

# BLASPHEMY LAWS AND PAKISTAN'S HUMAN RIGHTS OBLIGATIONS

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## Abstract

Pakistan's blasphemy laws are criticised for being discriminatory against religious minorities and inconsistent with human rights standards. There have been attempts in the past to amend these laws. However, after protests by religious parties, each of these attempts failed. In 2011 the debate to amend the blasphemy laws resulted in the killings of Governor Salman Taseer and the Federal Minister for Minorities, Shahbaz Bhatti. Such incidents have shocked the international community and caused a major blow to the efforts of civil society in Pakistan lobbying for the repeal of these laws. After Pakistan's ratification of the *International Covenant on Civil and Political Rights* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in June 2010, there is indeed a need to reassess the gamut of human rights violations under the blasphemy laws. This article critically analyses the impact of blasphemy laws on the core human rights enshrined in these treaties, with a view to build a case for repeal of these discriminatory laws.

## I INTRODUCTION

The creation of Pakistan through the partition of colonial India in 1947 led to the transmigration of around 10 million people from both India and Pakistan resulting in the killing of more than a million people in communal riots.<sup>1</sup> Although religious identity formed the basis of an independent state for Muslims of British India, the vision of the founding fathers of Pakistan was to create a secular entity where

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1 For details of partition, see Ian Talbot and Gurharpal Singh, *The Partition of India* (Cambridge University Press, 2009) 61-2.

Muslims could live freely from Hindu domination.<sup>2</sup> It was clear to the leaders of the Pakistan movement that, once created, Pakistan had to be a secular state with equal rights for minorities since a considerable number of Muslims would be left in India.<sup>3</sup> The right to religious freedom was thus central to the struggle for Pakistan.<sup>4</sup> Mohammad Ali Jinnah, popularly known as Quaid-e-Azam, reiterated this vision in his Presidential address to the first Constituent Assembly on 11 August 1947:

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 this State of Pakistan. You may belong to any religion or caste or creed — *that has nothing to do with the business of the State.*<sup>5</sup>

However, in the years following independence, Pakistan gradually drifted towards a regressive regime, promoted by a non-democratic political establishment.<sup>6</sup> Pakistan's regression into extremism is due to multiple factors, ranging from the failure of the first Constituent Assembly to develop a constitution for the country to internal strife within the politico-bureaucratic governing elites and successive military dictatorships, which allowed religious parties to exploit the vacuum in order to gain ground for radical fundamentalism.<sup>7</sup> The use of Islam for political purposes not only resulted in arbitrary islamisation of Pakistan's legal system but also contributed to a prevailing culture of intolerance and discrimination in the country.<sup>8</sup>

The political campaign of islamisation in the 1980s by the military dictator, General Zia-ul-Haq (1977-1988), resulted in discrimination against religious minorities and polarisation of the society.<sup>9</sup> The most

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2 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights* (Kluwar Law International, 2000) 142-3. See also, Jaswant Singh, *Jinnah: India-Partition-Independence* (Rupa & Co, 2009) 485.

3 Theodore Gabriel, *Christian Citizens in an Islamic State: The Pakistan Experience* (Asghate, 2007) 26.

4 Amjad M Khan, 'Persecution of the Ahmadiyya Community in Pakistan : An Analysis under International Law and International Relations' (2003) 16 *Harvard Human Rights Journal* 217, 221.

5 Quaid-i-Azam Mohammad Ali Jinnah, *Speeches as Governor General of Pakistan 1947-1948* (Ferozsons Ltd, 1962) 8-9 (emphasis added); see also Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford University Press, 2001) 75-6.

6 Maarten G Barends, 'Shari'a in Pakistan' in Paul Marshall (ed) *Radical Islam's Rules: The Worldwide Spread of Extreme Shari'a Law* (Rowman & Littlefield Publishers, 2005) 75.

7 Samina Yasmin, 'Pakistan and the Struggle for "Real" Islam' in Shahram Akbarzadeh and Abdullah Saeed (eds), *Islam and Political Legitimacy* (Routledge Curzon, London, 2003) 70-6.

8 Barends, above n 6, 75.

9 Rehman, above n 2, 137.

damaging blows to Pakistan by Zia were the controversial changes introduced in the legal system, such as, the creation of the Federal Shariat Court<sup>10</sup>, a Separate Electorate System, Hudood Laws and anti-blasphemy laws.<sup>11</sup> Formulated too broadly, anti-blasphemy laws,<sup>12</sup> inter alia, seek to punish the offence of insulting the Prophet Mohammad and impose severe punishment.

The international community has criticised Pakistan's blasphemy laws for violating universal human rights standards. Under increasing external pressure as well as demands from civil society, there have been several failed attempts to amend these laws in order to prevent their misuse against innocent people. The governments of Benazir Bhutto (1988-1990 and 1993-1996), President Musharraf (1999-2008) and Prime Minister Gilani tried to make changes in the laws, but backtracked after threats made by religious parties.<sup>13</sup> There is instead consistent support for the blasphemy laws by an increasingly radicalised society which demonstrates an emotional and non-negotiable attachment with these laws, presumed to protect the honour of the Prophet of Islam.<sup>14</sup> Even a debate on amending these laws is viewed as an attack on Islam and critics are frequently declared blasphemers by the radical Mullahs and killed with impunity.<sup>15</sup> This indicates the extent to which contemporary Pakistani society has degenerated so far as the rule of law and equal protection of law to all citizens are concerned.

This article will explore the conflict of blasphemy laws with Pakistan's obligations under various human rights treaties ratified by the country.

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10 The Federal Shariat Court was established by the President's Order No 1 of 1980 as incorporated in the *Constitution of Pakistan, 1973* under Ch 3A. This Court is mandated to review and decide if the existing or proposed laws are in conformity with the injunctions of Islam. Further details, <<http://www.federalshariatcourt.gov.pk>>.

11 See, Osama Siddique and Zahra Hayat, 'Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan- Controversial Origin, Design Defects, and Free Speech Implications' (2008) 17 *Minnesota Journal of International Law* 303, 320.

12 Sections 295, 295A, 295B, 295C, 298A, 298B and 298C incorporated under Ch 15 (Offences relating to religion) of the *Pakistan Penal Code 1860*, explained in Pt III, are popularly termed as anti-blasphemy laws.

13 In 2010, the government of Yusuf Raza Gilani backed off from the proposed amendment of the blasphemy laws following mass demonstrations and processions by religious parties in the wake of the death penalty against a Christian woman, Aasia Bibi, and the murder of the Governor Punjab, Salman Taseer.

14 Salman Masood, 'Pakistanis Rally in Support of Blasphemy Laws', *New York Times* (online), 31 December 2010 <<http://www.nytimes.com/2011/01/01/world/asia/01pakistan.html>>.

15 On 2 March 2011, Pakistan's Federal Minister for Minorities Affairs, Mr Shahbaz Bhatti, a Catholic, was assassinated under reported suspicion of his criticism of blasphemy laws. Earlier, on January 2011, the Governor of Punjab, Mr Salman Taseer, the Governor of Punjab, was killed by his official guard.

Part II will briefly trace the islamisation of laws in Pakistan, with particular emphasis on the introduction of blasphemy laws. Part III will discuss Pakistan's obligations under international human rights law. Part IV will elaborate upon the inconsistency of blasphemy laws with soft international law involving religious freedom. Parts V and VI will compare blasphemy laws with core human rights, such as, freedom of thought, conscience and religion, rights of equal protection of law and due process. Part VII will analyse the impact of blasphemy laws on rights to life, security of the person and freedom from torture, inhumane and degrading treatment. This will be followed by an overall conclusion.

## II BACKGROUND OF ISLAMISATION AND BLASPHEMY LAWS

It is generally agreed amongst Muslim scholars that freedom of religion and equal protection of the law are the inviolable rights of all citizens in an Islamic state, irrespective of their religious beliefs.<sup>16</sup> In the initial years of its existence, Pakistan demonstrated a commitment to establishing a regime of non-discrimination and equal treatment of all individuals, including protection of its religious minorities.<sup>17</sup> For example, Constitutions promulgated in 1956, 1962 and 1973, as originally adopted, affirmed fundamental rights based on equality and non-discrimination on the bases of sex, race or religion.<sup>18</sup>

However, the inherent tensions between principles of religious orthodoxy and building a secular non-discriminatory state are reflected throughout the history of Pakistan.<sup>19</sup> Soon after independence, the aspiration for an Islamic system materialised with the adoption of the Objectives Resolution in 1949. The Objectives Resolution sowed the seeds of Islamisation, resolving that the future constitution of Pakistan should be based on the Islamic principles of freedom, social justice and equity.<sup>20</sup> The Objectives Resolution was opposed by the non-Muslim members of the Constituent Assembly, who feared discrimination by mingling Islam with the constitutional rights of citizens.<sup>21</sup> Similarly, the Munir Report (released after the judicial inquiry into the anti-Ahmadiyya riots of 1953) concluded that there was no consensus amongst religious

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16 Dr M Cherif Bassiouni, 'Sources of Islamic Law and Protection of Human Rights in Islamic Criminal Justice System' in M Cherif Bassiouni (ed) *The Islamic Criminal Justice System* (Oceana Publications 1982) 21. See also, Abul Al'a Maududi, *Islamic law and Constitution* (Islamic Publications, 3rd edition, 1967) 339.

