

Modernizing Pakistan's Blasphemy Law as Hate Speech

by

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For my mother (Razia Sultana) Professor Diana Ginn and wife (Sadaf Farhan), who supported me with their love, Patience & prayers during this LL.M Program.

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Abstract

It is difficult to define blasphemy. What is regarded as blasphemous will depend on the values prevalent in a given society. In general, it includes denigrating and insulting expressions targeted toward God and other aspects of religion. My thesis is that blasphemy, to the extent it should be dealt with by the law, should be regarded a sub-category of hate speech. The law should concern itself only with those aspects of blasphemy which incite hatred against a group which is identifiable on the basis of religion. More specifically, I argue that Pakistan should repeal its blasphemy law (s. 295-c *Penal Code*, 1860) because blasphemous prosecutions are politically, socially, economically and culturally motivated while religion is only used as a legitimizing tool by opportunists.

Canada is an example in this regard. While the Canadian *Criminal Code* prohibition of blasphemous libel (s. 296) is vague and would likely be held to infringe freedom of expression unjustifiably, the hate speech provisions of the *Criminal Code* are much more precisely worded and have been upheld by the Supreme Court of Canada as a justifiable infringement of freedom of expression. Thus, the argument of this thesis is that the approach taken in s. 319(2) offers a useful model for modernizing Pakistan's laws on blasphemy as hate speech.

List of Abbreviations Used

PPC	Pakistan Penal Code
IPC	Indian Penal Code
QSO	Qanoon-e-Shahadat Order
PCO	Provincial Constitutional Order
PAK	Pakistan
US	United States
UK	United Kingdom
VIC	Victoria (Australia)
PBUH	Peace Be Upon Him
PBUT	Peace Be Upon Them
RTD	Retired
CH	Chapter
PCRLJ	Pakistan Criminal Law Journal
PLD	Pakistan Law Digest
UBCLR	University of British Columbia Law Review
HO	Hein Online
Ont. CA	Ontario Court of Appeal
SCR	Supreme Court Reports
AIR	All India Reports

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CHAPTER ONE

Introduction

1. Blasphemy

It is difficult to define blasphemy. What is regarded as blasphemous will depend on the values prevalent in a given society. Further, even if a sufficiently precise definition could be developed, there are difficulties inherent in fairly and consistently prosecuting an offence that focuses on words, not actions. There is no crime scene and very little objective evidence will be available. Given this, critics argue that blasphemy is a “noose” around the neck of speakers that could be pulled by anyone if the speaker belongs to the unpopular side.¹ The overly broad offence of blasphemy is defined in the *Criminal Code* of Canada in section 296² and in the *Penal Code* of Pakistan under s.295-c³ in the following words:

S. 296 of the Canadian *Criminal Code*:

1) Everyone who publishes a blasphemous libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

2) It is a question of fact whether or not any matter that is published is a blasphemous libel.

No person shall be convicted of an offence under this section for expressing in good faith and decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on religious subject.

¹ Jerome Neu, *Sticks and Stones: The Philosophy of Insults* (Oxford: Oxford University Press, 2009) at 202.

²*Criminal Code*, RSC 1985, c C-46, s. 296.

³*Pakistan Penal Code*, (PPC) 1860, Act No. 45, s 295-c.

S. 295-c of the Pakistan *Penal Code*, 1860:

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 (P.B.U.H) shall be punished to death and shall also be liable to fine.

In this thesis I will argue that blasphemy, to the extent it should be dealt with by the law, should be regarded a sub-category of hate speech.⁴In other words, the law should concern itself only with those aspects of blasphemy which incite hatred against a group which is identifiable on the basis of religion. More specifically, I argue that Pakistan should repeal its blasphemy laws and instead introduce a criminal provision patterned on the Canadian hate speech section of the *Criminal Code*. In this chapter, thus, I provide a comparative context for the later discussion of Pakistan's blasphemy law.

Greeks used a broad offence of "impiety" to prosecute speaking contemptuously or using profane language against religion or Greek deities. Further, drunkenness, black magic, sacrilege of religious places or objects in religion were also considered "impiety."⁵ Religion was considered an integral part of the state and so impious

⁴ Ivan Hare & James Weinstein, *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2010) at 291.

⁵ Leonard Levy, *Treason against God: a History of the Offense of Blasphemy*, 1sted (Schocken Books, 1981) at 7.

actions were seen as shocking behavior which threatened the state. Therefore, impiety was punished severely.⁶

Examples of those who were prosecuted for impiety include a famous sculptor who wrote his name under the shield held by a statue of a Greek god; Greek scientists and philosophers who failed to attribute the universe to a divine power; and most notably, Socrates, who was executed for claiming that the sun and the moon were not gods. Consequently, his most famous pupil, Plato, learned from his teacher's mistake, and attributed his theory of the creation of the universe to a divine and powerful sovereign.⁷ Whether the real objective behind these prosecutions was religious or political remains buried in history.

In Judaism, blasphemy and its punishment were established in the time of Moses, who led a loose confederation of Jewish tribes out of Egypt promising them a free land and blessings of God. Always skeptical about Moses' prophet-hood and the existence of God, the tribes insisted on miracles as proof. Eventually, they created a golden idol shaped like a cow and even plotted to kill Moses on his return from Mount Sinai. In response to this, Moses received these words from God:

Bring out of the camp him who cursed; and all who heard him lay their hands upon his head, and that all the congregation shall stone him. And say to the people of Israel, whoever curses his God shall bear his sin. He who blasphemes the name of the Lord shall be put to death...⁸ Thus, the punishment for blasphemy and what constituted blasphemy was born. In

⁶ Leonard Levy, *Blasphemy: Verbal offense Against the Sacred, from Moses to Salman Rushdie*, 1sted (Knopf, 1993) at 31.

⁷Levy, *supra* note 5 at 14.

⁸*Ibid* at 17; Neu, *supra* note 1 at 204.

sum, according to the Jewish religion only cursing or swearing in the name of God was considered as a crime of blasphemy.⁹

Thus, Jews regarded the rebellion towards God as blasphemy. This was still a quite broad scope, but was considered narrow since it excluded blasphemy towards religious objects and persons. Blasphemers were prosecuted by Jews in order to avoid the wrath of God, hence offering them in sacrifice just like animals to manifest their loyalty to God and disapproval for His enemies. Likewise, Jews excommunicated blasphemers so that they would not anger God by giving shelter to them.¹⁰

As with the Greeks and Jews, punishment for blasphemy in early Christian understanding was also death.¹¹ However, modern Christianity has rejected this orthodox concept and now hate speech laws cover this field of offence as would be seen later in Chapter 2 and Chapter 3 of this thesis. Nonetheless, a brief exegesis of the history of blasphemy in the early Christian tradition is in order.

In summary, blasphemy in early Christian times included: persecuting Christians; doubting Jesus' power to stop his crucifixion; doubting Jesus' miracles and teachings; posing as Jesus; claiming oneself equal to Jesus; and cursing, reproaching, criticizing or mocking Jesus.¹² By 400 A.D, nearly everything fell under this broad

⁹ David Lawton, *Blasphemy* (University of Pennsylvania Press, 1993) at 47.

¹⁰ *Neu, supra* note 1 at 196.

¹¹ *Lawton, supra* note 9 at 49.

¹² *Levy, supra* note 6 at 33-34.

definition of blasphemy. Given this, the Catholic Church, with the coercive power of the civil rulers at its back, emerged as the main defender of the one true faith. Many faithful Christians were burnt alive or otherwise prosecuted as they were considered blasphemers merely for having disagreement or disbelief on any religious point. As Leonard Levy has noted, “The view that blasphemy consisted of any religious belief contrary to the policies of the Church or its leadership, [was] a fixed position in Christian thought for prosecuting blasphemy”.¹³ Hence, blasphemy law served as Frankenstein’s monster: for killing of Christians was considered a blasphemous act and a negation of Christian faith conducive to conflict and wars; but numerous faithful Christians were prosecuted under these very laws by the Church itself.¹⁴

At various times in the past, Christianity considered blasphemy nearly the same as impiety, “idolatry, sacrilege, heresy... profanity... [and] treason.”¹⁵ On the contrary, the word ‘Blasphemy’ finds its origins in the late-Greek era, meaning to “injure” by “utterance, talk, speech” and/or “a speaking ill, impious speech and slander.”¹⁶ Jews interpreted the concept of blasphemy as to “pronounce aloud and to curse” or “hurting by speaking.”¹⁷

¹³Levy, *supra* note 5 at 3.

¹⁴*Ibid* at 103-122; Levy, *supra* note 6 at 31.

¹⁵*Ibid* at 4.

¹⁶ Leonard Levy, *Blasphemy: Verbal offense Against the Sacred, from Moses to Salman Rushdie*, 1sted (Knopf, 1993); David Lawton, *Blasphemy* (University of Pennsylvania Press, 1993); David Nash, *Blasphemy in Modern Britain: 1789 to the Present* (Aldershot: Ashgate, 1999).

¹⁷Lawton, *supra* note 9 at 14.

Blasphemy took its modern shape by evolving from the middle age English word “Blasfemen” and the old French “Blasfemer,”¹⁸ and meant “speaking any evil thing of God, making war with heaven itself... flying as it were in the face of the Almighty...scoffing at religion, and speaking reproachfully of God’s ordinances...”¹⁹ In the Catholic encyclopedia, blasphemy was defined as a “mortal sin [and] the greatest.”²⁰In the main, it consisted of expressions or acts which scurrilously vilified, ridiculed or otherwise reviled God, sacred persons, objects or the cornerstone ideals of religion.

For some theologians, blasphemy includes situations where men deny what belongs to God, ascribing something unbecoming with Him, or ascribe men with the qualities which are exclusive for God. Therefore, it is seen as an intemperate and unjustified attack rather than a product of good conscience and intellect. On the other side of the spectrum, blasphemy is described as a deliberate malicious attempt to shock believers, and threaten a society’s peace and tranquility. Thus, blasphemy is not only made punishable on a religious basis, but also considered as “treason” against a community and a state.²¹

Some supporters of blasphemy laws argue that anyone who rebels against God ought to be punished.²² Others contend that such a vague and subjective definition could include gambling, drinking, impiety, hypocrisy or any other action that

¹⁸Levy, *supra* note 16.

¹⁹Lawton, *supra* note 9 at 15.

²⁰*Ibid* at 6.

²¹Levy, *supra* note 5 at 5-6; Levy, *supra* note 6 at 297-299.

²²Lawton, *supra* note 9 at 15.

disobeys God's commandments. Such a broad understanding of blasphemy could allow for the prosecution of political, artistic, scientific and literary speech.²³

As sections set out above show, *mens rea* (in this context: intention to denigrate God, Prophets, Holy books etc) is not a compulsory ingredient of the offense and is generally presumed from the mere action of blasphemy. Secondly, the definition cannot apply to more than one religion, for one religion's expression may often be viewed as another's blasphemy. Further, court cases do not provide sufficient guidance in defining blasphemy, since Canadian cases were decided pre-Charter²⁴ and the ones in Pakistan have had many defects in them. I argue that blasphemy is a 'dogmatic subject' that increases radicalism in society. Therefore, there is a dire need to repeal the offence of blasphemy and introduce more modern hate speech laws which will focus on social problems rather than an unachievable ideal of religious piousness in society. Thus, my thesis is that blasphemy should not be a separate crime instead some aspects of blasphemy should be dealt with under a more modern conception of carefully designed hate speech laws.²⁵ A detailed explanation of this argument will be made in Chapter 3 and 4 of this thesis. But in this chapter I will focus on modern legislative methods adopted in various countries to amend their approach towards blasphemy laws, and on general arguments in favour and against blasphemy laws. In conclusion, I argue that the offence of blasphemy must be repealed but the concept should be modernized as a part of

²³*Ibid* at 45.

²⁴*Canadian Charter of Human Rights and Freedoms*, s 1, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11.

²⁵*Ibid* at 17; *Neu, supra* note 1 at 204.

narrowly designed hate speech laws. Similarly, punishments prescribed for the offence of blasphemy, after being stipulated as hate speech, must extensively be curtailed. Overall, I suggest, no punishment for rigid blasphemy law but a lesser degree of punishment for a modern hate speech offence as practiced in countries with hate speech or religious vilification laws.

Next I state some modern approaches to blasphemy adopted in various countries.

2. Modern Approaches to Blasphemy

Blasphemy laws are or were prevalent in many countries like Denmark, England, France, Germany, India, Ireland, Norway, New Zealand, Scotland, Spain, [Canada and Pakistan], Switzerland and Sweden. Furthermore, in most of these countries, punishments are or were very nominal, coupled with the fact that courts required strict evidentiary standards for prosecuting a blasphemer. In this regard, the following discussion gives a brief overview of jurisdictions like the U.S, Australia and some European countries in the hope to show how these countries have liberated themselves from the rigid and age old clutches of Blasphemy. However, a detailed discussion regarding blasphemy laws in Pakistan and Canada will be made subsequently in the relevant chapters.

2.1. United States

Despite the United States' strong historical commitment to freedom of speech, in 1837, a court observed that citizens had a right to enjoy their religion "without interruption or disturbance" and that blasphemous libel "struck at the foundation of

civil society.”²⁶ The court held that blasphemy laws defended society from “gross violation of decency and good order”, preventing blasphemers from corrupting public morals and peace.²⁷

However, in 1968, an Appellate Court in Maryland struck down the states’ blasphemy provision set out in a 1723 statute by declaring it unconstitutional.²⁸ Since then, the U.S Supreme Court has not ruled on the constitutionality of the offence of blasphemy, but it is unlikely that such an offence would withstand a constitutional challenge in the United States today.

2.2. Australia

The last two prosecutions in Australia for blasphemy occurred in 1871 and 1919. The provision was invoked as recently as in 1998, but the court refused to allow the prosecution, based on the principle of ‘desuetude’.²⁹ However, some aspects of blasphemy have been retained by several states in their religious vilification laws

²⁶ Justin Kirk Houser, “Is Hate Speech Becoming the New Blasphemy? Lessons from an American Constitutional Dialectic” (2009) 114:2 Penn State Law Review 571 at 573 (HO).

²⁷*Ibid* at 585; Delaware v. Chandler Del. 553, 1837 WL 154 (Gen. Sess. 1837).

²⁸ State v. West, 263 A. 2d, 602 (Md. App. 1970).

²⁹*The Oxford English Dictionary*, 2d ed, *sub verbo* “Desuetude”. The principle of desuetude is defined as denoting something in a state of disuse. In a legal sense when a principle becomes obsolete for so much time it cannot be effectively re-invoked after such gap.

which are somewhat similar to modern hate speech provisions.³⁰ To give an example, Victoria's *Racial and Religious Tolerance Act, 2001*³¹ reads as follows:

Section 8:

(1) A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

Note: "engage in conduct" includes use of the internet or e-mail to publish or transmit statements or other material.

(2) For the purposes of sub-section (1), conduct—

(a) may be constituted by a single occasion or by a number of occasions over a period of time; and

(b) may occur in or outside Victoria.

2.3. European Approach

After lengthy negotiations with the Anglican Church, England repealed its blasphemy laws in June 2008. These laws had been criticized as discriminatory because they protected only Christianity. England also replaced its blasphemy law with narrower provisions in its *Racial and Religious Hatred Act 2006*,³² and *Criminal Justice and Immigration Act 2008*,³³ which deal with the issue of discrimination on basis of religious hatred in the U.K.

³⁰ Jeremy Patrick, "Not Dead, Just Sleeping: Canada's Prohibition on Blasphemous Libel as a Case Study in Obsolete Legislation" (2008) 41 UBCLR 193 at 7 (Dalhousie online Libraries); Osama Siddique & Zahra Hayat, "Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial origins, Design Defects and Free Speech Implications" (2008) 17:2 Minnesota Journal of International Law 303 at 355 (SSRN).

³¹*Racial and Religious Tolerance Act (Vic)*, s 8.

³²*Racial and Religious Hatred Act 2006 (UK)*, c 1.

³³*Criminal Justice and Immigration Act 2008 (UK)*, c 4.

In Netherlands, article 147 on blasphemy of the Dutch *Penal Code*, 1881 was concerned with expressions made only against God not saints and other religious figures.³⁴ Likewise, mere proof of *willfulness* was not sufficient to establish guilt for the offence of blasphemy. For instance, if the speaker was cognizant of the fact that his expression may cause breach of peace, this alone circumstance would not have been considered enough to prove intention. Instead, such intent had to be ‘scornful’ clearly manifesting that the speaker had willfully intended to hurt the religious feelings of a certain class. This criterion of ‘scornfulness’ was a limit on the misuse of blasphemy law as it made it hard to establish guilt and was a discretion lying with the court exercised on a case to case basis.³⁵ There was a decade of debate between those who called for making the application of these laws lenient and those who wanted to abolish them. Finally, they were repealed on 5th December 2012.

