

Freedom of Speech, Freedom of Religion and Islam

A Review of Laws Regarding 'Offences Relating to Religion' in Pakistan from a Domestic and International Law Perspective

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Abstract

During the struggle for a separate homeland for Muslims who were the religious minority in British India, a promise was inevitably made that the religious minorities will enjoy freedom to hold and practice their belief in this new country. The promise was kept in all three Constitutions of Pakistan where minorities were given the right to practice their religion. However, subsequent amendments to the Constitution were made with the presumption that Pakistan was created to establish an Islamic State, which stifled the freedom of religion and belief of the religious minorities. In the absence of a domestic mechanism to protect the freedom of religion in Pakistan, international law was supposed to play a major role in the protection of the same. Unfortunately, international law, owing to the lack of sanctions and mechanisms to implement the law, proved to be weak in this case. However, through an amalgamation of international law, international pressure, amendments to existing laws and promulgation of new laws to protect the religious freedom of minorities in Pakistan, the minorities may be able to enjoy the freedom of religion as it was envisioned while fighting for the independence of Pakistan.

Keywords: blasphemy, apostasy, freedom of religion, Ahmadi, minority rights in Pakistan.

A. Introduction

There is a widespread assumption that the reason for the emergence of the Islamic Republic of Pakistan (hereafter Pakistan) was solely 'Islam'. Muslims, then the minority in British India, wanted a land where they could lead an Islamic way of life in all aspects. After the split from India, the religious minority became a religious majority, in 1947, with 97% of the total population of Pakistan.¹ Since then, many statutes have been either enacted or amended to protect the religion that is said to be the main reason for the emergence of this State. These statutes are applicable not only to the people professing the faith of Islam but also to the

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1 <www.religioustolerance.org/rt_pakis.htm>.

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people of all other faiths living in Pakistan. These statutes protect the religion of Islam in many ways. Inter alia, they provide for serious punishment of any person who insults the religion of Islam.² There is such a wide range of actions/words that are considered to be insulting to the religion that it is safe to assert that these statutes completely satisfy the main purpose behind their enactment. On their face, the statutes are neutral and should also protect religions other than Islam.³ However, the practice implies otherwise: the provisions in the Pakistan Penal Code (PPC) criminalise behaviour that is blasphemous to Islam and other religions; in their application, however, they stifle the religious freedom of non-Muslims. This work will show how Pakistan's treatment of religious minorities is a serious national and international concern.

The relevant statutes, their interpretation and history and the reasons for their enactment will be discussed. Constitutionality of these laws will be discussed with reference to the role of the Constitution of Pakistan in protecting the religion of Islam, and hence its ultimate bias against the religious minorities. This work will propose that these laws are against the spirit of the Constitution of Pakistan's guarantees of freedom of religion. Moreover, these laws are at odds with the International Human Rights, most significantly to the Universal Declaration of Human Rights. A number of cases will then be discussed where the blasphemy laws of the PPC are misused (or simply used) to violate the freedom of religion. The effect of these statutes, on the religious minorities, will then be discussed. One particular religious minority, namely the Ahmadi, will be discussed at length since one of the provisions of the blasphemy laws directly addresses this group.⁴

It will then be explored as to what can be the role of international law, if any, to stop the violation of international human rights of religious minorities. Different approaches of international law will be presented with the respective arguments.

Finally, the topic of reconciliation of these statutes with the human rights law will be discussed with the help of different proposals of amendments. The proposed amendments will include two other statutes of the PPC, namely Zina Ordinance and Qadaf Ordinance of Hudood Ordinance by way of analogy.

Also, administrative reforms will be explored as a proposed solution to the problem of abuses against the religious minority by using blasphemy laws in Pakistan. This reform is necessary because of the great divergence of Pakistani blasphemy laws and the international human rights regime and also because the blasphemy laws of Pakistan are a serious threat to the rights of religious minorities of Pakistan and are an instrument widely used to repress these minorities.

The article, unlike many other proposals that were considered unacceptable to the Muslim majority of Pakistan, does not propose decriminalisation of these behaviours that are considered to be insulting to the religion, particularly Islam. Looking at the history, any proposal of this kind would just remain a theory,

2 S. 298, S. 295 of Pakistan Penal Code.

3 S/s 298(A), 295. 295(A) of Pakistan Penal Code.

4 S. 298 of Pakistan Penal Code.

given the hardcore Islamist behaviour of lawmakers in Pakistan. Therefore, an effective proposal must be one that cannot be considered un-Islamic in any way. Such measures would be reformative measures in the absence of decriminalisation: strictly construing the requirements of blasphemy per se, amendments in existing laws keeping their Islamic nature in mind, enactment of 'brand-new' statutes guaranteeing the rights of minorities and strengthening the procedural and administrative law pertaining to these specific statutes.

B. Historical Groundwork: Emergence of Pakistan, Initial and Subsequent Constitutions

To understand the problem and propose a solution specific to it, it is important to look at the roots of the problem closely. Hence, it is important to analyse the history of the laws that are under discussion in this article, namely the Constitution of Pakistan, PPC (specific statutes) and Islamic criminal law (as interpreted in Pakistan).

The jurisprudence of India and Pakistan was devised and its laws were enforced by the British during British rule (British Raj), especially in the last quarter of the 19th century. The laws included codified forms of the common law of England in a wide range of areas of the law, such as criminal law,⁵ criminal procedure,⁶ evidence,⁷ etc. These laws, although regarded as 'masterpieces of drafting',⁸ were difficult to implement in a country with diverse religious groups. To give equal importance to all faiths, in the absence of British precedent, innovation was inevitable. Religious doctrines, as such, were to get a form of statutes. This gave birth to the personal laws that were applicable to people of faith to whom they were addressed.⁹

The Indian Constitution, during the British Raj, did not have any provision regarding religious freedom; however, many laws were in place to this effect.¹⁰ These laws, which were said to be serving the purpose of constitutional freedom of religion, after later statutory additions, now actually have the effect of protecting the majority faith.¹¹ This will be discussed later in this section.

In the 1940s, the Muslims' struggles to separate from 'Hindu' India to form 'Muslim' Pakistan were at their peak. Muslim leaders, including Mohammad Ali Jinnah, the founder of Pakistan, were concerned about the Muslim minority in India and felt that a separate homeland for Muslims was the only solution to pro-

5 Indian Penal Code (1860).

6 Indian Code of Criminal Procedure (1898).

7 Indian Evidence Act (1872).

8 M. Monir, *Principles and Digest of the Law of Evidence*, State Mutual Book & Periodical Service Limited, 1990.

9 Example: Muslim personal laws addressed and applicable to Muslims; Christian personal laws applicable and addressed to Christians.

10 Chapter XV of Pakistan Penal Code.

11 § 295, 295C. The original offences under this statute did include Blasphemy. If analysed closely, the additions to these statutes in the late 1970s blatantly protect the majority religion: Islam.

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tect this religious minority's rights.¹² The State they were striving for was envisioned as the largest Muslim State in the world. All these historical facts leave no doubt that Islam played a central role and was the main reason for the creation of Pakistan. It was therefore envisioned that this would be a Muslim State, but was it ever planned by the leaders that it would be an Islamic State (as asserted by most of the analysts)?¹³ Some historical facts will now be discussed to answer this question.

Three days before Pakistan's official declaration as a State, Jinnah stated:

You may belong to any religion or caste or creed – that has nothing to do with the business of the State.¹⁴

The right of religious freedom was itself central to the Pakistan Movement, as Muslims themselves were a minority in British India.¹⁵ Not long before the partition of India, the political party representing the interests of the Muslims, All India Muslim League, succeeded in negotiating with the Indian Congressional Party for constitutional protection for Muslims who would remain in India post partition.¹⁶ The All India Muslim League, during the negotiations, offered the same constitutional provisions for Hindus who would remain in or migrate to Pakistan during the partition.¹⁷ Moreover, the United Nations General Assembly was striving to form a universal norm for protecting the freedom of religions by bringing into play the Universal Declaration of Human Rights (hereinafter UDHR), which was passed in 1948 (a year after the creation of Pakistan). It is obvious that while the struggles for a separate State were going on in British India, the world was discussing this universal code for freedom of religion.¹⁸

During one of the drafting sessions of the UDHR, the Pakistani representative to the session argued, with the Saudi Arabian representative, in favour of inferred right to change one's religion under Sharia and hailed the adoption of the articles¹⁹ as an important event, considering them completely consistent with

12 I.H. Malek, *Islam, Nationalism and West*, Macmillan, London, 1999, p. 110.

13 For discussion, see *Pakistan: Between Mosque and Military*, 2005, p. 6, on <www.carnegieendowment.org/files/pakistan.ch01.FINAL.pdf>, last accessed 12 September 2007.