17 Rehman, above n 2, 135.

18 Farooq Hassan, 'Religious Liberty in Pakistan: Law, Reality, and Perception (A Brief Synopsis)' (2002) *Brigham Young University Law Review* 283, 286-7.

19 Rehman, above n 2, 144. See also, Daniel P Collins, 'Islamisation of Pakistani Law: A Historical Perspective' (1987-1988) 24 *Stanford Journal of International Law* 511.

20 Khan, above n 5, 91.

21 *Ibid* 95.

scholars on the definition of a 'Muslim' and cautioned against the subordination of democratic principles for political expediency and to appease radical forces.<sup>22</sup>

Ignoring the forewarnings to mix religion with politics, Islam was declared the State religion in the 1973 Constitution, prescribing that only a Muslim could become the President and the Prime Minister of the country.<sup>23</sup> Furthermore, oaths of the offices of the President and the Prime Minister included words that the office holders believe in the fundamental tenets of the Islamic faith, including the teachings of the Quran and Sunnah, and hence escalated the path of islamisation in Pakistan.<sup>24</sup> The process of islamisation reached its peak during the reign of General Zia with the introduction of blasphemy laws and selective penal code changes, as explained below.

### A *Laws related to Religion - under the British Legal System*

Since Pakistan inherited the British legal system prevailing in colonial India at the time of the partition, most of the laws from the *Indian Penal Code 1860* including laws contained in Chapter 15 (offences relating to religion), became part of the *Pakistan Penal Code 1860* ('PPC'). Crimes under this Chapter criminalised 'the injuring or defiling [of] a place of worship, with intent to insult the religion of *any class*'.<sup>25</sup> The rationale of incorporating laws relating to religion into the *Indian Penal Code 1860* was to maintain a balance in the multi-religious society<sup>26</sup> of colonial India where religion was always a sensitive matter for the general masses.<sup>27</sup> The promotion of peaceful coexistence in multicultural societies is also the obvious intent of religious hatred laws prevalent in some western democracies such as the UK and Australia.<sup>28</sup> However, with Hindus forming the majority population in British India and all other religions (including Islam) in the minority, part of the

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22 Report of the Court of Inquiry constituted under Punjab Act II of 1954. See also, *ibid* 121, quoting Munir Report 1954.

23 *Constitution of Pakistan 1973* art 2, 41(2) and 91(3).

24 Gabriel above n 3, 27.

25 *PPC* s 295 (emphasis added).

26 People of colonial India belonged to different religions, namely Hinduism, Islam, Christianity, Jainism, Buddhism, Parsis and Sikhism.

27 Siddique and Hayat, above n 11, 336 quoting Muhammad Mazhar Hussain Nizami, *The Pakistan Penal Code with Commentary (All Pakistan Legal Decisions 1974)* 1322. The original laws (s 295 and s 295A PPC) were introduced by the British in 1885 and 1927 respectively to outlaw the inflaming of religious hatred, much on the lines of anti-blasphemy laws enforced in the United Kingdom at that time. See also, Barends, above n 6, 76.

28 Tauati Rex Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *University of Queensland Law Journal* 293, 293-94.

motivation of Chapter 15 laws was the protection of the religious rights of minorities, also reaffirmed by a subsequent judgment of the Lahore High Court, Pakistan.<sup>29</sup>

## B *Zia's Blasphemy Laws*

After taking over from the democratically elected government of Zulfikar Ali Bhutto through martial law, General Zia gave the following rationale of Islamisation in his speech of 5 July 1977:

Pakistan which was made in the name of Islam will continue to survive only if it sticks to Islam. That is why I consider the introduction of an Islamic system as an essential pre-requisite for the country.<sup>30</sup>

During the 1980s, Zia introduced blasphemy laws in the *PPC* through various Ordinances. The most commonly invoked laws are the following sections of the *PPC*:

### *Section 295B*

Whoever willfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.<sup>31</sup>

### *Section 295C*

Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.<sup>32</sup>

The above two sections criminalise desecrating the Holy Quran or insulting the Holy Prophet of Islam and entail penalties of life imprisonment and the death sentence respectively. These laws, however, are not applicable to the insult or sacrilege of other Holy Scriptures or personalities belonging to the religious minorities of Pakistan. In 1990, the Federal Shariat Court, exercising its jurisdiction under s 203D of the Constitution to review the compatibility of s 295 C with the injunctions of Islam, held that the 'death penalty is the only punishment for contempt of the holy Prophet'.<sup>33</sup> The decision was never appealed against in the Shariat Appellate Bench of the Supreme Court; hence the death sentence became the mandatory penalty for s 295C, although words of life imprisonment remain on the statute books.

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29 Siddique and Hayat, above n 11, 337, citing judgment of Ali Nawab Chohan J.

30 Collins above n 19, 567.

31 Inserted through Ordinance I of 1982.

32 Inserted by *Criminal Law (Amendment) Act 1986*.

33 *Muhammad Ismail Qureshi v State* (1991) PLD 10 (Federal Shariat Court).

These laws suffer from critical structural defects such as absence of 'intent' which was a pre-requisite in the laws relating to religion under Chapter 15 of the *PPC* and discriminate disproportionately against religious minorities by singular protection of the Prophet and Book of Islam. For example, the words of s 295C of the *PPC*, 'imputation, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet' are open to diverse interpretations and potential abuse on the part of the complainants, the police, magistrates and the judges involved in blasphemy cases.<sup>34</sup> This law has also been criticised under the 'doctrine of vagueness' which prohibits criminalisation of an offence if the law does not clearly define the offence.<sup>35</sup>

### C *Laws Specific to a Single Minority*

General Zia consistently relied on the religious parties to exploit Islam as a political tool to prolong his unconstitutional rule.<sup>36</sup> This dictator-mullah complicity had been particularly instrumental against one religious sect called Ahmadiyya which, under the growing pressure of religious parties, was explicitly declared 'Non-Muslim' in 1974 through a constitutional amendment that provided an exclusionary definition of 'Muslim'.<sup>37</sup> In 1984, Zia promulgated the *Anti-Islamic Activities of the Qadiani Group, Labori Group and Ahmadis (Prohibition and Punishment) Ordinance (1984)* ('Ordinance XX of 1984'), inserting the following sections in the *PPC*:

*Section 298B(2)*

Any person of the Qadiani group ... (who call themselves 'Ahmadis' ..) 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

34 Siddique and Hayat, above n 11, 352.

35 Ibid 359. According to *Black's Law Dictionary*, a criminal law statute should state explicitly and definitely what acts are prohibited or restricted so as to provide a fair warning and preclude arbitrary enforcement: Bryan A Garner, *Black's Law Dictionary* (Thomson West, 9th ed, 2009), 1689.

36 Barends, above n 6, 66. See also, Gabriel, above n 3, 4.

37 Second amendment to the *Constitution of Pakistan 1973*, effected on 17 September 1974 and further revised by the Constitution (Third Amendment) Order, 1985 (P O No 24 of 1985), s 6 (with effect from March 19, 1985). After this amendment, art 260(3) of the Constitution reads as 'Muslim' means a person who believes in the unity and oneness of Almighty Allah, in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon him), the last of the prophets, and does not believe in, or recognize as a prophet or religious reformer, any person who claimed or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon him); and (b) 'non-Muslim' means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the *Qadiani Group or the Labori Group who call themselves 'Ahmadis'* or by any other name or a Bahai, and a person belonging to any of the Scheduled Castes (emphasis added).

the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years.

*Section 298C*

Any person of the Qadiani group .. (who call themselves 'Ahmadis' ..), 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.

By virtue of these penal provisions, persons belonging to the Ahmadiyya community were prohibited from calling themselves 'Muslims' and were also prevented from following the traditional Islamic precepts of greetings. Furthermore, for fear of being charged with 'directly or indirectly posing as a Muslim,' persons of the Ahmadiyya community could no longer profess or propagate their faith, build mosques, or make the call for Muslim prayers.<sup>38</sup> In short, virtually any public act of worship or devotion by a person belonging to the Ahmadiyya community can be treated as a criminal offense and penalised with three years imprisonment.

