Ahmed along with the Holy Prophet (PBUH), the accused had defiled the latter's name and committed a Section 295-C offense. Justice Imam Ali Kazi declared that it was a "cardinal principle of our penal law that 'mens rea' criminal intention, or guilty mind, evil intention or knowledge of the wrongfulness of the Act, is an essential ingredient of guilt of a criminal offence."[205]

According to Justice Kazi, where one of the methods mentioned in Section 295-C is "expressly employed to defile the sacred name of Holy Prophet . . . in a direct manner . . . [the] mens rea of the offence will be patent in the accusation itself."[206] However, in the instant case, the accusation was not of a direct nature. The prosecution's case was that the accused had indirectly defiled the Prophet's (PBUH) name. Yet, Justice Kazi ruled that "using the above sentences by itself would not prove that the name of the Holy Prophet . . . has been defiled. It would be necessary for the prosecution to lead further evidence

201. Akbar v. State, (2004) 6 Y.L.R. (Karachi) 2249 (Pak.).
202. *Id.* at 2250–51.
203. Mirza Mubarak Ahmed v. State, (1989) 7 M.L.D. 896, 896 (Pak.).
204. *See supra* note 10, and accompanying text.
205. *See Mirza Mubarak Ahmed*, 7 M.L.D. at 899.
206. *Id.* at 898.

to prove as to *what was actually intended* by the applicant by using such sentences in the letter addressed to the complainant."[207]

It must, however, be remembered that this case concerned a bail application. The proceedings of the case before the trial court are unreported, and it is not known whether Justice Kazi's reading of a mens rea requirement into section 295-C was adopted by the trial court. Very few other cases at the appellate level, including various cases with a near-identical fact pattern, appear to have adopted Justice Kazi's approach, and *Mirza Mubarak Ahmed* remains a comparatively obscure case despite its potential to radically circumscribe the ambit of section 295-C by reading in a mens rea requirement where none was explicitly incorporated into the section.

There are only two additional examples which demonstrate an attempt by the judiciary to read the requirement of intent into blasphemy laws. In *Nasir Ahmad v. State*, the accused, who were Ahmadis, had been charged for posing as Muslims as they printed common Muslim expressions on wedding cards issued by them.[208] While granting bail to the accused, the Supreme Court said that while looking at whether defilement of the name of the Prophet (PBUH) has taken place *ex facie* by written or spoken words or the act of the person accused, "the totality of the milieu, including necessarily the faith, the intention, the object, and the background of the person using them" has to be kept in view.[209] In the earlier case of *Rasheed Ahmad v. State*, involving an Ahmadi charged for inscribing a verse of the Quran on the door of his house, the Sind High Court made a similar attempt.[210] While granting bail to the accused and ordering further inquiry, the Court said that it could not refuse bail in a criminal case on the mere presumption that the accused had used the words with a *mala fide* intent—it still had to be "proved before the trial court whether and in what sense the verse in question was written on the wall."[211] However, these are the few exceptions in the cases reviewed and, by and large, the absence of the intent requirement in blasphemy laws is exacerbated by judicial silence on the subject, causing them to

207. *Id.* (emphasis added).
208. *See* Nasir Ahmad v. State, (1993) 26 S.C.M.R. 153, 154 (Pak.).
209. *Id.* at 155.
210. *See* Rasheed Ahmed Khan v. State, (1988) 21 P Cr. L.J. (Karachi) 1595, 1595 (Pak.).
211. *Id.* at 1595–96.

be interpreted like strict liability offenses.

C. DEFINITIONAL SPECIFICITY

A major factor compounding the absence of an intent requirement in the blasphemy laws, especially in Sections 295-C and 298-C, is their lack of specificity, making their ambit virtually limitless. Consider once again the text of Section 295-C:

> 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* Mohammed (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.[212]

The phrase "defiles the sacred name of the Holy Prophet Mohammed (PBUH)" is open to the most diverse interpretations, and lends itself to a high degree of subjectivity. The section offers no elucidation on the types of behavior that can constitute defilement. Moreover, the ambit of Section 295-C is virtually unlimited, since the manner of defilement can constitute "imputation, innuendo, or insinuation," either direct or indirect. Section 298-C carries this definitional breadth further, by declaring, *inter alia*, that any Ahmadi who "in any manner whatsoever" outrages the religious feelings of Muslims' is liable to conviction under this clause. A comparison with one of the original provisions in Chapter 15 of the PPC—Section 298—is illustrative. Section 298 states that:

> Whoever, with the deliberate intention of wounding the religious feelings of any person, *utters any word* or *makes any sound in the hearing of that person* or *makes any gesture in the sight of that person* shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or both.[213]

Thus the manner of wounding the religious feelings of any person is clearly circumscribed in Section 298—only words, sounds, or gestures in the hearing or sight of the complainant will suffice as a basis for conviction under Section 298. This is in direct contrast to Section 298-C, where an Ahmadi can be convicted for outraging the religious feelings of Muslims in "any manner whatsoever," as well as Section 295-C, where direct and indirect imputations, innuendos, or insinuations—not necessarily in the sight or hearing of the complainant—will

212. PAK. PEN. CODE § 295-C (emphasis added).
213. PAK. PEN. CODE § 298 (emphasis added).

suffice.[214] Such phrases are open to diverse interpretations and potential abuse and lend themselves to a high degree of subjectivity on the part of the complainants, the police, magistrates, and judges involved in blasphemy cases. The cases reveal the variety of situations attracting blasphemy charges and make apparent the consequences of the extremely overbroad drafting of Sections 295-C and 298-C.

Like the restriction of academic expression exemplified by the case of Dr. Younas Sheikh,[215] journalistic expression has not remained exempt from charges of blasphemy, either. The office of a local Urdu daily, *Muhasib*, owned by the Islamabad-based *Al-Ikhbar* group of newspapers, was sealed by the police and its editors arrested on charges of blasphemy. The charges were initiated by the president of the Organization for the Defence of the Finality of Prophethood, following the publication of an article by the newspaper, titled *Islam and the Beard*. In the article, the author had argued that it is not mandatory in Islam for men to wear a beard and that the Prophet's (PBUH) keeping a beard was merely a prevailing tradition of his times. He also criticized the clergy for their hypocrisy in advocating the mandatory keeping of a beard while adopting various other aspects of a modern life. [216]

It is also important to note the occasional attempts by certain judges in recent years to advocate a forgiving approach in order to discourage charges under blasphemy laws. In *Ghulam Akbar v. State*, the Lahore High Court said that if a person claiming to be Muslim denied committing blasphemy before a trial court and sought pardon for any misunderstanding, there was no justification for persisting with the accusation.[217] The Court further exhorted that such matters should then be dropped given the teachings of forgiveness and mercy of the Holy Prophet (PBUH).[218] In *Muhammad Mahboob v. State*, the Lahore High Court further elaborated that in situations where a person had committed blasphemy and denied the charge during trial or repented of his act, there were sufficient examples under Islamic legal history to demonstrate

214. The use of Section 298-C against Ahmadis reveals a great diversity of situations attracting blasphemy charges, though it is beyond the ambit of this article to discuss that in any further detail.

215. *See* Iqbal, *supra* note 157.

216. Nadeem Iqbal, *Blaspheming the Beard*, NEWSLINE, July 2001, at 66.

217. Ghulam Akbar v. State, (2000) 2 Y.L.R. (Lahore) 1273 (Pak.).

218. *Id.* at 1275.

that a clement and forgiving approach had been adopted.[219] In a 2006 case, the Sind High Court also stated that that the life of the Prophet (PBUH) clearly showed that where a person had repented after insulting him, he had forgiven that person.[220]

While these are commendable attempts to check false accusations and overzealous prosecutions, such instances are few and far between and surrounded by various examples of a less than benevolent stance on the part of the judiciary. Additionally, these instances do not mention whether such a benevolent and forgiving approach can and should also be adopted towards non-Muslims, though it can be argued that in the instances cited from Islamic history, such clemency had been extended to non-Muslims, as well. Coupled with the lack of an intent requirement, the lack of definitional specificity makes the blasphemy laws extremely broad in reach and ambit. Furthermore, no procedural safeguards have been provided in the text of the laws, despite the fact that a conviction under Section 295-C carries the death penalty.[221]

D. DESIGN ISSUES—AN INTERNATIONAL COMPARATIVE PERSPECTIVE

Having shown the various inherent design and drafting shortcomings of the blasphemy laws, it is useful at this stage to compare the text of the Pakistani blasphemy laws with similar laws in other jurisdictions, especially to gauge whether they address the kind of significant issues that have been pointed out above.

219. Muhammad Mahboob v. State, (2002) 54 P.L.D. 587, 600–01 (Lahore) (Pak.).

220. *See* Muhammad Ali v. Qadir Khan Mandokhail, (2006) 58 P.L.D. (Karachi) 613, 616 (Pak.).

221. While several cases have strongly criticized investigative incompetence, prosecutorial errors, and trial inadequacies that have contributed to false accusations under blasphemy laws, one recent case proffered some meaningful suggestions in this regard. *See Mahboob*, 58 P.L.D. at 599, 601. After soundly criticizing various aspects of the investigation and the trial proceedings, the judge warned against a growing number of false cases that were motivated by mischief and *mala fide* intent. He then directed the Inspector General of Police, Punjab, to ensure that all future investigations of blasphemy cases were entrusted to a team of at least two gazetted investigating officers, preferably conversant with Islamic jurisprudence. In case they did not have such expertise, a scholar of known repute and integrity could be added to the investigation team. The judge further proposed that all blasphemy trials ought to be presided over by a judicial officer who was not less than the rank of a District and Sessions Judge—the highest judicial post in Pakistan below the appellate courts.