14 See <www.weeklystandard.com/Content/Public/Articles/000/000/013/998vddlr.asp>. Address at Karachi club, 11 August 1947, <http://pakistanian.org/pakistan/legislation/continuent_address_11aug1947.html>, last accessed 12 September 2007.

15 See T. Mahmud, 'Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice', *Fordham International Law Journal*, Vol. 19, 1995, pp. 40, 86. See also <www.thepersecution.org/archive/aiul_2.html>.

16 For discussion, see <www.saag.org/papers8/paper800.html>, last accessed 10 August 2007.

17 See Mahmud, 1995, at 52-53.

18 See A. Mahmood Khan, 'Persecution of Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations', *Harvard Human Rights Journal*, Vol. 16, 2003, p. 221.

19 See S.B. Twiss, 'Theology, Tolerance, and Two Declarations of Human Rights: An Interrogative Comparison', in A. Sharma & F. Adeney (Eds.), *Christianity and Human Rights: Influences and Issues*, State University of New York Press, New York, NY, 2007, <www.fsu.edu/~religion/faculty/documents/theologyandtolerance.pdf>, last accessed 12 January 2007.

Islam's denunciation of compulsion of religion.²⁰ This historical fact sheds light on Pakistan's 'initial' commitment to the UDHR and freedom of religion and thought.²¹

I. *Fundamental Freedom of Religion Under International Law*

UDHR, Article 18, states:

Every one has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.²²

II. *Religious Freedom Guaranteed in the Constitution(s) of Pakistan*

Pakistan's constitutional documents, if studied closely, also reflect the same. However, these provisions are not as effective in practice as they were thought to be by the founders of Pakistan.

1. *The Founding Document and Freedom of Religion*

The resolution, later called the Lahore resolution, for the division of British India was passed in 1940 by Mohammad Ali Jinnah.²³

Jinnah was a dedicated advocate of religious freedom. This vision of his became a part of the Objective Resolution (the first founding document of Pakistan) passed in 1949.²⁴ The document states that:

Muslims should be enabled to order their lives in individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quran and Sunna; [...]. [and] adequate provisions shall be made for the minorities freely to profess and practice their religions and develop their cultures.²⁵

20 *Id.*

21 M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, New York, NY, 2001, p. 168.

22 Universal Declaration of Human Rights, Art. 18, GA Res. 217 A (III), UN Doc. A/810, at 71 (1948).

23 S.J. Bukhari, *Pakistan: Fifty Years of Nationhood*, Vol. 1, 3rd edn, Westview Press, Boulder, CO, 1999. For Mohammad Ali Jinnah's profile, see < http://en.wikipedia.org/wiki/Mohammad_Ali_Jinnah>, last accessed 5 December 2007.

24 S.M. Zafar, 'Constitutional Development in Pakistan: Founders' Aspirations and Today's Realities', in H. Malik (Ed.), *Pakistan: Founders' Aspirations and Today's Realities*, Oxford University Press, Oxford, 2001, pp. 30, 31-32.

25 S. Mahmood, *Constitutional Foundations of Pakistan*, Vol. 46, 2nd edn, Jang, Lahore, 1990.

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This document became a guideline for the drafters of the following Constitution of 1956.²⁶

2. *Religious Freedom and Islamic Provisions Under the 1956 Constitution*

The preamble to the 1956 Constitution included the ideas of freedom of religion set forth in the Objective Resolution. However, it also asserted that Pakistan was “based in Islamic principles of social justice”.²⁷ Therefore, it prohibited any laws “repugnant to Islam as set forth in Quran and Sunnah”.²⁸ Here it is important to note the reference to the Quran and Sunnah, rather than Sharia.

This emphasizes the Muslim, as opposed to Islamic, character of Pakistan. Many commentators think these references were aimed at placing authority to create and interpret law in the secular parliament and courts rather than in Islamic jurists. The reason was the tension, which still exist today, between Islam and religious minorities under traditional Shari’a.²⁹

More importantly, the preamble used the same reference as in Objective Resolution: “adequate provision shall be made for the minorities freely to profess and practice their religions and develop their cultures.”³⁰

This Constitution was, however, short-lived.

3. *Religious Freedom and Islamic Provisions Under the 1962 Constitution*

The repugnancy clause and any reference to the Holy Quran and Sunnah were missing in the following Constitution of 1962, which came into being as a result of a military coup by a secular dictator, General Muhammad Ayub Khan. Even though General Khan began his rule by staffing newly formed Islamic institutions with secular-minded people, pressure from Islamic extremists brought about an amendment in the then Constitution, which reinstated the repugnancy clause and added an additional phrase, stating: “[N]o law shall be repugnant to the teachings of Islam as set out in the Holy Quran and Sunnah, and all existing laws shall be brought into conformity therewith.”³¹ The Constitution established an Advisory Council of Islamic Ideology³² and an Islamic Research Institute,³³ neither of which, in reality, had any power over legislation.³⁴ More importantly, an enforcement framework was built, as the Advisory Council of Islamic Ideology

26 However, the courts, in many instances, have held that the Objective Resolution, which formed part of the preamble of every Constitution of Pakistan, was not intended to override other provisions of the Constitution. See *Asma Jilani v. Govt. of the Punjab*, 1972 PLD (S.Ct.) 139 (Pak.); *Pakistan v. United Sugar Mills, Ltd.*, 1977 PLD (S.Ct.) 397 (Pak.); *Ali v. State*, 1975 PLD (S.Ct.) 506 (Pak.); *Fauji Foundation v. Shamimur Rehman*, 1983 PLD (S.Ct.) 457 (Pak.).

27 Pak. Const. of 1956 pmbl.

28 Mahmood, 1990, at 32.

29 *Id.*, at 33-34.

30 *Id.*, at 33.

31 Pak Const. of 1956 pmbl.

32 See <www.cii.gov.pk/about/history.asp>, last accessed 19 February 2007.

33 *Id.*

34 Pak Const. of 1962, pt. X, Arts. 199-207, in Mahmood, 1990, at 602-604.

was directed “to examine all laws in force immediately [...] with a view to bringing them in conformity” with Islamic law.³⁵ This was the start of ‘Islamisation’ of Pakistan as envisioned by hardcore Islamists.

4. *Religious Freedom, Minorities and Islamic Provisions in the Present Constitution*³⁶

The 1973 Constitution of Pakistan not only saved the ‘repugnancy’ and ‘conformity’ clause present in the 1962 Constitution (after the amendment), but was also the first constitution to declare Islam as the State religion of Pakistan. This Constitution reflected the growing control of a ‘legalistic form of Islam’ in the political structure of the country.³⁷ I feel compelled, here, to clarify the reason and the root of fundamentalism in Pakistan, although this is otherwise outside of the scope of this article.

The political power of the religious radicals comes from their ability to mobilise the passions of the lower middle classes in the cities by conjoining the ideology of nationalism with the xenophobia and legalistic positivism of militant Islam.³⁸

One of the analysts has noted:

All kinds of politicians have been trying to bolster their weak regime by giving concessions to the clerics and compromising on democratic norms and the ideals of the freedom movement. Most of this at the cost of minorities’ rights and interests.³⁹

Under the regime of Prime Minister Zulfikar Ali Bhutto, the Constitution was amended in 1974 after serious riots.⁴⁰ Ahmadis⁴¹ were deprived of the status of being Muslims by amending Article 260 of the Constitution, which defines different terms used in the Constitution.⁴² The Constitutional (Second) Amendment Act, 1974 added a new clause that states:

35 Mahmood, 1990, at 635.

36 This article was initially written before the imposition of a state of emergency in Pakistan on 3 November 2007 by military dictator General Pervez Musharaff. The Constitution of Pakistan has been suspended indefinitely as a result. As such, no constitutional freedom is guaranteed at this time. However, in the hope of reinstatement of the Constitution, no changes have been made, in the content of this article, to reflect the constitutional status quo of Pakistan.