### III PAKISTAN'S HUMAN RIGHTS OBLIGATIONS

Pakistan's human rights obligations, particularly with regard to the prohibition of discrimination on the bases of race, sex, language or religion, flow primarily from the UN Charter<sup>39</sup> as well as the various human rights treaties. Pakistan's Constitution also guarantees the fundamental rights to life, liberty and equality before the law, as well as equal protection of the law.<sup>40</sup> However, it has been argued that successive Pakistani regimes have failed to implement the provisions of equality and non-discrimination as far as minorities in Pakistan are concerned.<sup>41</sup> Before the violations of human rights linked with the blasphemy laws are discussed, it is pertinent to briefly examine the human rights obligations of Pakistan under international law.

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38 See for eg, testimony of Amjad Mahmood Khan before the US House of Representatives, House Committee on Foreign Affairs on 8 October 2009 at Washington DC: <http://www.mkausa.org/View-document/1217-Congress-Testimony-Amjad-Khan-10-08-09>.

39 *Charter of the United Nations* arts 1(3) and 13.

40 See, Muhammad Naseem Chaudhri, '*Constitution of Islamic Republic of Pakistan with Commentary*' (Lahore Law Times Publications, 2005).

41 Rehman, above n 2, 144.



### A *Obligations under International Human Rights Treaties*

Pakistan is a party to the core human rights treaties, including the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>42</sup> and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT'),<sup>43</sup> having ratified the two treaties in June 2010. Pakistan is also bound by the obligations under the *Convention on the Rights of the Child* ('CRC'),<sup>44</sup> *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW')<sup>45</sup> and the *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD').<sup>46</sup> These treaties oblige Pakistan to ensure the protection of a host of important human rights to its citizens without any discrimination on the basis of religion.

For example, under the *ICCPR*, Pakistan is legally obliged to ensure that every person has the right to freedom of thought, conscience and religion, which includes the right to manifest one's religion in practice and worship as well as the right to change one's religion.<sup>47</sup> Pakistan is also obligated to protect the freedom of opinion and freedom of expression guaranteed under this covenant, subject to the restrictions under the relevant provisions such as to protect national security or public order.<sup>48</sup> Similarly, it is incumbent on Pakistan to treat all citizens as equal before the law. Consequently, all persons are entitled to have the equal protection of the law and a right to a fair trial without undue delay.<sup>49</sup> Notably, as an established presumption of the criminal law, all accused persons should be presumed innocent until proven guilty in an impartial and fair trial.<sup>50</sup> Furthermore, Pakistan is bound to protect the liberty and security of all individuals within its jurisdiction. No person can be arrested arbitrarily and those wrongfully detained will have the

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42 *International Covenant on Civil and Political Rights*, opened for signatures 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

43 *The Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment*, opened for signatures 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

44 *Convention on the Rights of the Child*, opened for signatures 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

45 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signatures 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

46 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signatures 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

47 *ICCPR* art 18.

48 *ICCPR* art 19.

49 *ICCPR* art 14.

50 *ICCPR* art 14(2).

right to compensation.<sup>51</sup> Additionally, it is the responsibility of Pakistan to ensure that its religious minorities are able to profess and practice their religion.<sup>52</sup>

As a party to *CAT*, Pakistan is legally obliged, inter alia, to take effective legislative, administrative, judicial or other measures to prevent acts of torture against individuals by the officials of the State.<sup>53</sup> The treaty further stipulates that the State should investigate any acts of torture under its jurisdiction and provide security and assistance to victims. In addition to the aforementioned obligations, Pakistan has to ensure the protection of the inherent right of all individuals to life and is obliged to take measures against arbitrary deprivation of life.<sup>54</sup> While application of the death penalty is not strictly prohibited under the *ICCPR*, the relevant provision of the treaty stipulates to confine the death penalty for the most heinous crimes and not to impose this penalty upon persons who commit the capital offence under the age of eighteen years.<sup>55</sup>

It is relevant to note here that the nature of international human rights law as enshrined in various treaties is not rigid. Barring a few exceptions, the treaty obligations offer a level of flexibility to State parties to keep a balance between the protection of human rights and maintaining the objectives of national security, which is desirable for the overall protection of society. For example, by virtue of the proviso under article 18 of the *ICCPR*, a State may restrict the right to religious freedom subject to law in order to 'protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.<sup>56</sup> The admissibility of limitations provided in law will be discussed in the next Part together with the relevant human rights.

### B *Legality of Reservations on Treaties*

Article 19 of the *Vienna Convention on the Law of the Treaties* allows States to formulate reservations at the time of signing, ratifying or acceding to a treaty unless a reservation is specifically prohibited or is incompatible with the object and purpose of the treaty.<sup>57</sup> While ratifying the *ICCPR*, Pakistan initially made general reservations, inter alia, on the right to life, freedom from torture, freedom of thought, conscience and

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51 *ICCPR* art 9.

52 *ICCPR* art 27.

53 *CAT* art 2.

54 *ICCPR* art 6.

55 *ICCPR* art 6(5).

56 *ICCPR* art 18(3).

57 *Vienna Convention on the Law of Treaties*, opened for signatures 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

religion, and freedom of opinion and expression, by subjecting them to the subordination of the Pakistani Constitution and the Sharia laws.<sup>58</sup> However, most of the reservations were subsequently withdrawn, except for articles 3 and 25 of the *ICCPR*.<sup>59</sup> Article 3 of the *ICCPR* calls for equal enjoyment of rights without any discrimination on the basis of gender, and hence is not directly related to the subject of this article. Article 25 of the *ICCPR* provides equal rights to all citizens to take part in public affairs of the State, including the right to vote and get elected to a public office, and hence has broad implications. The reservation by the Government of Pakistan upon Article 25 nullifies this right to religious minorities by subjecting it to articles 41(2) and 91(3) of the Constitution which stipulate that a non-Muslim cannot become the President or the Prime Minister of the country.<sup>60</sup>

Apparently, Pakistan's reservations tend to limit some rights guaranteed under the *ICCPR* by relegating their status as subservient to the domestic law. The Human Rights Committee ('HRC'), being the monitoring body of the *ICCPR*, has discussed the legitimacy of such reservations by State parties under international law.<sup>61</sup> It is crucial for a State party to take into consideration the effect of reservations on the overall integrity of the Covenant as well as its objects and purposes.<sup>62</sup> Drawing upon the threshold of article 19 of the *Vienna Convention on the Law of the Treaties* that prohibits reservations incompatible with the objects of a treaty, the HRC defines the object and purpose of the Covenant in these terms, 'to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify' them.<sup>63</sup> The HRC stresses that many provisions of the Covenant, including the

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58 See Depository Notification of 29 June 2010 by Secretary General of the UN: *Secretary General of the United Nations Depository Notification*, UN Doc C.N.405.2010.TREATIES-17 (29 June 2012) <<http://treaties.un.org/doc/Publication/CN/2010/CN.405.2010-Eng.pdf>>.

59 See Pakistan's reservations on *ICCPR* <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec)>.

60 *Constitution of Pakistan 1973*, art 41(2) 'A person shall not be qualified for election as President unless he is a Muslim of not less than forty-five years of age and is qualified to be elected as a member of the National Assembly'; art 91(3) 'After the election of the Speaker and the Deputy Speaker, the National Assembly shall, to the exclusion of any other business, proceed to elect without debate one of its Muslim members to be the Prime Minister'.

61 Human Rights Committee, *General Comment No 24: Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under article 41 of the Covenant*, 52nd sess, UN Doc CCPR/C/21/Rev.1/Add.6 (4 November 1994).

62 *Ibid.*

63 *Ibid* [para 7].

rights to life, freedom from torture, freedom of thought, conscience and religion, and minorities' rights to enjoy their culture and profess their religion, are considered part of the customary international law; hence reservations offending these norms are not allowed if incompatible with the purpose of the Covenant.<sup>64</sup> It is clear from the reading of General Comment 24 of the *ICCPR* that States should not enter such reservations so as to replace the acceptance of the Covenant in its totality with selective recognition of human rights obligations. Similarly subordination of rights emanating from the Covenant to the domestic law has also been held inadmissible.<sup>65</sup> More particularly, reservations on certain rights forming part of the objects of the Covenant are specifically prohibited. Hence, reservations made by Pakistan upon the *ICCPR* are not legally tenable.

The subsequent Parts will analyse how Pakistan's blasphemy laws violate both the international soft law on freedom of religion as well as the core provisions of important human rights treaties.

#### IV INCONSISTENCY WITH INTERNATIONAL SOFT LAW AND INITIATIVES TO COMBAT RELIGIOUS INTOLERANCE

Blasphemy laws, inter alia, contravene various provisions of the *UN Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief*<sup>66</sup> ('*Declaration on Religious Intolerance*'). Adopted in 1981 through a consensus resolution of the General Assembly, the *Declaration on Religious Intolerance* particularly addressed the restriction on religious minorities related to the conflicting interpretations of a single religion concerning both the intra-state and intra-religious discrimination.<sup>67</sup> Article 2(2) of the *Declaration on Religious Intolerance* states:

For the purposes of the present Declaration, the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.<sup>68</sup>

Article 2(2) distinguishes 'intolerance' based on religion or belief from 'discrimination' based on religion or belief. In the first instance of

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64 Ibid [para 8].