3. Critical Analyses of Blasphemy

Arguments in favour and against blasphemy laws are pursued in the following sections.

3.1. Arguments in Favour of Blasphemy Laws

3.1.A. Blasphemy: the Greatest Sin of Sins as Against the Greatest King of Kings

Thomas Aquinas, a highly reputable theological scholar from 13th century Italy, proposed a very harsh policy against blasphemers. Contours of his approach can

³⁴*Dutch Penal Code 1881* (Netherland), s 147.

³⁵*Siddique*, *supra* note 30 at 356.

still be observed in the blasphemy law of various Muslim countries. Aquinas believed that blasphemy was the greatest of the sins, targeting the greatest king of all kings. He claimed that blasphemy was even greater a crime than murder, as murder was a crime against another person but blasphemy was a crime against the creator Himself. Therefore, he argued that blasphemy must be punished with death, as any lesser punishment similarly amounted to blasphemy. Aquinas believed in death of all blasphemers.³⁶

3.1B. Blasphemy: A Threat to Religious and Constitutional Structure

Other historic proponents of blasphemy laws argued that blasphemy threatens the very basis of religion and society.³⁷ Blackstone in 18th century Britain argued that an attack on religion is an assault upon the very roots of society, morality, decency, communal values, social order and public peace, the values that the state is responsible for protecting.³⁸ Somewhat different argument may be put forward in connection with religion-based laws that blasphemy may be seen as a step toward secularization and anarchy. Thus, Anti-blasphemy laws are then justified as necessary to protect societies.³⁹

³⁶*Levy, supra* note 5 at 108-113.

³⁷*Siddique, supra* note 30 at 307.

³⁸*Houser, supra* note 26 at 585-588.

³⁹*Hare, supra* note 4 at 301.

3.1C. Religion Based Laws as a Means of Preventing Violence

In countries with religion-based laws, some also argue that prohibiting blasphemy also limits the possibility of vigilante violence by those offended by blasphemy. Thus these laws are seen as preventing breach of public peace in society.⁴⁰

4. Counter Arguments to Blasphemy Laws

4.1 Is Blasphemy Really a Religious Crime?

Secular scholars acknowledge that blasphemous statements relate to religion, but some argue that such statements might well be understood as a form of political speech that must not be regulated unless reasonably justified. Their main argument is that a state uses blasphemy laws to shut down the critical expression of those who question government's power as established under the notion of religion.⁴¹

4.2 Blasphemy: Misreading of Innocent Ideas

Some scholars argue that those who are accused of blasphemy do not mean to be offensive. Instead, these blasphemers try to talk about important causes of the chaotic nature in society, but it is the other people who misunderstand them. As well, it is suggested that the only reason people are accused of blasphemy is because their ideas challenge those in control of religious institutions who believe that any new idea revolting against the set religious ideals in society amounts to rebellion

⁴⁰*Nash, supra* note 16 at 3.

⁴¹*Ibid; Lawton, supra* note 9 at 44 & 110-114; Joss Marsh, *Word Crimes: Blasphemy, Culture, and Literature in Nineteenth-Century England* (Chicago: University of Chicago Press, 1998) at 19.

against God's commandments.⁴² Thus, they claim, prosecuting people on the basis of mere offensiveness and disagreement towards what others believe must not be allowed.

4.3 Blasphemy: A Communal Clash

Some critics oppose blasphemy laws on the reasoning that it is not a religious offence, rather, a communal disagreement between two groups. Thus, they believe that punishment for such an offence which does not target God but only a community collectively ought not be awarded. Thus, they claim that blasphemy laws must be abolished and other criminal laws in respect of protecting peace and order should be used to control such disorder in society.⁴³

In support of their claim, they argue that incidents of blasphemy often occur where society is divided on different social identities. Similarly, in many of the cases pertaining to allegations of blasphemy, the complainant and accused come from nearly the same background sharing commonalities among them regarding their place of residence, religion or social status etc. Hence, allegations of blasphemy are often a result of power struggle between two conflicting groups due to which simple expression, disagreement, novel thinking or disbelief may become a reason for prosecution under broad blasphemy laws.⁴⁴

⁴²*Lawton, supra* note 9 at 1-3 & 43: the form of religious fundamentalism in the service of the civil authorities

⁴³*Ibid* at 4 & 41.

⁴⁴*Ibid*.

These critics, therefore, claim that blasphemy is simply a difference of opinion between two groups living in a community, but it is maliciously and readily converted into a battleground of religious beliefs and moral standards by opportunists. Therefore, it is safely argued that blasphemy laws are indeed used as a tool by those who are in power in such divided communities to prosecute, marginalize and eradicate those having a viewpoint different from the predominant majority.⁴⁵

4.4 Blasphemy laws: A Wrong Approach for Achieving Standard of Unity in Society

Phillip Furneaux, a non-conformist minister of 18th century Britain, suggested that inquisitiveness and ingenious thinking ought to be permitted in religious matters, because the most sacred and cherished values in a society are inherently capable of protecting themselves against false ideas and malicious accusations. Furneaux also asserted that religion benefits from discourse which allows the truth to emerge. Further, he held that modern religions must also show leniency and should not prohibit others to do the same which they did in their developing stages.⁴⁶

Thus, critics argue that blasphemy laws are a wrong approach for achieving standard of unity in society, since they threaten people by imposing severe punishments for actions which are not even specifically defined or known by the so called blasphemers. Further, they contend that blasphemy laws are orders from a

⁴⁵*Ibid.*

⁴⁶*Houser, supra* note 26 at 616.

higher governmental authority dictating public as to what is right and what is wrong for them. Thus, this defeats the ideals of promoting individual dignity, reasoning and intellectual liberties that are considered to be a more sound and democratic way of achieving unity as compared to punishing or removing people from society by the government.⁴⁷

4.5 Is Blasphemy an Insult to God?

Critics reject that insults to God must be punished to avoid divine wrath, since He is Almighty who is able to defend His name and realm without help from anyone.⁴⁸ Besides this, it is not God who feels insulted and then reacts, but the orthodox religious community which apprehends danger in novel ideas. So, the threatened religious community repulses them with as much power as it can gather to counter any such movement which may sow the seeds of transformation or modernization in societal beliefs. These critics maintain that blasphemous statements offend private persons in a community, so the standard of punishment should be according to the standards mentioned in other laws.

5. Conclusion

The job of the state is not to protect a heavenly authority but instead its job has been explicitly ordained by such authority to maintain social tranquility and peace in society. Therefore, it is the primary duty of a state to protect its citizens from crimes and only after the accomplishment of this goal it can seek the unachievable task of

⁴⁷*Levy, supra* note 6 at 314.

⁴⁸*Ibid* at 317.

religious piousness by protection of divine authorities. So, unless a state does not perform its basic duty of preventing harms done to its citizens, both by others and the government itself, it should not go for avenging harms made to the name of God with severe punishments on the basis of a broad concept like Blasphemy. Hence, on a rational basis, the offence of blasphemy must be repealed but the concept in general should be modernized as a part of narrowly designed hate speech laws. Punishment prescribed for the offence of blasphemy, after being stipulated as punishments of hate speech, must be extensively curtailed. It is indeed not the religion which is being targeted but only the political or fundamentalist framework of society. No punishment for orthodox blasphemy law, but rather a lesser degree of punishment for the modern hate speech offence is required as is practiced in countries with such laws. Therefore, I will discuss my analysis and suggestions on this approach in Chapter 4. At this juncture, I will reiterate my thesis that blasphemous prosecutions are politically, socially, economically and culturally motivated while religion is only used as a legitimizing tool by opportunists. So, these draconian laws need transformation in terms of making them narrow and specific with lenient punishments keeping in view the standards of the modern legal regimes.

CHAPTER TWO

The Hate Speech Debate

1. Introduction

This chapter first defines hate speech, and then considers relevant arguments against, and in support of censoring free expression with the aim to prohibit hate speech (including blasphemous statements that meet the test for hate speech).

Although freedom of expression is a quintessential right in a democracy, it has an interactive relationship with other fundamental rights. No right is absolute; thus there is room for some regulation of free expression even in a society that has freedom of speech as a fundamental democratic value. For this reason, a narrowly designed criminal provision which prohibits hate speech, while clearly defining what is prohibited and providing appropriate defenses, is a justified limit on freedom of expression.

2. What Is Hate Speech?

There is not a single exact definition for hate speech which may work in all jurisdictions with multifarious historical, legal, cultural and religious backgrounds and with reference to various targeted groups. My purpose here is to provide for Pakistan a workable definition of hate speech, after discussing various ways of thinking about hate speech in light of Canadian law. The latter, holds substantial guidance for countries like Pakistan that need to tighten their broad criminal laws.

Hate speech can be a direct or indirect attack by a majority on a minority group with the sole objective to intimidate and humiliate. It can be an attempt to persuade a dominant group of the inferiority of a minority group. It can also be an expression propagated by one minority group towards another, or by a minority group toward the majority.⁴⁹ In general, hate speech means willful promotion of hatred that is hostile, malicious, and motivated by bias.⁵⁰ Consequently, it is intimidating, harassing, degrading and victimizing.⁵¹ Such speech targets an individual or group on the basis of some actual or perceived distinctive characteristics.⁵² For these reasons, it incites discrimination, probably violence and hatred within society.⁵³

It is appropriate to note here that I favour allowing disagreement, satire, political and academic discussion, etc., which may ‘unintentionally’ cause hatred or violence in society. As well, I think that a government must judge expression in light of its

⁴⁹*Hare, supra* note 4 at 213; Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton University Press, 1996) at 64; Mari J. Matsuda et al, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (New Perspectives on Law, Culture, & Society)* (West view Press, 1993) at 39.

⁵⁰ Raphael Cohen-Almagor, “Fighting Hate and Bigotry on the Internet” (2011) 3:3 Policy and Internet: university of Hull at 3 (SSRN).

⁵¹ James Banks, “European Regulation of Cross-Border Hate Speech in Cyberspace: The Limits of Legislation” (2011) 19 European Journal of Crime, Criminal Law and Criminal Justice at 2 (SSRN).

⁵² O. Bakircioglu, “Freedom of Expression and Hate Speech” (2008) 16 Tulsa Journal of Comparative and International Law at 4 (Dalhousie Online Libraries).

⁵³*Almagor, supra* note 50; *Greenwalt, supra* note 49 at 50; Alexander Tsesis, “Dignity and Speech: The Regulation of Hate Speech in a Democracy” (2009) 44 Wake Forest Law Review at 517 (Dalhousie Online Libraries); Bhikhu Parekh, “Hate Speech: Is there a case for banning?” (2006) 12:4 Public Policy Research at 217 (Dalhousie Online Libraries); Richard Delgado & Jean Stefan, *Must We Defend Nazis: Hate Speech, Pornography, and the New First Amendment* (NYUP, 1999) at 129.

context before deciding whether it should be regulated or not. If a speaker had not intended for adverse effects to occur, he must not be charged for an offence of hate speech. In this case, it is the listeners' response that makes the expression to come across as bad and not that the speaker himself intended for such hatred or violence to take place in society. However, if the expression willfully promotes hatred, thus inviting violence, it can be regulated whether violence occurred or not.⁵⁴ The burden of proof is on the state to show that the speaker had 'intentionally' made a hateful expression, and it must be a substantial burden of proof to satisfy a criminal prohibition.⁵⁵ Given this, scholars present different views on how to regulate hate speech. A detailed analysis of the arguments for and against hate speech regulation is presented in the next section.

⁵⁴*R. v. Buzzanga and Durocher* (1979), 49 CCC (2d) 369, (Ont. CA) Martin JA [Buzzanga].

⁵⁵ I believe that political, academic, and media's expression might well hold the highest grounds in a democracy, but it does not mean that whenever false assertions are made through these powerful platforms, targeting a specific group on basis of some distinctive characteristic, they cannot be regulated. Any such expression that promotes distasteful opinions against a certain class of people due to their distinctive presence in society should not be left free to taint a society. Indeed, governments should give levity to expression falling under these categories, which may 'unintentionally' cause hatred or violence. But, they must analyze the context in which the expression is made and only then decide whether the intention was to promote hatred in society or whether it was just political criticism, genuine inquiry, mockery, etc demanding censorship.

3. The Hate Speech Debate

3.1 Non-Regulation of Hate Speech: “The Market Place of Ideas”

Opponents of speech regulation believe that hate speech is a sub-category of free expression, and that it is intrinsically important for the development of intellectual thought in society. They claim that there should not be any governmental censorship of hate speech. Indeed, they compare the ‘market place of ideas’ to an ‘economic market place,’ and insist that as good practices emerge inherently in the economic market place, so do they also occur in the ‘market place of ideas’ when governments do not interfere. In this respect, John Stuart Mill noted that all opinions and ideas ought to be free in the market place without any influence from government.⁵⁶ He thought that truth is most likely to emerge when ideas are given an equal opportunity to convince their audience. He claimed that people will resort to independent reasoning to decipher truth from falsehood regarding prevalent issues in society, and do not need a didactic government to tell them what is right or wrong. Further, he proposed that if a person knows relevant information about an issue, he is less likely to make a bad decision. Therefore, Mill claimed that free speech gives the power of thought to individuals to decide for themselves what is best without any fear of authoritative regulation of their thought.⁵⁷

⁵⁶ Kent Greenwalt, *Speech, Crime, and the Uses of Language* (Oxford University Press, 1989) at 17.

⁵⁷ Franklyn Saul Haiman, *Speech and Law in a Free Society* (Chicago: University of Chicago Press, 1981) at 99.

Similarly, Ronald Dworkin notes that:

Politics is more likely to discover truth and eliminate error, or to produce good rather than bad policies, if political discussion is free and uninhibited... Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one... no official and no majority...has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.⁵⁸

Thus, Dworkin criticizes government attempts to dictate what kinds of speech are allowed. He also argues that an individual must be free to decide for himself, and free to discuss his opinions with others in society. He asserts that governments ought not to regulate any opinions, no matter how hideous and distasteful those may be, in an attempt to prevent injury to others.⁵⁹

Other scholars argue that principles of autonomy and equality require that a person must be given full liberty to exchange his views with others and his views must be entitled to equal recognition with those of others.⁶⁰ Robert Post, for example, holds that the essence of democracy is that individuals should be autonomous in forming

⁵⁸ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Boston: Harvard University Press, 1997) at 200.

⁵⁹*Ibid* at 200-202.

⁶⁰*Hare, supra* note 4 at 169-171. Scholars believe that autonomy is of two kinds i.e. 'formal' and 'substantive' autonomy. Formal autonomy suggests that a government must not regulate ideas of its people, no matter how repulsive, repugnant or abhorrent those may be. Because, when a government censors views of a person, he cannot be considered autonomous or equal in society. Furthermore, formal autonomy of one individual does not collide with formal autonomy of another in society. However, it may conflict with a person's substantive autonomy which means that a person has a right to spend his life in best possible ways without fear of interference or harm. Contrarily, substantive autonomy can obstruct both formal and substantive autonomy of other citizens. Therefore, these exponents consider it inferior in value than the formal one.

opinions through their own observations rather than blindly follow orders emanating from an authority. Greenwalt maintains that freedom of expression is a highly valuable right which must not be censored. In his view, expression is what makes us know who we are, as it gives us power to enjoy our liberty, form our thoughts and express our feelings to others.⁶¹ Lee Bollinger corroborates these views by arguing that although hate speech is harmful, still it must be given protection in a democratic country. While hate speakers try to incite religious warfare by using the power of wrongful words, responsible citizens can resort to good reasoning to discourage and reject their propaganda. He claims that a society which can tolerate harmful expression, like hate speech, reinforces its belief in real democracy.⁶²

To summarize, scholars who reject the regulation of any speech claim that the autonomy of an individual must not be sacrificed for collective reasons, as this would create a society based on inequality and discrimination. Further, these scholars reject the argument that hate speech creates violence and hatred threatening the public good. Hate speech, in their view, consists of mere opinions, and it would be nearly impossible to decide which opinions to criminalize.⁶³ Also, a

⁶¹Richard J. Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 20.

⁶²*Matsuda, supra* note 49 at 18.