37 For a detailed account of the treatment of Islam by the 1973 Constitution of Pakistan, see F. Rahman, ‘Islam and the New Constitution of Pakistan’, in J.H. Korson (Ed.), *Contemporary Problems of Pakistan*, Brill Archive, Leiden, 1974, p. 30.

38 A. Al-Azmeh, *Islams and Modernities*, Verso, 1993, pp. 44-45.

39 See I.A. Rehman, ‘Silenced Minorities’, *Newsline*, August 1993, at 72.

40 See <www.ahmadiyya.us/index.php?option=com_docman&task=doc_download&gid=155>.

41 Ahmadis consider themselves Muslims and follow a prophet (after Mohammad) named Mirza Ahmed, who they claim was the Promised Messiah.

42 *Id.*

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A person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (Peace be upon him) the last of the Prophets or who claims to be a Prophet, in any sense of the word or of any description whatsoever, after Muhammad (Peace be upon him), or recognizes such claimant as a prophet or a religious reformer, is not a Muslim for the purposes of the Constitution or the law.

Although Ahmadis had long been harassed, this amendment began a more serious and long series of direct persecution of this community. The persecutions will be discussed later in this work.

Z.A. Bhutto's civilian rule was overturned by the military coup of 1977. Bhutto was later hanged for a murder plot. General Zia, the dictator of the time, declared *Islamisation* of Pakistan as his objective.⁴³ Other measures to this effect, which inevitably compromised on the religious minorities' rights and religious freedom, will be discussed in the next section dedicated to the present situation since they are still fully in force.

C. Present Legal Situation and Cases

An important case was seen in the earlier days of Bhutto's regime regarding the religious status of Ahmadis: the case of Abdul Karim.⁴⁴ In this case, it was held that Ahmadis are within the fold of Islam and are guaranteed the freedom to practice their faith, under the Constitution, like any other citizens of Pakistan of any other faith.⁴⁵ The court, furthermore, commented that persecutions of Ahmadis are "sad instances against which human conscience must revolt if any decency is left in human affairs".⁴⁶ This opinion is, however, found rarely among the members of the judiciary, legislatures, administration or public of Pakistan in later cases. These cases will be discussed after General Zia's efforts to accomplish his mission of Islamisation of Pakistan are discussed. Also, a recent historical case in this area of law, the case of Rimsha Masih, will be discussed, where a 14-year-old girl was charged with blasphemy and faced life imprisonment under the law despite her mental condition and age.

General Zia introduced a series of laws in the Parliament to create a separate electorate system for non-Muslims, including Ahmadis.⁴⁷ Shariat benches within the superior courts were displaced to form a separate and stronger Federal Shar-

43 Justice G. Muhammad Khan, *Islamization of Laws in Pakistan*, Presidential Address at 5th Pakistan Jurists Conference in Karachi, reprinted in *All Pakistan Legal Decisions Journal*, Vol. 38, 1986, pp. 249, 261. See also J.H. Korson, 'Islamization and Social Policy in Pakistan', *Journal of South Asian & Middle East Studies*, Vol. 6, 1982, pp. 71, 72.

44 *Abdul Karim Shorish Kashmiri v. The State of West Pakistan*, 1969 PLD 289 (Lah.).

45 *Id.*

46 *Id.* at 307.

47 See <www.alislam.org/ror/June_2003.pdf>.

iat Court, under Zia's regime.⁴⁸ These courts were to have the jurisdiction 'notwithstanding anything in the Constitution' to examine whether any law was repugnant to Islam.⁴⁹ Initially, these cases were to be brought by the citizens of Pakistan or the federal or provincial government. Subsequently, another amendment was passed to give these courts the power to initiate such cases on their own, taking up any law on its own motion.⁵⁰ If the Shariat Court found a law to be in conflict with the injunctions of Islam, the invalid part of the law became immediately void, and the President was directed to take steps to bring that portion in conformity with the injunctions of Islam.⁵¹ Another proposed amendment, which was never passed, would have strengthened this provision even further by adding the language:

The injunctions of Islam as laid down in the Holy Quran and Sunnah shall be the supreme law and source of guidance for legislation to be administered through laws enacted by the parliament and provincial assemblies, and for policy making by the government.⁵²

The main purpose for the two proposals was to establish the supremacy of Sharia over the Constitution itself.

During the same era, in 1978, a second setback for Ahmadis began. Ulemas⁵³ of the country brought a suit seeking an injunction to prohibit Ahmadis from calling their place of worship Masjid,⁵⁴ reciting azan,⁵⁵ offering namaz⁵⁶ and reciting the Quran.⁵⁷ This petition proved unsuccessful when it was denied, and the Lahore High Court held that the right to hold a religious belief and opinion is a religious right and no one can be called before a civil court for adjudication upon such matters.⁵⁸ Furthermore, the court held that no law, either public nuisance law or any direct application of Sharia law, can be used so as to prevent Ahmadis

48 See R. Patel, *Islamisation of Laws in Pakistan*, Faiza Publishers, Karachi, 1986; L. Carroll, 'Nizam-e-Islam: Process and Conflicts in Pakistan's Programme of Islamisation, With Special Reference to the Position of Women', *Journal of Commonwealth & Comparative Politics*, Vol. 20, 1982, p. 57; A.M. Weiss (Ed.), *Islamic Reassertion in Pakistan: The Application of Islamic Laws in Modern State*, Syracuse University Press, New York, NY, 1986.

49 *Id.*

50 Pak. Const. of 1973, Art. 203D (amended 1982), in Mahmood, 1990, at 940, n. 4.

51 *Id.* at 938-941.

52 See Pak. Const. amend. IX, Bill Section 2 of 1985 (an unadopted proposal to amend Pak. Const. of 1973).

53 See < <http://en.wikipedia.org/wiki/Ulema>>. "In a broader sense, the term *ulema* is used to describe the body of Muslim clergy who have completed several years of training and study of Islamic sciences, such as a mufti, qadi, faqih, or muhaddith. Some Muslims include under this term the village mullahs, imams, and maulvis – who have attained only the lowest rungs on the ladder of Islamic scholarship; other Muslims would say that clerics must meet higher standards to be considered ulema."

54 Masjid or Mosque is a name by which the Muslim place of worship is referred to.

55 A name for Muslims' call for prayer, recited five times a day.

56 Muslims' specific way of prayer.

57 *Mobashir v. Bukhari*, 1978 PLD (Lah.) 113 (Pak.).

58 *Id.*

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from calling themselves Muslims. The court rejected the argument that “subject to law” in Article 20 (above) refers to Islamic law.⁵⁹ While protecting the religious minority, the courts either forgot to or deliberately did not raise the question of the validity of the 1974 amendment.⁶⁰ Not long after this case, in 1983, a further constitutional amendment was made under the provisions of the Constitution (3rd) Amendment Act.⁶¹ This amendment was aimed, and succeeded, in clarifying the definition of a non-Muslim. A subclause (b) was added to Article 260 to state:

[a] non-Muslim means a person who is not a Muslim and it includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi Community, a person of the Qadiani group or the Lahori group (who call themselves ‘Ahmedis’ or by any other name), or a Bahai, and a person belonging to any of the scheduled castes.

The inevitable result of the constitutional amendment of 1983 was the Federal Shariat Court’s wide range of power, which later became a legal justification for passing the so-called blasphemy laws by the Parliament.⁶²

Blasphemy laws were a part of the law of the land during the British era. The need arose, once again, owing to a chain of events including Asma Jahangir’s (prominent female lawyer and human rights activist) remarks that were considered derogatory to Prophet Mohammed by the majority of the Islamist political leaders and ulemas. When Benazir Bhutto, former Prime Minister of Pakistan, criticised stiff punishments for blasphemy and the Federal Shariat Court’s approach towards cases regarding the same, she was proposed to be executed for blasphemy by a religious affairs minister.⁶³ In 1984, under General Zia’s regime, five ordinances were passed explicitly targeting religious minorities: a law against blasphemy, a law punishing the defiling of the Quran, a prohibition against insulting wives, family or companions of the Prophet Mohammad, and two laws specifically restricting the activities of Ahmadis.⁶⁴

According to Section 298B:

- 1 Any person of the Qadiani⁶⁵ group or the Lahori⁶⁶ group (who call themselves ‘Ahmadis’ or any other name) who by words, either spoken or written, or by visible representation,

59 *Id.*

60 For more discussion, see Mahmud, 1995, at 40. Stated in this article, a remark by the High Court in the decision of *Mobashir v. State* is worth noting: “[i]t is true that Legislature can pass any law and can declare even a man as a woman or conversely a woman as a man.”