65 Ibid [para 12].

66 *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, UN Doc A/Res/36/55 (25 November 1981) [133].

67 Khan, above n 4, 234.

68 *Declaration on Religious Intolerance*, Art 2(2).

intolerance, religious minorities are protected from members of the majority religion — a case of Pakistani Christians and Hindus vis-a-vis the majority Muslim population.<sup>69</sup> The second aspect of discrimination, provides a safeguard against exclusion of a particular sect within the same religion — a case of the Ahmadiyya community against persecution by majority Sunni Muslims and also from the systematic discrimination by State, since Islam is recognized as the State religion.<sup>70</sup>

There is obvious incompatibility of blasphemy laws with the *Declaration on Religious Intolerance*. For instance, sections 295B and 295C of the *PPC* only penalise defiling the holy book and prophet of Islam and thus discriminate in favour of the majority religion. These laws do not punish for desecrating the holy books of Christians, Hindus or other minority religions of Pakistan. Ironically, a proposed amendment of the blasphemy laws by a minority Member of Parliament in 2007, which sought to criminalise desecration of other religions, was rejected by the Parliament.<sup>71</sup> Similarly sections 298B and 298C of the *PPC* criminalise members of the Ahmadiyya community for calling themselves 'Muslims', which is a singular discrimination against their sect.

Furthermore, blasphemy laws also contradict Pakistan's initiatives at international forums, including through General Assembly Resolutions to combat religious intolerance and promote interfaith harmony. Presented by Pakistan on behalf of the Organization of the Islamic Conference ('OIC'), the resolution titled '*Combating Defamation of Religions*'<sup>72</sup> addressed the issue of 'Islamophobia'. However, the implementation of blasphemy laws with clear prejudice to the rights of minorities is in stark contradiction to Pakistan's efforts at the United Nations seeking concessions for Muslims against religious profiling, religious hatred and defamation of Islam.<sup>73</sup> Pakistan has since advocated for a legally binding international instrument criminalising defamation of religions.<sup>74</sup> On the other hand, the growing negative consequences of blasphemy

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69 Khan, above n 4, 234.

70 Ibid.

71 See, Aftab Mughal, 'Parliament rejects amendment in Blasphemy law', *Countercurrent.org*, 5 June 2007 <<http://www.countercurrents.org/mughal050607.htm>>.

72 *Combating Defamation of Religions*, GA Res 65/224, UN GAOR, 3rd Comm, 65th Sess, Agenda Item 68(b), UN Doc A/Res/65/224 (21 December 2010).

73 Through successive resolutions of *Combating Defamation of Religions* at the Human Rights Council as well as the General Assembly, Pakistan is advocating to address the issue of religious intolerance and negative stereotyping of Muslims, the equation of Islam with terrorism, which (inter alia) leads to cultural inferiority and exclusion of Muslim communities in Western countries. See, Dobras, below n 115, 364.

74 Shah Mahmood Qureshi, *Statement of Pakistan's Foreign Minister in New York in 2008* (10 July 2008) Pakistan Mission to United Nations <[http://www.pakun.org/statements/Other\\_International\\_Fora/2008/07102008-01.php](http://www.pakun.org/statements/Other_International_Fora/2008/07102008-01.php)>.

laws in its domestic jurisdiction with singular protection of Islam and systematic discrimination against minorities expose the biased approach of Pakistan's efforts to secure an end to vilification of religions through international consensus.

In addition, blasphemy laws are clearly in conflict with the jointly sponsored annual resolution of Pakistan and Philippines at the General Assembly to promote inter-religious and inter-cultural understanding, dialogue, and cooperation for peace.<sup>75</sup> This annual resolution reaffirms that the promotion and protection of the rights of persons belonging to national, ethnic, religious and linguistic minorities contribute to political and social stability and peace.<sup>76</sup> The resolution urges States to take effective measures to prevent and eliminate discrimination on the grounds of religion or belief. It recognises the exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life. The resolution also states parties must make all efforts to enact or rescind legislation, where necessary, in order to prohibit any such discrimination.<sup>77</sup> However, the continuous failure to amend or repeal the blasphemy laws by successive governments casts serious doubts about the intent and genuineness of Pakistan's initiative at the United Nations to eliminate religious discrimination and prevent abuse of the rights of persons belonging to religious minorities.

## V CONFLICT WITH FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Article 18 of the *ICCPR* stipulates:

- 1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom ... to manifest his religion or belief in worship, observance, practice and teaching;

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75 See successive GA resolutions, for eg, Promotion of interreligious and intercultural dialogue, understanding and cooperation for peace, GA Res 62/90, UN GAOR, Plen, 62nd sess, Agenda Item 49, UN Doc A/Res/62/90 (17 December 2007); Promotion of interreligious and intercultural dialogue, understanding and cooperation for peace, GA Res 63/22, UN GAOR, Plen, 63rd sess, Agenda Item 45, UN Doc A/Res/63/22 (13 November 2008); Promotion of interreligious and intercultural dialogue, understanding and cooperation for peace, GA Res 64/81, UN GAOR, Plen, 64th sess, Agenda Item 49, UN Doc A/Res/64/81 (7 December 2009); Promotion of interreligious and intercultural dialogue, understanding and cooperation for peace, GA Res 65/138, UN GAOR, Plen, 65th sess, Agenda Item 15, UN Doc A/Res/65/138 (16 December 2010).

76 See, Promotion of interreligious and intercultural dialogue, understanding and cooperation for peace, GA Res 61/221, UN GAOR, Plen, 1st sess, Agenda Item 44, UN Doc A/Res/61/221, (20 December 2006) [para 8].

77 *Ibid* [para 7].

- 2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice;
- 3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 18 has two main constituents: the right to have or adopt a religion and to manifest and practice that religion. The HRC has explained that article 18 does not permit any limitation on freedom of thought and conscience or the freedom to have a religion, whereas the right to manifest one's religion or belief may be subject to certain limitations, such as the public safety, order, health, or morals or the fundamental freedoms of others.<sup>78</sup> However, it has been argued that limitations allowed under article 18(3) of the *ICCPR* must not be applied in an arbitrary manner nor in a way that vitiates the rights within article 18(1).<sup>79</sup>

In this context, it can be stated that sections 298B and 298C of the *PPC* violate the right to freedom of religion of persons belonging to the Ahmadiyya community by criminalising the profession, manifestation and propagation of their religion. The impact of these two sections impinge both on the freedom to hold or adopt a religion which cannot be restricted through limitations as well as on the right to manifest one's religion which may be subjected to limitations under 18(3) of the *ICCPR*. Quite manifestly, the criminalisation of Ahmadis under 298C to 'pose directly or indirectly as Muslims' is highly subjective and open to abuse by complainants who could perceive any act or omission on the part of the accused as injuring their religious sensitivities. In numerous instances following complaints by individuals, Pakistani police have destroyed Ahmadiyya translations of the Qur'an and banned Ahmadiyya publications, the use of any Islamic terminology, the offering of Ahmadiyya funeral prayers, and the displaying of the Kalima (the principal creed of a Muslim) on their gravestones without any act or incitement to violence by the Ahmadiyya people.<sup>80</sup> Hence, the application of anti-Ahmadiyya laws clearly violate article 18(1) of the *ICCPR* in respect of persons belonging to the Ahmadiyya minority.

Further, the implementation of these laws contravene the provisions of article 20 of the *ICCPR* which places a duty on the State to adopt the necessary measures prohibiting actions that amount to discrimination

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78 Human Rights Committee, General Comment No 22: The right to freedom of thought, conscience and religion, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [para 8].

79 Alex Conte and Richard Burchill, *Defining Civil and Political Rights: the jurisprudence of the United Nations Human Rights Committee* (Ashgate, 2nd ed, 2009) 80.

80 See testimony of Amjad Mahmood Khan, above n 38.

and religious hatred.<sup>81</sup> Article 20 of the *ICCPR* prohibits ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.<sup>82</sup> This provision provides an important safeguard against infringement of the rights of religious minorities to exercise the rights guaranteed by article 18 and against acts of violence or persecution directed towards them.<sup>83</sup> However, sections 298B and 298C of the *PPC* encourage hostility against members of Ahmadiyya community for calling themselves ‘Muslims’. Arguably, sections 295B and 295C which criminalise critical remarks against Islam through any direct or indirect means perceived as insult to the prophet of Islam, also stifle the freedom of opinion of religious minorities and instill perpetual fear of violence and persecution. Reportedly, a large number of Christians have converted to Islam because of fear of false prosecution under blasphemy laws.<sup>84</sup> Such forced conversions are a violation of article 18(2) of the *ICCPR* which prohibits change of religion under coercion.