1. Other Jurisdictions: Repealed and Non-Functional Blasphemy Laws

Some other jurisdictions, where laws pertaining to blasphemy continue to exist or once existed, include, *inter alia*, Northern Ireland, Scotland, Denmark, France, Germany, Ireland, the Netherlands, Spain, Switzerland, India,[222] New Zealand, Sweden, the Czech Republic, and Norway.[223] Our review divulges that the offense of blasphemy has been either completely abolished or, in those jurisdictions where it continues to exist, seriously curtailed either through stricter intent requirements or judicial attempts to strike a balance between conflicting rights.[224] It is also evident that in certain jurisdictions where the law remains on the books, violations have either not been prosecuted or prosecuted unsuccessfully, rendering the law redundant. For instance, in Northern Ireland, where blasphemy is a common law offense, the first and the last successful prosecution took place in 1703.[225] Similarly, in Scotland, the last reported prosecution for blasphemy was in 1843.[226] Some writers have therefore argued that blasphemy may no longer be a crime in Scotland.[227] Some commentators opine that, in any event, since Scottish law, unlike English law, requires a personal interest in a matter before there can be any private prosecution, and since the State in unlikely to want to prosecute for blasphemy, a prosecution—though technically possible—is unlikely to occur.[228] In Belgium, there is no longer a

222. For details see SELECT COMM. ON RELIGIOUS OFFENSES, FIRST REPORT: RELIGIOUS OFFENSES IN ENG. AND WALES (House of Lords 2003), *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/9501.htm [hereinafter FIRST REPORT].

223. For details see Interights—The International Center for the Legal Protection of Human Rights, http://www.interights.org/page.php?dir=Publication&page=wingrove.php (last visited Jan. 6, 2008) [hereinafter Interights].

224. It has to be highlighted, though, that based on our review we have seen that the interpretive approach adopted by the appellate courts in Pakistan *vis-à-vis* the blasphemy cases has been quite fair and balanced. Furthermore, to date no blasphemy case has resulted in a conviction leading to the implementation of capital punishment and the appellate courts have always struck down or caused to be struck down (by remanding these cases after pointing out flaws of evidence and procedure) convictions at the trial court level.

225. The prosecution involved a certain Thomas Emlyn, a Unitarian minister who had written a book arguing that Jesus Christ was the equal of God the Father. *See* FIRST REPORT, *supra* note 222, at app. 5.

226. H.M. Advocate v. Robinson, (1843) 1 Broun 643 (H.C.J.) (Scot.).

227. GERALD H. GORDON, THE CRIMINAL LAW OF SCOTLAND, 998 (W. Green & Son Ltd. 2d ed. 1978) (1967).

228. G. Maher, *Blasphemy in Scots Law*, 1977 S.L.T. 257, 260 (Nov. 11, 1977).

law criminalizing blasphemy.[229] In Denmark, while a law prohibiting blasphemy exists under the its penal code, it has not been used since 1938.[230] Australia is another jurisdiction which recently experienced a case involving an allegation of blasphemy.[231] The Supreme Court held that a crime of blasphemous libel did not exist in the Australian state of Victoria. It went on to rule that if such a law did in fact exist, it was necessary to show that the publication of the matter complained of would cause unrest of some sort. In the absence of such evidence, the court declined to grant the injunction sought.[232]

There are also jurisdictions where the law on blasphemy exists and convictions can be brought. However, as mentioned earlier, these convictions are curtailed by way of a strict intent requirement. In Germany, for instance, the criminal code forbids insults to a religion publicly or by dissemination of publications.[233] However, "for an insult to be punishable under this law "the manner and content" of the insult must be such that an objective onlooker could reasonably apprehend that the insult would disturb the peace of those who share the insulted belief."[234] Moreover, to be convicted, an offender must "intend or at least be aware that his or her action constituted an offence."[235] In Ireland, the Constitution guarantees citizens' liberty (subject to public order and morality) to express freely their convictions and opinions but provides that "the publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law."[236] However, the Irish Supreme Court held in 1999 that it was impossible to decipher from previously decided case law what

229. FIRST REPORT, *supra* note 222, at app. 5. Article 4 of the Decree of 23 September 1814, which penalized writings and images offensive to religion, was abrogated by the Fundamental Law of 1815. *Id.*

230. *See* FIRST REPORT, *supra* note 222, at app. 5 (citing Straffeloven [Criminal Code] § 140 (Den.)).

231. Pell v. Council of Tr. of the Nat'l Gallery of Vict. (1998) 2 V.R. 391 (Vict.).

232. *Id.* A Roman Catholic Archbishop had sought an injunction against the showing of a photograph on the basis of such showing being blasphemous libel. The court weighed on the one hand whether blasphemous libel was an offense under the laws of the state of Victoria and on the other whether a multi-faith society might be better served by a law that protected different faiths from scurrility, vilification, ridicule, and contempt.

233. Strafgesetzbuch [StGB] [Penal Code] § 166 (F.R.G.).

234. FIRST REPORT, *supra* note 222, at app. 5.

235. *Id.*

236. IR. CONST., 1937, art. 40.6.1.i.

the elements of the crime of blasphemy were.[237] It is thus now considered largely impossible to bring a blasphemy prosecution in Ireland.[238] In the Netherlands, blasphemy is a criminal offense under its penal code, but this provision covers only expressions concerning God, not saints and other revered religious figures. Further, the criminal offense of blasphemy has been interpreted to require that the person who makes the expression must have had the intention to be "scornful."[239] This is a stricter test than normally applied to the intent of the accused. Thus, even if it was objectively foreseeable that people would be aggrieved—and those people actually were aggrieved—there is no offense if the speaker did not have the intent to be scornful.[240] This intent requirement was confirmed in one of the very few blasphemy cases in the Netherlands.[241] In 1968 the court acquitted an author because it was not proven that his aim was to be scornful.[242]

The Indian Penal Code states that a person is liable to punishment where the act committed is "deliberate and malicious" and done with the "intention of outraging the religious feelings of any class of citizens of India."[243] In such a case, however, "[t]he prosecution must establish that the intention of the accused to outrage was malicious as well as deliberate, and directed to a class of persons and not merely to an individual."[244] The legislative intent in introducing the provision was that "the essence of the offence . . . [was] that the insult to religion or the outrage to religious feelings must be the sole, or primary, or at least the deliberate and conscious intention."[245]

In New Zealand, it is not against the law "to express in good faith and in decent language, or to attempt to establish by arguments used in good faith and conveyed in decent language, any opinion whatever on any religious subject."[246] In Norway, the Penal Code provides for the possibility of punishment for

237. Corway v. Indep. Newspapers (Ir.) Ltd., [1999] 4 I.R. 484 (Ir.).
238. FIRST REPORT, *supra* note 222, at app. 5.
239. Article 147 of the Penal Code. *Id.*
240. FIRST REPORT, *supra* note 222, at app. 5.
241. *Id.* A Dutch writer represented God in a novel as a donkey and contemplated his having sexual intercourse with the animal. *Id.*
242. FIRST REPORT, *supra* note 222, at app. 5.
243. RATANLAL AND DHIRAJLAL'S LAW OF CRIMES: A COMMENTARY ON THE INDIA PEN. CODE, 1860 1171 (Bharat Law House 25th ed. 2003).
244. *Id.* at 1172.
245. *Id.* at 1173.
246. Crimes Act 1961, 1961 S.N.Z. No. 43, Part 7, S. 123(3).

any person who publicly insults or in an offensive manner shows contempt for any religious creed or for the doctrines or worship of any religious community lawfully existing there. However, this provision has not been applied by the courts since 1936.[247] In France, there is no law against blasphemy; only the showing of a film contrary to good morals is proscribed under the Penal Law.[248] In Sweden, crimes relating to blasphemy or religious insult have been abolished.[249] The general law of blasphemy was abolished in 1949, and a narrower crime of religious insult was abolished in 1970.[250] In the Czech Republic, there is no offense of blasphemy. It is only a provision of the Criminal Code which provides that insults to the nationality, race, or conviction of a group of inhabitants of the Republic can be punished.[251]

It would also be instructive to look at the range of penalties for the commission of blasphemy in these jurisdictions. In New Zealand, the relevant law states that "[e]very one is liable to imprisonment for a term not exceeding one year who publishes any blasphemous libel."[252] Further, "[w]hether any particular published matter is or is not a blasphemous libel is a question of fact."[253] Finally, "[n]o one shall be prosecuted for an offence against this section without the leave of the Attorney-General, who before giving leave may make such inquiries as he thinks fit."[254] In India, a person committing such an offense can be punished with imprisonment which may extend to three years, or with fine, or with both.[255]

The above analysis highlights that blasphemy laws are fast becoming antiquated in many international jurisdictions. Where they persist, law-makers and judges have ensured that the prerequisites of actual intent, specificity of offense, and a linkage of blasphemous speech as a causal factor for actual creation of breach of peace are rigorously employed to both ensure that valid speech is not curtailed and that innocent people are not implicated in a blasphemy case.

247. Interights, *supra* note 223.
248. *Id.*
249. *Id.*
250. *Id.*
251. Trestní zákon č. 140/1961 §198, *translated in* CRIMINAL CODE 192 (Trade Links 1999).
252. Crimes Act 1961, 1961 S.N.Z. No. 43, Part 7, S. 123(1).
253. *Id.* S. 123(2).
254. *Id.* S. 123(4).
255. *See* RATANLAL, *supra* note 243, at 639.