61 For draft of the Amendment, see <www.pakistan.org/pakistan/constitution/amendments/3amendment.html>.

62 Lahore High Court’s remarks in *Mubashir v. State* were verified after the passage of the so-called Blasphemy laws.

63 *The Economist*, 5-11 September 1992, at 38.

64 Pak. Penal Code §§298B, 298C (collectively referred to as Ordinance XX).

65 Another term for Ahmadis.

66 *Id.*

- a refers to, or addresses, any person, other than a Caliph or companion of Holy Prophet Muhammad (peace be upon him), as 'Ameer-ul-Mumineen', 'Khilafat-ul-Mumineen', 'Khilafat-ul-Muslimeen', 'Sahaabi' or 'Razi Allah Anaho';
 - b refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as 'Ummul-Mumineen'
 - c refers to, or addresses, any person, other than a member of the family of 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 that may extend to 3 years, and shall also be liable to fine.
- 2 Any person of the Qadiani 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 Muslims shall be punished with imprisonment of either description of a term that may extend to three years, and shall also be liable to fine.

According to Section 298C:

- 1 Any person of the Qadiani group or Lahori group (who call themselves Ahmadis or by any other name), who, directly or indirectly, poses as a Muslim, or calls or refers to his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations in any manner whatsoever outrages the religious feelings of Muslims shall be punished with imprisonment of either description for a term that may extend to three years and shall also be liable to fine.⁶⁷

Right after the passage of these laws, the legal representative of the Ahmadi community tried to challenge the validity of these laws before the Federal Shariat Court (which has jurisdiction to review any laws and invalidate them if found repugnant to Islamic principles).⁶⁸ In the *Mujibur Rahman* case, the validity of these laws was upheld. The court found Ahmadis non-Muslims according to Islamic principles and, therefore, the provisions imposing restrictions on Ahmadis' claim to be Muslims were held to be not repugnant to the principles of Islam. Hence, it was declared valid.

From 1984 to 1999, a huge number of cases were filed against members of the Ahmadi community under different provisions of Ordinance XX.⁶⁹ A famous

67 Pakistan Penal Code (Act XLV of 1860), Section 298-C

68 *Mujibur Rahman v. The Federal Government of Pakistan*, PLD 1985 FSC 8.

69 For statistics, see <www.thepersecution.org/facts/summary.html> for specific sections.

case of a Christian headmaster who allegedly blasphemed against Prophet Muhammad is an example of the implementation of Section 295C.⁷⁰

In 1993, in one of the most prominent cases regarding blasphemy law, the constitutionality of these provisions of the PPC was upheld.⁷¹ This was thought to be the last resort for Ahmadis, especially after the Mujibur Rahman case decision.⁷² Moreover, the court added in this decision that Ahmadis defame the Prophet if they persist in proclaiming that Muhammad was not the last prophet. Therefore, such a person may be liable to the death penalty.⁷³ The grounds on which the court dismissed the claim that the Ordinance violates the rights of the religious minorities represents the opinion of the section of Pakistani society who are considered well educated! One of the two grounds was that Ahmadis' religious practices, no matter how peaceful, offend and anger Sunnis, who make up the majority of the population of Pakistan. Therefore, restricting the religious practice of Ahmadis was thought necessary to maintain law and order in Pakistan. The other ground was that Ahmadis, being non-Muslims, when they use Islamic epithets violate company and trademark laws; therefore, Pakistan has the right to protect the sanctity of such religious terms under these laws and to prevent their usage by non-Muslims.⁷⁴ The court, in the decision, compared Ahmadis with Salman Rushdie, a famous writer charged with the offence of blasphemy,⁷⁵ by way of justification: the risk to public safety justified violence against the Ahmadi community.⁷⁶ It is important to note here that the Ahmadi faith does not approve of violence in any circumstances other than self-defence.⁷⁷ It should be noted, however, that the judge commented (in the ratio of the case) that Section 295C should be strictly construed so as to prevent its grave consequences.⁷⁸ However, the statistics in that year (1994) show an amazing increase in the number of arrests of members of religious minorities. Seventeen blasphemy cases were regis-

70 See <www.worldnetdaily.com/news/article.asp?ARTICLE_ID=26854>, last accessed 16 November 2007.

71 *Id. See Zaheeruddin v. State*, 1993 SCMR 1718 (1993) (Pak.). The Court relied on *Pakistan v. Public at Large*, 1987 PLD (S.Ct.) 304 (Pak.) and *Pakistan v. N.W.F.P.*, 1990 PLD (S.Ct.) 1172 (Pak.) and held that because the Objective Resolution was not incorporated in the substantive part of the Constitution, the validity of legislation may be tested for repugnancy to the Quran and Sunnah. *Id.*

72 <www.soas.ac.uk/Centres/IslamicLaw/YB1Zaheer-ud-din.html>.

73 D.F. Forte, *Studies in Islamic Law*, Austin & Winfield, Lanham, 1999, p. 42.

74 See F. Hassan, 'Religious Liberty in Pakistan: Law, Reality and Perception' [A Brief Synopsis], *Brigham Young University Law Review*, Vol. 2002, No. 2, 2002, pp. 283-299.

75 See <http://en.wikipedia.org/wiki/Salman_rushdie>, last accessed 19 November 2007. Salman Rushdie is the author of the novel *The Satanic Verses* (1988), which "provoked violent reactions from Muslims in several countries. Faced with death threats and a *fatwa* (religious edict) issued by Ayatollah Ruhollah Khomeini, then Supreme Leader of Iran, which called for him to be killed, he spent nearly a decade largely underground, appearing in public only sporadically". *Id.*

76 For discussion, see <www.soas.ac.uk/Centres/IslamicLaw/YB1Zaheer-ud-din.html>.

77 Mirza Tahir Ahmed, the spiritual leader of the Ahmadi community at the time of the passage of Ordinance XX, and the Blasphemy Law did not show official opposition and encouraged tolerance among Ahmadi believers.

78 *Zaheeru-ul-din v. State*.

tered in the first nine months, against Ahmadis alone.⁷⁹ Some argue that it is clear that the judiciary, by giving the minimum punishment available in such cases, tried to approach the matter in a liberal way.⁸⁰ However, it should not be forgotten that the same judiciary has always upheld the constitutionality of such cases.⁸¹ Not only in the cases of Ahmadis but also in the cases of members of other religious minorities, Pakistani courts are evidently ready to impose the death penalty. One of such cases is the case of a Christian named Gul Masih. Gul Masih, merely because he entered into an argument with his neighbour on the question of the number of wives Prophet Muhammad had, was tried and sentenced to death. The whole trial and the decision were based on the sole testimony of his neighbour with whom he argued.⁸² He had to remain in jail until his decision was overturned by the High Court of Lahore.⁸³ According to law professor David F. Forte, in a statement to the U.S. Senate Foreign Relations Committee, "The main effect of the blasphemy law is to unleash a reign of private terror against Christians and other religious minorities, frequently without the perpetrators being brought to justice."⁸⁴

Many have long since noticed that blasphemy laws in Pakistan are used as a tool to settle matters like property disputes, personal and business issues.⁸⁵ Members of religious minorities are not the only target of these laws; blasphemy cases have also been brought against Muslims themselves.⁸⁶ Research is still needed to resolve the question whether the majority of these Muslims against whom these cases are brought are of any particular Muslim sect: Sunni, Shia, Wahabi, Ahl-e-Sunnat, etc. Research and surveys seem to indicate that most of the complaints regarding these laws are filed within the Sunni Muslim community.⁸⁷ The credibility of this statistic, however, is uncertain, considering that this data has been taken from a pro-Ahmadi website. Also, the fact that Pakistan is a Sunni Muslim-majority country justifies and makes it logical that the majority of the complaints are filed in the Sunni community. It has not been statistically proved, though it is a fair assumption, that the majority of complaints pertaining to any area of law are filed within the Sunni community. This issue is outside of the scope of this article, and therefore will not be investigated any further. However, one thing that is transparent is that when a case of blasphemy is brought against

79 See *US Department of State's Annual Report on Human Rights Abuses: Pakistan, 1995*, on <www.state.gov/www/global/human_rights/drl_reports.html>, last accessed 16 November 2007.