Additionally, sections 298B and 298C of the *PPC* also violate article 20 of the Pakistani Constitution which stipulates that subject to law, public order and morality, ‘every citizen has the right to profess, practice and propagate his religion’.<sup>85</sup> When Ordinance XX of 1984 was challenged in the higher courts as being *ultra vires*, the Supreme Court rejected the consolidated appeals of Ahmadiyya members in the 1993 case of *Zabeeruddin v State*.<sup>86</sup> The Court declared instead that the laws were not repugnant to Article 20 of the Constitution since they prevent violence by Muslim mobs who feel injured by Ahmadis calling themselves Muslims. Quoting some out of context references from the books of the founder of the Ahmadiyya sect, the Court questioned: ‘Can then anyone blame a Muslim who loses control on reading, hearing or seeing such blasphemous material?’<sup>87</sup> The Court further reasoned that the Ordinance rightfully stops Ahmadis from using Muslim epithets which was a kind of trademark of Islam and in line with several statutes that regulate commercial activity by protecting certain trademarks and patents in favour of certain companies.<sup>88</sup> The Supreme Court also

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81 Conte and Burchill, above n 79, 90.

82 *ICCPR* art 20(2).

83 Human Rights Committee, General Comment No 22: The Right to Freedom of Thought, Conscience and Religion, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [para 9].

84 Auon Saho, ‘Pakistani Christians Convert to Islam because of Threats and Intimidations’, *Worldwide Religious News* (online), 16 March 2011 <<http://wwrn.org/articles/35237/?&place=pakistan>>.

85 *Constitution of Pakistan 1973* art 20.

86 *Zabeeruddin v State* (1993) SCMR 1718 (Pakistan Supreme Court).

87 *Ibid* 1777.

88 *Ibid* 1751-53.



justified the restrictive nature of the Ordinance because of the possible law and order situation if activities of Ahmadis posing as Muslims were not curtailed.<sup>89</sup> The Court found that using Muslim epithets by Ahmadis appear to the Muslim minds as a 'deliberate act of defiling the holy personages of Islam, a threat to the integrity of Islamic Ummah as well as to the tranquility of the nation'.<sup>90</sup> The dissenting judge, Shafiur Rahman J, however, found parts of Ordinance XX 1984 *ultra vires*, such as, calling Ahmadis 'Muslims' and propagating their faith.<sup>91</sup> He maintained that singular criminalisation of Ahmadis for calling others to their faith and 'posing directly or indirectly' as Muslims, without any other objectionable feature was a violation of the rights of freedom of religion, equality and freedom to hold opinion.<sup>92</sup>

This 1993 decision of the Supreme Court can be contrasted with a religious freedom case decided by the Supreme Court of Pakistan in 1957, where it was held:

The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of the Constitution to say that a right is fundamental but it can be taken away by the law.<sup>93</sup>

This contrast clearly reflects the deterioration in the Pakistani judiciary in upholding the constitutional rights against the repressive laws.

#### A *Legitimacy of the 'Public Order' Argument under International Law*

Public order is defined as the 'sum of rules which ensure the functioning of society or the set of fundamental principles on which a society is founded'.<sup>94</sup> Pakistani authorities traditionally defend the blasphemy laws on grounds of public morals and 'order' linked to the emotional attachment of Pakistani people with Islam<sup>95</sup> and hence resort to exceptions provided in article 18(3) of the *ICCPR*. In the *Zabeeruddin case*, the main argument of the Supreme Court also revolved around

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89 Ibid 1777.

90 Ibid 1765.

91 Ibid 1742-44, 1746-49.

92 Ibid.

93 *Jibendra Kishore Acharyya Chowdbury v East Pakistan* 1957 PLD 9, 41-42, as quoted by Tayyab Mahmud, 'Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice' (1995) 19 *Fordham International Law Journal* 40, 69.

94 UN Commission on Human Rights, 'Siracusa Principles on the Limitation and Derogation Provisions of the International Covenant on Civil and Political Rights' (1985) 7 *Human Rights Quarterly* 3.

95 Abdelfattah Amor, *Report of the Special Rapporteur on question of Religious Intolerance on a Visit to Pakistan in 1995*, UN Doc E/CN.4/1996/95/Add.1 (2 January 1996) 10 (*Abdelfattah Report*).

maintaining public order, likely to be threatened by Ahmaddiya persons posturing as Muslims. According to exceptions provided in article 18, restrictions on this right are only warranted through prescribed laws necessary to protect public health, morals, safety, order and fundamental rights and freedoms of others.<sup>96</sup> However, there have not been significant instances in Pakistan justifying the limitation of religious freedoms of the Ahmadiyya community on grounds of public order or safety. Although, twice in the Pakistani history, in 1953 and 1974, anti-Ahmaddiya riots occurred, there has not been any strife since then justifying the law and order situation.<sup>97</sup> A renowned Pakistani legal scholar asserted that it was incorrect to perceive that the small number of Ahmadis could pose a threat to Islam.<sup>98</sup> It has been observed that throughout the persecution of the Ahmaddiya community in Pakistan, there has been no retaliation from persons belonging to Ahmaddiya.<sup>99</sup> Even in a major attack on the two Ahmaddiya mosques in Lahore in May 2010 which killed 89 innocent persons, no demonstrations or protests were made by Ahmadis.<sup>100</sup> Hence, the argument of public order is not substantiated through evidence in support of the repressive nature of sections 298B and 298C.

Remarks were made by the Supreme Court that because of the writings of the founder of Ahmaddiya, any Muslim can lose his control and incite violence against the Ahmadis.<sup>101</sup> The *Zabeeruddin* case is therefore criticised as having legitimised the persecution of the Ahmaddiya community at the hands of official authorities.<sup>102</sup> The UN Special Rapporteur on Freedom of Religion and Belief, following his visit to Pakistan in 1995, observed that blasphemy laws were ‘unwarranted’ and likely to increase extremism in the society.<sup>103</sup> The Rapporteur also rejected the public order argument of the Pakistani Government and concluded that laws applied specifically to the Ahmadi minority were ‘particularly questionable’.<sup>104</sup>

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96 ICCPR art 18(3).

97 See, Linda J Berberian, ‘Pakistan Ordinance XX of 1984: International Implications on Human Rights’ (1986–87) 9 *Loyola of LA International and Comparative Law Journal* 661, 681.

98 Khan, above n 5, 664–65.

99 Khan, above n 4, 234.

100 Press Secretary AMJ International, ‘Terrorist attacks on Ahmadi Mosques in Pakistan’ on *The Persecution of Ahmadiyya Muslim Community* (28 May 2010) <<http://thepersecution-org.blogspot.com/2010/05/terrorist-attacks-on-ahmadi-mosques-in.html>>.

101 Nadeem Ahmed Siddiq, ‘Enforced Apostasy: Zaheeruddin v. State and the Official Persecution of the Ahmadiyya Community in Pakistan’ (1995) 16 *Law and Inequality: A Journal of Theory and Practice* 275, 324.

102 Ibid 277.

103 Abdelfattah Report, above n 95, 17.

104 Ibid 17.

## VI CONFLICT WITH RIGHTS OF EQUAL PROTECTION OF LAW, DUE PROCESS AND MINORITY RIGHTS

Article 26 of the *ICCPR* stipulates the equality of all persons and equal protection of the law without any discrimination. This article strictly prohibits discrimination on grounds, inter alia, of race, religion or political opinion.<sup>105</sup> In the *Zabeeruddin* case, there was clear discrimination against Ahmadiyya people on the basis of their religious belief. For instance, the interpretation by the Supreme Court that 'Islam' and its 'modes and precepts' are a trademark for Muslims does not conform to the heterogenic nature of Islam. It particularly contradicts the demographic realities of Pakistan where several Muslim sects co-exist but do not agree on a number of religious fundamentals.<sup>106</sup> On the contrary, there is a continuing strife between the two main sects, namely Shias and Sunnis, who not only disagree on a number of core precepts of Islamic rituals but also remain engaged in internecine conflict creating serious situations of law and order for the government.<sup>107</sup> The sectarian tension becomes particularly heightened in the holy month of Muharram when persons belonging to the Shia sect hold mourning processions on roads, often resulting in bloodshed after attacks by opposing religious sects. Such law and order situations have not resulted in the curtailment of the Shia community's right to practice their religious belief in Pakistan. Thus singular exclusion of the otherwise peaceful Ahmadiyya community under the public order argument is both discriminatory and disproportionate.