E. THE BLASPHEMY LAWS AND THE DOCTRINE OF VAGUENESS

It is instructive here to briefly examine the "doctrine of vagueness," enshrined in the jurisprudence of many legal jurisdictions.[256] To take an illustrative example—in the United States for instance—the "doctrine of vagueness" is embodied in the Due Process clauses of the U.S Constitution and has been essentially invoked in situations where certain statutes have been challenged as being in violation of these clauses and their underlying principles of fairness, justice, and liberty that should permeate the process of law.[257] The essence of the doctrine was explained in the case of *Connally v. General Construction Company*, in which the Supreme Court held that a penal statute creating a new offense is required to clearly state what conduct is proscribed and the penalties the offender is likely to face.[258] The doctrine thus puts forth the requirement that legislatures use clear and precise language so that people of common intelligence do not have to guess at the meaning of a law or its application.[259] In other words, an individual must be able to reasonably understand that certain action or conduct is proscribed[260] and cannot otherwise be criminally liable in the event that such action or conduct occurs.[261] A statute must not only be defined with certainty and precision but must also contain ascertainable standards of guilt.[262] In *Lanzetta v. New Jersey,* the Court found that a statute was void for vagueness because the action or conduct it prohibited was not clearly defined.[263] The Court reasoned that if a statute does not clearly

256. *See, e.g.*, The Obscenity Law Reporter, Vagueness Doctrine, http://www.moralityinmedia.org/nolc/olrChapters/vagueness.htm (last visited Mar. 8, 2008) [hereinafter Law Reporter].

257. *See* U.S. CONST. amend. V & XIV. The 5th and 14th Amendments to the U.S. Constitution forbid the government from taking life, liberty, or property without due process of law. *Id.*

258. *See* Connally v. General Construction Company 269 U.S. 385, 390–92 (1926).

259. *Id.*; *See* McBoyle v. United States 283 U.S. 25, 27 (1931) (holding that an accused has the right to fair warning, "in language that the common world will understand, of what the law intends to do if a certain line is passed.").

260. *See* United States v. Lanier 520 U.S. 259, 271 (1997).

261. *See* Law Reporter, *supra* note 256.

262. *Id.*; *see* United States v. Cohen Grocery Co. 255 U.S. 81, 97 (1921) (holding that the text of the statute in question did not fix an ascertainable standard of guilt).

263. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns under transgression. No one may be required at peril of life, liberty or property to

define what constitutes a criminal act and gives inadequate warning of what the law forbids, an innocent act could become a criminal one.[264] Hence, a vague statute may be potentially unconstitutional if an individual implicated under it could not defend himself against the charged crime because of its vagueness. Its vagueness results in a denial of the due process mandated by the Fifth and Fourteenth Amendments—constitutional provisions that guarantee, *inter alia*, that citizens are given fair warning that certain conduct will be deemed criminal.[265] In other words, the test is whether the language of a statute—challenged as being vague—provides a person of average intelligence with sufficient warning that his action is illegal by common understanding and practice. If this test cannot be satisfied, a law will be held to be vague and hence void.[266]

The "doctrine of vagueness," as it is understood in the United States, however, requires more than just textual ambiguity. Many statutes contain some vagueness.[267] Therefore, the enforcement of a statute will be prohibited on the basis of vagueness only when it is found to be so vague that it enables "arbitrary and discriminatory" enforcement.[268] The test for vagueness is more strictly applied in the case of criminal statutes since the penalties imposed are stringent. Whereas if the penalties are being imposed for conduct contrary to civil statutes—e.g., an obscenity statute—the courts have found that the lack of precision does not by itself offend due process, as long as the language sufficiently conveys definite warning as to proscribed conduct, when measured by common understanding and practices.[269]

The above review illustrates the rationale and ambit of the "doctrine of vagueness," and it is readily apparent that the blasphemy laws fall well short of giving clear and meaningful warning of the exact nature of offenses. This is especially true in the case of Section 295-C, which carries such stringent

speculate as to the meaning of penal statutes.").

264. *See* Law Reporter, *supra* note 256.

265. Talya Yaylaian, *Statutes May Be Interpreted in an Unforeseeably Expansive Manner: United States v. Councilman,* 41 NEW ENG. L. REV. 293, 293 (2007).

266. Raley v. Ohio, 360 U.S. 423, 438 (1959) ("A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them.").

267. United States v. Lanier, 520 U.S. 259, 266 (1997).

268. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

269. Miller v. California, 413 U.S. 15, 28 (1973); Law Reporter, *supra* note 256.

penalties. Considering the lack of definitional specificity discussed *supra*, the blasphemy laws and Section 295-C, in particular, are highly questionable in view of the internationally recognized "doctrine of vagueness."

V. BLASPHEMY LAWS AND THEIR IMPLICATIONS FOR FREE SPEECH IN PAKISTAN

A. THE RIGHT OF FREE SPEECH IN PAKISTAN AND THE INTERNATIONAL SPECTRUM OF FREE SPEECH ABSOLUTISM AND TOTAL STATE CONTROL

There is an important nexus—and at times conflict—between free speech and the freedom of religion, the right to human dignity, and the equal protection of law provisions or other important rights under various constitutional systems. This is an important aspect of this issue, which is the subject matter of another fairly developed body of legal thought. While recognizing the importance of this dimension, this article will not delve into that independent and complex debate. The preliminary discussion of the Pakistani free speech laws that follows—and their comparison with other international jurisdictions—will provide an idea of where along the spectrum of free speech absolutism and total state curtailment of speech Pakistan lies and how that influences the existence and perpetuation of its blasphemy laws.

1. Free Speech Protection Models and the Impact of Structure on Degree of Protection: Built-in Restrictions vs. Open-ended Protection

What catches one's immediate attention upon glancing through Article 19,[270] the constitutional provision providing protection for freedom of speech under the Pakistani Constitution, is the number and extent of qualifications and

270. PAK. CONST. art. 19 ("Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, commission of or incitement to an offence").

exceptions embedded in the text of the provision.[271] These "claw-back" provisions are prima facie broad and generic. Consider a right of free speech and expression, as well as freedom of press, that can nonetheless be circumscribed by "reasonable restrictions" imposed by the law in the interest of "the glory of Islam . . . the integrity, security or defense of Pakistan or any part thereof . . . friendly relations with foreign states . . . public order . . . decency or morality . . . or . . . in relation to contempt of Court or incitement to an offence."[272] The more flippant may comment that these restrictions hardly leave room for any halfway decent conversation. The pragmatists and those sensitive to the arguments of cultural relativism would, however, urge one to delve deeper in order to gauge whether the Pakistani courts have salvaged sufficient room for meaningful speech in spite of the built-in restrictions in the constitutional text, while striking a balance with other values, freedoms, and public interests that it may want to protect.

This preliminary review necessarily propels one to draw a broad comparison with another rather obviously pertinent jurisdiction (where the jurisprudence on free speech is widely regarded to be highly developed and sophisticated)—namely the United States. The First Amendment to the U.S. Constitution lays out a definitive and absolutist sounding right of free speech: "Congress shall make no law . . . abridging the freedom of speech . . . ."[273] Over two-hundred years of complex jurisprudence, courts have essentially, though not always consistently or convincingly, carved out certain categories of speech to which the First Amendment protection does not extend. It is important to note, however, that these categories are limited and progressively circumscribed by the very broad right of free speech stated in the Constitution. In other words, while upholding the sanctity of freedom of speech as an absolute virtue, the U.S. courts have rigorously scrutinized all kinds of speech prohibiting or curtailing legislation to glean and uphold only what was, in their view, legislation essential for protecting or furthering a conflicting public policy imperative. It is only these limited categories of speech proscription, under certain circumstances, that have been allowed to trump speech. This

271. PAK. CONST., Part II of Chapter 1 lays out a comprehensive list of the Fundamental Rights enjoyed by the citizens of Pakistan. Article 8 declares laws inconsistent with or in derogation of Fundamental Rights to be void.

272. *See supra* note 270, and accompanying text.

273. U.S. CONST. amend. I.

has caused some commentators to say that there is inherently a hierarchy of rights in the United States, and the right of free speech lies at the very apex of that hierarchy.[274]

2. The Doctrine of "Hate Speech" in the United States: From Evolution to the Existing State of the Law

To focus on the category of speech that can be validly prohibited in the United States most relevant for our purposes, we must look to the seminal case of *Chaplinsky v. New Hampshire*.[275] In this case the U.S. Supreme Court prefaced its introduction of the category of "fighting words" by mentioning "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[276] These words, the Court found, were "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[277] The Court went on to enunciate the rationale for their non-protection by stating that, "[i]t has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[278]

A half-century separates this judgment from the most significant recent revisiting by the U.S. Supreme Court of this unprotected category of speech. The majority opinion of five judges in the case of *R.A.V. v. City of St. Paul*[279] dealt with the constitutionality of a city ordinance banning display of symbols, including a burning cross that could arouse anger in others on the basis of race, color, creed, religion, or gender. This case seems to further circumscribe the domain of what remains unprotected by the First Amendment within the "fighting words" category. The Court stated that selective suppression of speech that is unprotected because of a broader characteristic ("fighting words" in this case) can still violate the freedom of speech if the selection is made on the basis of the particular message conveyed, unless the particular message lies at the

274. *See* Kentridge, *Freedom of Speech, supra* note 4, at 254–56.
275. Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).
276. *Id.* at 571–72.
277. *Id.* at 572.
278. *Id.*
279. R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992).

heart of what makes it suppressible.[280] In other words, the regulator of speech—in this case the city of St. Paul—could not properly choose among "fighting words" based on the content of the particular message. It could not punish racial epithets but not equally punish those disparaging other characteristics of the addressee, such as his prejudices or his illegitimacy or his sexual orientation—at least not without a credible determination that the forbidden messages were more likely to provoke a violent response or to provoke a more violent or dangerous response than those not forbidden.[281]

In essence, "fighting words" are unprotected in the United States because they are likely to provoke violence and not because they express prejudice or bias on the part of the speaker. Prejudice or bias lies within the realm of ideas and cannot be suppressed because of wrongness or unpopularity; it is the violence-inducing dimension of such speech that needs to be clearly identified and can as such be suppressed. Meanwhile, the minority opinion of the remaining four judges found the ordinance to be substantially overbroad—prohibiting not just fighting words but a range of constitutionally protected speech as well as activity which is not protected—thus finding it invalid on its face and subject to challenge even by the persons whose conduct is not protected, in order to avoid the "chilling effect" which the ordinance would have on law-abiding persons who would otherwise wish to engage in protected expression.[282]

The *R.A.V.* verdict thus stands, albeit controversially, for further restricting the possible doctrinal scope of "fighting words" by holding unconstitutional the prohibition of speech solely on the basis of the content or "subjects the speech addresses."[283] Thus, in order to find out whether certain words are "fighting words," there can seemingly be no recourse to the content and subject matter of what is said.[284] In its promotion of

280. *Id.* at 393–94.