80 *Id.*

81 See *Zaheer-ud-din v. State*.

82 See *US Department of State's Annual Report, 1995*, at 65.

83 *Id.*

84 See <www.worldnetdaily.com/news/article.asp?ARTICLE_ID=26854>, last accessed 16 November 2007.

85 *Id.*

86 On 8 September 2001, four Muslims were tried under Section 295 C for posting the Prophet's name on their shops. The signs, according to the witnesses and police, were derogatory to Prophet Muhammad.

87 <www.thepersecution.org/ussd/us2006.html>.

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a Muslim, the line between apostasy⁸⁸ and blasphemy becomes blurred.⁸⁹ Blasphemy, if argued skilfully, can be converted into apostasy as insulting the Prophet or Islam implies that the person does not profess Islam as his religion. Blasphemy is a tazir⁹⁰ offence, and therefore the punishment is at the judge's discretion.⁹¹ When turned into apostasy, it becomes Hadd,⁹² where the judge is required to prescribe punishment in accordance with the Sharia. If the blasphemer in this case is a Muslim, he automatically commits apostasy. The consequences are therefore likely to be more serious in such cases.

Among the provisions of this Ordinance, Section 295C has received the most criticism by domestic and international analysts. Section 295C prescribes that the person who utters derogatory remarks about the Prophet be punished with death. The element of such a severe punishment has attracted the most criticism; the justification for such a harsh sanction, however, has always been protection of public security (as mentioned earlier in *Zaheer uddin v. State Case*) by preventing rage caused by such remarks in the majority of the public.⁹³ The majority, evidently, are Sunni Muslims.

The biggest concern is not the prescribed punishment or the judiciary's behaviour but the administrative malpractice in such cases and the social implications of these laws⁹⁴ since the majority of the cases of blasphemy laws are dismissed in appellate courts.⁹⁵ In the Criminal Procedure laws of Pakistan, offences are divided into two categories: cognisable and non-cognisable. A cognisable offence is an offence in which the police can register a direct criminal case, and can investigate and arrest the accused without an order from the court.⁹⁶

In a non-cognisable offence, the police need the prior permission of the magistrate/judge before registering the criminal case or proceeding with investigation.⁹⁷ In these offences, on receiving information through any means or informer, the police have a duty to take the matter to the magistrate. Then it is

88 Apostasy is described as a renunciation of or abandonment of Islam by one who professes that faith. See M.I. Siddiqi, *The Penal Law of Islam*, Adam Publishers, New Delhi, 1988, p. 95.

89 See D. Forte, 'Apostasy and Blasphemy in Pakistan', *Connecticut Journal of International Law*, Vol. 10, 1994, pp. 27, 29. Blasphemy has been described as a 'lesser' form of apostasy.

90 "If there is an offense not covered under the hadd punishments, or if there is a lack of definitive evidence in a hadd case, a tazir is employed. They are not categorized in any way, and unlike hadd punishments, are not binding." See < <http://selfscholar.wordpress.com/2012/06/02/defending-asia-bibi-blasphemy-and-legal-reform-in-pakistan/>>, last accessed 14 January 2014.

91 H. Laoust, *Le Precis de Droit D'Ibn Qudama*, 1950, No. 114, p. 269.

92 "Hadd punishments are established by direct textual evidence in the Koran and *Sunnah*. They include those for adultery, slander and false accusation, alcohol consumption, theft and highway robbery, among others. Generally, they are considered to be 'rights of God', (*huquq Allah*) which it is sinful to not implement, or delay." See < <http://selfscholar.wordpress.com/2012/06/02/defending-asia-bibi-blasphemy-and-legal-reform-in-pakistan/>>, last accessed 14 January 2014.

93 1958 A.I.R. S.C. 1032.

94 < www.thepersecution.org/ussd/us2006.html>, last accessed 16 November 2007.

95 *Id.*

96 The Code of Criminal Procedure, 1898 (Pakistan). As amended by Act II of 1997, Chapter 1 Section 4(f).

97 The Code of Criminal Procedure, 1898 (Pakistan). As amended by Act II of 1997, Chapter 1 Section 4(n).

the duty of the court to go through the matter/information of the offence, and if the court deems fit the case of proceeding further, then the police are permitted by the magistrate to investigate and/or arrest the accused.⁹⁸

It can be said that in non-cognisable offences, the possibilities of charging innocent persons are lower than in the cognisable offences. A preliminary enquiry is conducted by the magistrate/judge, and then the criminal proceedings are initiated. Other than the offences under Sections 295A (deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs⁹⁹) and 298 (uttering words, etc. with deliberate intent to wound religious feelings¹⁰⁰) of PPC, all blasphemy offences are cognisable. It can be seen from the cases discussed below that the majority of blasphemy cases where the accused were jailed and later acquitted involve Sections 295B (defiling, etc. of Holy Quran) and 295C (use of derogatory remarks, etc. in respect of the Holy Prophet), both of which belong to the cognisable offences category. A look at the case law makes it apparent that Sections 295B and 295C, because they deal with cognisable offences, are more prone to abuse to serve personal interests.

The accused typically has to wait in jail for several years before a decision is taken on his trial.¹⁰¹ It is the fear of being arrested, public response, trial and the potential punishment that is used as a tool by those who have a better social standing and those who do not form a part of the religious minority, to their advantage such as in property disputes or for mere revenge. Many cases can be seen to substantiate this statement. In December 2003, in the city of Lahore, a huge number of Christians reported that a new convert to Islam from Christianity, Naseer Ahmad, was using blasphemy laws to settle old disputes.¹⁰² According to reports of 2003, three Christians who were accused of blasphemy, including an accused person named Ayub Masih, spent nearly six years in jail, four of them on death row, before the Supreme Court overturned their convictions in August 2002, and they were released. Also released were two brothers (Christians) who remained imprisoned for nearly four years until the Lahore High Court acquitted them. The data represents the time such trials take, and the time the accused have to spend in jail waiting for the decision. The fear of decision itself, therefore, is not even the main problem. What is used as a tool to repress is the mere threat of arrest and the long time and poor conditions in jail.

Although, contrary to popular belief in the West, extremist religious groups tend to remain marginal, their capability to influence local authorities for their

98 The Code of Criminal Procedure, 1898 (Pakistan). As amended by Act II of 1997, Chapter XIV, Section 155 (1).

99 Pakistan Penal Code (Act XLV of 1860), Chapter XV (Of Offences Relating to Religion), Section 295A.

100 Pakistan Penal Code (Act XLV of 1860), Chapter XV (Of Offences Relating to Religion), Section 298.

101 <www.thepersecution.org/ussd/us2006.html>, last accessed 17 January 2014.

102 HRCP, State of Human Rights, 2003, p 172.

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demands and to incite large groups of illiterate Muslims to 'defend' Islam against any kind of blasphemous acts remains crucial.¹⁰³

Such a case occurred, where public infuriation is marked, when Neamat Ahmar (Christian by faith and a teacher by profession) of Dasuha village, discovered one day in 1991 posters accusing him of blaspheming the 'Prophet of Allah'.¹⁰⁴ Ahmar, fearful of the authorities' and public response, took leave and found a job in Faisalabad.¹⁰⁵ On 6 January 1992, another man named Farooq, who had seen the posters in Ahmar's village, found Ahmar at his workplace and stabbed him to death.¹⁰⁶ It was reported that Farooq inquired from Ahmar why he had blasphemed, but Ahmar denied any such act until the last moment.¹⁰⁷ More interestingly, it was reported that Farooq was "kissed by some of the policemen for his remarkable courage and commitment to Islam and was presented with flowers and cookies by the villagers".¹⁰⁸ This is just one example of the public response and the mentality of the public authorities in cases of blasphemy.