Article 14 of the *ICCPR* is of a complex nature and aims to ensure the proper administration of justice through upholding multiple rights of individuals, such as equality before courts, right to a fair trial without undue delay, right of legal assistance to defend the charge and the right to be presumed innocent until proven guilty by a competent tribunal.<sup>108</sup> Blasphemy laws cause violations of rights to equality and equal protection of law as well as due process and fair trial through the failure of administrative and judicial organs of the State. For instance, having adequate legal aid to defend the charges is the right of every accused under article 14(3)(b) of the *ICCPR*. The HRC in its General Comment 32 has emphasised the responsibility of the State to provide adequate legal assistance to the accused in criminal cases, especially where the penalty is severe.<sup>109</sup> However, in blasphemy charges, quite often no legal support is provided to the accused to defend the allegations because

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105 *ICCPR* art 26.

106 Khan, above n 5, 121, quoting Munir Report 1954.

107 Dr Aslam Abdullah, 'Shia Sunni Conflict: A Nation at War with Itself', *The Muslim Observer* (online), 9 April 2009 <<http://muslimmedianetwork.com/mmn/?p=3880>>.

108 Conte and Burchill, above n 79, 155.

109 *Ibid* 161.

of the refusal of lawyers to accept their cases due to security threats and personal religious biases, thus rendering the accused literally defenceless.<sup>110</sup> In *Smartt v Guyana*, the HRC observed that since the accused remained unrepresented in the committal proceedings of an offence invoking capital punishment, the entire proceedings were a violation of article 14 of the *ICCPR*.<sup>111</sup>

Trial without undue delay is also part of the right entitled under article 14(3)(c) to ensure that the period of detention is not prolonged unnecessarily. It is reported that blasphemy cases usually end up in delayed and slow trials because of the reluctance of judges and prosecution to proceed with the case due to security threats.<sup>112</sup> In *Munoz Hermoza v Peru*, the HRC observed that the concept of a fair hearing necessarily entails that justice be rendered without undue delay, and any delay which cannot be satisfactorily explained constitutes an aggravation of the violation of the principle of a fair hearing.<sup>113</sup> Similarly, it is common under the Pakistani judicial system that a person sentenced to death, including under section 295C of the *PPC*, would languish in jail for up to 10 years before his appeal can be heard by the High Court or the Supreme Court. This long delay in disposing of an appeal, especially in cases involving the death penalty, has also been observed as a violation of Article 14(3)(c) of the *ICCPR* in *Lumanog and Santos v Philippines*.<sup>114</sup> Furthermore, it is argued that due to religious biases of prosecutors, judges and police officials against the alleged blasphemers, accused persons are less likely to receive a fair trial, with frequent denials of bail.<sup>115</sup>

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110 Amnesty International, *Pakistan: Use and Abuse of Blasphemy Laws* (2004) <<http://www.amnesty.org/en/library/asset/ASA33/008/1994/en/0f6f2146-ebfc-11dd-9b3b-8bf635492364/asa330081994en.pdf>>.

111 *Smartt v Guyana* cited in Human Rights Committee, *Communication No 867/1999: Guyanae*, 81st sess, UN Doc CCPR/C/81/D/867/1999 (19 August 2005).

112 Human Rights Commission of Pakistan's, Annual Report, *State of Human Rights 2004: Freedom of Thought, Conscience and Religion* (2004) 112-113.

113 *Munoz Hermoza v Peru* (203/86) 4/11/88, quoted in Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (New York, 2nd ed, 2004) 421.

114 *Lumanog and Santos v Philippines* cited in Human Rights Committee, *Communication No 1466/2006*, 92nd sess, UN Doc CCPR/C/92/D/1466/2006 (21 April 2008).

115 Rebecca J Dobras, 'Is the United Nations Endorsing Human Rights Violations?: An Analysis of the United Nations' Combating Defamation of Religious Resolutions and Pakistan's Blasphemy Laws' (2008-09) 37 *Georgia Journal of International & Comparative Law* 357. See also, Human Rights Watch, *Annual Report on the State of Human Rights (Pakistan)*, (2008); according to this report, trial courts are reluctant to release on bail or acquit blasphemy defendants for fear of retribution by extremist religious groups.

The impartiality of the judicial process, especially in the lower courts, is further impaired by the demonstrations and crowd movements outside court rooms and threats to judicial officers.<sup>116</sup> Judges in the lower courts are also particularly afraid of releasing those accused of blasphemy due to fear of violent backlashes and security threats by radical elements. These therefore violate the essentials of a fair trial.<sup>117</sup> The HRC, in *Gridin v Russian Federation*, observed that conduct of the trial under an hostile atmosphere violated the right of the accused to a fair trial provided in 14(1) of the *ICCPR*.<sup>118</sup> In this case the accused complained that hostility within the courtroom deprived him of a fair trial because the angry crowd was chanting slogans calling for the death penalty.<sup>119</sup> Since most blasphemy cases result in convictions and imposition of the death penalty by the trial courts, there is criticism that the courts are more concerned with permitting the exercise of 'mob veto' rather than religious liberties in Pakistan.<sup>120</sup> Furthermore, following the acquittal of accused persons facing blasphemy charges, there have been no reported cases of false and malicious prosecutions. This indicates that the authorities are prepared to allow and tolerate abuse of these laws to the detriment of minorities.

Blasphemy laws also violate article 27 of the *ICCPR*, which states that persons belonging to religious, ethnic and linguistic minorities are not to be denied the opportunity to freely profess and practice their culture and religion.<sup>121</sup> Zia's laws do not protect individuals belonging to minorities from religious violence, but instead promote threats to public order and incite religious hostility by intimidating religious minorities.<sup>122</sup> For instance, an Ahmadi can be charged for any conduct which 'outrages'<sup>123</sup> the feeling of Muslims as it is not defined in Ordinance XX as to what constitutes 'outrage'. This ambiguous and non-specific language of the law leads to arbitrary arrests and detentions of persons belonging to the Ahmaddiya community who have been arrested in defence of attacks against their mosques.<sup>124</sup> Once arrested under blasphemy charges, people have been held in detention without bail for up to six months, which is also a violation of the international standards of the right to a fair trial.<sup>125</sup>

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116 Abdelfattah Report above n 95, 12.

117 Freedom House Special Report, *Policing Belief: The Impact of Blasphemy Laws on Human Rights*, (2010) 72 <<http://freedomofexpressionunderfire.org/wp-content/uploads/2010/10/Overview-Defamation-and-Blasphemy-Laws.pdf>>.

118 *Gridin v Russian Federation* (770/97) quoted in Sarah Joseph et al, above n 113, 414.  
119 Ibid.

120 Jeffrey A Redding, 'Constitutionalizing Islam: Theory and Pakistan' (2003-04) 44 *Virginia Journal of International Law* 795.

121 *ICCPR* art 27.

122 Siddique and Hayat, above n 11, 337.

123 See s 298C *PPC*.

124 Berbarian, above n 97, 682.

125 Ibid 683.

Desecration of holy places of minorities, punishable under section 295 PPC, is usually tolerated and condoned by the authorities. This accentuates the feeling of marginalisation in minorities. For instance, in February 2008, members of the Christian community held a protest demonstration against the demolition of a historical church in the Garden Town area of Lahore, the desecration of the holy Bible and the illegal occupation of the land belonging to Christian community.<sup>126</sup> According to witnesses, police and the district administration of the city remained silent spectators during the systematic desecration of Christian property.<sup>127</sup> Reportedly, the government did not take any action on complaints of attacks against one church, one Hindu temple, and five Ahmadiyya mosques in Punjab in 2008.<sup>128</sup> With the proliferation of such real life examples, Pakistan's Federal Minister for Minorities publicly admitted the discriminatory application of blasphemy laws on minorities.<sup>129</sup> The UN Special Rapporteur on Religious Freedom also observed that due to the laws being related to religion, there was a fear that Pakistani society 'may be divided into differentiated and even hierarchical categories of citizens'.<sup>130</sup>

## VII VIOLATION OF RIGHTS TO LIFE, SECURITY OF THE PERSON AND FREEDOM FROM TORTURE

The rights to life and freedom from torture and inhuman and degrading treatment are among the most critical norms under the ICCPR and cannot be restricted to the detriment of individuals.<sup>131</sup> Likewise, right to the security of person is guaranteed under article 9(1) of the ICCPR which includes freedom from arbitrary arrest and detention. Arbitrariness is interpreted more broadly than conduct which is simply 'against the law' so as to include elements of unreasonableness.<sup>132</sup> To be deemed arbitrary, the detention must include elements of injustice, lack of predictability and due process of law.<sup>133</sup> The arrest of a person under false pretence was found to be violative of article 9(1) in *Mulezi v Democratic Republic of the Congo*.<sup>134</sup> As reported by human rights

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126 Human Rights Watch, *Annual Report on the State of Human Rights (Pakistan)*, (2008), 78.