⁶³*Hare, supra* note 4 at 149. [T]he hope of those favoring hate speech prohibitions must be that enforcement will be meaningful and effective at a quite early stage. Pessimism about this speculative hope seems justified. First, are generic doubts about likelihood of effective legal enforcement. More important, however, is the likelihood that at this most relevant stage the speech that meaningfully contributes to developing or sustaining racism will be subtle, quotidian and, to many people,

hate speaker is likely to have been motivated by previous hateful expressions made by others, therefore a government cannot control this connected web of hatred. If it tries to do so, it would impede more speech than is desired or necessary.⁶⁴

Interestingly, their chief argument is that hate speech is also a form of public discourse which helps to form public opinion. They think that when hate speakers make their views known, it allows for analysis of their ideas, as opposed to forming opinions about them based on emotions and subjective inclinations.⁶⁵ To them, therefore, when a government proscribes an idea as hate speech, it actually deters free thinking, autonomy and equality of its subjects as to making their own choices.⁶⁶

Before I refute some of these arguments, I will summarize arguments from those who support regulation of hate speech.

seemingly inoffensive or at least not 'seriously' offensive speech. This speech is likely to fly under the legal radar screen and, in any event, meaningful enforcement of prohibitions against this speech is even less likely. Thus, even given a belief that racist speech contributes significantly to virulent racism and genocidal practice [Edwin Baker's] hypothesis is that at earlier stages legal prohibitions will not cover or be effectively enforced against the most relevant speech and at later stages enforcement will not occur, will be counter-productive in creating martyrs for a racist cause, or will focus on the wrong targets.

⁶⁴ Michael Hatt, "The Subject of Hate Speech" (2000) 23:1 Oxford Art Journal 139-146 at 142 (Dalhousie Online Libraries).

⁶⁵ Moon, *supra* note 61 at 10.

⁶⁶ Matsuda, *supra* note 49 at 33; Hare, *supra* note 4 at 146 & 171. Baker argues that regulation of public reasoning in some matters through dictation by the government as in the case of hate speech and giving liberty in others as in self-government goes against the cardinal principles of democracy which ensure autonomy and equality in society.

3.2 Regulating Hate Speech to Promote Communal Good

Those who want hate speech to be regulated include Steven J. Heyman. In his view, hate speech undermines the dignity and autonomy of its victims, and impedes enlightened intellectual discussion. It also creates an atmosphere of discrimination which militates against the very idea of communal harmony. To Heyman, just as governments have a responsibility to treat citizens with equality, individuals are also morally obliged to treat their fellow citizens with respect and dignity.

Therefore, where certain forms of speech threaten to dissolve the fabric of society, governments are justified to control such propaganda and restore public order because they are elected by the people for this task.⁶⁷

Likewise, Meiklejohn contends that free speech does not mean that all ideas must be protected in a democratic society. Instead, freedom of expression is intended to protect those ideas which are conducive to the communal good. Since hate speech promotes discrimination and segregation in society, by definition, it cannot help people to reach decisions beneficial to the collective whole. He holds that the use of abusive language which creates hatred in society is not an aspect of democratic debate.⁶⁸ Richard Moon also notes that “although expression sometimes increases knowledge and reflection, at other [times] it is disengaging of thought and reason, thus being hurtful and manipulative.”⁶⁹

⁶⁷Matsuda, *Ibid* at 172.

⁶⁸*Ibid* at 176.

⁶⁹Moon, *supra* note 61 at 31.

Others maintain that hate speech is usually directed towards groups that are already vulnerable or marginalized. Therefore, allowing hate speech requires individuals in these groups to tolerate what others do not have to, as the price of freedom of expression for all. On the contrary, Justice, equality and autonomy require that the burden of free speech must be the same for all those who enjoy the freedom, rather than be borne disproportionately by already victimized groups.⁷⁰

In this respect, Alexander Tsesis asserts that maintaining social order and collective safety in society from unwanted assault (psychological or physical) is the real job for which governments are chosen. This, according to him, supersedes any claim of individual dignity by a person who employs hateful speech to satisfy his feelings of grudge, thereby poisoning the whole atmosphere of society.⁷¹ He notes that:

Self-assertion is not an absolute trump against egalitarian decision making...an autonomous right of lewd communication may sometimes be outweighed by well-defined contemporary community concerns...⁷²[R]egulations against intimidating hate speech can reflect that governments have greater interests in preventing harmful expression than to exempt expression of menacing animus...⁷³[A]s much as self-expression is fundamental to democratic institutions, it can, nevertheless, be balanced against social interest in safeguarding a pluralistic culture by preventing the instigation of demagogic threats. [Therefore] placing no limits on speech... preserves the right of speakers at the expense of targeted groups.⁷⁴

⁷⁰*Matsuda, supra* note 49 at 80; Richard Delgado et al, *The Price We Pay: The Case against Racist Speech, Hate Propaganda, and Pornography* (Hill and Wang Publishers, 1995) at 260.

⁷¹Alexander Tsesis, "Dignity and Speech: The Regulation of Hate Speech in a Democracy" (2009) 44 *Wake Forest Law Review* at 501 (Dalhousie Online Libraries).

⁷²*Ibid* at 500.

⁷³*Ibid* at 503.

⁷⁴*Ibid* at 508.

Like these scholars, my view is that dignity does not only mean that a person must be respected in society by the state. It also denotes that other citizens must respect his individuality and freedoms. The correlative responsibility such an individual carries is whether his own expressions are in consonance with the idea of communal good.⁷⁵ Therefore, where government regulations promote collective harmony and social welfare, it is then legitimate. So long as hate speech upholds narrow cause of a hate group contrary to majority opinion, government regulation of the former is both necessary and justified.

Peter Hogg rightly notes: "It is normally a sufficient moral or political justification for law that it is calculated to increase the general welfare. The law may make some people worse-off, but as long as these costs are outweighed by benefits to others, there is a net increase in the general welfare."⁷⁶ On this score, it is clear that though some regulation may harm a speaker, the overall benefit to the targeted group and society is much more important in a democratic society.

Heyman agrees that where the benefits of regulation outweigh the injury caused to an individual in respect of his freedom of expression, such regulations (even though

⁷⁵ Robert Mark Simpson, "Dignity, Harm and Hate Speech" (2013) *Law and Philosophy* 32-6 701-728 at 708 (SpringerLink). By communal good, I mean that benefit of the whole society should be given importance than protecting hateful expression of one which only satisfies such one person and is not in conformity with the underlying principles of free speech and democracy.

⁷⁶ Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell Publishers, 2009).

targeting a content-based expression) are justified on egalitarian grounds.⁷⁷

Similarly, Bhiku Parekh notes: “Although free speech is an important value, it is not the only one. Human dignity, equality, freedom to live without harassment and intimidation, social harmony, national unity and protection of one’s good name and honor are also central to the good life and deserve to be safeguarded.”⁷⁸ Richard Moon and Caleb Young opine that although hate speech advances some interests and values, it poses a serious threat to the peace and tranquility of society at large. As such, it cannot be accorded protection.⁷⁹ John Locke observes that an expression which denies equal rights to others ought to be dismissed. This is because the dignity, autonomy and freedom of an individual borrow their energy from similar rights that others must enjoy.⁸⁰

In sum, to those who advocate regulating hate speech, freedom of expression is interactive. It does not have any more special importance compared to other constitutionally protected rights, such as dignity and equality. These rights take inspiration from each other and can be limited where they impinge upon each other’s integrity. In regard to an individual, therefore, these rights can be compromised where the collective welfare of the community is better served by restricting them.

⁷⁷ Quoted in, *Hare, supra* note 4 at 160-163.

⁷⁸ *Parekh, supra* note 53 at 216.

⁷⁹ *Moon, supra* note 61; Caleb Yong, “Does Freedom of Speech Include Hate Speech?” (2011) 17:4 *Res Publica* 385-403 at 388 (Springer).

⁸⁰ Quoted in, *Hare, Supra* note 4.

3.2.A Keeping Hate Speech Unregulated?

It was indicated earlier that arguments in support of non regulation are not fool proof. A number of these arguments are now assessed.

In general, it is argued that since hate speech cannot be completely regulated, any effort to achieve this objective would fail. In contrast, others think that if regulation cannot completely control unlawful activity, it does not mean that the whole legal framework is unworkable for concentrating where it is effective. Laws in respect of crimes like murder, theft and rape do not fully control these crimes, yet their importance and workability cannot be denied. Therefore, criticizing hate speech laws on the basis of their ineffectiveness on some points is overstated criticism.⁸¹

Another criticism is that principles embodied in the provisions pertaining to hate speech protect the norms or values of a single group, those who most benefit from regulation. The reality, however, is that the protection offered by regulation benefits the whole society. Indeed, a civilized community requires a culture of mutual respect and tolerance, coupled with the protection of peaceful citizens from the injurious effects of hateful expressions. Such a community emerges only when people learn to respect and treat others in the same way they prefer to be treated. This is why, good hate speech laws that may not be fully effective are, at least an important step toward creating and sustaining such a society. Such laws help to

⁸¹*Hare, supra* note 4 at 173.

obviate an atmosphere of anarchy and vengeance which hate speech otherwise promotes.⁸²

Clearly, the argument that government regulation of hate speech suppresses free expression and damages truth is exaggerated. Rather, it is the untenable ideas of hate speech which adulterate clear reasoning with biased views. Left unchecked, hate speech takes on acceptability and legitimacy because it confuses by skewing truth in order to win hearts in the unregulated market place of ideas.

Further, a regime of non-regulation will entail heavy social and individual costs. By natural logic, it is obvious that hate speakers will augment their hateful activities rather than stop them; after all, they are free to disseminate whatever hateful material they like. Such freedom also provides them a platform to instill the poison of their hatred into the very roots of society. This way, they contaminate the whole system with their false ideas and allure others to join them in promoting hatred as a true social value.

To conclude, it must be pointed out that the assertion that people may be able to correctly see through prevalent false views in the absence of true ones has been sufficiently negated. Scholars have shown that there is plenty of reason to be skeptical of the reliability of public reason when exercised in particular social/economic contexts.⁸³ In other words, people are less likely to find out truth where there is imbalance in favour of ideas in the market that resonate with their

⁸²*Ibid.*

⁸³*Moon, supra* note 61 at 10.

own biases and interests. Therefore, if hate speech is unleashed for non-regulation, it would create a society based on ideals of hatred, and those false assertions will sabotage truth in a proportion far greater than the alleged adverse impacts of governmental regulation.⁸⁴

The succeeding sections consider the debate between non-regulation and regulation of hate speech around nine points of disagreement. The sections take them one after the other, and for each, the discussion assesses both positions supporting with supporting arguments and comes to a conclusion on the theme.

4. Regulation of Hate Speech

4.1 Is Hate Speech Politically Important Speech?

Those who oppose regulation of hate speech think that it is a valuable form of expression because it challenges the status quo, and seeks to give awareness to the general populace on how to wisely choose political leaders, for instance.⁸⁵ In other words, the argument is that hate speech initiates debate about issues of social discontent with the set objective to win adherents for the view point of hate speakers. In this view, the fact that hate speakers present values they consider acceptable to them gives their speech political status deserving of protection in a democratic society.

⁸⁴*Greenwalt, supra* note 56 at 17-19.

⁸⁵W. J. Waluchow, *Free Expression: Essays in Law and Philosophy* (Clarendon Press, 1994) at 153.

In contrast, authors like Alexander Tsesis argue that, “When harassing expression is disguised as political expression it adds nothing to democratic debate.”⁸⁶ Richard

Moon also notes that:

Under established accounts of freedom of expression racist threats and insults may have some value, in as much as they express personal feelings or convey some kind of crude political view point. However, if we think that freedom of expression protects communicative relationship then we might also believe that a certain level of engagement with the audience is required before expression should be protected. The limited value of these acts must be weighed against the intended and significant injury to others... If words are threatening and harassing they may be unacceptable whether or not they cause the targeted individual to stop speaking.⁸⁷

Habermas and Heyman believe that speech is an individual right under the free speech principle, but political speech cannot trample all other equally important social interests. Further, freedom of speech means mutual recognition of respect and equality by all stakeholders in the public debate, while hate speech seeks intentionally to intimidate and dominate others, making it inimical to the ideals of social tolerance and peaceful co-existence.⁸⁸ Essentially, these scholars argue that hate speech does not promote intellectual discourse as political expression; rather, it willfully promotes hatred in society. As such, it cannot be considered a form of political expression.⁸⁹

⁸⁶*Tsesis, supra* note 71 at 501.

⁸⁷*Moon, supra* note 61 at 128.

⁸⁸*Quoted in, Hare, supra* note 4 at 169-176.

⁸⁹*Dworkin, supra* note 58 at 202; Stefan Braun, *Democracy Off Balance: Freedom of Expression and Hate Propaganda Law in Canada* (Toronto: University of Toronto Press, 2004) at 36.

Other critics argue that hate speech is not public discourse but private expression. They say so because hate speakers do not target a government but private social groups who become their victims. Consequently, governments do not regulate the expressions of their own political rivals, but operate as mediator between the two sides to ensure order in society.⁹⁰ Given this, restrictions on hate speech can be justified, and, thus negate the idea that hate speech is politically important and deserves high protection.⁹¹

4.2 Dangerous Implications of Governmental Regulation

Some critics of regulation hold that although hate speech is inimical to society, it is more dangerous for principles of free speech and democratic values to place discretionary powers in the hands of government to criminalize expression.⁹² For, it would give the executive power to decide which speech is prohibited and which is not.⁹³ Hence, their argument is that once a government is allowed to limit speech, it will widen its scope of regulation, bringing mere disagreement or even slightly offensive expressions within the ambit of proscribed speech. As a result, regulation even poses serious threat of censoring valuable scientific and artistic expressions.⁹⁴

⁹⁰*Delgado, supra* note 53 at 106.

⁹¹*Haiman, supra* note 57.

⁹²*Bakircioglu, supra* note 52 at 3.

⁹³*Greenwalt, supra* note 49 at 63; Dwight D. Murphey, "Conceptual Issues in Prohibiting 'Hate Speech' " (2003) 43:3 *Mankind Quarterly* at 335 (Dalhousie Online Libraries).

⁹⁴Nicholas Wolfson, *Hate Speech, Sex Speech, Free Speech* (Praeger, 1997) at 23.

They also contend that if political speech is unpopular with government or critical of its policies, it would be declared prohibited. In this regard, it is noted that:

The free speech principle must permit grotesque and nasty speech, because society in the domain of speech cannot be half-skeptical and half-infallible. We cannot infallibly choose the subjects that are legitimately debatable and those that are not. Once the boundary between the acceptable and the unacceptable is open for judicial scrutiny and legislative action, self-interested groups will forever battle to legitimate censorship in one area after another.⁹⁵

Thus, they claim that these prohibitions on hate speech do not extend any clear guidance to speakers as to when their expression might be prohibited.⁹⁶ For, “An attempt to micro surgically remove even small category of worthless speech from public discourse [would] seriously damage the vitality of the free expression crucial to democracy.”⁹⁷

4.3 Scope of Justified Governmental Regulations

Those who support prohibition of hate speech argue that such prohibition conveys a clear message that promoting hatred is unacceptable, and protects those who are unable to speak for themselves. Criminal prohibition places the burden of opposing hate speech on the state, not the individual, because requiring the targeted individual to speak up could make them subject to more intimidation and violence.⁹⁸

Abraham S. Goldstein notes:

⁹⁵*Ibid* at 31.

⁹⁶*Murphy, supra* note 93 at 340.

⁹⁷*Waluchow, supra* note 85 at 203.

⁹⁸*Delgado, supra* note 53 at 105.

[T]hose who see efforts to regulate group libel as taking us down a slippery slope to censorship pay too little attention to a second slippery slope...one which can produce a swift slide into a market place of ideas in which bad ideas flourish and good ones die [thus creating a discriminatory society].⁹⁹

Similarly, Stanley Fish notes “censoring politically incorrect speech will serve the instrumental purpose [of discovering truth and promoting individual and collective self-development] better than freedom will.”¹⁰⁰ Thus, concerns about expression censorship can be dealt with through careful wording in the legislation. As well, the judiciary is quite capable of distinguishing between protected and unprotected expressions, as cases involving pornography or defamation demonstrate. Courts have devised sufficient censorship guidelines over the years which exclude only a specific kind of expression from the protection accorded to free speech. Canada is an example in this regard where, although a very extensive system of hate speech regulation operates, the importance of free speech has not been denied. Canada’s example reinforces the argument that if a law to proscribe only a particular category of speech is carefully designed to extend reasonable exceptions to eliminate the chances of misuse, then it may be justified in a democratic society. Such legislation cannot be seen as blindly sweeping down the slippery slope, because it would limit only a particular kind of expression without affecting other freedoms. It would also leave no unbridled discretionary powers in the hands of the government, courts, or the majority.¹⁰¹ Finally, the balance envisaged is expressed as follows:

⁹⁹*Bakircioglu, supra* note 52 at 11.