281. *Id.*

282. *Id.* at 394.

283. *Id.* at 381; *cf.* Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993) (distinguishing punishment of the defendant's abstract beliefs as such from consideration of his prejudice as a motive for otherwise wholly unprotected conduct. In other words, the Court said that it was reaffirming what had always been the case that motive either as an essential element of a crime or as an aggravating factor in determining punishment is not successfully challengeable on free speech ground.).

284. *See* JUDITH BUTLER, EXCITABLE SPEECH 52, 53 (Routledge 1997) ("[A]t stake in the majority opinion is not only when and where 'speech' constitutes some component of an injurious act such that it loses its protected status under the First

the free marketplace of ideas, viewpoints—including those that are unpopular, unpleasant and/or offensive—are also protected by the First Amendment, and it has to be clearly shown that the alleged "fighting words" are indeed that and not just an unpopular viewpoint. Any proscriptive legislation thus must be content-neutral. Writing the majority opinion, Justice Scalia "establishe[d] a distinction between the content and vehicle of that expression; it is the latter which is proscribable, and the former which is not." As Justice Scalia says, "fighting words are thus analogous to a noisy sound truck."[285] Thus, what is injurious is the sound and not the truck!

3. Multiple Approaches to Free Speech Protection: The Impact of History and Culture and the Prioritization of Conflicting Rights and Policy Imperatives

The manner in which First Amendment debates dominate the constitutional discourse in the United States is unique.[286] The above analysis bolsters the views of commentators who find that the United States in recent times has stood out for providing exceptionally broad protection for otherwise objectionable speech. Hate speech is understood to be one of the areas in which it has positioned itself further out on the speech-protective end of the legal spectrum than perhaps most other countries have been willing to venture.[287] There is no dearth of staunch supporters of this position, who find that the strong

Amendment, but what constitutes 'speech' itself."). The author draws the compelling analogy that the majority, while finding the act of cross-burning reprehensible, is also wary of another fire—i.e., what it finds to be overbroad restrictions in the city ordinance—a fire that may lead to the incineration of free speech. *Id.* at 55.

285. *Id.* at 56.

286. *See* Christina E. Wells, *First Amendment: Discussing the First Amendment*, 101 MICH. L. REV. 1566, 1566 (2003) (reviewing ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds., 2002)) (describing the remarkably advanced and diverse strains of free speech debate in the United States, which surely makes it one of the most sophisticated avenues for such discourse).

287. *See* William B. Fisch, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV Hate Speech in the Constitutional Law of the United States*, 50 AM. J. COMP. L. 463 (2002). The author does argue, however, that despite the vast extent of protection for such speech in the United States *vis-à-vis* other jurisdictions, such protection is narrower in scope than might be supposed and that there is still allowance for the suppression of, or legal sanctions against, a great deal of conduct motivated by and expressing hostility towards particular social groups.

constitutional protection for freedom of speech in the United States is itself an American humanistic value—a value that is the product of its own history and experience—and is reflected in American culture.[288] But there are also those who find that "hate speech" intentionally used to intimidate others can drastically undermine public safety and social welfare, and hence the freedom to intimidate must be balanced against the reasonable expectation of civic order. A federal uniform law may accordingly be the panacea.[289] There are others who believe that although the First Amendment purports to offer a way for subordinate social groups to participate in political discourse and to hold and exercise power through communication through its protection of dissident speech, in recent times one could question whether these traditional principles inherent within the First Amendment and the Supreme Court's reliance on them may have become an outdated idea of liberty.[290] They argue that by focusing overtly on autonomous individuals, these principles fail to address societal power and the role of speech in that power dynamic.[291] While an ongoing debate, there is persistent difficulty in determining with any great certainty—in spite of the Supreme Court declaring "fighting words" as a well-defined class of speech—whether any individual's speech constitutes unprotected fighting words rather than expression protected by the First Amendment. This remains an area of evolution and growth.[292]

288. *See* Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377, 378 (2006). The author argues, *inter alia*, that since many of the guarantees of the Bill of Rights have been drafted in sweeping and broad terms, so that their meaning depends on court interpretations over a long period of time, and since the First Amendment's guarantees for freedom of speech are perhaps stronger than those accorded to any other individual right under the U.S. Constitution; over the years so many concepts, principles, doctrines, and precedents have accumulated to form the Law of the First Amendment that that itself provides a great deal of protection to Freedom of Speech. As a result, in First Amendment litigation there is an increased likelihood that the First Amendment claim will prevail.

289. *See* Alexander Tsesis, *Symposium Essay: Regulating Intimidating Speech*, 41 HARV. J. ON LEGIS. 389, 389 (2004). The author argues against free speech absolutism by emphasizing both the low social and political value of hate speech, as well as the use of hate speech as a façade to intimidate speakers from freely exchanging ideas on topics of public interest—the political exploitation of intimidation, as he calls it.

290. *See* Chris Demaske, *Modern Power and the First Amendment: Reassessing Hate Speech*, 9 COMM. L. & POL'Y 273, 273 (2004).

291. *Id.*

292. *See* Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 414 (2005) (proposing a new

The manner in which such an embedded and broad right of free speech in a constitution—as is the case in the United States—and the peculiar socio-political and cultural developments surrounding its constitutional evolution impacts the exact nature of emerging rights is highlighted in the comparison with other jurisdictions. Take, for example, a jurisdiction without a written constitution and with only fairly recent legislation explicitly incorporating the right to freedom of expression into law, such as the United Kingdom.[293] Or another jurisdiction with a constitutional framework based on a written constitution but with no explicit right to freedom of speech in its main instrument of government, such as Australia. It has been argued that since the introduction of the Human Rights Act of 1998, constitutional interpretation changed considerably in the United Kingdom. As a result, legislators are bound to take account of a guaranteed right to freedom of expression, individual citizens have easier access to his or her rights under the European Convention, and there is an emerging notion of the court acting as a guardian of rights, which is explicit in the Human Rights Act of 1998.[294]

It is still true that, in the United Kingdom, the Parliament and not the courts have the power and responsibility for striking a balance between freedom of expression and unlawful conduct. This is to be done in a manner and under a legal tradition whereby there already exists, *inter alia*, extensive legislation proscribing racially motivated speech, speech that will stir up religious hatred, speech that contains official secrets, and obscene speech, as well as common law prohibitive provisions relating to blasphemy and treason.[295] Conversely, in Australia,

approach to the fighting words doctrine whereby state and local governments can—consistent with First Amendment jurisprudence—designate words or symbols as criminal, but only when used in certain situations where an ordinary listener in that situation might respond in such a way as to lead to a breach of the peace).

293. Human Rights Act, 1998, c. 42, sched. 1, art. 10 (U.K).

294. *See* Christopher J. Newman, *Allowing Free Speech and Prohibiting Persecution—A Contemporary Sophie's Choice*, 70 J. CRIM. L. 329 (2006) (considering the approach of three common law jurisdictions—U.S.A., U.K., and Australia—to the problems faced by courts when an individual's right to freedom of expression is invoked as a defense to a low-level public order offense and while doing so, *inter alia*, highlights the difference of approach that stems from differences in constitutional history and frameworks).

295. *See* Crime and Disorder Act, 1998, c. 37, § 28 (Eng.); Serious Organized Crime and Police Act, 2005, c. 15 (Eng.); Official Secrets Act, 1989, c. 6 (Eng.); and Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66 (Eng.). A new Racial and Religious Hatred Bill is also in the offing. *See* Dr. Dawn Watkins, *Racial and Religious Hatred v. Free Speech*, 155 NEW L.J. 1737, 1737–38 (2005). *See also*

each state has its own method of regulating criminal law; despite the fact that the Australian Government has signed the International Covenant on Civil and Political Rights,[296] contained within which is a qualified right to freedom of expression, Australian courts are not bound by that international treaty. While this does not mean that Australian citizens must endure a basic lack of human rights, Australia has no provisions to embed such freedoms into its domestic law, either by legislation (as in the United Kingdom) or constitutionally (as in the United States). Commentators argue that in this context—while there has been an on-going program of constitutional reform—in the final analysis it is the common law which has been slowly garnering the right to freedom of expression.[297]

4. Free Speech in Pakistan: Traditional Approaches and the Impact of History, Culture, and Politics

In Pakistan, the constitution and constitutional culture have been traditionally and, in recent years, increasingly influenced by a religious ethos. At times, freedom of speech has had to give way to several other rights, values, and imperatives on which the State and society put a premium.[298] What used to be the preamble to previous constitutions[299] is now an operative part of the current Constitution as Article 2-A, and very much

Kentridge, *Freedom of Speech*, *supra* note 4, at 258–70 (conceding that judged by the measure of the legal protection given to freedom of speech in the United States, England seems to have fallen behind, but agreeing with the approach adopted in England in the areas of the law of contempt of court and defamation where he argues that the English Courts have tried to strike a balance between the right of free speech and the rights to a fair trial as well as the right to the reputation of an individual, unlike the United States which has tilted far too much towards protection of freedom of speech at the cost of other conflicting rights).

296. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 172.

297. *See* Kentridge, *Freedom of Speech*, *supra* note 4, at 254–55 (describing how The High Court of Australia has recently discerned in the Australian Constitution an entrenched freedom of public discussion of political matters and how the freedom is implied as being essential to the system of representative democracy established by the Constitution).