A recent case of 2012, however, attracted a mixed response from the public in Pakistan, the police force and the courts. The mere fact that it started a discussion among the public, media and courts on how the blasphemy law is misused in the country makes it a landmark case. In this case, a 14-year (some authorities say a little over 14 years)-old girl was charged with blasphemy, arrested and kept in adult jail for allegedly burning pages of the Quran. Rimsha was reported to have Down syndrome. This caused an uproar among the human rights activists, media and the minority groups. It was later reported to the police that the area cleric, tampering with evidence, had placed the pages of the Quran among the papers that Rimsha had burnt so that the Christians were forced to leave the neighbourhood. Honourable Chief Justice Iqbal Hameed ur Rehman, in his 15-page judgment, dismissed the case as it lacked evidence, and urged the public to be extremely cautious when levelling blasphemy charges as they are prone to misuse for personal grudges/interest and disputes.¹⁰⁹ The court also emphasised the fact that there were no eye-witnesses to the alleged blasphemous act. This is especially interesting as blasphemy charges are known for and have been criticised for not having any kind of evidentiary standards. The court's comments about lack of evidence and eye-witnesses, however, show its inclination towards making the evidentiary requirements for blasphemy stricter. Having said that, the public's response to Rimsha's bail and acquittal was a mixed one. Where a huge number of people celebrated Rimsha's acquittal, an angry mob awaited her after her bail

103 United States Commission on International Religious Freedom, Home, USCIRF Events, 2000 Hearings, Hearings on Religious Freedom in India and Pakistan: Professor Mumtaz Ahmad Prepared Testimony. <www.uscirf.gov/events/hearings/2000/september/panel2/09182000_Ahmad_test.html>, last accessed 24 May 2007.

104 1992 report, The 'Blasphemy' Episodes, the Human Rights Commission of Pakistan, p. 12.

105 A city in Punjab province of Pakistan.

106 1992 report, The 'Blasphemy' Episodes, at 12.

107 *Id.*

108 1992 report, The 'Blasphemy' Episodes, at 11.

109 See <www.dailymail.co.uk/news/article-2200498/Rimsha-Masih-Young-Pakistani-Christian-girl-accused-blasphemy-burning-Koran-freed.html>, last accessed 14 January 2014.

from the jail. For security reasons, the police had to airlift her by a helicopter to avoid the mob. The decision was appealed in the Supreme Court of Pakistan. In January 2013, the Supreme Court of Pakistan dismissed the appeal to reopen the blasphemy case against Rimsha.

D. International Standards of Freedom of Religion or Belief and Remedies

I. *The Rule*

Pakistan was once an ardent advocate of Article 55 (C) of the United Nations Charter, which suggests: “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”,¹¹⁰ and Article 18 of the UDHR:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.¹¹¹

Given this historical behaviour of Pakistan towards international religious freedom, it surprises one to consider events such as the upholding of the constitutionality of Ordinance XX and the frequency of implementation of blasphemy laws. Article 18, on the one hand, gives the right to “freedom of thought [...] and to manifest this in community with others and in public or private, teaching, practice, worship and observance”.¹¹² On the other hand, Ordinance XX has a clearly contrary effect: it subjects persons who criticise Prophet Muhammad and “manifests this thought by words or representations”,¹¹³ or any person who calls himself/herself an Ahmadi and calls or refers to his/her faith as Islam, or propagates his faith, or ‘outrages’ the religious feelings of Muslims to imprisonment and fine. Additionally, Section 295C of PPC not only restricts completely the exercise of important rights to manifest one’s belief, religion or thought, but also prescribes capital punishment for doing so.¹¹⁴ This is particularly true for Ahmadiis.¹¹⁵ These laws, with strict (according to some critics, skewed) interpretation of Sharia law,¹¹⁶ make Pakistan a violator of fundamental freedoms guaranteed by the UDHR. Pakistan is one of the only Muslim countries that is not only a signatory but fully accepts the provisions of UDHR. Moreover, it is ironic that Pakistan once ‘defended’ the fundamental freedom of belief, in an argument with Saudi Arabia (see earlier sections discussing UDHR and fundamental freedom of belief).

110 See <www.un.org/aboutun/charter/chapter9.htm>, last accessed 1 August 2007.

111 See <www.udhr.org/UDHR/udhr.HTM#18>, last accessed 1 August 2007.

112 Cite Art. 18.

113 No. F.17(1)84-Pub, Ordinance No. XX of 1984, The Gazette of Pakistan.

114 Pakistan Penal Code (Act XLV of 1860), Chapter XV (Of Offences Relating to Religion), Section 295-C.

115 *Id.* See provisions directly related to Ahmadiis.

116 For a further discussion on blasphemy under Sharia Law, see D.E. Arzt, ‘Heroes or Heretics: Religious Dissidents Under Islamic Law’, *Wisconsin International Law Journal*, Vol. 14, 1996, p. 349.

Although Pakistan is bound by 'international law' to guarantee religious freedom, it certainly takes advantage of the 'shortcoming' of this law: lack of sanctions and mechanism for implementation. To overcome the non-binding nature of the UDHR, Articles 18, 19, 20 and 27 of the International Covenant on Civil and Political Rights (hereinafter ICCPR), were passed in 1996. With this Covenant, the State parties to the UDHR became legally bound by it.¹¹⁷ The ICCPR, in addition to prohibiting States party to it from curtailing religious freedom, also prohibits the States from denying their religious minorities the freedom to enjoy their own culture and profess and practice their own faith.¹¹⁸ This right to freedom of belief is absolute and is not subject to any limitations.¹¹⁹ States are to refrain from 'coercion' or any other measure that may impair this *unconditional* freedom. Article 18 para. 2 bars coercion that would impair the right to religion or belief. This includes the threat of physical force or penal sanctions to take back their religion or belief or to convert. Any policies, laws or practices having the effect of restricting rights guaranteed by Article 25 or any other article of the Covenant are inconsistent with Article 18 para. 2.¹²⁰ The importance of religious freedom can be gauged by the fact that these freedoms cannot be suspended or overridden even in a state of emergency.¹²¹ It seems that this Covenant was passed to prevent situations like Pakistan's present situation with regard to religious minorities and laws affecting them. However, conveniently, Pakistan is not a State party to this Covenant, although 23 Muslim countries have ratified it.¹²² In spite of the fact that 125 countries around the World have ratified this Covenant, analysts say that religious freedom has not become a binding rule of customary international law as yet;¹²³ However, the passage of the Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief is an indication of the emergence of such a customary international law.¹²⁴

Section 298 represses religious minorities and prevents them from exercising their right to profess and practice their faith, by penalizing Ahmadis for posing as Muslims, using the widely used Muslim greeting, terming their 'call for prayer' Azaan and calling their places of worship 'Masjid'. Religious minorities, including Christians, Hindus and Parsis, are repressed by the misuse of Section 298 to set-

117 International Covenant on Civil and Political Rights, Arts. 18, 27 GA Res. 2200AA (XXI), UN GAOR 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1996), 999 UNTS 171.

118 *Id.* For more details see M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Kehl, Germany, 1993, p. 316.

119 'General Comment adopted by the Human Rights Committee under Art. 40, para. 4, of the International Covenant on Civil and Political Rights': UN doc. CCPR/C/21/Rev.1/Add.4, 27 September 1993, para. 5 (adopted 20 July 1993).

120 *Id.*

121 ICCPR Art. 4.2.

122 For a detailed discussion, see M. Wa Mutua, 'The Ideology of Human Rights', *Virginia Journal of International Law*, Vol. 36, No. 39, 1966, pp. 589, 604, 606.

123 *Id.*

124 See '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., Supp. No. 51, at 171, UN Doc. A/36/684 (1981).

tle petty disputes. The provision prescribing punishment for any person outraging the religious feelings of Muslims is vague enough to be easily misused. These provisions violate Article 18 of the UDHR and Articles 17 and 27 of the ICCPR and the Declaration. Although Pakistan is not a party to the ICCPR and the Declaration, there is clear evidence of emergence of international customary law that binds all the States to comply with the international norms.