¹⁰⁰*Dworkin, supra* note 58 at 205.

¹⁰¹*Delgado, supra* note 53 at 125.

The civil harm from unstopped spewing of hate justifies narrowly tailored regulation of speech so devoid of social utility. Requiring a showing of intent to promote destructive behaviour...[providing defenses, and provisions mitigating misuse of the law for false prosecutions] is a serious limitation on possible over breadth of the law.¹⁰²

Prohibiting hate deters those who are future hate mongers. Essentially, the fear of accountability lessens chances of hate speech coming into discussion more frequently, which leads to its reduction in society. For, when no one is willing to discuss a hateful idea, it becomes obsolete over time.

4.4 Hate Speech vs. More Speech

Opponents of regulation contend that instead of asking government to censor fundamental rights, targeted victims of hate speech should confront their antagonists with more speech. They argue that regulation of hate speech places power in the hands of authorities. The result is that victims of hate speech are oppressed, are unable to use their right to reply, and their self-esteem is damaged. For this reason, victims must counter argue, thus experiencing catharsis and develop self-reliance to take charge of their own destiny. Counter speech would also educate the ignorant hate speaker who may abstain from more of it. In brief, the view is that counter speech from the targeted victims may prove very fruitful for the democratic process, and must take precedence over legal prohibition.¹⁰³

¹⁰² Steven D. Jamar, "Respecting Speech", Book Review of *How Hate Speech Paves the Way for Harmful Social Movements* by Alexander Tsesis, (2003) 46:3 Harvard Law Journal 499 at 506 (Dalhousie Online Libraries).

¹⁰³ Delgado, *supra* note 53 at 103.

The problem with the foregoing argument, in my view, is that victims of hate speech are not able to reply because they are at a disadvantage regarding the power of communication in the market place of ideas. Further, those who have the limited opportunity to answer may be unwilling to risk their security with an enraged group of hate speaker. Therefore, I think that a clearly defined criminal provision with specific defenses can be enacted to narrowly target speech that promotes hatred. Such a provision would both respect freedom of expression (because it would be narrowly drawn and provide guidance for distinguishing between protected and prohibited speech), and reduce the harms caused by the promotion of hatred.¹⁰⁴

4.5 The 'Deflection' Argument

Critics hold that prohibitions of hate speech divert peoples' attention from other important issues in society, and that governments use such prohibitions to stifle criticism of prevalent social, political and economic issues. Hate speech is often seen as discontent toward certain groups that are considered to be the cause of all problems. Therefore, these critics argue that by suppressing hatred, governments suppress the voices that highlight socio-economic issues. They argue that the demand on government is to eliminate such issues which, in their view, occur due to the presence of certain groups in society. Hence, their demand is actually not directed against the people per-se. In this sense, hate speech becomes a category of political discourse. In sum, they argue that governments should address prevalent

¹⁰⁴*Ibid* at 101.

socio-economic problems rather than focusing on promulgation of more speech prohibition laws if they are serious about eliminating hate within society.¹⁰⁵

Those who reject this argument claim that controlling hate speech is as important as improving socio-economic conditions. They claim that if left unmonitored, hateful feelings will transform into deeply rooted beliefs which would ultimately become causes of same socio-economic and political problems that the hate mongers are said to seek improvement for. These critics fear that a society based on discriminatory values would endorse the use of power and violence against identifiable groups who are seen as second class citizens. They point out, therefore, that those who belittle the value of regulation do no more than that draw attention away from its utilization as a valuable tool to ensure balanced debate and attention to social problems.¹⁰⁶

4.6 Is the Right to Free Speech More Special than other Equally Important Rights?

Dworkin argues that fundamental rights protected by the constitution, for instance, the right to free speech will not be given preference or 'taken seriously' where a government keeps curtailing important liberties on which the system of democracy stands. He maintains that the right to free speech should not be curtailed as it is not in conflict with other rights, and rather, other rights depend on the protection of

¹⁰⁵Hare, *supra* note 4 at 153; GaraLaMarche et al, *Speech & Equality: Do We Really Have To Choose?* (New York: NYU Press, 1996) at 64.

¹⁰⁶Delgado, *supra* note 53 at 112-113.

freedom of expression for their existence.¹⁰⁷ Thus, according to Dworkin, free speech is more special than other constitutionally protected rights that government absolutely must not be allowed to regulate.

Proponents of regulation, in contrast, contend that an inherent conflict exists between the right to free speech and other rights, such as dignity, equality and religion. They acknowledge that it is a daunting challenge to find equilibrium between these two extremes, but that essentially, free speech is protected in the constitution just as other rights, and it has no special place. For this reason, speech must not be allowed when it encroaches into the territory of other rights. Therefore, it is reasonable to prohibit it when doing so brings greater collective benefits.

4.7 Words are Deeds

Proponents of regulation argue that hate speech can stimulate others to violence. As Richard Moon notes, “expression causes harm when someone is persuaded by a false idea or persuaded to act in a violent way towards another.”¹⁰⁸ An example in this regard could be a situation where one speaker tries to speak but the other interrupts him with his words.

It could be argued that words used in hate speech do not only have ostensible meanings, but they also depict what a speaker felt while using those words. A hate speaker may write an article using eloquent language to cover up his hateful sentiments and false assertions towards the targeted group. However, his words

¹⁰⁷ Quoted in *Hogg, supra* note 76 at 820.

¹⁰⁸ *Moon, supra* note 61 at 19.

must be seen as falling under the prohibited category of expression (after judging the context of his expression), since his readers or listeners might become violent by being motivated by the same grudge that he felt while using those words. For example, a speaker who is known for his criticism of Islam, saying that Islam is barbaric, and that the presence of Muslims in society is a continuous threat to peace because Islam promotes terrorism, is not just saying words, he is decrying the dignity of Muslims and inciting people to see Muslims negatively. Therefore, although no heinous words are spoken, the statement (if seen in the context of the speakers' hostility against Muslims due to the distinctive characteristic of Islam) shows the anger of the speaker whose false assertions provide no proof that Islam promotes terrorism. Such statements may, nevertheless, inspire some people to act differently when they see a Muslim.¹⁰⁹ In this case, the intention to motivate people to hate Islam and Muslims, although it may not promote direct violence, can lead to such events. Indeed, I agree that words are not just words (depicting ostensible meanings), but they carry hidden meanings that can influence others to perform the actions they imply.

4.8 Law as Promoter of Hate Speech

Some scholars argue that prohibiting hate speech will be counter-productive because it will enrage those who express hate and drive them to move from expression to violence. As well, prohibition will cause those prosecuted to be seen as

¹⁰⁹*Matsuda, supra* note 49 at 48; *Haiman, supra* note 57 at 17-20

martyrs in the cause of protecting free speech, and this will possibly attract more adherents to the hateful ideas of the speaker.¹¹⁰

Consequently, they hold that prohibitions of hate speech can only provide a short term remedy. A better strategy is to educate the public to reject hateful ideas. They note, “ while the courts and the Constitution establish legal dogma, one cannot overlook the overwhelming influence that the public has in constructing and establishing legal norms for society.”¹¹¹

Proponents of regulation argue that the message sent by criminalizing hate speech outweighs the martyrdom argument. In other words, while a few new adherents may be gained, more members of the public become educated to the harms. There is no evidence that people will have the wisdom to reject ideas that express hatred, especially where the public is mostly uneducated. Likewise, in addition to prohibition, other options such as education can be used to combat hatred.¹¹²

Proponents point out that speaking hate causes immediate harms and on a scale which requires an urgent response from the state. Therefore, when public rejection of hate speech is complied with governmental action in the shape of criminal regulation, victims are encouraged that the government is mindful of its duty to

¹¹⁰*Delgado, supra* note 53 at 99; *Hare, supra* note 4 at 151.

¹¹¹ Jon B. Gould, *Speak No Evil: The Triumph of Hate Speech Regulation* (Chicago: University of Chicago Press, 2010) at 80.

¹¹²*Delgado, supra* note 70 at 285.

prevent certain ideas, such as hate speech, which can endanger public peace and harmony.¹¹³

4.9 Hate Speech and Harms: Is There a Causal Link?

Critics of regulation argue that hate speech should not be prohibited unless it can be established that there is a causal connection between the expression and its consequential harm. They suggest that such causal connection must show an imminence of harm which requires an immediate response from the government. Such critics would maintain that regulation of hate speech merely on the basis of its tendency to harm ought not be allowed. They argue that “Speech is often provocative and challenging...[but it] is nevertheless protected against censorship or punishment, unless shown likely to produce[imminent harm] of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.”¹¹⁴

Judge Easterbrooke argues that there is no scientific evidence for a sound causal connection between hate speech and its alleged harms. He believes that lack of scientific evidence means hate regulations might be created on unreliable data. This makes it easier for the state to proscribe expression that it considers offensive or harmful. The challenge is ensure that freedom of expression is not censored on the basis of subjective and unproven notions.¹¹⁵

¹¹³*Matsuda, supra* note 49 at 18.

¹¹⁴*Hare, supra* note 4 at 134.

¹¹⁵*Quoted in, Wolfson, supra* note 94 at 57-60.

Critics also argue that mere offensiveness or outrageousness is not a sufficient criterion to warrant the use of legal prohibitions to limit an important right like freedom of speech. They contend that any expression can be held outrageous by any number of people because speech which is vulgar to one is freedom for another. Therefore, there must be more than offensiveness for speech to be censored by executive interference. Such an occasion, they say, may arise where danger is imminent and the government must act decisively to protect public good.¹¹⁶

Supporters of regulation, like Mari Matsuda and Alexander Tsesis, contend that hate speech causes harm. Matsuda notes: “violence is a necessary and inevitable part of the structure of racism. It is the final solution...barely held at bay while the tactical weapons of...hate propaganda do their work.”¹¹⁷ Alexander Tsesis argues that although an imminent threat or harm may not occur in hate speech cases, yet with the passage of time, it promotes grudge and detestation in society, and such antagonism can devastate the whole social fabric when revealed. Thus, he asserts that it is more important to control the long term harms of hate speech than to focus only on the immediate dangers.¹¹⁸ Bhiku Parekh observes: “Although the moral and psychic injury that [hate speech] can cause, and the restricted life chances to which it leads, are not easy to identify and measure, they can be profound and real.”¹¹⁹

¹¹⁶*Moon, supra* note 61 at 71; *Whitney v California*, 274 US 357,376 (1927); *Waluchow, supra* note 85 at 153 & 206.

¹¹⁷*Matsuda, supra* note 49 at 24.

¹¹⁸ Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (NYU Press, 2002) at 137.

¹¹⁹*Parekh, supra* note 53 at 218.

Similarly, Jack Levin and Jack McDevitt argue that targets of hate speech fear violence, and have no way of placating those who hate them, even if they wished to so placate. Consequently, these victims avoid public places; become introverted and silenced; accept that their speech would not be taken seriously in society; believe that nowhere in society are they respected; lose self-esteem and a sense of personal security; feel humiliated, dehumanized, isolated and degraded. Furthermore, if government refuses to take action against hate speech, victims believe that even the state, which is the embodiment of society, has no respect for their personhood as valuable members of society.¹²⁰

As well, it is argued that this psychological strain can cause illness, including high blood pressure, hypertension, nightmares and post traumatic disorder.¹²¹ Further, the victim may not be able to concentrate or perform well at his place of work due to constant stress. Hence, some scholars are convinced that hate speech ought to be criminalized because of these consequent impacts on victims. These critics regard such regulations as ideals making it clear that this kind of obnoxious and contentious behavior should not be borne by society.¹²²

My conclusion is that though it is sometimes difficult to show a causal connection between hate speech and accrued harms, but it is a matter of common sense

¹²⁰*Matsuda, supra* note 49 at 25-26,48-49 & 90-91; *Moon, supra* note 61 at 127; *Greenwalt, supra* note 56 at 287; James B. Jacobs & Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics 'Studies in Crime and Public Policy'* (Oxford: Oxford University Press, 2000) at 86.

¹²¹*Greenwalt, supra* note 49 at 53; *Matsuda, supra* note 49 at 92.

¹²²*Ibid* at 93.

fortified by judicial discussions that hate leads to violence and the most effective method of control is through penal regulation.¹²³ Both sides considered, I believe, regulation of hate speech is the preferable approach in all societies. Therefore, I present my final thoughts on the subject in the following concluding section of this chapter.

5. Conclusion: Drawing the Line on Hate Regulation

Some critics believe that prohibitions are a severe curtailment of the right to free speech because they compel speakers to express opinions on some issues while abstaining from discussing others. They hold that speakers must be free to express all kinds of ideas, for their expression cannot satisfy all listeners alike. Those who do not agree with an expressed statement would allege that the speaker is propagating hate.

It is understandable that satire, academic work, etc., should remain protected from criminalization. However, there must be limitations where speech arises from hateful intentions that are rationalized. Those who willfully spread hate on the basis of religion, etc., should not be free to do so only because they use eloquent words to suppress their hidden hatred. If the work is based on hate toward a distinctive group, and this intention is quite apparent when the whole expression is examined in the context, then expression must be prohibited whether it is satire or academic research, etc.¹²⁴

¹²³*R v Keegstra*, [1990] 3 SCR 697, SCJ No 131.

¹²⁴*Matsuda*, *supra* note 49 at 36; *Moon*, *supra* note 61 at 143-144.

I agree that a genuine inquiry into an issue, even if some portion of it is offensive, must not be proscribed. It is possible that some scholars or group members might use hateful remarks only to prove their point more forcefully, but do not intend to create hatred.¹²⁵ For example, a scholar when writing a paper on religious fanaticism, may include in it the arguments propounded by other scholars who claim that a particular religion is responsible for promoting extremism in its followers. In this situation, it is wrong to prosecute the author or speaker if only that section of text is taken as a basis for prosecution though he had no bad intention and that the words are not his own. Since the cumulative impression of his work or statements will convey a different intent, his expression must be seen in the context to judge whether it was to spread hatred or just to prove a point.

In conclusion, I would reassert that a carefully designed criminal hate prohibition law will give freedom to expression made in good faith and in decent language. These provisions would permit expressions like satire, humor and disagreement, and would be invoked only when the limits of decency are crossed and violence is apparent in light of the cultural, historical legal and religious context of the society at hand. The law must also provide measures or supervisory mechanisms to control its misuse or abuse. It should not only control hate speakers but also those who may try to take the law into their own hands to promote extremism.

Given this, it is appropriate to point out that Canada has gone through this hate debate and, having considered the arguments for and against regulation, has

¹²⁵*R. v. Buzzanga and Durocher* (1979), 49 CCC (2d) 369 (Ont.ca) [*Buzzanga*].

decided to uphold criminal hate speech prohibitions. Further, it has succeeded in creating equilibrium between freedom of expression and censorship of hate speech, and, thus is a guiding model for countries that need to diminish hate and intolerance within their borders. A detailed discussion of how Canada dealt with hate speech and its sub-category, blasphemy, is the subject of the next chapter.

CHAPTER THREE

Canadian Legal Regime on Blasphemy and Hate Speech

1. Introduction

This chapter deals with laws relating to blasphemy and hate speech in Canada. The previous chapter argued that some regulation of hate speech is necessary, thus here I look into what type of regulation would be beneficial in carefully and narrowly controlling intentional hateful expression. In this respect, I discuss s.296 and s.319 (2) of the Canadian *Criminal Code*, 1892¹²⁶ which deal with blasphemy and hate speech respectively. Later, s. 14(1)(b) of the Saskatchewan *Human Rights Code*¹²⁷ is presented so to understand Canada's non-criminal law approach to the subject.

Of these three possible models examined here, I conclude that the most appropriate for Pakistan is the hate speech model (s. 319) of the Canadian *Criminal Code*, 1892. I do not propose the human rights approach both because the criminal law is a more powerful tool for the state to prohibit and punish harmful behavior, and because Pakistan does not have in place legislation that parallels Canadian human rights codes or an administrative apparatus that parallels human rights commissions and tribunals.¹²⁸ As between the two criminal provisions discussed here, I consider the hate speech approach more appropriate and effective than the blasphemy section 296. As set out below, Canada's criminal provision on blasphemy significantly

¹²⁶*Criminal Code*, RSC 1985, c C-46, s 296 & s 319 (2).

¹²⁷*Human Rights Code*, RSO 1990, c H.19, s.14.