298. *See* Siddique, *Jurisprudence of Dissolutions*, *supra* note 28, at 627–29 (discussing the various Islamization-motivated steps and legislation in the 1980s during the regime of General Zia-ul-Haq).

299. We are referring here to the Constitutions of 1956 and 1962 and the un-amended version of the Constitution of 1973.

defines its ethos as a non-secular one.[300] Yet, recent Pakistani judgments have put a halt to the discussion regarding whether Article 2-A can trump other constitutional provisions—thus acting as a sort of *grundnorm*—and have declared instead that it stands on an equal footing with other provisions of the Constitution, no more and no less.[301] Indeed, these judgments have firmly precluded and strongly warned against an interpretation of Article 2-A which would raise it to the point of being a litmus test for gauging, evaluating, and potentially justifying the judiciary to strike down any other constitutional provisions. While acknowledging that various such provisions may be inconsistent with Article 2-A, the courts clearly warned that such an interpretive approach would undermine the entire Constitution.[302]

It must be reemphasized that Pakistan has faced several praetorian interventions throughout its history which have resulted in long periods of military rule, with constitutions abrogated or held in abeyance, and fundamental rights suspended for extended periods of time. This trend can explain to a great extent why the political and judicial ingredients for rights protection and growth are relatively underdeveloped in that country. This is an important dimension. Having said that, one can still plausibly argue that in spite of the several impediments to normal functioning of the courts in view of Pakistan's troubled history, the Pakistani judiciary has made various attempts to protect free speech. They have only allowed its proscription when the facts and circumstances of a case, in their view, seriously merited so, adopting a cost-benefit analysis and a clear case-by-case approach, as shall be discussed below.

300. PAK. CONST. art. 2A. This article makes the Objectives Resolution a part of the substantive provisions of the Constitution. The controversial Objectives Resolution, which was opposed by all the minority members of the Constituent Assembly at the time of its adoption in 1949, apart from having an overtly religious tone starts with the words: "Whereas sovereignty over the entire universe belongs to Allah Almighty alone and authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust." It extends protection to the Fundamental Rights under the Constitution subject to "law and public morality." *Id.*

301. *See* Sharaf Faridi v. Federationn of Islamic Republic of Pakistan, (1989) P.L.D. 404, 430, 452 (Karachi) (Pak.).

302. *See* Hakim Khan v. Government of Pakistan, (1992) P.L.D. 595, 617, 620, 634 (Pak.), *aff'd by* Zaherrudin v. State, (1993) S.C.M.R. 1718 (Pak.). In our view this interpretation was not necessarily giving precedence to the secular provisions of the Constitution over the "sacred" ones but simply blocking an emerging trend which the Supreme Court feared could lead to a complete unraveling of the existing constitutional structure and its stability.

Before analyzing free speech protection under Article 19, it is significant to look at a snapshot of the Pakistan's early jurisprudence on freedom of speech, which is heartening for its progressive, well-reasoned, and sensitive support for free speech. In several cases dealing with press regulatory laws and controversial political and religious discourse and publications, there was a concerted judicial attempt to dilute stringent government regulations and to resist public and political pressure to curb and censor uninhibited and critical speech. In one such case which involved, *inter alia*, newspaper articles that strongly criticized the religious practices of certain Muslim sects and were contended by the state to be promoting feelings of hatred between different classes of citizens as well as bringing into contempt a class of citizens, the court endeavored to circumscribe the ambit of "hate speech" and carve out room for even polemical or controversial debate. Justice A.R.Cornelius said:

> [A]ny form of mere dislike is not enmity; the feelings must be one of hostility, antagonism and ill-will. Similarly, hatred is much stronger than mere opposition; it means aversion carried to the point at which there is a desire to injure or destroy the object of the emotion, and contempt means more than regarding the object as inferior; it involves an opinion that is the object of a vile, despicable or worthless character.[303]

In similar subsequent attempts, the judiciary further narrowed the ambit of press regulatory laws by stating that, "In construing the offending article, we must read it as a whole in a fair, free and liberal manner and not in any narrow minded or sectarian way, nor are we to pick out isolated words or sentences from one or the other place of the article or

303. In the matter of The Daily Ehsan, (1949) P.L.D. 282, 296 (Lahore) (Pak.). In a subsequent case, the court looked at the rules of engagement in controversial religious speech and said that there was no restriction on such speech as long as the speech or writing furthered the ends of the controversy. It was only when such speech contained malice and was not necessary to further the ends of the controversy, that it could be scrutinized by the courts. *See* Working Muslim Mission and Literary Trust, Lahore v. The Crown, (1954) P.L.D. 724, 730 (Pak.). In a later case, while examining the limits of political and anti-government speech, the court urged that it was very important to make a distinction between the effect of an article which was merely disparaging in nature and one which had the effect of bringing the Government into hatred and contempt — which in turn were very strong terms and may not necessarily follow from a disparaging remark against the Government or its executive officers. *See* Ilyas Rashidi v. Chief Commissioner, Karachi, (1975) P.L.D. 890, 891 (Karachi) (Pak.).

publication."[304] Indeed, judicial pronouncements from that era vibrantly extol the virtues of "healthy" criticism and underline that "politics" entails the expression of a developed human mind and could not be repressed for long periods of time.[305] The commitment to free speech and to a truly democratic ethos in such judgments is highly significant, for they came during an era of multiple interruptions of democratic politics and blatant state suppression of rights such as that of speech.

5. Free Speech Protection under Article 19 of the Pakistani Constitution: A Cost-Benefit Approach

Coming now to Article 19, with so many "claw back" provisions protecting different public interest and public policy imperatives enshrined in its text, it is already evident that freedom of speech is neither phrased in as liberal and empowering a fashion as in the Constitution of the United States, nor does it enjoy supremacy over other rights as it does in that document. At the same time, it arguably still provides the judiciary ample room for defining the ambit of constitutionally protected speech by potentially elaborating upon the restrictive limits of the "claw back" provisions. There are several important Pakistani judgments that underline the importance of interpreting the Constitution in a manner that the ambit of fundamental rights, including that of freedom of speech, is not curtailed, but indeed expanded.[306] And yet the judicial pronouncements in the case law generated under Article 19 specifically are not that extensive—both in terms of clearly defining and expanding categories of untouchable speech or

304. *See* The Sangbad Newspaper and Nasiruddin Ahmed v. Province of East Pakistan, (1958) P.L.D. 324, 330 (Dacca) (Pak.). *See also* further reaffirmation of this in Mahmood Ahmad Abbasi v. The Governor of West Pakistan, PAK. CRIM. L.J. 1139, 1148 (1968).

305. *See* Muhammad Saleem v. Government of West Pakistan, (1960) P.L.D. 206, 207, 210 (Lahore) (Pak.).

306. For example, the Pakistan Supreme Court has held that constitutional interpretation should not just be ceremonious observance of the rules and usages of interpretation but instead inspired by, *inter alia*, Fundamental Rights, in order to achieve the goals of democracy, tolerance, equality and social justice. *See* Benazir Bhutto v. Federation of Pakistan, (1988) P.L.D. 416, 489 (Pak.). The prescribed approach while interpreting Fundamental Rights is one that is dynamic, progressive and liberal, keeping in view the ideals of the people, and socio-economic and politico-cultural values, so as to extend the benefit of the same to the maximum possible. The role of the courts is to expand the scope of such a provision and not to extenuate the same. *See* Muhammad Nawaz Sharif v. Federation of Pakistan, (1993) P.L.D. 473, 674 (Pak.).

alternatively, categorically and clearly limiting certain kinds of speech and the circumstances under which they can be legitimately proscribed by the State. Instead, the courts have essentially adopted a case-by-case approach. While espousing the importance and value of free speech, they have chosen to gauge the "reasonableness" of any restrictions imposed by the legislature by attempting to strike a balance between conflicting rights and public interest and public policy imperatives.

What emerges is a stream of cases where the Pakistani courts of the more recent era have continued to emphasize the freedoms of speech and press as essential requirements for the survival and sustenance of democracy, but qualify that such rights are not absolute, that reasonable restrictions based on reasonable grounds can be imposed, and that reasonable classifications can be created for differential treatment.[307] There is a fairly developed body of law on the area of interplay between free speech and the laws of contempt and defamation. The courts have come out strongly in saying that a free speech right does not give citizens a license to commit contempt of court.[308] While striking down any state attempts to directly or indirectly curtail freedom of the press,[309] and refusing temporary injunctions to restrain publication of a news item about alleged malpractices,[310] the courts have at the same time restrained

307. *See* Engineer Jameel Ahmad Malik v. Pakistan Ordinance Factories Board, Wah Cantt, SCMR 164, 178 (2004) (Pak.). The Supreme Court had also said in an earlier seminal case, which dictum has since been followed in subsequent cases, that the law permits reasonable classification and distinction in the same class of persons but it should be founded on reasonable distinction and reasonable basis. *See* Abdur Rehman Mobashir v. Syed Amir Ali Shah Bokhari, PLD 113 (1978) (Pak.).

308. *See, e.g.*, The State v. Sheikh Shaukat Ali, Advocate, (1976) PLD 355, 364 (Pak.). The Court said that Article 19 is in a way subject to Article 204 of the Constitution which provides a safeguard in the public interest against any attempt to scandalize the courts or undermine their dignity. *See* PAK. CONST. art. 204(2)(d).

309. *See* Muzaffar Qadir v. Dist. Magistrate, (1975) 27 P.L.D. (Lahore H.C.) 1198, 1204–05 (Pak.) (striking down a law found to illegally refuse permission to the petitioner to bring out a newspaper through the imposition of certain unreasonable requirements). *See also* Indep. Newspapers Corp. v. Chairman, Fourth Wage Bd. Implementation Trib. for Newspaper Employees, (1993) 26 S.C.M.R. 1533, 1544 (Pak.) (finding that any measure, including the cost of production and resultant price increase, that directly or indirectly restrains the circulation of newspapers should be avoided as far as possible); Qaisar Nadem Saqi v. Dist. Coordination Officer, (2006) 58 P.L.D. (Lahore H.C.) 76, 81 (Pak.) (saying that any attempt to curtail freedom of press must not be slipshod and must withstand judicial scrutiny).