127 Ibid.

128 US Department of State, *2009 Human Rights Report Pakistan*, (2009) <<http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136092.htm>>

129 Freedom House Special Report, above n 117, 77, quoting Mr Shahbaz Bhatti, Federal Minister of Minorities.

130 Abdelfattah Report, above n 95, 14.

131 ICCPR art 4(2).

132 Conte and Burchill, above n 79, 113.

133 Ibid.

134 *Mulezi v Democratic Republic of the Congo* cited in Human Rights Committee,

organisations, arrest and detention under public pressure of persons accused of blasphemy violate the right to the security of person, since in most of the instances, even the prima facie evidence does not implicate the accused and arrests are made without necessary investigations.<sup>135</sup>

Article 6 of the *ICCPR* protects the right to life, described as the 'supreme right', which contains both negative and positive components.<sup>136</sup> Protection of this right, against arbitrary deprivation of life, requires States to take measures not only to prevent and punish deprivation of life by criminal acts but also to prevent arbitrary killing by their own security forces.<sup>137</sup> Similarly, under article 7 of the *ICCPR*, it is the duty of the State to afford everyone protection, through legislative and other measures against acts of torture, cruel and inhuman treatment inflicted by people acting in their official capacity or outside their official capacity.<sup>138</sup> It is one of the few absolute rights in the *ICCPR* which does not allow any limitations even in situations of public emergency.<sup>139</sup> Article 1 of *CAT* defines 'torture' to mean 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession ...'<sup>140</sup> Quite often, acts of torture also result in the violation of the right to life.

In Pakistan, persons detained under blasphemy charges are often likely to suffer torture and inhuman and degrading treatment at the hands of the biased jail authorities because of their personal religious beliefs.<sup>141</sup> For instance, in September 2009, a Christian named Fanish Masih was arrested from a village in Sialkot district on the complaint that he had thrown some pages of the Quran in a drain.<sup>142</sup> Four days later, the accused was found dead in a special security zone of the central jail. The jail superintendent stated that the accused had hanged himself by using the string of his pants (shalwar). However, the post-mortem

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Communication No 962/2001: Democratic Republic of the Congo, 81st sess, UN Doc CCPR/C/81/D/962/2001 (23 July 2008) [para 5].

135 Amnesty International, above n 110.

136 Human Rights Committee, General Comment No 6: The Right to Life, 16th sess, UN Doc CCPR General Comment No. 6 (30 April 1982) [para 1].

137 Ibid [para 3].

138 Human Rights Committee, General Comment No 22: The Right to Freedom of Thought, Conscience and Religion, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993).

139 See Joseph et al, above n 113, 195; Conte and Burchill, above n 79, 130.

140 See Joseph et al, above n 113, 196.

141 Freedom House Special Report, above n 117, 84.

142 Ibid 85. See also, Maleeha Hamid Siddiqui and Asad Jamal, 'Law Unto Themselves' *The Dawn* (online), 15 February 2011 <<http://www.dawn.com/2011/02/15/herald-exclusive-law-unto-themselves.html>>.

report revealed wounds on the head and marks around the neck of the deceased, suggesting that he was tortured to death.<sup>143</sup> Reportedly, no prosecution of the police official allegedly involved has been initiated and the case lingers on, pending a departmental inquiry, without any results.<sup>144</sup> In *Sathasivam and Saraswathi v Sri Lanka*,<sup>145</sup> the son of the complainant was arrested and died while in police custody under allegations of torture. The Sri Lankan government conducted an inquiry but could not prosecute the police officials. The HRC observed that the decision of the Sri Lankan government to initiate only disciplinary and not criminal proceedings constituted a denial of justice. Therefore, under Articles 6 and 7 of the *ICCPR* Sri Lanka had violated its obligation to adequately investigate the torture and death of the deceased and take proper action against any persons found guilty.

Similarly, there are several reported cases of torture and violence of persons accused of blasphemy at the hands of private citizens, angry mobs or biased colleagues, resulting in death or permanent disability.<sup>146</sup> According to credible reports, more than 32 people charged under blasphemy cases have been subjected to extra-judicial killings between 1984–2004.<sup>147</sup> More recently, in April 2008 a Hindu factory worker was beaten to death by co-workers and in July 2009 a Christian was killed by mobsters under blasphemy allegations. In both instances police did not intervene despite being in the proximity.<sup>148</sup> In August 2009, seven Christians in Gojra city were burned alive, and three churches and 57 houses belonging to local Christians were torched by members of religious organisations.<sup>149</sup> It later transpired that the attack was planned by radical organizations (fabricating blasphemy allegations and inciting people to come out through announcements from mosque loudspeakers) aimed to decimate the Christian community and expel them from the predominately Muslim area.<sup>150</sup>

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143 Ibid.

144 Maleeha Hamid Siddiqui and Asad Jamal, 'Law unto themselves' *The Dawn* (online), 15 February 2011 <<http://www.dawn.com/2011/02/15/herald-exclusive-law-unto-themselves.html>>.

145 *Sathasivam and Saraswathi v Sri Lanka* cited in Human Rights Committee, Communication No 1436/2005, 93rd sess, UN Doc CCPR/C/93/D/1436/2005 (31 July 2008).

146 Amnesty International, above n 110; Human Rights Watch, *Annual Survey of Pakistan* (2005) <[http://www.hrcp-web.org/report\\_HRW.cfm](http://www.hrcp-web.org/report_HRW.cfm)>.

147 Freedom House Special Report, above n 117, 84.

148 Ibid 84–85.

149 Ibid.

150 Human Rights Commission of Pakistan, *Violence against Christian Community in Gojra after allegations of defiling Holy Quran* (2009), <<http://www.hrcp-web.org/showfact.asp?id=12>> (HRCP on Gojra).



Despite numerous cases of violence and torture against religious minorities under blasphemy allegations, authorities have shown laxity and indifference in investigating and prosecuting the offenders. This creates the impression that government machinery condones such acts of violence.<sup>151</sup> The HRC in *Sankara and Ors v Burkina Faso* observed that failure by the government to investigate the deaths of individuals within its jurisdiction and facilitate the judicial remedies available to the families of victims constituted violations of articles 7 and 14(1) of the *ICCPR*.<sup>152</sup> The frequent mob lynching of persons accused of blasphemy coupled with the tacit complicity of State machinery also amounts to a violation of the protection against torture and inhuman and degrading treatment, in the light of the International Court of Justice ruling in the *American Hostages* case in which the Court attributed State responsibility in cases of gross negligence and inaction by the State authorities for crimes committed by private individuals.<sup>153</sup>

Another problem with blasphemy laws is the mandatory death penalty, which has been viewed as too harsh for the 'excessively vague' and 'loosely defined' section 295C of the *PPC*. A former UN Special Rapporteur for Freedom of Religion and Belief stated 'applying death penalty for blasphemy appears disproportionate and even unacceptable'.<sup>154</sup> The HRC in *Thompson v St. Vincent and the Greandines* observed that mandatory capital punishment without affording the applicant the opportunity to explain the nature and circumstances of the alleged offence as well as his personal character was a violation of the right to life.<sup>155</sup> Although permissible under article 6(2) of the *ICCPR*, it has been held that States should limit the death penalty to 'the most heinous crimes' which have been interpreted by the UN Special Rapporteur on Religious Freedom to include those offences that result in loss of life.<sup>156</sup>

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151 Amnesty International, above n 110, 2. See also the case of Zahid Masih, reported by Human Rights Commission of Pakistan's, Annual Report, *State of Human Rights 2004: Freedom of Thought, Conscience and Religion* (2004) 227. Zahid Masih, a sanitary worker, was tried by a military court and sentenced to death in 2006. The Human Rights Commission of Pakistan stated that Masih had been denied his basic right to legal representation and was allegedly tortured to extract a confession.

152 *Sankara and Ors v Burkina Faso* cited in Human Rights Committee, Communication No 1159/2003, 86th sess, UN Doc CCPR/C/86/D/1159/2003 (11 April 2006).

153 *Case Concerning United States Diplomatic and Consular Staff in Tebran (United States of America v Iran)* [1980] ICJ Rep 451, 56-94.

154 Freedom House Special Report, above n 117, 76, quoting Philip Alston.

155 *Thompson v St. Vincent and The Grenadines* (806/98) quoted in Sarah Joseph, above n 113, 169.

156 UN Human Rights Council, *Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jabangir: Addendum—Summary of Cases Transmitted to Governments and Replies* (2008) 199 <<http://www2.ohchr.org/english/bodies/hrcouncil/7session/reports.htm>>.

Hence, a mandatory death sentence under section 295C of the *PPC* is unjustifiable since its commission does not result in the loss of life.