¹²⁸ *Hogg, supra* note 76 at 705.

impedes freedom of religion and so could not withstand a constitutional challenge today. As hinted in the first chapter, I consider blasphemy as a sub-set of hate speech, and argue that Pakistan's criminal law on blasphemy must be modernized following s. 319 of the *Canadian Criminal Code*, 1892.

Each of the models examined here does infringe freedom of expression, so before discussing whether any of these approaches can be upheld as a justifiable infringement of freedom of expression, I set out the approach taken in Canadian law where legislation is challenged on the grounds that it encroaches on a constitutionally entrenched right or freedom.

2. Stages of Charter Inquiry

In 1982, *Charter of Rights and Freedoms* became part 1 of the Canadian *constitution Act* 1982. The *Charter* placed a significant limitation on Parliamentary supremacy in that a law can be challenged in the courts on the basis that it infringes a right or freedom set out in the *Charter*. If the court finds such an infringement, the legislation will be struck down unless the state can show (in accordance with s.1 of the *Charter*)¹²⁹ that the infringement is demonstrably justifiable in a free and democratic society. Thus, the *Charter* is intended to protect certain rights and freedoms from unbridled discretionary power in executive authorities or in Parliament. The *Charter* has, however, been criticized for seeming to protect rights and freedoms on one hand, yet allowing the state to infringe those rights under s. 1,

¹²⁹*Charter*, *supra* note 24.

and for vesting significant discretionary powers in the courts to subjectively determine which curtailment of rights will be allowed and which will not.¹³⁰

Proponents of section 1 contend that it works as a “neutral normative method by which to provide determinate guidance for the choice between individual freedom and collective control.”¹³¹ Also, protecting certain rights and freedoms through constitutional entrenchment protects against an orthodox pro-majority regime, while s. 1 allows the state some flexibility in governing.

Courts examine allegations of *Charter* infringements in two stages: (a) has a *Charter* right or freedom been encroached upon, and (b) if so, is that encroachment justified? So, in the examination of the Canadian *Criminal Code* provisions on blasphemy and hate speech, or a human rights code prohibition of hate speech, the first question would be whether the legislation infringed the constitutional protection guaranteed to free expression under section 2(b) of the *Charter*. At this stage, the court will inquire into whether the behavior prohibited by the legislation is in fact expression, and thus covered by s. 2(b). Further, at this first stage, there may be a discussion as to whether the law is intended to limit freedom of expression, or whether that is simply the effect. The guarantee provided under section 2(b) of the *Charter* has been interpreted very broadly, and the blasphemy

¹³⁰ Joseph Eliot Magnet, *The Canadian Charter of Rights and Freedoms: Reflections on the Charter after Twenty Years* (Markham: Butterworths, 2003) at 82-83.

¹³¹ Errol P. Mendes & Stephane Beaulac, *Canadian Charter of Rights and Freedoms*, 4thed (LexisNexis, 2005) at 167.

and hate speech provisions discussed here have been held to infringe freedom of expression.¹³²

Once a *Charter* right or freedom is found to have been restricted, the question then becomes whether the state can meet the requirements set out in s. section 1 of the *Charter*,¹³³ which states:

The Canadian 'Charter of Rights and Freedoms' guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹³⁴

Thus the first stage of the *Charter* inquiry is to “identify cases for judicial review”¹³⁵ while the “determination of validity or invalidity of laws” happens at the second stage under section 1.¹³⁶ Section 1 involves the courts in balancing protection of constitutionally protected rights and freedoms against other societal interests.¹³⁷

The Supreme Court of Canada has offered guidance in interpreting s. 1 of the *Charter*. First, s. 1 requires that the restriction on the right or freedom must be “prescribed by law”, which means that the law being challenged “must provide

¹³²*Ibid* at 169; *R v Keegstra*, [1990] 3 SCR 697, SCJ No 131; *R V Oakes*, [1986] 1 SCR 103, Dickson CJ [*Oakes*]; *Saskatchewan (Human Rights Commission) V Whatcott*, 2013 SCC 11, [2013] 1 SCR 467,

Rothstein J [*Whatcott*]; *Irwin Toy ltd. v Quebec (Attorney general)*, [1989] 1 SCR 927, 1989 CanLII 87 (SCC); *R.v Buzzanga and Durocher* (1979), 49 CCC (2d) 369 (Ont.ca) [*Buzzanga*]; *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R 567.

¹³³*Charter, supra* note 24.

¹³⁴*Ibid.*

¹³⁵*Magnet, supra* note 130 at 89-90.

¹³⁶*Ibid* at 92.

¹³⁷*Ibid.*

sufficient guidance for others to determine its meaning”. If the law is “so obscure as to be incapable of interpretation with any degree of precision”¹³⁸ then no further s. 1 analysis will be required and the law will be held to be unconstitutional. While *Charter* rights and freedoms are not absolute, restrictions must be justified under s. 1 and as a starting point, such restrictions must be sufficiently precise so that it is clear what specific activity is being targeted.¹³⁹

If the legislation being challenged meets the “prescribed by law” test, then the state must show that the restriction is a reasonable limit that can be demonstrably justified in a free and democratic society. In 1986, in the case of *R. v. Oakes*¹⁴⁰, the Supreme Court of Canada set out a test that has been used ever since to determine whether or not challenged legislation passes the s. 1 test.

2.1 Oakes Test of Proportionality

2.1A. A Sufficiently Important Objective of Public Benefit

Former Chief Justice of the Supreme Court of Canada, Dickson, observed in *Oakes*¹⁴¹ that a *Charter* guarantee can only be limited by the government if the impugned law is designed to achieve a “pressing and substantial” social objective. This part of the

¹³⁸*Mendes, supra* note 131 at 172; *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, 1989 CanLII 87 (SCC).

¹³⁹*Mendes, supra* note 131 at 171-173.

¹⁴⁰[1986] 1 SCR 103, Dickson CJ [*Oakes*].

¹⁴¹*Ibid.*

Oakes test is not difficult to pass; it would be very unusual for a court to find that legislation did not represent a pressing and substantial objective.

2.1B. Rational Connection between the Objective and Means

Next, the court asks whether the means employed by the government to achieve its claimed objectives are rationally connected to those objectives. Thus, it is possible that a court might declare the government's method of carrying out its purpose as, for instance, over-broad in scope and unnecessarily prohibiting more activity than was required by the stated objectives;¹⁴² however, it is rare for the government to lose on this stage of the analysis too.¹⁴³

2.1C. Reasonably Minimal Impairment

Third, courts require that the degree of impairment of the right or freedom in question is reasonable, given the government's objectives; thus, the government must "demonstrate a reasonable basis that the means employed were the least drastic means possible."¹⁴⁴ This burden is quite high in criminal matters because there is so much at stake including a person's reputation, time and most importantly liberty if he is ultimately convicted. On the other hand, where the objective is to achieve collective welfare, protect vulnerable groups or balance competing rights courts may be more deferential.¹⁴⁵

¹⁴²*Mendes, supra* note 131 at 194; *R. v. Chaulk*, [1990] 3 SCR 1303.

¹⁴³*Ibid* at 195-196.

¹⁴⁴ *Mendes, supra* note 131 at 201.

¹⁴⁵*Hogg, supra* note 76 at 858.

A court cannot strike a law down simply because the court can imagine more effective or less damaging alternative means than those employed by the government for achieving its objectives. Thus, perfection is not required and the state is given some margin of appreciation.¹⁴⁶ In this regard, Gerald A. Beaudoin & Errol Mendes have noted that “Parliament has no obligation to choose the absolutely least intrusive means of meeting its objective. It is sufficient that Parliament has chosen from a range of means which infringe the *Charter* right as little as is reasonably possible.”¹⁴⁷

2.1D. Proportionality between Effects and Objectives

At this stage of the s. 1 analysis, the court weighs the benefits and deleterious effects of the law that is being challenged. As one author states, “the object of the legislation ought to be that the incidents which [the law] tries to prevent are really evils... and that if evils they are greater than those [employed by the legislature to prevent such incidents].”¹⁴⁸ Dickson C.J. also noted that the “effects [of a legislation] must not so severely trench on individual or group rights that the legislative objective, albeit important, is nonetheless outweighed by the abridgment of rights.”¹⁴⁹ Until fairly recently, very little analysis actually took place at this final stage; in fact, Peter Hogg, an eminent constitutional scholar in Canada, had argued that this stage of the *Oakes* test was redundant because courts simply treated it as a mere rephrasing of the first

¹⁴⁶*Ibid* at 854.

¹⁴⁷*Mendes, supra* note 131 at 202.

¹⁴⁸*Braun, supra* note 89 at 81.

¹⁴⁹*Mendes, supra* note 131 at 207.

stage which demanded a “pressing and substantial objective”. However, in 2009, in *Hutterian Brethren of Wilson Colony*¹⁵⁰ the Supreme Court extensively discussed this fourth step, with the majority and dissent disagreeing strongly on how to weigh the positive and negative effects of the challenged legislation. After *Hutterian Brethren*, it seems likely that each step of the *Oakes* test will require full discussion and analysis when a law is challenged as breaching the *Charter*.

With that as background, I now turn to a consideration of the Canadian criminal provisions on blasphemy and hate speech, and the hate speech provision of the Saskatchewan human rights code.

3. Canadian Criminal Regime

3.1 S. 296 Blasphemous Libel

S. 296 of the *Canadian Criminal Code (Code)*¹⁵¹ prohibits blasphemous libel, stating:

- (1) Everyone who publishes a blasphemous libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
- (2) It is a question of fact whether or not any matter that is published is a blasphemous libel.

No person shall be convicted of an offence under this section for expressing in good faith and decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on a religious subject.

This section, introduced in 1892, has survived despite multiple revisions of the *Criminal Code*. However, there is little judicial commentary on the section, and it has not been used in Canada since 1935.¹⁵²

¹⁵⁰*Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R 567.

¹⁵¹*Criminal Code*, *supra* note 2.

¹⁵²*R v Rahard* (1936), 65 CCC 344, 3 DLR 230 [*Rahard*].

S.296 does not define blasphemy. However, one 1926¹⁵³ blasphemy case offers the following definition:

It is blasphemy to publish any profane words vilifying or ridiculing God, Jesus Christ, the Old or New Testament, or Christianity in general with intent to insult and shock believers or to pervert or mislead the ignorant or unwary. This intent is an essential element in the offence, though it may be presumed wherever such a result is the natural and necessary consequence of the publication. The defendant is not allowed to plead any justification or to argue at the trial that his blasphemous words are true.¹⁵⁴

Today, of course, the question would arise as to whether this definition would have to be extended to include vilification or ridicule of other religions as well. The case law indicates that blasphemy is not restricted to expressions scorning God only but also includes other aspects of religion like Holy Scriptures, sacred persons, and objects.¹⁵⁵ In at least one case¹⁵⁶ the judge attempted to make the distinction between opinions and particular expressions of those opinions, instructing the jury as follows:

What you have to consider, gentlemen, is whether or not this publication is limited to the decency of proper controversy? [Sterry] is perfectly entitled to express his opinions so long as he does so in respectful and proper language that does not outrage your feelings and the feelings of the rest of the community.¹⁵⁷

¹⁵³*R v Sterry*, (1926) Quoted in *Patrick*, *supra* note 30 at 14.

¹⁵⁴ 48 C.C.C 1 (Ont. C. A) (annotation only).

¹⁵⁵ Initially, *R v Kinler and the Golden Age* (1925), 63 Que. C.S 483 (Qc. Supp.Ct) [Kinler] had decided that the offence of blasphemy only related to insults towards God, leaving aside all the other aspects of religion. However; in *R v St Martin* (1933), 40 R de Jur 411 (QC CSP) [Martin] and *R v Rahard* (1936), 65 CCC 344, 3 DLR 230 [Rahard] decided later, the broader approach outlined in the text above was taken.

¹⁵⁶*Sterry*, *supra* note 153.

¹⁵⁷*Ibid* at 15.

Interestingly, despite some judicial descriptions of blasphemy as offensive, heinous and capable of causing serious breach of peace, courts in Canada have awarded fairly nominal punishments in blasphemy cases.¹⁵⁸

As noted above, s. 296 has not been used since even before the advent of the *Charter*, and it is highly doubtful whether the section would survive a constitutional challenge in the present time. Clearly, the provision infringes freedom of expression, which is protected under s. 2(b) of the *Charter*, so the question is whether s. 296 could pass the s. 1 *Oakes* test described above.

Given the lack of definition, s. 296 is vague and overbroad, and so it would be difficult to argue that it infringes 2(b) of the *Charter* as minimally as possible, even if one takes into account the margin of appreciation discussed above. Further, in today's world, the government might find it difficult to maintain that the prohibition provides benefits which outweigh the clear encroachment on freedom of expression – particularly since the section has not been enforced for nearly 80 years. Finally, some have noted that enforcement of blasphemy laws would require the state to become “the arbiter of religious dogma”¹⁵⁹, which would violate not only freedom of

¹⁵⁸ For instance, In *R v. Pelletier and the Little Review* (1901), 6 R.L. (n.s) 116 (Q.c.): the trial judge observed that “[t]hings most sacred have been turned into jokes; sarcasm appears in every sentence in a most impious and obscene form [the expression seems as the]...creation of a libertine mind and of a spoiled heart [and] can be understood only as the writing of a heathen espousing evil [which is]... capable of causing death of faith and of virtue” yet a nominal fine was imposed.

¹⁵⁹Rebecca Ross, “Blasphemy and the Modern, ‘Secular’ State” (2012) 17 Appeal 3-19 Review of Current Law and Law Reform at 9-13 (Dalhousie Online Libraries).

expression but freedom of religion too. Concluding this, it is argued that blasphemy approach pursued in s.296 is not a prudent one to be adopted in modern societies.

Next I demonstrate Canada's criminal law provision on hate speech.

3.2 S. 319 Willful Promotion of Hatred

While the Canadian *Criminal Code* prohibition of blasphemous libel is vague and would likely be held to infringe freedom of expression unjustifiably, the hate speech provisions of the *Criminal Code* are much more precisely worded and have been upheld by the Supreme Court of Canada as a justifiable infringement of freedom of expression.¹⁶⁰ It is argued here that the harms relating to blasphemy which the state could justifiably attempt to control are those aspects which resemble hate speech, and thus blasphemy should be treated as a sub-set of hate speech. Further, the argument of this thesis is that the approach taken in s. 319(2) offers a useful model for modernizing Pakistan's laws on blasphemy as hate speech.

The need for prohibitions on hate speech in Canada is described in a Library of Parliament report as follows:

The distribution of hate propaganda and the activities of racist groups have come [in Canada] in two waves since the 1960s. In the middle of that decade, anti-Jewish and anti-black hate propaganda was widespread in Canada, but

¹⁶⁰People may think that Canada is a country free from hatred based on characteristics such as race or religion, but unfortunately this is not the case. Historically, black slaves were brought from Africa and exported to Canada's southern neighbor (U.S) in large numbers during the 17th and 18th century as a lucrative business. Likewise, hatred against Jews, Muslims, Chinese, Japanese, East Indians etc., is still to some extent common in Canada; Errol P. Mendes & Stephane Beaulac, *Canadian Charter of Rights and Freedoms*, 4thed (LexisNexis, 2005).

especially in Ontario and Quebec. Simultaneously, neo-Nazi and white supremacist groups, based largely in the U.S., became active in Canada.¹⁶¹

As a result, the federal government appointed a committee chaired by Maxwell Cohen, a McGill professor and Dean of Law to investigate the problem of hate propaganda in Canada.¹⁶²

The committee released its report in 1966 and noted that:

There exists in Canada a small number of persons and a somewhat larger number of organizations, extreme in method and dedicated to the preaching and speaking of hatred and contempt against certain identifiable minority groups in Canada.¹⁶³

And that:

However small the actors may be in number, the individuals and groups promoting hate in Canada constitute a clear and present danger to the functioning of a democratic society. For, in times of social stress, such hate could mushroom into a real and monstrous threat to our way of life... In the committee's view, the hate situation in Canada although not alarming clearly is serious enough to require action. It is far better for Canadians to come grips with the problem now, before it attains unmanageable proportions, rather than deal with it at some future date in an atmosphere of urgency, of fear and perhaps even of crises.¹⁶⁴

As a result of the Cohen Committee's recommendations, sections 318-320 were added to the *Criminal Code*, 1892 in 1970.

S. 319 states as follows:

¹⁶¹Philip Rosen, "Hate Propaganda" *Library of Parliament* (24 January 2000), online: The Parliament of Canada <<http://www.parl.gc.ca/Content/LOP/researchpublications/856-e.htm>>.

¹⁶²*Mendes, supra* note 131 at 1415-1416.