310. *See* Unichem Corp. v. Abdullah Ismail, (1992) 10 M.L.D. (Sindh H.C.) 2374, 2376–77 (Pak.) (finding such an injunction to be in violation of the principles of free speech as it may suppress facts which may be of public interest, and warning that if a newspaper report against which such an injunction was sought was later found to

publications they have found to be defamatory.[311] At times the courts have even exhorted the press to bring excesses of government authorities to the public's attention and strongly promoted political speech.[312] The courts have also determined that restrictions on speech which may have the effect of creating or increasing hatred or animosity between different ethnic groups may be reasonable. However, the courts have also advocated a cost-benefit approach to striking a balance between preservation of freedom of speech and protecting conflicting imperatives of public interest within the restrictive categories acting as caveats to Article 19.[313]

We have already seen that when it comes to the right of free speech—or for that matter any other fundamental right—there can be considerable variation in terms of its ambit in different jurisdictions. Free speech is a very different concept in the United States than in the United Kingdom. Both positions have arguments in their favor, their own respective protagonists and antagonists, and remain in a constant state of evolution. Furthermore, at a preliminary level, it is apparent that such variations are a function of the structure and form of a country's

be false and defamatory, the publisher could face an action under the law of defamation; publishing the story would be at their own risk and cost).

311. *See* Sadia Sumbel Butt v. Rafiq Afghan, (2006) 24 M.L.D. (Sindh H.C.) 1462, 1465–68 (Pak.) (finding allegations of prostitution and drinking made against a female airhostess in a newspaper to be defamatory and in violation of Article 14, which protects the right of human dignity under the Pakistani Constitution). *See also* Syed Masroor Ahsan v. Ardeshir Cowasjee, (1998) 50 P.L.D. 823, 834 (Pak.) (observing that freedom of press was not "absolute, unlimited and unfettered" and that its "protective cover" could not be used for wrongdoings); Muhammad Rashid v. Majid Nizami, (2002) 54 P.L.D. 514, 524–25 (Pak.) (saying that despite the fact that Article 19 did not contain defamation as a claw-back provision, it did not give license to the press to publish harmful and damaging material).

312. *See* Sultan Ali Lakhani v. Shakil ur Rehman, (1997) 49 P.L.D. (Sindh H.C.) 41, 48–49 (Pak.) (saying that pre-censorship in the absence of any reasonable restrictions imposed by the law for any purposes specified by Article 19 would be violative of the freedoms of speech and press). *See also* Benazir Bhutto v. News Publ'ns (Pvt.) Ltd., (2000) 22 C.L.C. (Sindh H.C.) 904, 911–12 (Pak.) (stating that in an Islamic society, every citizen was entitled to raise objective criticism on the ruler of the day—which was also in keeping with the modern democratic ethos); Abu Bakar Muhammad Reza v. Sec'y to Gov't of Punjab, Home Dep't, (2005) 57 P.L.D. (Lahore H.C.) 370, 372–74 (Pak.) (stating that the distribution of anti-government materials came under the protection of Article 19).

313. *See* Ghulam Sarwar Awan v. Gov't of Sind, (1988) 40 P.L.D. (Sindh H.C.) 414, 418–24 (Pak.) ("The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond that [which] is required in the interest of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates.").

constitutional framework, its political ideology, and its own unique alchemy of historical events, social structures, cultural values, political evolution, and contemporary realities. Pakistan in that sense is no different, and in many important ways these factors have defined and continue to define not only the scope of free speech in Pakistan, but also what price the State and society are willing to pay for such freedom. On the speech-protection spectrum, Pakistan lies short of the controversial position of the United States, but by no means is it a country where various categories of speech are not accorded due protection. In spite of the several "claw back" provisions, the Pakistani courts have adopted a case-by-case, cost-benefit approach to deciding whether speech ought to be protected or trumped by any conflicting values, and, where speech is proscribed, it is not always for less-than-defensible grounds.

B. THE BLASPHEMY LAWS IN PAKISTAN AND FREE SPEECH IMPLICATIONS

Having analyzed at length both the controversial evolution and ethos and the various design and drafting defects of the blasphemy laws, it is now appropriate to review these laws in view of the international jurisprudence on "hate speech." Review of the United States' jurisprudence in particular, and also that of other jurisdictions, reveals that the relevant laws limiting hate speech attach great importance to the fact that, in order for speech to fall in the proscribable category of "fighting words," it must be shown to trigger a violent reaction and a resultant breach of peace. It is not the mere prejudice of the idea or the unpleasantness of the form of its communication which makes it subject to restriction. Analysis of the blasphemy laws as a form of "hate speech," as initially proposed, reveals that they (in particular Section 295-C) do not require a linkage between blasphemous speech and a breach of peace. Not only do these laws not require a nexus between intent and action, they also do not require a nexus between action and outcome.

We now move on to the blasphemy laws and their free speech implications. Our review of the forty-two reported cases as well as several unreported cases under Section 295-C reveals that speech was impugned as blasphemous in a variety of forms and situations, including, *inter alia*, casual conversations, speeches at religious congregations, raising slogans at processions, provocation leading to retorts, arguments and altercations, publishing and/or teaching, translating and

calligraphy, photocopying, possessing someone else's writings, wearing badges with certain inscriptions, placing a sticker with a certain inscription on a motorcycle, sending wedding invitations with certain verses of the Quran, displaying certain verses of the Quran on a poster or in front of a house, sending anonymous messages or letters, proselytizing and preaching, religious polemics, publishing of viewpoints, editing magazines, etc. What is quite remarkable, however, is that even though in some of the cases the courts discussed whether the impugned speech was likely to provoke and/or create a breach of peace, in not a single instance did they invoke or discuss whether Article 19 Free Speech protection had a role to play given that it was always speech that was being challenged and demanded to be proscribed.

This is all the more significant given that, as it turns out, the accused were found to be innocent in a majority of these cases at the appellate level. In the remaining, the verdict was invariably in their favor at the trial court level after bail questions had been determined by the appellate courts. We also know for a fact that not a single person has been sent to the gallows for a blasphemy conviction in Pakistan.[314] And yet though speech was always in question, and speech was invariably found to be neither unholy nor illegal —the constitutional protection for speech was never raised as directly or indirectly relevant in these cases. Given the general approach which the Pakistani courts have adopted in Article 19 jurisprudence while dealing with other kinds of speech, this is highly aberrational.

On the very rare occasion that Section 295-C or other blasphemy laws have been challenged on constitutional grounds, the courts have been swift and categorical in rejecting such arguments.[315] The most direct judicial tackling of the question of whether some of the Pakistani blasphemy laws are in conflict with the freedoms provided under the Pakistani

314. *See Pakistani Gets Life for Blasphemy*, BBC NEWS, Nov. 30, 2004, http://news.bbc.co.uk/2/hi/south_asia/4055723.stm.

315. *See* Riaz Ahmad v. State, (1994) 44 P.L.D. (Lahore H.C.) 485, 495–96 (Pak.). In *Kurshid Ahmad v. Government of Punjab*, (1992) 44 P.L.D. (Lahore H.C.) 1, 16 (Pak.), the court rejected a challenge to Section 298-C on the basis of Article 20's "Freedom of Religion" provision of the Constitution by saying that Article 20 was subject to Article 260(3) of the Constitution which declared the Qadianis to be non-Muslims, which meant that Qadianis could profess that they believe in the unity of Allah and/or the prophethood of Mirza Ghulam Ahmad, but they could not profess themselves to be Muslims or their faith to be Islam.

Constitution, however, has come in the very important case of *Zaheeruddin v. State*.[316] A three-judge majority in a five-member bench of the Supreme Court held that resort to Article 20's "Freedom of Religion" provision[317] on part of members of the Qadiani/Ahmadi sect, in their effort to challenge Section 298 of the PPC, could not be allowed to succeed on grounds of their interference with the law and order and breach of public peace and tranquility.[318] The State would not permit, the majority said, anyone to take away the fundamental rights of others, in the enjoyment of his own rights, and no one could be allowed to insult, damage, or defile the religion of any other class or outrage their religious feelings, so as to disturb the peace.[319] This is a rare instance of the courts gauging the acceptability of allegedly blasphemous actions and speech while conducting a cost-benefit analysis of the freedoms enshrined under the Constitution *vis-à-vis* public policy imperatives to prevent breach of peace. Though not talking directly about Article 19—focusing instead on Article 20—the majority drew an analogy which very much sounds like a "fighting words" scenario relatable to Article 19 speech, as the impugned actions of the applicants were both ostensibly an exercise of freedom of religion as well as free speech. In spite of the clear applicability of Article 19 to the case, however, the majority did not rely on Article 19.

The majority conducted a historical and theological evaluation of the impugned actions and speech of the appellants and discussed at length the various doctrinal differences between the faith systems of mainstream Islam and the Ahmadi sect. It then condemned as unpardonable any insulting and

316. Zaheeruddin v. State, (1993) 26 S.C.M.R. 1718 (Pak.). The case was decided in the context of the larger constitutional question of the Qadiani sect's freedom to profess its own religion and its conflict with the Pakistani blasphemy laws. The petitioners had been charged and sentenced for wearing badges displaying the "Kalima" or the Muslim creed. The Supreme Court dismissed appeals against convictions under The Anti-Islamic Activities of Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance 1984 (Ordinance NOXX of 1984) which was also challenged by the appellants as being *ultra vires* of the Pakistani Constitution. A specific challenge was directed at Sections 298-B and -C that had been introduced to the PPC by the said Ordinance. For details of these provisions see PPC, *supra* note 7, at 647–48.