In my view, the lack of sanction in international law may be compensated by international pressure. Some, however, may argue that interfering with the domestic matters of Pakistan will amount to violating its sovereignty.¹²⁵ Another argument in favour of omission to act by international players is that while it is true that Pakistan is a violator of international norms set by the UN, it is also true that one of the international relations theories is cultural relativism.¹²⁶

II. *Domestic Remedies*

Pakistan's Constitution provides for freedom of religion, and states that adequate provisions shall be made for minorities to profess and practice their religions freely. The Pakistani blasphemy laws are, undoubtedly, inconsistent with the fundamental religious freedom guaranteed by the Constitution of Pakistan. However, these laws can successfully be argued as not being unconstitutional given the emphasis placed on Islamic principles and Sharia in the Constitution of Pakistan. The question then is, can these laws be rendered void because of the fact that they do not conform to the fundamental freedoms without conducting an ultra vires act? Here it is important to look at Article 8 of the Constitution of Pakistan, which states:

- 1 Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter [on fundamental rights] shall, to the extent of such inconsistency, be void.
- 2 The State shall not make any law which takes away or abridges the right so conferred and any law made in contravention of this clause shall, to the extend [sic] of such contravention, be void.

Sections 298 and 295 (by way of causing a fear in the people of minority) repress minorities and prevent them from practicing their faith. This clearly violates the fundamental freedom of religion. As per Article 8, blasphemy laws (Sections 298 and 295) should automatically become void. This, however, is not possible because of the presence of the repugnancy and conformity clause in the Constitu-

125 For a discussion on this point of view, see A.-M. Slaughter, 'The Technology: Principal Theories of International Relations', in A.-M. Slaughter (Ed.), *International Law and International Relations*, Hague Academy of International Law Lectures, 2000, pp. 9-14.

126 See <www.cceia.org/resources/for_educators_and_students/terms/00001.html>, last accessed 13 January 2014. "Cultural relativists uphold that cultures differ fundamentally from one another, and so do the moral frameworks that structure relations within different societies. In international relations, cultural relativists determine whether an action is 'right' or 'wrong' by evaluating it according to the ethical standards of the society within which the action occurs."

tion (discussed earlier). The Constitution itself gives supremacy to the Holy Quran and Sunnah above itself, which makes this a matter of circular argument.

One way of improving a country's system specific to guarantees of fundamental freedoms is the constitutional references to international human rights agreements to which that country is a party.¹²⁷

Legal reforms are necessary to prevent the continuing abuse of these laws against religious minorities by local authorities and the Sunni majority. Following are proposed reforms that would make the complaint process onerous, and would therefore deter the accusers from instigating charges for unintentional acts.

I will use another provision of the PPC, by way of analogy, to make recommendations aimed at preventing this violation of religious freedom by using PPC provisions 289 and 295.

Hudood Ordinances¹²⁸ of 1979 are a combination of five ordinances or 'statutes'. Each of them deals with a particular category of offences. It involves the definition of that particular crime and evidentiary requirements necessary to prove it. The most criticised provisions of these ordinances are the Zina Ordinance, 'criminalizing and prescribing stringent punishment for adultery and fornication',¹²⁹ and the Qazaf Ordinance, which criminalises and was promulgated to prevent false accusation of the offence of Zina. According to women rights activists, Qazaf has long been used to repress women, as the woman (if a victim of rape) who is not able to prove her rape is automatically charged under Qazaf for false accusation of adultery.¹³⁰ Ironically, the structure of this Ordinance, if used to promulgate a new offence 'false accusation of blasphemy', can be useful to prevent the misuse of blasphemy laws by members of the religious majority or persons of better standing in society to settle personal or business disputes, to take revenge or just to 'defend' Islam if incited by religious extremist groups. Like the Qazaf Ordinance, this offence should be structured in such a way that the victim should establish that the allegation was made with mala fide motives and that it affected the reputation of the victim. By looking at the cases discussed above, this is not hard to prove as in most cases the intention is revealed through

127 T. Stahnke & R.C. Blitt, 'The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries', *Georgetown Journal of International Law*, 2005, Vol. 36, p. 947.

128 Prohibition (Enforcement of Hadd) Order, 1979, PO No. 4 (Feb. 9, 1979), 1979 PLD (Central Statutes) 33 (Pak.).

129 See A. Jahangir & H. Jilani, *The Hudood Ordinances: A divine Sanction?* Sang-e-Meel, Lahore, 2003. Under the penal laws of Pakistan, adultery was a crime, whereas sexual intercourse between unmarried consenting couples was not an offence. Punishment for adultery was either imprisonment for five years or fine or both. Complaints of adultery could only be made by the husband of the adultress. The crime was compoundable and bailable. If the complainants chose to drop charges, or not to prosecute the offender, criminal proceeding against the accused was automatically dropped. The woman partner to adultery could not be punished under the old criminal legal system. At the same time, a woman could not complain of adultery. The women, thus, were secondary but protected citizens.

Presently, Zina is punishable with ten years (maximum) of rigorous imprisonment, including 30 whips and a fine. Adultery and fornication are both non-bailable offences and non-compoundable. Charges of Zina can be made by any person, whether aggrieved or not.

130 Rape comes in the ambit of adultery for the purposes of Hudood Ordinances.

newspapers, media and through the work of human rights activists¹³¹ and the Human Rights Commission of Pakistan. The structure of the Qazaf Ordinance, therefore, is crucial to discuss here. Since Qazaf was passed with reference to the Zina Ordinance, not all the provisions for Qazaf should be adopted to cater to the need for promulgation of a new statute to prevent false accusation of blasphemy. The general structure of Qazaf should be used in order to make complaints of blasphemy risky to undertake.

Qazaf can attract Hadd punishment, which has strict evidentiary requirements. If those requirements are not met, it can then attract tazir punishment.¹³² Although Qazaf charges are hardly pressed, they still make an accusation of Zina a risky task to undertake. As Qazaf attracts Hadd punishment, this new offence can carry a stricter punishment than the charge of blasphemy (as blasphemy is a tazir crime). Promulgation of a piece of legislation on the pattern of Qazaf, prescribed by Sharia law, should be acceptable to the public that is majorly Muslim, and on the other hand will most likely deter people from making false accusations of blasphemy. Although the Pakistani courts have now started to express, albeit in obiter dicta, the need for caution to be taken when levelling blasphemy charges,¹³³ their comments cannot be binding on the future decisions. Whereas, creating a new offence of 'false accusation of blasphemy' will be a substantial and binding step.

To serve the purpose effectively, there is a need not only for a new piece of legislation on false accusation of blasphemy, but also to amend the existing evidentiary procedures of blasphemy laws. A blasphemous act, as mentioned above, attracts tazir punishment. Unlike the Islamic law of evidence, tazir does not put much emphasis on eye-witnesses; therefore, blasphemy is not hard to prove. The procedures of evidence for tazir punishments are contained in the Qanoon-e-Shahadat (the law of evidence), which is applied generally to all laws. Pakistan followed the Evidence Act of 1872 based on Anglo-Saxon law, which was repealed and substituted by Qanoon-e-Shahadat. As this is a man-made law, in contrast to the divine Sharia law, amending the evidentiary requirements is therefore not like amending any provision related to Islamic law, an act that is highly likely to be unacceptable to Muslims. This amendment should not, therefore, attract criticism from religious groups or from the public as it does not harm Islamic law per se. The next question is, what changes should be made to the evidentiary requirements to make it an onerous task to prove a blasphemous act? Currently, the law does not require proof of intention and does not have any evidentiary standard. One suggestion would be to require accusers to provide substantial, rather than circumstantial, evidence against alleged blasphemers. To file a complaint, the accuser would have to provide proof that the act was premeditated and intentional.

131 A human rights activist group and legal clinic, AGHS, is known for digging out such cases through their network throughout the country.

132 M. Munir, *Is Zina bil jabr a Hadd, tazir or Siyasa Offence?: A Reappraisal of the Protection of Women Act 2006 in Pakistan*, Selected Works 2008.