¹⁶³*Waluchow, supra* note 85 at 172; Minister of Justice Canada, *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada*, (Cohen Committee), Queens Printer, Ottawa, 1966.

¹⁶⁴*Dworkin, supra* note 58 at 13.

319. (1) Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

(2) Everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

According to the Library of Parliament report referred to above, a second wave of hate propaganda erupted in Canada in the 1970s, this time with a broader range of targets: "Hate propaganda was not only anti-Jewish and anti-black, it was also anti-East Indian, anti-Catholic, anti-French and anti-Native people".¹⁶⁵ This new wave of hate propaganda brought a number of prosecutions; in the most famous of these, *R v Keegstra*, [1990] 3 SCR 697. The Supreme Court of Canada upheld s. 319(2) as a

¹⁶⁵*Rosen, supra* note 161.

justifiable limit on freedom of expression. This case is discussed in some detail below.

3.2.A R. v. Keegstra (1990)¹⁶⁶

Mr. Keegstra taught social studies to 9th and 10th grade students in Alberta. His teaching was highly anti-Semitic; he described Jews as sadistic, money loving, power hungry, child killers, whose sole objective was to control the world. Further, he blamed Jews for economic depressions, anarchy, chaos and wars worldwide, and claimed that reports of the Holocaust had been concocted to win sympathy. Students in Mr. Keegstra's classes were required to reproduce these views if they wished to get good marks. Consequently, Mr. Keegstra was charged with the willful promotion of hatred against Jews under section 319. Mr. Keegstra defended his teaching as based on sincerely held interpretations of Christian theology and contended that far from being discriminatory, his teachings enriched public intellect.¹⁶⁷ He further argued that s. 319(2) was overly broad, would require a very subjective assessment of what might offend or disturb, and had a serious chilling effect on freedom of expression, which should not be compromised on a mere likelihood of its' potential to injure feelings of some class of people.¹⁶⁸ Thus, Mr.

¹⁶⁶*Keegstra, supra* note 123.

¹⁶⁷Louis Greenspan & Cyril Levitt, *Under the Shadow of Weimar: Democracy, Law and Racial Incitement in Six Countries* (Praeger, 1993) at 155-156.

¹⁶⁸*Waluchow, supra* note 85 at 207.

Keegstra argued that section 319(2) violated his freedom of expression, and could not be saved under s. 1 of the *Charter*.

His arguments were dismissed by the Alberta Court of Queen's Bench, but the Alberta Court of Appeal held in his favour holding s. 319(2) to be unconstitutional, on the grounds that it was overly broad stating that:

[a]lthough the deliberate expression of lies is not protected by s 2(b) of the *Charter*, s 319(2) also criminalizes innocent or negligent expression of falsehood, and it is this feature which violates freedom of expression.¹⁶⁹

At the Supreme Court of Canada, all seven justices hearing the appeal agreed that s. 319 infringed freedom of expression, and then split 4-3 as to whether the infringement could be justified under s. 1. Dickson CJ, writing for the majority, concluded fairly quickly that s. 2(b) was breached, but within his s. 1 analysis, indicated (as discussed below) that hate propaganda lay at the fringes of what is protected by the *Charter* guarantee of freedom of expression.

In contrast, McLachlin J (as she then was), writing for the dissent, spent significant time discussing the theoretical underpinnings of protection for free expression before moving to the s, 1 analysis. While McLachlin J acknowledged that:

[h]ate literature presents a great challenge to our conceptions about the value of free expression [and]... often constitutes a direct attack on many of the other principles that are cherished by our society.¹⁷⁰

She characterized

[a]ttempts to confine the guarantee of free expression only to content which is judged to possess redeeming value or to accord with the accepted values strike at the very essence of the value of the freedom, reducing the realm of

¹⁶⁹*Mendes, supra* note 131 at 1420 & 1421.

¹⁷⁰*Keegstra, supra* note 123.

protection to that which is comfortable and compatible with current conceptions.¹⁷¹

Moving to the s. 1 analysis, the majority and dissent agreed that s. 319 met the first stage of the test, having a pressing and substantial objective. Dickson CJ described hate propaganda as both harming the targeted group, and “creat[ing] serious discord between various cultural groups in society”¹⁷² and, with references to the Cohen Committee referred to above and international human rights instruments, concluding that combating such harms was a pressing and substantial objective. McLachlin J agreed that attempting to prevent the promotion of hatred against vulnerable groups and attempting to protect social harmony were “laudable goals and serious ones”.¹⁷³

Dickson CJ also saw the importance of the objective as bolstered by the protection of equality and multiculturalism in the Charter.¹⁷⁴ Thus, the majority relied on rationales set in *Zundel*¹⁷⁵ and *Taylor* case where the courts remarked that “freedom of expression must necessarily have regard to the corresponding rights and freedoms of other persons”.¹⁷⁶ By contrast, McLachlin J opposed the notion of using

¹⁷¹*Ibid* at para 87.

¹⁷²*Ibid* at para 32.

¹⁷³*Ibid* at para 104.

¹⁷⁴*Ibid* at para 38.

¹⁷⁵*Canada Human Rights Commission v Taylor*, [1990] 3 SCR 892 [*Taylor*]. The rationale of protecting communal good rather than one hate speaker’s right to self-realization, whose expression is disconnected from the underlying principles of democracy such as seeking of truth, furtherance of democracy etc., was given priority in *Zundel* and *Taylor* case by the majority of the Supreme Court.

¹⁷⁶ *R v Zundel*, [1992] 2 SCR 731, SCJ No 70.

Charter guarantees for equality and multiculturalism to narrow the protection offered by s. 2(b).¹⁷⁷

Dickson CJ began his consideration of the proportionality aspect of the *Oakes* test by noting that, in his view, hate propaganda “is of limited importance when measured against free expression values”,¹⁷⁸ given that it:

contributes little to the aspirations of Canadians or Canada in either the quest for truth the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.¹⁷⁹

Dickson CJ found that s. 319 (2) met the rational connection test from *Oakes*.

Recognizing that it is often difficult to gauge precisely the effects of legislation, Dickson CJ held that the approach taken in s. 319 was “rational in both theory and operation.”¹⁸⁰ McLachlin J concluded differently, saying that courts must look beyond Parliament’s intentions, and consider the actual effects of challenged legislation and that “it is far from clear that it [s. 319] provides an effective way of curbing hate-mongers”.¹⁸¹

At the minimal impairment stage of the inquiry, Dickson CJ considered the argument that s. 319 was overbroad such that it ran the risk of criminalizing expression that did not relate to the objective of protecting against hate propaganda, or so vague

¹⁷⁷*Keegstra*, *supra* note 123 at 83-84.

¹⁷⁸*Ibid* at Para 41.

¹⁷⁹*Ibid* at para 43.

¹⁸⁰*Ibid* at Para 46.

¹⁸¹*Ibid* at para 94.

that its meaning could not accurately be determined. Dickson CJ expressed these arguments as follows:

The question to be answered then is whether s. 319 indeed fails to distinguish below low value expression that is squarely within the focus of Parliament's valid objective and that which does not invoke the need for the severe response of criminal sanction.¹⁸²

Dickson CJ responded to arguments regarding over-breadth and vagueness by noting that the section excluded private conversations, mandated that the promotion of hatred must be willful, required that the expression be aimed at particular groups rather than simply an individual, used the language of hatred, which in Dickson CJ's view meant "a most extreme emotion that belies reason"¹⁸³ and provided defenses relating to "good faith or honest belief".¹⁸⁴ Dickson CJ saw these elements as sufficiently narrowing and defining the offence. Further, Parliament is permitted to use a variety of methods to further government objectives, so the fact that hate propaganda could also be targeted through human rights legislation did not automatically mean that a criminal prohibition was not also justifiable. Ultimately therefore, Dickson concluded that s. 319 met the minimal impairment test.

McLachlin J, was of the view that s. 319 might be overly broad. She construed the term hatred more broadly than did Dickson and noted with concern that the section does not require the proof of "actual harm or incitement to hatred".¹⁸⁵ However, McLachlin

¹⁸²*Ibid* at para 46.

¹⁸³*Ibid* at para 49.

¹⁸⁴*Ibid* at para 50.

¹⁸⁵*Ibid* at para 96.

J hesitated to characterize arguments based on the wording of s. 319 as “constitutionally determinative”,¹⁸⁶ given the fact that the section also provided defenses. Instead, she looked to the section’s “track record” concluding that “it has provoked many questionable actions on the part of the authorities”.¹⁸⁷ Further, McLachlin J was of the view that other, non-criminal approaches might be more appropriate. For these reasons, she concluded that s. 319 did not meet the minimal impairment test.

In weighing the positive and negative effects of the section, Dickson simply balanced the fact that hate propaganda is “only tenuously connected with the values underlying the guarantee of freedom of speech” against “the enormous importance of the objective fueling s. 319”.¹⁸⁸ McLachlin J, on the other hand, saw s. 319 as constituting a serious restriction on freedom of expression which was not, in her view, counter-balanced with evidence of any real benefits.

Critics of the majority position in *Keegstra* have adopted many of the arguments of the dissent, arguing that there is social science evidence which supports the assumption that criminalizing hate speech will protect vulnerable groups from hatred. Some have argued that:

fears or concerns of mischief which may occur are not adequate reasons for imposing a limitation. There should be actual demonstration of harm or a real likelihood of harm to a society’s value before limitations can be said to be justified.¹⁸⁹

¹⁸⁶*Ibid* at para 96.

¹⁸⁷*Ibid* at para 98.

¹⁸⁸*Ibid* at para 55.

¹⁸⁹ Mendes, *supra* note 131 at 184-185.

However, for reasons more fully explored in chapter 2, I find the majority approach in *Keegstra* more compelling, and I am of the view that a carefully defined, narrowly drawn criminal prohibition on hate speech which also provides the kinds of defenses available in s. 319 is a justifiable restriction of freedom of expression. It is for this reason that I see s. 319 as a useful model for modernizing Pakistan's blasphemy laws.

4. Human Rights Regimes in Canada

In Canada, each province and territory, as well as the federal government has passed human rights legislation. These Acts prohibit discrimination based on certain protected grounds, in sectors such as employment, the rental of residential premises and the provision of services to the public. Protected grounds include quite a number of characteristics, including race, religion, gender, sexual orientation and marital status. While processes vary slightly from jurisdiction to jurisdiction, a fairly common approach is as follows: where a person believes that he or she has been discriminated against in contravention of the applicable human rights act, the person can make a complaint to the Human Rights Commission, appointed under the Act. The Commission will investigate and if it appears that discrimination has taken place, attempt to reach a settlement between the parties. Where this is not possible, the matter will go to a human rights tribunal, which is appointed to hear the complaint, decide if it is substantiated, and if so, choose from the range of remedies available in the Act. Remedies could include issuing an apology, paying compensation, re-instatement in the context of employment or making public

services more accessible. The informal and inexpensive remedies used by the tribunal include conciliation, mediation and arbitration, with the sole purpose to compensate victims. Thus, human rights commissions and tribunals are part of the administrative state, rather than the criminal justice system. A defendant who defaults in compliance of a tribunal order may be subject to contempt of court proceeding which could lead to imprisonment; however, this rarely occurs.¹⁹⁰

Until recently, the federal Human Rights Act contained a section prohibiting

a person or a group of persons acting in concert to communicate telephonically ... any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.¹⁹¹

However, this section was repealed in 2013, to take effect in 2014,¹⁹² despite the fact that the section had been upheld by the Supreme Court of Canada as a justifiable

¹⁹⁰*Canadian Human Rights Act*, RSC 1985, c H-6.

¹⁹¹*Ibid* : **13**. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.

¹⁹² [Repealed, 2013, c.37, s.2].

infringement of freedom of expression.¹⁹³The opposition parties were not in favour of the repeal and it could be speculation that a changed government might lead to a re-instatement of the section in June 2015.

In the meantime (along with the section 319 regime mentioned above), a number of provincial human rights codes in Canada contain hate speech provisions. One of these, s. 14 of the Saskatchewan code,¹⁹⁴ was recently challenged as unconstitutional. In *Whatcott*,¹⁹⁵ the Supreme Court upheld a slightly modified version of the section, as a justified infringement of freedom of expression.

At the time of the challenge, s. 14 read as follows:

14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:

(a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or

(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

(2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.

¹⁹³*Taylor*, *supra* note 175.

¹⁹⁴*Code*, *supra* note 126.

¹⁹⁵*Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467, Rothstein J [*Whatcott*].

4.1A Whatcott v. Saskatchewan Human Rights Commission

A complaint was laid against Mr. William Whatcott under section 14(1)(b) for publishing and distributing four flyers in Saskatoon and Regina.¹⁹⁶ Out of those four flyers, two were titled as “Keep Homosexuality out of Saskatoon’s Public Schools” and “Sodomites in our Public Schools.” The remaining two were reprints of an advertisement to which the respondent had added written comments.¹⁹⁷ Four individuals who received the flyers at their homes filed complaints to the Saskatchewan Human Rights Commission alleging that Mr. Whatcott’s publications “promoted hatred against individuals because of their sexual orientation.”¹⁹⁸

The tribunal agreed with the claimants that the flyers promoted hatred, and ordered the respondent to refrain from publishing any such material in future. The tribunal also directed him to pay \$2500 to one complainant while the remaining three claimants were to receive \$5000 each as compensation.¹⁹⁹ The tribunal also found the section to be constitutional. On appeal, the Saskatchewan Court of Queen’s Bench upheld the tribunal’s decision, observing that section 14(1)(b) only prohibited “communication that involves extreme feelings and strong emotions of detestations, calumny and vilification.”²⁰⁰ The Court of Appeal also found s. 14 to be

¹⁹⁶*Code, supra* note 126.

¹⁹⁷*Whatcott, supra* note 195 at para 8.

¹⁹⁸*Ibid* at para 9.

¹⁹⁹*Ibid* at para 11.

²⁰⁰*Ibid* at para 13; *Taylor, supra* note 175 at para 21.

constitutional, but held that the flyers distributed by Mr. Whatcott did not violate the section. The Saskatchewan Court of Appeal held that:

the Tribunal and Court of Queen’s Bench had both failed to balance the limitation on freedom of expression in section 14(1)(b) with the confirmation of the importance of expression set out in section 14(2).”²⁰¹

On appeal to the Supreme Court of Canada, the Court considered whether s. 14 infringed freedom of expression and freedom of religion. Rothstein J, writing for a unanimous court, stated that “This Court’s approach in *Keegstra* and *Taylor*, with some modification, sets out an acceptable method for determining how to balance the competing rights and interests at play.”²⁰²

With regard to the argument of that the section allowed for too great subjectivity, the Court noted that the Act required the application of the reasonable person standard, and referred to Dickson J’s discussion of hatred in *Taylor*. Rothstein J stated that

“detestation” and “vilification” aptly describe the harmful effect that the *Code* seeks to eliminate. Representations that expose a target group to detestation tend to inspire enmity and extreme ill-will against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to abuse, denigrate or delegitimize them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience. Expression exposing vulnerable groups to detestation and vilification goes far beyond merely discrediting, humiliating or offending the victims.²⁰³

In response to arguments that the section was overly broad, Rothstein J stated:

In applying hate prohibitions, courts must assess whether the impugned expression is likely to expose a protected group to hatred and potentially lead to the activity that the legislature seeks to eliminate. This ties the

²⁰¹ *Ibid* at para 16.

²⁰² *Ibid* at para 3.

²⁰³ *Ibid* at para 41.

analysis to the legislative purpose and works to prevent the prohibition from capturing more expressive activity than is necessary to achieve that objective.²⁰⁴

Thirdly, tribunals hearing complaints under s. 14 “must focus their analysis on the effect of the expression at issue”.²⁰⁵

Having set out its understanding of how hatred was to be construed in this context, the Court then turned its attention to the constitutionality of s. 14(1)(b). Only one paragraph was devoted to the s. 2(b) discussion. The impugned section was found to violate freedom of expression, and the real focus of the decision was on whether or not this infringement could be justified under s. 1.

The Court had no difficulty determining that s. 14(1)(b) was enacted in furtherance of the pressing and substantial objective of reducing discrimination. Since hate speech “seeks to delegitimize group members in the eyes of the majority” characterizing them “as blameworthy or undeserving”, this ultimately makes it “easier to justify discriminatory treatment.”²⁰⁶

Mr. Whatcott contended that the impugned provision was not rationally connected to the objective of preventing hate speech in the society, arguing that no reliable socio- scientific evidence or data showed either that hate speech produces harms or that s. 14(1)(b) prevented hate speech.²⁰⁷ The Supreme Court remarked that immediate empirical evidence cannot be produced in hate speech cases as it is

²⁰⁴*Ibid* at para 48.