317. PAK. CONST. art. 20 ("Subject to law, public order and morality (a) every citizen shall have the right to profess, practise and propagate his religion; and (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.").

318. *Zaheeruddin*, 26 S.C.M.R. at 1765.

319. *Id.*

offensive use of language or behavior on the part of the Ahmadis directed at the Muslims, highlighting the breach of peace ramifications of the same.[320] However, this clamping down was not just on so-called offensive behavior. The majority said that given the significant differences between the two faith systems—even the adoption by the Ahmadis of certain words, names, descriptions, titles, epithets, etc., traditionally used by Muslims—would be validly regarded as misrepresentative, belittling, and offensive by the Muslims.[321] Adopting a firmly public policy promotion approach, the majority went on to say:

> So, if an Ahmadi is allowed by the administration or the law to display or chant in public, the 'Shaair-e-Islam,'[322] it is like creating a 'Rushdi' out of him. Can the administration in that case guarantee his life, liberty and property and if so at what cost? Again if this permission is given to a procession or assembly on the streets of a public place, it is like permitting civil war.[323]

The minority of two judges, however, also tackled the question as to whether any violation of Article 19 freedom of speech was involved in the prohibitions introduced, *vis-à-vis* the Ahmadis' propagation of their faith, by Section 298 of the PPC, and found that a violation could only be found if there were a discriminatory prohibition on the Ahmadis in terms of propagation of their religion, but that if such propagation were coupled with any offensive speech or behavior, the Article 19 protection would not be available.[324] The difficulty of adjudicating legal cases deeply imbued with theological complications and controversies was, however, not lost to the judges.[325]

The *Zaheeruddin* case occurred in the context of the blasphemy laws specifically directed at the Ahmadis.[326] In the final analysis, however, Section 295-C remains unassailed on fundamental rights grounds, in contexts where allegedly blasphemous speech may be actually valid academic or general discussion and dialogue, potentially garnering protection from

320. *Id.* at 1776–77 ("It is the cardinal faith of every Muslim to believe in every Prophet and praise him. Therefore, if anything is said against the Prophet, it will injure the feelings of a Muslim and may even incite him to the breach of peace, depending on the intensity of the attack.").

321. *Id.* at 1765–78.

322. The distinctive characteristics of Islam. *See id.* at 1755.

323. *Id.* at 1777.

324. *Id.* at 1747–48, 1780.

325. *Id.* at 1749.

326. *Zaheeruddin*, 26 S.C.M.R. at 1765.

Article 19.

C. NON-INVOCATION OF ARTICLE 19 IN BLASPHEMY CASES AND FUTURE SCENARIOS OF POTENTIAL ABUSE

The reported and unreported cases under Section 295-C encompass speech in a variety of forms. Whether the speech was unintentional, obscure, taken out of context, misinterpreted, misconstrued, logically and analytically defendable, manipulated by those with a *mala fide* intent or a personal gripe against the speaker, made in the heat of the moment or on provocation, made by an insane person, or made during an academic discourse does not seem to preclude the implication of people under the very broad ambit of Section 295-C. Cases like that of *Dr. Younas Sheikh* illustrate that even ordinary, classroom discussions can be taken out of context and deemed as blasphemous.[327] This, combined with the non-invocation of Article 19 in such cases, can bode rather ominously for innocent and, at times, socially meaningful speech in the future.

Consider the following hypothetical scenario, which may not be as unlikely as it may seem. Given the current formulation of Section 295-C, even this Article can potentially trigger a blasphemy charge and prosecution. The wide ambit of the law, the increasingly religiously intolerant environment gripping Pakistan, and the lack of resilience shown by Pakistan's lower judiciary in the face of street pressure and threats by religious zealots and self-styled custodians of faith, create a rather volatile alchemy. Though it is based on rigorous academic work, written by Muslims who have tremendous respect for and devotion to the Holy Prophet (PBUH), and with the intention of highlighting the injustices perpetrated by a flawed and highly unjust law, any portion or aspect of this Article could be mischievously or misguidedly challenged as blasphemous. Direct or indirect "imputation, innuendo, or insinuation" is after all an incredibly wide definition, and, regardless of the fact that Pakistan's appellate judiciary has by and large shown the sophistication, thoroughness, and courage to throw out false convictions, that dispensation has mostly come after the accused has at times borne a heavy cost. In the recent case of *Ranjha Masih v. State*,[328] the Lahore High Court overturned the

327. *See* FIR, *supra* note 159, and accompanying text.
328. Ranjha Masih v. State, (2007) 9 Y.L.R. (Lahore H.C.) 336, 340 (Pak.).

conviction of a person who had been charged under Section 295-C for allegedly committing blasphemy while raising slogans in a procession, and vehemently denounced the fact that the accused had been languishing in jail for almost eight-and-a-half years. Justice was eventually done, but it was inexorably delayed.

The state of Pakistan's lower judiciary merits some discussion here as well. After all, it is its courts of first instance that take up blasphemy cases coming through investigative and prosecutorial systems which suffer from many deficiencies and which, along with the performance of the lower judiciary, have been roundly criticized by the appellate courts in various reported judgments. The judges manning the lower judiciary have been historically under-funded, under-trained, and over-burdened with work, so that such careers are primarily opted for by those who have few other alternatives—essentially the very bottom of the available talent pool.[329] The fact that all the provincial governments as well as the federal government in Pakistan allocate less than one percent of their respective budgets to the judiciary underlines historical low-prioritization and neglect of the justice sector.[330] The adverse impact on both the morale and performance of the Pakistani lower judiciary of meager salaries, inadequate facilities, poor working environment, low social status, and overwhelming workloads is a well documented phenomenon. Pleas for reform have been consistently ignored.[331]

329. *See generally* BHANDARI & NAQVI, COUNTRY STUDY: PAKISTAN (The Asia Foundation & Asian Development Bank Judicial Independence Project 2002) (identifying and analyzing the following factors as responsible for the highly unsatisfactory state of the lower judiciary in Pakistan: poor legal education, as well as lack of on-going training opportunities; a culture of litigation and an insufficient number of judges causing existing judges to be over-worked; the plummeting of funding levels for the judiciary over the years; the very low-level of judicial salaries, as well as their rapid decline in real value terms over the past century; the highly inadequate physical infra-structure and facilities; the, at times *ad hoc*, policies followed by the High Courts with regard to the promotion, transfer and disciplinary actions of lower courts judges and the resultant negativities; personal security concerns and the threat of intimidation or even individual violence from disgruntled litigants and intimidating lawyers, as well as organized terrorist, sectarian,, and other groups; instances of high-handedness by the Executive branch; and ethnic and clan loyalties and their impact on judicial dispensation). These, of course, are independent factors, in addition to the general impact of the various constitutional upheavals throughout Pakistan's history and the resultant instability.

330. *Id.* at 92–132.

331. *See* ASIAN DEV. BANK & PAK. MINISTRY OF LAW, JUSTICE & HUMAN RIGHTS, STRENGTHENING THE SUBORDINATE JUDICIARY IN PAKISTAN (Asian Dev. Bank & Pak. Ministry of Law, Justice & Human Rights 1999).

With pluralism and religious and political tolerance facing their strongest challenge yet in Pakistan, and with the forces of dogma, intolerance, and obscurantism becoming increasingly assertive and violent, laws like Section 295-C pose a constant threat to both innocent citizens and the freedom of speech in Pakistan. With the blasphemy laws persisting in spite of recent pressures to amend them,[332] innocent, socially relevant, and meaningful speech continues to be a potential victim of the same.

VI. CAPITAL PUNISHMENT

A. THE FEDERAL SHARIAT COURT JUDGMENT

Section 295-C states that the defilement of the Holy Prophet's name is punishable with life imprisonment or death.[333] In 1990, a petition demanding that the alternative punishment of life imprisonment be declared void on account of repugnance to the Quran and the Sunnah, was moved before the FSC.[334] The petition was accepted and its demands endorsed on the basis of arguments employing the FSC's interpretation of various Quranic verses.[335] The FSC further directed that a copy of the court order be sent to the President of Pakistan to constitutionally require him to take steps suitably to amend the law and demand that should such an amendment not take place before April 30, 1991, the words "or imprisonment for life" in Section 295-C PPC shall cease to have effect on that date.[336] The amendment directed by the FSC was not made to the PPC; as a result, the clause "or imprisonment for life" remains a part of

332. In 2000, President General Pervez Musharraf withdrew his earlier announcement to bring procedural changes in the manner of registration of blasphemy cases. Though this was not even a substantive change to the laws, he quickly capitulated to a threat of street protests by some religious parties. *See* Owen Bennett-Jones, *Pakistan's Blasphemy Law U-Turn*, BBC NEWS, May 17, 2000 http://news.bbc.co.uk/2/hi/south_asia/751803.stm. This was looked upon as betrayal on part of Musharraf, who had criticized the laws in the past and promised amendments, by many human rights organizations as well as minority groups. Two years earlier a Roman Catholic bishop had committed suicide in protest against the death sentence awarded to an accused—a Christian. *See Despatches*, BBC NEWS, May 8, 1998, http://news.bbc.co.uk/2/hi/south_asia/88890.stm.

333. For text of Section 295-C, *see supra* note 8.

334. Muhammad Ismail Qureshi v. Pakistan, (1991) 43 P.L.D. 10 (Fed. Shariat Ct.) (Pak.).

335. *Id.* at 34.

336. *Id.* at 34–35.

Section 295-C.[337] Since all injunctions of the FSC are binding,[338] as a result of this judgment, the alternative penalty has presumably lapsed, and death is a mandatory punishment for the offense of blasphemy under Section 295-C.