133 Rimsha Masih Case 2012.

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As previously discussed, Sections 295B (defiling, etc. of Holy Quran) and 295C (use of derogatory remarks, etc. in respect of the Holy Prophet) are cognisable offences in Pakistan, which means that it is an offence for which a police officer can arrest without a warrant.¹³⁴ The fact that the police can arrest without a warrant makes a charge of blasphemy very susceptible to abuse. As demonstrated earlier, these charges are made, in many cases, owing to personal grudges or disputes. The accused then have to wait in jail to get a hearing. To reduce the risk of abuse of these laws, these offences should be declared as non-cognisable offences. In this case, the police would be bound to refer the matter to the court. In case the magistrate/judge finds the allegation to be true, the police would be allowed to proceed/investigate. This step is unlikely to be criticised by religious groups as it does not touch upon the substance of these laws, which is considered sacred. This suggestion entails a procedural change and does not call into question the matter of these laws.

E. Conclusion

Pakistan's emergence was directly related to guarding religious minorities against discrimination. In the struggle for a separate homeland for Muslims, the then minority in British India, a promise was inevitably made to religious minorities that they will enjoy freedom to hold and practice their belief and will enjoy every other right that will be given to any other citizen of this new country. The promise was kept in all three Constitutions of Pakistan, and minorities were given the right to practice their religion. On the international front, Pakistan seemed eager to sign and adhere to the UDHR, which was to guarantee fundamental religious freedom to each and every citizen of the States party to it. Pakistan, since the day of its emergence, has been through political crises, which adversely affected the promise that was made to the religious minorities. The courts played their assigned roles as guardians of the constitutional freedom of religion during the initial period.¹³⁵ It was decided that legislation cannot act to take away this freedom from the citizens of Pakistan. The movement by religious political leaders to drive the Ahmadi community out of the circle of Islam by way of law continued. The subsequent amendments to the Constitutions¹³⁶ with the *wrong* presumption that Pakistan was created to establish an Islamic State, made a way for provisions into the Constitution that stifled the freedom of religion and belief of these minorities, particularly the Ahmadis.¹³⁷ After this event, in 1973, courts simply refused to question the validity of these amendments.¹³⁸ It should be kept in mind that the Federal Shariat Court can overturn any court's decision stating invalidity of this development. It is important to note that the judiciary, in 1977,

134 Pakistan: Code of Criminal Procedure, 1898 as amended by Act 2 of 1997 Chapter 1 Section 4(f).

135 Mujib-ur-Rehman Dard versus Pakistan through Secretary, Ministry of Justice & Parliamentary Affairs, Islamabad.

136 Constitutional Amendment of 1969.

137 Ahmadi amendment.

138 Mujib-ur-Rahman's case.

declared these amendments constitutional in *Zaheer-ud-din v. The State*.¹³⁹ Furthermore, not only did the judiciary lay down their guard, but also the legislature acted promptly to pass PPC 298 and 295. As discussed above, Pakistan's State practice is derived from Sharia law, but also shows its initial acceptance of its fundamental religious freedom. The PPC provisions 298 and 295 curtail religious freedom guaranteed in the Constitution of Pakistan and international law; Ahmadis and other minorities had a history of being repressed at that time. Soon after the promulgation of these provisions, a long and inevitable series of repression of minorities by curtailing their right to practice their religion and faith began. Many cases have been discussed above to represent the attitude of the state, local authorities and the public (most of the time Sunni majority) towards the freedom of religion and towards the religious minorities in general.

In the absence of a domestic mechanism to protect the freedom of religion in Pakistan, international law was supposed to play a major role in the protection of the same.¹⁴⁰

Although Pakistan was initially enthusiastic about the UDHR, to which it is a State party, the State practice does not show its true commitment to the same. International law, owing to the lack of sanctions and mechanism to implement the law, proves to be weak in this case. The ICCPR, though passed with an intent to oblige States to adhere to the UDHR, also failed in assisting religious minorities in Pakistan to freely practice their faith, because Pakistan found its way around it by not signing the Covenant. At some point, Pakistan's judiciary has expressed the importance of adhering to international conventions such as the ICCPR, though not in ratio but in obiter dictum.¹⁴¹

A counter-argument for advocates of the view that these provisions are and should be governed by domestic law is that all international laws that are created for humanitarian purposes (such as the ICCPR, UDHR etc.) form a part of *jus cogens*.¹⁴² A matter comes into a state's jurisdiction only when it is not governed by international law. The case of fundamental religious freedom has been explicitly discussed at great lengths in international documents and is therefore governed by international law. These international norms are, no doubt, a part of the constitutional law of a state and can therefore be commented upon by domestic courts. Pakistan is a common law jurisdiction; therefore, the courts can play a

139 M. Lau, 'The Case of *Zaheer-ud-din v. The State* and Its Impact on the Fundamental Right to Freedom of Religion', in *CIMEL Yearbook*, Vol. 1, Islam and Fundamental Rights in Pakistan.

140 See United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 1985/21, para. 1: UN doc E/CN.4/1986/5 at 102. Ordinance XX has been criticised greatly, in the international community, especially with regard to Pakistan's treatment of religious minorities. It has been stated: Ordinance XX violates the right to "liberty and security of the person; the right to freedom of thought, expression, conscience and religion; the right of religious minorities to profess and practice their religion and the right to an effective legal remedy" *Id*.

141 Justice Muhammad Haleem <www.thecommonwealth.org/gender/whatwedo/activities/humanrights/regjudcoll.htm>, last accessed 11 February 2007.

142 *Jus cogens* (from Latin: compelling law; English: peremptory norm) refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted. <www.law.cornell.edu/wex/jus_cogens>.

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great role in guaranteeing fundamental freedom of religion, especially in light of the fact that the legislature has always been reluctant to address this matter. This will achieve the purpose of guaranteeing religious freedom to a state's citizen as it enables courts to protect this right via the State Constitution. It has been decided not so long ago that Ordinance XX is constitutional. However, this does not close the last door for religious minorities as the Supreme Court can, technically, overturn its own decision (though unlikely). The solution to this problem appears to be an increased number of constitutional references to the Supreme Court regarding fundamental religious freedoms.

The provisions 298 and 295 clearly curtail the practices of Ahmadis and other minorities by creating fear. Since it has been decided that Ordinance XX of the Pakistan Penal Code, which restricts the usage of Islamic terms and titles by Ahmaddiya Community, is constitutional, Pakistan automatically becomes a violator of Article 18 of the UDHR, and of Articles 19 and 27 of the ICCPR. Pakistan is a State party to the UDHR and is thus obligated to adhere completely to its provisions. Although Pakistan is not a State party to the ICCPR and the Declaration, there is an argument that fundamental freedom of religion, due to the passage of different conventions regarding this matter, is becoming a part of customary international law. This has created an obligation on all States, including Pakistan, to guarantee these freedoms.

Pakistan, therefore, should be put under pressure by the international community, especially by the United States, not to diverge from international law. Now is a time when pressure from the United States may be effective because Pakistan is economically dependent on it to a great extent for military aid, loans and aid to fight against terrorism prevailing in the region.

This problem should be solved not only through international law instruments but also on a domestic scale. Blasphemy laws, since they attract tazir punishment, fall under Qanoon-e-Shahadat. Qanoon-e-Shahadat is a 'man-made' law and therefore not 'virtually impossible' to amend as the amendment is not likely to attract the same level of criticism as an amendment of a statute deriving its root from Sharia law. Amendments to this statute should be duly made to address the evidentiary requirements specific to blasphemy laws. These requirements should be made more stringent, to prevent easy "proof" of this offence. After the proposed amendment described above, another new law should be made a part of the PPC: 'False Accusation of Blasphemy'. This law, unlike the Qazaf Ordinance, would be likely to prevent false accusations in the true sense.

Last but not the least, as discussed above, Sections 295B and 295C should be declared non-cognisable offences so that the police have a duty to bring the matter to the court before they can investigate or make arrests. This step will not eliminate the misuse of these laws but will reduce it.

Thus, with all these elements – international law, international pressure, amendments to existing blasphemy laws and promulgation of new laws to protect the religious freedom of minorities in Pakistan – the minorities may be able to enjoy the freedom of religion as it was envisioned while fighting for the independence of Pakistan.