²⁰⁵*Ibid* at para 58.

²⁰⁶*Ibid* at para 71.

²⁰⁷*Ibid* at para 96.

generally possible in other crimes. But, incidents of hate crimes in society are much rampant rather increasing every day, thus it might be hasty to assume that the provisions pertaining to hate speech are ineffectual or that hate inflicts damage on no one. Therefore, it is not an exaggeration to claim that these laws are justified rationally because they “remind Canadians of their fundamental commitment to equality of opportunity and the eradication of intolerance.”²⁰⁸

On rational connection, the Court held that protecting individuals from emotional harm is not the appropriate test; instead

the focus must be on the likely effect of the hate speech on how individuals external to the group might reconsider the social standing of the group. Ultimately, it is the need to protect the societal standing of vulnerable groups that is the objective of legislation restricting hate speech.²⁰⁹

S. 14(1)(b) largely reflected this societal approach, and also focused on the targeting of individuals because of their membership in a particular group. However, the references to “ridicules”, “belittles” or “affronts the dignity of” inappropriately focused on subjective feelings, and thus were unconstitutional as they were not rationally connected to the objective of eliminating discrimination. These words were therefore severed from the section.²¹⁰ With this modification, Rothstein J also held that the section did not fail for being overly broad.²¹¹

On minimal impairment, Rothstein J examined two alternatives proposed for combating the kind of speech targeted in s. 14. The first of these was the

²⁰⁸*Ibidat* para 98.

²⁰⁹*Ibidat* para 82.

²¹⁰*Ibidat* para 94.

²¹¹*Ibidat* para 111.

“marketplace of ideas”; while Rothstein J did not reject this approach nor did he see it as precluding governmental action, citing Keegstra’s warning not to “overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas”.²¹² The second proposed alternative was that the criminal law should be used to sanction speech that advocates or justifies violence or where actual harm is shown. Rothstein J was not convinced that any one of these alternatives was so clearly superior as to make the human rights approach unreasonable. Further, civil law remedies provided under s 14(1)(b) had a remedial purpose, were less intrusive than criminalization, and provided an inexpensive way of accessing justice for disadvantaged groups. Thus, the Court concluded that as compared to the proposed alternative means of regulation s.14 minimally impaired free speech.²¹³

In terms of the nature of the expression being protected, the Court relied upon Dickson C.J.’s observation in *Keegstra* that:

Hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development, or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s 2(b), and hence conclude that restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b).²¹⁴

Having concluded that s. 14(1)(b) met the minimal impairment test set out in *Oakes*, the Court then moved to the last step in the *Oakes* analysis, asking whether the

²¹²*Ibid* at para 104.

²¹³*Ibid* at para 106.

²¹⁴*Ibid* at para 113.

benefits of the challenged section outweighed its deleterious effects. The prime objective of human rights legislation is to compensate victim instead of punishing respondents, so it promotes the modes of settlement through mediation and conciliation techniques.²¹⁵

Ultimately therefore, the Supreme Court found that s. 14(1)(b) was a justifiable restriction on freedom of expression.

5. Conclusion

To summarize, I regard s. 319 of the Canadian Criminal Code as the most appropriate model for modernizing Pakistan's blasphemy laws. Section 319 is narrowly designed, has proper defenses and cannot be invoked without permission from the Attorney General. This seriously curtails the potential for the kinds of misuses described in the next chapter on Pakistan's blasphemy laws. While s. 319 does infringe freedom of religion and expression, I agree with the analysis of the Supreme Court of Canada that such an infringement is justifiable. Once hate speech provisions are added to the criminal law in Pakistan, the current overly broad blasphemy section could be repealed. I do not propose the human rights approach because Pakistan does not have human rights legislation or administrative bodies to enforce such legislation. Arguably too, the human rights approach might still be open to misuse through unfounded complaints of the sort described in the following chapter. However, while I do not advocate the human rights approach, the

²¹⁵*Ibidat* para 148-151.

discussion of the Supreme Court of Canada in cases such as *Taylor* and *Whatcott* reinforces the argument that some limitation on freedom of expression is justifiable in order to reduce the societal harms caused by hate speech targeting vulnerable groups.

CHAPTER 4

Blasphemy in Islam and the Draconian Nature of Pakistan's Blasphemy Laws

1. Introduction

This chapter analyzes the current law on blasphemy in Pakistan, and offers suggestions for reform based on the Canadian criminal law approach to hate speech provided under section 319(2) of the Canadian *Criminal Code* (Code), as discussed in the previous chapter. The chapter presents a historical snapshot of blasphemy laws in Pakistan. It discusses the relationship between blasphemy and Shariah. Further, it categorizes some cases on blasphemy to give context to how the law is being used in Pakistan. It sheds light on a) incidents of social fanaticism as a response to blasphemy; b) incidents of harshness and broadness of the law; and c) cases in which the accused was acquitted at the Appellate stage, but the case still illustrates ways in which the law can be manipulated and misused.

2. History of Pakistan's Blasphemy Laws

Before the takeover by Britain in 1857, the undivided India had been frequently under attack from various warriors since Alexander the Great. However, the Great Mughals ruled India for the longest period in Indian history.²¹⁶ They considered India as their second home. One Mughal emperor named Akbar, who ruled in the

²¹⁶Descendents of Genghis Khan who ruled India for five centuries. They were not from the sub-continent but had adapted the lifestyle and culture of this highly enigmatic place 'India'. They spent extensive treasures in promoting India's culture and building palaces, fortresses, mosques and other buildings that are still famous historical attractions for many people.

15th century A.D, became the most famous among them. He introduced a modified and reformed version of Islam to which he gave the title 'Deen-I- Ilahi.' This new form of religion emphasized the principles of tolerance and equality among all Indian citizens. Therefore, we find almost no examples of prosecution for the crime of blasphemy in his era.²¹⁷

Aurangzeb Alamgir, another Mughal ruler who was the grandson of Akbar, introduced purely an Islamic way of life in India when he ascended to throne. He and his successors were not inclined to develop a harsh and orthodox Islamic society, so very few records of any prosecutions for the offence of blasphemy are available in their period.²¹⁸

When Britain assumed supremacy over India, it suspended the Islamic legal regime and monarchy, considering them to be undemocratic. In reality, the treatment meted out by the British to Indians over the next century was much harsher than that faced during the royal monarchies. The British introduced their own laws in India to control and improve public order and peace.²¹⁹ One example was the introduction of blasphemy laws intended to control communal clashes between Muslims and Hindus living under English control.²²⁰ In the light of one such incident, a famous blasphemy case titled "Raj Pal vs. the Emperor"²²¹ was heard in 1927, in

²¹⁷ Mohammad Nafees et al, "Blasphemy Laws in Pakistan: A Historical Overview" (2012) Center for Research and Security Studies (*Report*).

²¹⁸*Ibid* at 4.

²¹⁹*Ibid* at 9.

²²⁰*Ibid* at 14-15.

²²¹*Raj Paul v Emperor* (1927), [1927] A.I.R Lahore 590.

response to the publication of blasphemous material by a Hindu writer against prophet Muhammad (P.B.U.H). Muslims initiated prosecution against the Hindu writer under section 153-A of the Indian *Penal Code* (IPC).²²² The provision read as follow:

Indian Penal Code, Section 153A: Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.—

(1) Whoever—

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities...shall be punished with imprisonment which may extend to five years and shall also be liable to fine

The trial judge held that the main objective of section 153-A IPC was to prevent public disorder triggered by religious hatred and discrimination, and not to prohibit blasphemous attacks on sacred religious personages which might hurt the feelings of a particular class or religion. Therefore, the accused was acquitted and the need for stronger blasphemy laws was felt in India.²²³

²²²*Indian Penal Code*, 1860, Act No. 45, s 153-A.

²²³*Raj Paul, supra* note 221; In consequence of this greater need for blasphemy laws in India, the following provision was enacted:

Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of His Majesty's subjects, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. [*Indian Penal Code*, 1860, Act No. 45, s 295-A]

3. Transition of Pakistan from Secularism to Islamization

3.1 From Iqbal to Jinnah: A Secularist Vision

Fundamentalists believe that the pioneer Muslim society of the times of Mohammad (P.B.U.H) is the most suitable model for an ideal society today. Hence, they demand that current political regimes following westernized laws in Muslim countries be reformed or overthrown to bring those systems in accordance with the injunctions of Shariah. Thus, their goal is to make Islam the political, social and economic ideology of Muslim states.²²⁴

In contrast, a majority of Muslim scholars believe that Shariah is a guiding source, but it cannot be interpreted in such a way as to reshape the whole constitutional and legal structure of a state. Further, they hold that it is impossible to implement laws which were prevalent in the society of Prophet (P.B.U.H) 1400 years ago, because societies have gone through a major transformation since then. Thus, Shariah must be applied in a modernized way, keeping in view the needs and realities of present times. These scholars contend that implementing the orthodox structure of Shariah rigidly in modern societies would allow for misinterpretation and abuse of law, thus risking significant social damage.²²⁵

For instance, Muhammad Iqbal, a great Muslim poet and philosopher of the 20th century, was known as 'Poet of the East' among the youth of his time owing to his

²²⁴ Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice* (BRILL, 2008) at 3; Ron E. Hassener, "Blasphemy and Violence" (2011) 55:1 *International Studies Quarterly* 23-45 at 28 (Wiley Online Library).

²²⁵Wasti, *Ibid* at 30.

motivational poems. He did his doctorate in philosophy from Munich, Germany, and was the one who dreamt of a new Muslim state in the Indian subcontinent.

Unfortunately, he died before the creation of Pakistan in 1938, but this great thinker made a remarkable contribution to the struggle for Pakistan by convincing Muhammad Ali Jinnah²²⁶ in 1930 to help in realizing his dream of a separate Muslim state.

Iqbal dedicated his whole life to the enlightenment and encouragement of Muslim youth to achieve knowledge, hoping to create a class of young intellectuals who would understand and support Islamic reforms. He believed that certain provisions of Shariah were limited to the time, conditions and traditions of Arabs a thousand years ago, so those could not be considered binding for future generations of Muslims. Therefore, he argued that Muslims needed to seek guidance from Islamic principles, but they should adopt a dynamic approach in their application, keeping in view the needs of the modern age instead of being orthodox and conservative.²²⁷

Likewise, Muhammad Ali Jinnah remarked in 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 the state of Pakistan. You may belong to any religion or caste or creed— that has nothing to do with the business of the state...Now I think we should keep that in front of us as our ideal and you will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense,

²²⁶ Also known as Quaid-e-Azam (the great leader), he was a renowned barrister from Lincoln's Inn, England who politically fought for Muslim independence from the British during 1900-1947.

²²⁷ David F. Forte, "Apostasy and Blasphemy in Pakistan" (1994) 10 Connecticut Journal of International Law 27 at 29 (Hein Online).

because that is the personal faith of each individual, but in the political sense as citizens of the state of Pakistan.²²⁸

Given Jinnah's views, I strongly agree with Keith Callards' observation that Pakistan was intended to be a secular state. The independence movement was led by those who were educated under the western school of thought. However, the ideal of a secular state has been totally hijacked by the fundamentalists in today's Pakistan, who consider the enlightened founding fathers enemies of Islam owing to their secular outlook.²²⁹

However, Jinnah's view was ignored by the majority of the constituent assembly of Pakistan when it passed the "objectives resolution" in 1949 to be described below. Similarly, after the sad demise in 1948 of Muhammad Ali Jinnah, his dream of making Pakistan a secular country died with him, and fundamentalists emerged on the political scene to disseminate the view that Pakistan was made in the name of Islam. They claimed that the implementation of an Islamic way of life was the only refuge from the ordeals experienced by the new nation since its independence in 1947.

Essentially, the introduction of the "Objectives Resolution" marked the introduction of an orthodox mindset in the country, under the pretext of islamization. This is so because, despite objections by minority members and some Muslim members of the assembly, the resolution was ultimately passed. Focal points of the resolution included: the sovereignty of God Almighty was acknowledged while giving power to

²²⁸ Quoted in *Siddique, supra* note 30 at 317.

²²⁹ *Wasti, supra* note 224 at 6.

the people as a sacred trust to be exercised by their chosen representatives; existing laws were to be brought in conformity with the injunctions of Shariah and any law repugnant to them was to be declared null and void; non-Muslims would not be eligible to be appointed as the prime minister of the state; and the state was to enable Muslims to order their lives in accordance with Islamic teachings.²³⁰ The Objective Resolution was, therefore, a notable event in the constitutional history of Pakistan, as it established religion as the dominant force in state affairs. It was criticized because non-Muslim members had no idea what sovereignty of Allah and living life according to Islamic principles meant, neither were they adequately consulted. However, succeeding constitutions of the country had the “Objective Resolution” as an integral part, and have transformed Pakistan’s outlook from the one it was originally meant to have.²³¹

3.2 The Zia Regime and the Death of a Secular State: Manipulation of Islam to Legitimize Dictatorship

General Zia-ul-Huq, played the most negative role in making Pakistan a radical country. He was appointed as Chief of Army Staff by the then Prime Minister, Mr. Zulfikar Ali Bhutto, by superseding eight Senior Lieutenant Generals. However, Zia-ul-Huq eventually became the President of Pakistan himself through a military coup

²³⁰*Ibid* at 6-7; Bilal Hayee, “Blasphemy Laws and Pakistan’s Human Rights Obligations” (2012) UNDAU Law Review 3 at 28(AustLii).; *Forte, supra* note 224 at 31.

²³¹ The Objectives Resolution remained as an important guiding beacon for the constitutions of Pakistan in 1956 and 1962. But, most notably, it was adopted as a preamble in the constitution of 1973 which finally made it a substantive part of the Constitution of Pakistan.

which ousted Bhutto's regime in the late 1970s.²³² When Zia-ul-Huq assumed office of the Chief Martial Law Administrator in 1977, he stated that he had no political motives at all, and that he considered it his duty as a 'soldier of Islam' to oversee the peaceful transfer of power to a democratically elected government. He also showed his resolve to introduce Islamic system in the country by stating that since Pakistan was attained in the name of Islam, so its survival depends upon its commitment to Islam.

He believed that the political parties were un-Islamic because they promoted sectarianism, so he proposed himself as a reformer, ultimately assuming power as President of the state. This was the beginning of a new era consisting of eleven long years of despotism and autocracy throughout which Zia-ul-Huq strenuously tried to consolidate more and more power in the office of the President. During this period, the country emerged as a major Western ally in combat between Afghanistan and Russia, and Zia, along with the U.S, promoted Jihadist fundamentalists in the region.

On the pretext that Muslims follow one God and one Book, he ordered that there should be only one office or leader having ultimate power in the state (a President).

²³²This was an action that Mr. Bhutto must have regretted later because Zia-ul-Huq got Bhutto sentenced to death in a false murder accusation. It is ridiculous indeed that Pakistani leadership did not learn from this mistake despite being acquainted with the horrific repercussions of such actions. I am saying this because in the year 1999, another prime minister of the country Mr. Nawaz Sharif who is also the current prime minister of Pakistan, and has been selected so for the 3rd time, repeated the same mistake by appointing Pervez Musharraf, General (Rtd.) as the Chief of Army Staff by superseding other senior generals. The result was, again, much the same because Musharraf took over the reign of the country through another military coup. The country is entangled in the war against terror, and has become the center of worldwide attention since then.

Likewise, he compelled judges of the superior courts through a Provincial Constitutional Order (PCO) to take an oath of allegiance to his government. The judges who did not comply had to resign, while those who did concede to his orders were influenced to declare favorable judgments supporting his regime.

In 1979, Zia temporarily empowered Provincial Appellate Courts to the extent that they could declare any law void if it was found repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (P.B.U.H). Next, he established a Federal Shariah Court to examine and decide whether any provision or law was repugnant to the injunctions of Islam, and instituted a separate Shariah Appellate Bench within the Supreme Court of Pakistan. The Shariah Appellate Bench consisted of three Muslim judges of the Supreme Court and two so-called Islamic scholars (Ulemas).²³³ Zia appointed his favourite judges in the Federal Shariah Court and Shariah Appellate Bench of the Supreme Court and tried to further curtail the powers of the other Appellate Courts. But Zia's appointees were not experts in Islam, so they pronounced numerous faulty judgments declaring many Islamic legal provisions and punishments as un-Islamic. Protests begun and Zia had to appoint Ulemas' with orthodox approaches as judges of the Court to secure his regime.