According to Minto, the very premise upon which the death penalty was declared mandatory is flawed—and if blasphemy falls within the purview of "hadd" (Islamic punishments that carry the mandatory death penalty), as the FSC ruled, then the higher burden of proof requisite for convictions in "hadd" cases also ought to be required.[339] Moreover, according to Minto, the legislature alone possesses the competence to enact legislative amendments. Not only does the FSC, in his view, represent a redundant, parallel judicial apparatus, but by requiring it to change or strike down law repugnant to Islam, the purpose of the judiciary as the interpreter rather than the formulator of law is subverted. While he advocates restoration of the alternative punishment of life imprisonment, even that, according to him, is a temporary measure. In the long term it is essential to drastically mitigate the penalty for the offense of blasphemy.[340] Indeed, in the Indian Penal Code, the maximum penalty awarded to any category of religious offenses was two years.[341]

It is significant that the declaration of death as the mandatory punishment for blasphemy under Section 295-C has led to an increase in the number of blasphemy cases registered. It can be ventured, based on a review of the nature of allegations made in these cases and their eventual verdicts, that the death sentence has increased the potency of Section 295-C as an instrument for victimization. This view is shared by the Lahore High Court, which said in a recent judgment:

> It appears that ever since the law became more stringent, there has been an increase in the number of registration of blasphemy cases . . . between 1948 and 1979, 11 cases of blasphemy were registered. Three

337. Interview with Abid Hassan Minto, *supra* note 108.

338. PAK. CONST. art. 203 GG, at 119.

339. *See Qureshi*, 43 P.L.D. at 30. Mr. Minto, as the counsel of an accused under Section 295-C, raised this point before the Supreme Court of Pakistan as an alternative plea in the case of *Ayub Masih v. State*, (2002) 54 P.L.D. 1048, 1054–55, 1059 (Pak.). The accused was, however, acquitted on merits and this question was left unaddressed by the court. At the same time, however, there was no affirmation by the Supreme Court of the declaration of blasphemy as a "hadd" offense by the FSA. This issue can thus be considered as currently unresolved at the level of the apex court.

340. Interview with Abid Hassan Minto, *supra* note 108.

341. INDIA PEN. CODE, *supra* note 121, at 1324–42.

> cases were reported between the period 1979 and 1986. Forty-four cases were registered between 1987 and 1999. In 2000 alone, fifty-two cases were registered . . . this shows that the law was being abused . . . to settle . . . scores.[342]

It is fortunate that appeals against Section 295-C convictions have so far been allowed by appellate courts and the penalty revoked. As mentioned earlier, acquittal is not sufficient compensation for the physical and emotional trauma borne by blasphemy convicts on the death row, especially in light of the threats to their security which they face upon release.

B. THE DEATH PENALTY FOR BLASPHEMY AND THE INTERNATIONAL TRENDS VIS-À-VIS CAPITAL PUNISHMENT

There is a broad international consensus on the undesirability of the death penalty in principle. The U.N. General Assembly Resolution 32/61, dated December 1977, calls for "progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment."[343] Moreover, extremely strict guidelines regulate the use of this penalty in countries where its use persists. The first clause of the U.N. Economic and Social Council's (ECOSOC) "Safeguards guaranteeing protection of the rights of those facing the death penalty," approved by the U.N. General Assembly in 1984, states that "capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes, with lethal or other extremely grave consequences."[344] There is, however, an increasing international movement to bring about total abolition of the death penalty. Amnesty International—one of the most prominent international organizations actively working towards an end to executions and the abolition of the death penalty everywhere—in its latest report reiterates its strong anti-death penalty stance by describing it as "the ultimate cruel, inhuman and degrading punishment."[345] The organization also argues that the death penalty "violates the right to life," "is irrevocable," might be inflicted on the innocent, and "does not

342. Muhammad Mahboob v. State, (2002) 54 P.L.D. 587, 597 (Lahore) (Pak.).
343. G.A. Res. 32/61, ¶ 11, U.N. Doc. A/RES/32/61 (Dec. 8, 1977).
344. ECOSOC Res. 1984/50, ¶ 14, U.N. Doc. E/1984/50 (May 25, 1984).
345. Amnesty Int'l, *Death Penalty*, Apr. 1, 2007, http://archive.amnesty.org/library/index/engact500102007.

deter crime more than other punishments."[346]

There are additional persuasive arguments against the death penalty, especially in countries where the legal systems suffer from several shortcomings and are thus more prone to making mistakes and giving in to political and other pressures. Critics of the death penalty point out the high probability of legal and procedural inconsistencies and errors. These inescapable flaws, they say, are exacerbated by discrimination, prosecutorial misconduct, and inadequate legal representation, leading to execution of innocent people. They further criticize the death penalty for its misuse by authoritarian states as an instrument of coercion and persecution against dissenting voices, for its perpetuation of a culture of violence and brutalization, for its discriminatory use against minorities and members of racial, ethnic, and religious communities, for its divisive impact on widely held values, for its cost on the public purse, which funds could be better expended on rehabilitation and reconciliation, crime prevention, and helping the victims' families, and for the cost put on the families of the executed and the non-impact of the execution on the families of the victims of those executed, as well as further extension of their torture. They also argue, relying on various scientific studies, that the death penalty has no greater deterrent effect compared to other lesser penalties and is a simplistic solution to complex human problems.[347]

Amnesty International points out the large number of international covenants, treaties, and developments that demonstrate that the international mood is fast moving towards the abolition of the death penalty.[348] It supports its claims by reporting that while in 1977 only sixteen countries had abolished the death penalty for all crimes, today the figure stands at ninety-one.[349] To date, 135 countries have totally

346. *Id.*
347. *Id.*
348. *Id.*
349. According to Amnesty International, to date ninety-one countries have abolished the death penalty for all crimes, eleven have abolished it for ordinary crimes only, and thirty-three countries are abolitionists in practice. In this way, 135 countries have either totally abolished the death penalty in law, or abolished it in law for ordinary crimes or abolished it in practice. Pakistan is amongst the sixty-two remaining countries (which, barring the U.S.A, Japan, South Korea, Malaysia, Singapore and China, are mostly less developed countries with undemocratic political governance setups) that retain the death penalty. *See* Amnesty, Int'l, *Death Penalty: Abolitionist and Retentionist Countries*, Sept. 17, 2007, http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries.

abolished the death penalty in law, abolished it in law for ordinary crimes, or abolished it in practice. Pakistan is among the sixty-two remaining countries that retain the death penalty.[350]

Given the above snapshot of the fast changing global opinion on the death penalty, its continuation in Pakistan looks increasingly untenable and indeed many of the problems pointed out by critics of the death penalty plague its legal and judicial system, thus making the possibility of investigative and judicial errors high. The implications of capital punishment for a conviction under Section 295-C, in particular, become clearer when one considers the context of religious intolerance within which the law operates. A grave consequence of the death penalty is the implicit sanction it grants extremist elements which invariably demand such penalty in blasphemy cases, to themselves inflict the penalty through vigilante justice if the court does not deliver according to their wishes. That acts of this nature have occurred make the barbarism of the extremists evident. While it is arguable that even in the absence of the death penalty, the bigoted attitude of the extremists would remain unaltered, it is undeniable that legal sanction for death to the accused is an added impetus to their taking the law into their own hands.

Taking into account the abuse and manipulation to which Section 295-C is subjected, as well as the context within which it operates, the adverse consequences of capital punishment for blasphemy become evident and make the case for greater substantive and procedural safeguards against false convictions and a more lenient penalty stronger.

VII. CONCLUSION

Pakistan's citizenry, and in particular its vulnerable groups, remain besieged by blasphemy laws that were clearly promulgated in an undemocratic environment and manner. The products of a self-perpetuating dictatorial ethos, they suffer from several serious design and drafting issues and when applied in a legal environment that is debilitated by several

For Amnesty International's justifications for its position and its response to arguments in favor of the death penalty, see Amnesty Int'l, *supra* note 345.

350. Amnesty, Int'l, *Death Penalty: Abolitionist and Retentionist Countries*, Sept. 17, 2007, http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries.

constraints and shortcomings, they have resulted in the persecution, harassment, unjust confinement, exile, and even the death of innocent people. At the same time these laws continue their highly problematic existence in the name of Islam, an additionally painful fact to many Muslims. Furthermore, they underline autocratic attempts to create a theocratic state to entrench certain vested, and by no means majority, interests in a country whose founding father visualized, and whose vast majority of citizens are committed to, the creation and sustenance of a pluralistic, progressive, and tolerant democracy. The blasphemy laws, however, continue to perpetuate a highly uncomfortable incongruity and apart from being responsible for several miscarriages of justice, they exacerbate a growing environment of dogma and intolerance — spawning a culture of extremism and violence. They provide openings and cover to religious zealots and vigilantes as well as those wanting to settle personal scores through the coercion of law, as well as create serious doubts about the future of free speech in the country.

At the very least, addressing the design and drafting faults as well as of the shortcomings of the investigative, procedural, prosecutorial, and adjudicative regimes highlighted and discussed in this article can greatly redress the current misuse and exploitation of the blasphemy laws. However, it is high time that the very existence of the blasphemy laws is collectively and meaningfully reappraised by Pakistani policy makers, religious scholars, legal experts, human rights activists, citizen groups, and the people at large, in order to determine whether they deserve perpetuation. A related challenge is to question whether the pre-Zia religious offenses are not sufficient to tackle any genuine issues of hate speech, including blasphemous speech, and whether legal process and procedural reforms as well as tremendous budgetary and technical support and capacity building of the judiciary are not vitally required to prevent the abuse of even the pre-Zia religious offenses, and for that matter other existing laws. At a higher and fundamental level, Pakistan's blasphemy laws raise a palpable moral question as to that nation's commitment and ability to becoming a progressive, just and fair society where fundamental rights protection is accorded the highest values in its list of priorities. Pakistan's blasphemy laws damage both at a practical and at a symbolic level. It is high time to shed this tainted vestige of a period of its history that ought to not in any circumstances be

allowed to repeat itself.