There have been instances when the death sentence under section 295C was even given to a juvenile, which constitutes a clear violation of article 6(5) of the *ICCPR*. For example, in the high profile 1995 case of *Salamat Masih v State*,<sup>157</sup> a 13-year old Christian boy Salamat, and his co-accused were given death sentences after conviction under section 295C by a Sessions Judge in 1995, despite the weak evidence in the case, in which the main prosecution witness was declared hostile by the court.<sup>158</sup> The decision in this case indicates that the lower judiciary capitulated before the rising tide of extremism in the country and abdicated the protection of religious minorities through fair legal process.<sup>159</sup> Although the death sentences were later quashed by the Lahore High Court owing to gross disregard of crucial evidentiary requirements, the accused persons after acquittal had to leave the country as they feared for their lives.<sup>160</sup> A few months after the decision of the High Court, the judge concerned was killed in his chamber for acquitting the Christians accused of blasphemy.<sup>161</sup>

It is often argued by defenders of blasphemy laws that not a single death penalty has been executed in such cases as almost all the cases have been overturned at the appellate level by either the High Court or the Supreme Court of Pakistan. However, it demonstrates the extent of false accusations in these charges and the biased decisions of the lower courts. Since 2007, at least twice, the proposed amendments in the blasphemy laws for prosecution of false charges have been stifled or blocked by the ruling parties.<sup>162</sup> Furthermore, no compensation has been made to the accused, who has had to languish in jail for several years on death row, until his or her appeal was finally disposed of by

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157 *Salamat Masih v State*, (1995) 28 P.Cr (Lahore High Court, Pakistan) 811.

158 Siddique and Hayat, above n 11, 332-334.

159 Mahmud, above n 93, 43.

160 Ibid.

161 Human Rights Watch, *Annual Report 1998: Justice Arif Iqbal Bhatti Murdered in his Chamber* (1998) <[http://www.hrw.org/legacy/worldreport/Asia-09.htm#P823\\_214912](http://www.hrw.org/legacy/worldreport/Asia-09.htm#P823_214912)>.

162 In 2007, a proposed amendment by a minority MP was turned down by the Parliament: see, Aftab Mughal, 'Parliament Rejects Amendment in Blasphemy Law', Countercurrent (online) 5 June 2007 <<http://www.countercurrents.org/mughal050607.htm>>. Again in January 2011, a ruling party MP Ms Sherry Rehman had to withdraw her bill proposing amendments to the blasphemy laws which would allow prosecution for false allegations of blasphemy: see, Zia Khan, 'Blasphemy Law Amendment: Sherry Redman to Withdraw Bill says PM' The Express Herald Tribune (online) 3 February 2011 < <http://tribune.com.pk/story/113445/blasphemy-law-amendment-sherry-rehman-to-withdraw-bill-says-pm>>.

the higher court.<sup>163</sup> In addition, this stringent punishment which usually discriminates against minorities is exceedingly disproportionate to the public order aims, in the wake of a growing consensus in the international community to abolish the death penalty.<sup>164</sup> Another grave consequence of the death penalty in blasphemy laws is the implicit sanction it grants to extremist elements to themselves inflict the penalty through vigilante justice if the court does not deliver justice according to their wishes.<sup>165</sup> Several instances of mob justice and killings of persons accused under blasphemy charges lend credence to this assumption.<sup>166</sup> Although it is arguable that the prevailing environment of extremism and bigotry would be little affected, in the absence of the death penalty, it is, however, likely that legal sanction for death to the accused provides encouragement for religious fanatics to take the law into their own hands, as demonstrated by the assassinations of Governor Salman Taseer and the Federal Minister for Minorities Shabaz Bhatti in 2011.<sup>167</sup>

## VIII CONCLUSION

This article has argued that blasphemy laws are inconsistent with international soft law on religious freedom; violate a number of legally binding human rights obligations of Pakistan; and also contravene the multiple rights guaranteed in the Constitution of Pakistan.<sup>168</sup> These laws not only discriminate against minorities' right to freedom of thought, conscience and religion but also breach the crucial rights of the security of the person, protection against torture and freedom from arbitrary deprivation of the right to life. Evidently, blasphemy laws are not only

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163 Given the backlog in the Supreme Court of Pakistan, an appeal can take from 10 to 20 years before a hearing is fixed in the highest court of Pakistan: see, Asian Human Rights Commission, *Pakistan: The Human Rights Situation in 2006* (2006).

164 Ibid. See also, Siddique and Hayat, above n 11, 381.

165 Ibid, 383.

166 According to data compiled by an NGO National Commission on Justice and Peace, 37 people accused of blasphemy (16 Christians, 14 Muslims, five Ahmadis and two Hindus) have been killed since 1986. Nine among them were either killed by policemen, their fellow inmates in jail or committed 'suicide' in police custody: see, Emulating Ghazi Ilum Din, '37 Blasphemy-accused Killed Extra-judicially' *View Point Online* (online) 4 March 2011 <<http://www.viewpointonline.net/emulating-ghazi-ilam-din-37-blasphemy-accused-killed-extra-judicially.html>>.

167 See above n 15.

168 For instance, blasphemy laws violate art 20 of the *Constitution of Pakistan 1973*, as explained in context of *Zabeeruddin v State* (1993) SCMR 1718 (Pakistan Supreme Court): see above n 71.

structurally faulty,<sup>169</sup> but also retrogressive,<sup>170</sup> discriminatory,<sup>171</sup> inhuman and so fraught with mischief that the accused is left permanently stigmatised<sup>172</sup> even after acquittal by the courts.<sup>173</sup>

It has been rightly observed that the effects of laws are not simply confined to those who fall foul of them, but also impact the character of a society and its attitudes and prejudices.<sup>174</sup> The arbitrary application of blasphemy laws has not only served as a judicial tool for vengeance in cases of religious, political, social and economic rivalries, but also led to inciting obscurantist sentiments resulting in public violence against the accused.<sup>175</sup> As highlighted above, blasphemy laws not only promote hatred and intolerance within the society, resulting in systematic abuse of vital human rights of minorities, but also feed into a culture of impunity by tolerating vigilante justice by those wanting to settle personal scores through coercion and abuse of highly impressionable laws.<sup>176</sup> Today's Pakistan is a manifestation of an intolerant and regressive society, as forewarned by a renowned Pakistani jurist in the following words:

[A]ny attempt to resurrect an Islamic State in Pakistan would be a vain effort to revive a bygone era. Today it would lead to bigotry and paralytic theory suppressing all free inquiry and intellectual freedom.<sup>177</sup>

It is imperative that the utility of a law should be judged by evaluating the balance between restricting the individual's freedoms and the larger benefit to society. If a law curtails or endangers the enjoyment of certain inviolable rights such as right to life, liberty, and freedom of thought,

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169 See, Siddique and Hayat, above n 11, 353–58. Criticism is particularly leveled against the absence of wilful intent, usually considered part of any criminal offence. See also Freedom House Special Report, above n 117.

170 See, Gabriel, above n 3, 67, quoting I A Rahim.

171 See, Freedom House Special Report, above n 117, 69–70. According to this report about 695 persons were charged under blasphemy laws in Pakistan between 1986 to 2006, half of whom belonged to various minority groups. Furthermore, although theoretically blasphemy laws are applicable to all the citizens of Pakistan, sections 298B and 298C of the Pakistan Penal Code are specific to one religious minority (Ahmadiyya). For further illustration, see Gabriel, above n 3, 66.

172 Gabriel, above n 3, 62. See also the case of Anwar Masih who was charged under blasphemy laws in 2003 and acquitted by the court in 2004. Due to threats on his life, he had to leave his place and remained in hiding for a long time: Special Report of Freedom House, above n 117, 77–78.

173 For detailed statistics and extent of damage by blasphemy laws: see Siddique and Hayat, above n 11, 323–327.

174 See, Gabriel, above n 3, 4, quoting I A Rahim.

175 See, Human Rights Watch Annual Report 1995, 168.

176 Siddique and Hayat, above n 11, 384.

177 Ishtiaq Ahmed, *The Concept of an Islamic State in Pakistan*, (Vanguard Books Ltd, 1991) 38, quoting Justice Munir.

conscience and religion without providing any major benefit to the subjects, it is not only legitimate but incumbent upon the concerned State to review and amend the legislation to prevent the violation of such critical human rights. It is, however, tragic that any debate within Pakistan on blasphemy laws is silenced with open violence by the religious fanatics. On the other hand, the government seems totally helpless in controlling the continuous hate speech and war mongering of radical elements who use their Friday sermons for waging wars and killing perceived enemies of Islam.<sup>178</sup> There is no doubt if Pakistan is to stand in the comity of nations as a credible democratic country, it will have to demonstrate a serious commitment in safeguarding the rights guaranteed in the legally binding instruments ratified by the State. The first step towards this commitment would be dispensing with blasphemy laws that have endangered the lives of so many ordinary citizens of Pakistan.

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178 Statement of Asian Human Rights Commission, 15 February 2011 <<http://www.ahrchk.net/statements/mainfile.php/2011statements/3087/>>.