Zia also introduced Hudood laws through a presidential ordinance in 1979, thus implementing very harsh punishments for crimes like adultery, drinking and theft.²³⁴ Furthermore, he initiated sectarianism and hatred among different faction

²³³ A person considered to be well versed in Islamic teachings.

²³⁴ 'Hudood' means limits of conduct ordained by God in Sharia and specifically mentioned in the Holy Quran. If someone breaks these fixed limits, he commits a

of Pakistani society by favoring certain religious identities, coming close to getting Shias' declared as non-Muslims because of their way of practicing religion.²³⁵

Despite his earlier statements against sectarianism, Zia was the strongest promoter of it.

In 1984, Zia placed restriction on Ahmadis, who in 1974 were declared non-Muslims, but were free to practice their religion as they pleased.²³⁶ However, Zia forbid Ahmadis from professing their creed publicly along with many other restrictions making the violations as punishable, thus severely curtailing freedom of religion in Pakistan as laid down under Article-20 of the Constitution.²³⁷

crime for which fixed punishment of 'Hadd' has been expressly stated. Some examples include, amputation for theft, whipping for alcoholism and stoning/whipping in case of adultery etc.

²³⁵These are a sect of Muslims who follow Quran and Sunnah (the life of Prophet P.B.U.H) in just the same way as all the Muslims do. They believe in all the ideals and principles of Islam as ordained by God through His Messenger in true spirit. But, the only difference lies in the way they practice religion which at some occasions does not conform to the prevalent practice in Pakistan; National Legislative Bodies/ National Authorities, *Pakistan: Ordinance No. VII, offence of Zina (Enforcement of Hudood) Ordinance, 1979 (10 February 1979)*, Online: [refworld<http://www.refworld.org/docid/4db999952.html>](http://www.refworld.org/docid/4db999952.html).

²³⁶These are a sect of Muslims who follow Mirza Ghulam Ahmed. He was a man in 1940's who proclaimed that he was Jesus Christ the Prophet of God. He was, in reality, a spy paid by the British government who had maliciously tried to take advantage of the the Muslim belief that Jesus Christ would be resurrected before the Day of Judgment. Consequently, he became successful in winning at least some adherents who are known as Ahmadi's and considered infidels in Pakistan.

²³⁷*The Constitution of Islamic Republic of Pakistan*, 10 April 1973, Ch 1, Art 20:

Article 20-Freedom to Profess Religion and to manage religious institutions

Subject to law, public order and morality—

(a) every citizen shall have the right to profess, practice and propagate his religion; and

This review of the history of Zia's regime clearly shows that his claim of Islamization was not more than a drama which he enacted to give legitimacy to his unjust rule as a usurper and despot. He left no stone unturned to grab more and more power on the pretext of Islamization and even did not shun from using the judiciary to gain political benefits, as those judges pronounced faulty judgments by introducing un-Islamic punishments in Pakistan.

This is the background in which the current blasphemy law section 295-C of the Pakistan Penal Code (PPC) was introduced. The provision reads.

Section 295-c Pakistan Penal Code 1860:

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 (P.B.U.H) shall be punished with death, and shall also be liable to fine.

S 295-C (PPC) contains many patent defects of form and procedure, which are exacerbated by current social and political milieu of Pakistan. Further, it has extensive textual lacunas coupled with imposing very harsh punishments which are indeed not warranted by Islam. Finally, as one writer puts it "These laws, in their current form, have caused, and continue to cause, several miscarriages of justice and are a stimulus for strengthening the negative and highly divisive forces of intolerance and fanaticism in the Pakistani society."²³⁸ Therefore, in my view, it is clear that blasphemy law section 295-C is indeed not religiously motivated, thus

(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

²³⁸*Siddique, supra* note 30 at 305-306.

justifying the emotional and uncompromising attachment of its adherents. But, in reality it is a product of political objectives of a certain mindset, and, thus must be adjudged on this criterion alone. In this regard, I present a criticism of the blasphemy law of Pakistan below. The aim is to depict some practical examples of their misuse through a brief overview of famous blasphemy cases.

4. Contours of Problem: a Snapshot of Some Controversial Blasphemy

Incidents in Pakistan

The incidents discussed below show how blasphemy is seen in Pakistan, and how the law is used for false prosecutions. In this regard, it is important to mention that during the whole period of turmoil and disturbance between 1857-1947 when the undivided India was entangled in huge communal clashes, only seven cases of blasphemy were reported. This number rose to 80 during Zia's regime from 1977-1988. However, it reached a shocking number of 247 cases which were recorded from 1989 to 2012. In addition, around 435 people have been prosecuted since 1990, while as many as 50 have lost their lives in extrajudicial murders by religious fanatics.²³⁹ These unfortunate victims include men, women and children of all ages belonging to different religions, faiths, sects, creeds, and ethnicities. Even mentally ill, physically impaired or illiterate persons have not been spared in this regard. Further, this is the story of only those cases which have been recorded but there are numerous other unrecorded cases affecting the lives of many innocent people.

²³⁹*Nafees, supra* note 217.

Below are some anecdotes of religious fanaticism which is out-rightly un-Islamic, unjustified and illegal yet practiced in Pakistan.

4.1 Personal Stories

In 1991, Naimat Ahmar, a Christian school teacher in a village near Faisalabad,²⁴⁰ was accused of committing blasphemy by pasting posters on a wall which were derogatory towards Prophet Mohammad (P.B.U.H). He denied these allegations, but still apologized unconditionally for any emotional harm that this incident had created among Muslims. He was constrained to leave his job and flee to a nearby city due to threats by fanatics. However, during police investigations, it came to light that he was maliciously implicated in a false case by a rival candidate jealously aspiring for his teaching position. So finally, he was acquitted of the charge leveled against him. But unfortunately, a year later, a religious fanatic named Ahmad stabbed him at least 17 times to death for a crime Naimat had never committed. His killer did not leave the crime scene and confessed before the police that he had committed murder out of his religious obligations to kill a blasphemer.

Aggravating the agony and grief of the family of the victim, the murderer was kissed by policemen for his courage, devotion and commitment to Islam. Clerics congratulated him for the blessings and rewards in the hereafter for this lofty deed. Likewise, many legal professionals offered free representation to Ahmed for his pious act of killing a blasphemer, while rejecting to represent heirs of the victim.

²⁴⁰ A city in the central part of the province of Punjab, Pakistan.

Last but not the least, police made every effort to spoil the case of the prosecution by not gathering potential evidence and using delaying tactics.²⁴¹

Similarly, in 2005, Dr. Younas Sheikh, an eminent scholar in Pakistan, was sentenced to death on a charge of blasphemy by the Sessions Court²⁴² in Islamabad for statements he made during a lecture delivered to his students in the university. The allegation was that he said, "Prophet Muhammad (P.B.U.H) was a non-Muslim until the age of forty; until the age of forty his armpit and pubic hairs were not removed; his first marriage contract was not solemnized since he was married at the age of twenty five; and that his parents were non-Muslims, since they died when he was only a child."²⁴³ The Appellate Court, on the other hand, exonerated him thus observing therein that those statements had been delivered without any malicious intent to hurt religious feelings of the students just as a response to the questions on pre-Islamic Arab traditions. Therefore, the accused had committed no blasphemy.

On another occasion in 2011, Salman Taseer²⁴⁴ and Shahbaz Bhatti²⁴⁵ were murdered by religious fanatics because they had spoken in support of a Christian

²⁴¹ Based on the narrative in *Forte, supra* note 227 at 60-64.

²⁴² A court of original jurisdiction

²⁴³ Akbar S. Ahmed, "Pakistan's Blasphemy Law: Words Fail Me" *The Washington Post* (19 May 2002), online: The Washington Post

<<http://www.wright-house.com/religions/islam/pakistan-blasphemy-law.html>>.

²⁴⁴ A former Governor of the province of Punjab, Pakistan who was killed by his own security guard. Taseer had just said that the blasphemy law needs to be amended because of its inherent defects.

²⁴⁵ A federal minister for minority affairs in Benazir Bhutto's government who had raised voice against false prosecutions of Christian Pakistanis' under the pretext of blasphemy.

woman named Asia Naureen who was sentenced to death on a charge of blasphemy. They both had validly argued that the blasphemy law was full of vagueness, thus creating a vast room for its misuse. Their lives were taken because they had shown courage to criticize these laws. Both of them were themselves considered blasphemers as well, according to complaints made by religious fundamentalists.

Another teenage Christian girl named Rimsha was accused of blasphemy in 2012. She was alleged by a cleric to have burned pages of the Holy Quran near Islamabad, the capital city of Pakistan. As a result, a frenzied mob of Muslims attacked the Christian community living in that area, and forced them to flee. Rimsha was arrested by police the same day the complaint was registered, and the case was investigated. During investigation, it was revealed that the cleric had concocted a false story just to gain the area occupied by the Christian community for the purpose of constructing a mosque. Next I discuss court cases relevant to blasphemy in Pakistan.

4.2 Court Cases

4.2A. Sarfaraz Ahmaed vs. the State (1992)²⁴⁶

A marriage invitation card became the bone of contention in this case. It was alleged that the said card contained blasphemous material against the Holy Prophet Muhammad (P.B.U.H) although not in a direct but in an implied sense. The number of accused persons was six, one woman and five men.

²⁴⁶*Sarfaraz Ahmad v State*, [1992] P.Cr.L.J 2346, Akhtar J [*Sarfaraz*].

The prosecution contended that the accused/appellants were Ahmadis' by faith who believed in the false claim of a person named Mirza Ghulam Ahmad as a prophet of God equal in status to Prophet Muhammad (P.B.U.H). The said card had a specific Arabic prayer 'Durood' written on it which is commonly used by Muslims as a blessing of God Almighty exclusively for Prophet Muhammad (P.B.U.H). Thus, it was asserted that the said blessing or prayer was meant for Mirza Ghulam Ahmad since the sender was an Ahmadi by faith. Essentially, it was alleged to be an effort to degrade the holy name of Prophet Muhammad (P.B.U.H) by the accused persons.

The Attorney General representing the prosecution argued that Mirza Ghulam Ahmad was a false claimant of prophet-hood, since Islam has explicitly pronounced that Muhammad (P.B.U.H) is the last prophet of God. In this perspective, the Ahmadis' were declared as non-Muslims through a parliamentary amendment since they follow a false claim which is repugnant to the injunctions of Islam and openly violate the teachings of Shariah. As a result, their use of 'Durood' clearly shows that it was not meant for the Prophet of Islam (P.B.U.H) but for Mirza. So it was considered blasphemous, attracting the application of section 295-C of Pakistan Penal Code, 1860 (PPC).²⁴⁷

Contrarily, the counsel for appellants submitted affidavits of at least two men deposing on oath that they were true Muslims and considered Mirza as a liar. However, when the remaining three accused-appellants were subjected to cross examination, they were reluctant to expressly denounce Mirza, the false claimant of

²⁴⁷PPC, *supra* note 3.

prophet-hood. This fact raised serious doubts in the mind of the Court regarding their assertions as to being true Muslims. To conclude, the Court in its judgment held that since Ahmadis' have been declared as non-Muslims according to Article 260(3) (b) of the Constitution of the Islamic Republic of Pakistan, 1973, so the 'Durood' written on the said invitation card by them was meant for their false prophet, which amounts to degrading the respectful name of Prophet Muhammad (P.B.U.H), thus attracting the penal provision under section 295-C PPC.

Consequently, the Court granted bail to two of the accused persons on the basis of their affidavits that they were true Muslims. The one accused woman was also granted bail due to her women-hood. But, the bail applications of the remaining two accused/petitioners were denied because they had not renounced their affiliation with Mirza and they were sentenced to death.²⁴⁸

4.2B. Salamat Masih vs. the State (1995)²⁴⁹

In this case the allegation of committing blasphemy under section 295-C PPC was leveled against a thirteen year old Christian boy named Salamat along with two others namely Rahmat and Manzoor who were his middle aged relatives in 1993.²⁵⁰

A cleric of a local mosque filed the complaint, alleging that he, along with other

²⁴⁸*Ibid.*

²⁴⁹*Salamat Masih v the State*, [1995] P.Cr.L.J 811 (Lahore) (Pak) [*Salamat*].

²⁵⁰ Section 295-c Pakistan Penal Code 1860:

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 (P.B.U.H) shall be punished with death, and shall also be liable to fine.

witnesses, had seen the accused persons writing derogatory remarks against the holy prophet (P.B.U.H) with broken pieces of bricks on the wall of the mosque. It was also alleged that similar offensive remarks were found written on the walls of toilets in the said mosque, but the identity of those who wrote the same was unknown. The complainant also produced some papers in evidence which contained insulting statements written in pen concerning the personality of Prophet Muhammad (P.B.U.H). He asserted that he had found those pages from the mosque a year before the registration of the instant case. The prosecution produced four witnesses who deposed before the Court that they tried to apprehend the accused persons when they were writing the blasphemous remarks on the wall of the said mosque, but they fled, taking advantage of the darkness of night. Thereafter the complainants and other eye witnesses of the locality immediately removed the insulting statements.

Resultantly, a criminal case under section 295-C PPC, 1860 was registered against the accused persons at the local police station in Gujranwala²⁵¹ The case was later shifted to Sessions Court in Lahore²⁵² for trial because the accused persons were receiving death threats. However, during trial in 1994, the accused were attacked by gunmen outside the Court when they were brought for hearing. As a result of that murderous assault, one of the accused, Manzoor, lost his life on the spot. The other two, namely Salamat and Rahmat, were severely injured. Adding pain to grief, the

²⁵¹ A city in the central part of the province Punjab, Pakistan.

²⁵² The capital city of the province of Punjab 'Lahore' (Pakistan), where Sessions court is situated near the famous Mall Road.

Court out of sheer disregard of the demands of justice, showing cowardice, incompetence, negligence and feeling threatened by the impending violence, sentenced them to death without fully appraising the available evidence.

The trial Court sent a reference to the High Court/Appellate Court for confirmation of the death sentence. However, the Appellate Court, after examining the evidence in detail, found numerous legal and factual defects in the case, so it refused to confirm the sentence and acquitted both accused persons. The Court noted that the complainant who was the star witness for the prosecution had retracted his previous statement during trial, thus becoming a hostile witness. So it was unfair for the trial Court to have relied on his testimony to convict the accused persons.

Likewise, the complainant claimed to have kept the handwritten papers containing blasphemous remarks with him for a year prior to the said incident of blasphemy which he provided to the investigating officer only two days after the said case was registered. This sole fact spoke aloud about the quality of evidence available against the accused persons in terms of legality and admissibility. Neither the investigation agency nor the trial Court ever bothered to have taken at least the handwriting samples of the accused persons to be matched with the one on the alleged papers to reach the truth or veracity of the allegations, but still the trial Court was pleased to convict and sentence the accused persons to capital punishment.

Three witnesses gave statements that were inconsistent and contradictory to each other. One witness deposed that he had only seen Salamat accused of writing the blasphemous remarks on the wall, while the other two accused were only standing

behind him keeping watch. On the other hand, the other two witnesses deposed that they had seen all the accused persons simultaneously writing blasphemous remarks, which sarcastically, consisted of just four to five words in all. Therefore, the Appellate Court showed great displeasure over the attitude of the trial Court for relying on a mere ocular account which was not only inconsistent but also devoid of any sort of independent corroboration, in a case pertaining to such a grave charge and severe sentence which of course requires a very potent evidentiary basis for initiating prosecution against someone.

In addition, it was established in evidence that all the accused persons were illiterate. Besides this, all of them lived in the same village situated about one and a half miles away from the place of occurrence and they were all arrested from their homes on the same day. The Appellate Court observed that if three persons were simultaneously writing on the wall, then it is unnatural to assume that they wrote just three or four words in total. Likewise, it was observed that if other people in the locality had gathered there at the time of the incident and helped to remove derogatory remarks from the wall, then why was none of those individuals ever produced by the prosecution as a witness in the court.

Given this, after a detailed appreciation of evidence, the Appellate Court came to the conclusion that the prosecution had miserably failed to prove the case against the accused persons beyond any shadow of doubt, so it directed the acquittal of both accused persons while setting aside the impugned judgment. The Court vehemently criticized the trial court for pronouncing the death sentence on such flimsy grounds,

holding that the prosecution could not prove its case at all. Finally, the Court ordered an immediate release of the convicts/appellants in the face of enraged and charged processions of religious fanatics.

Meanwhile both Salamat and Rahmat were offered political asylum by Germany and were compelled to leave their homeland reluctantly just for the protection of their family in future. Counsel for the accused, a famous human rights lawyer in Pakistan, Asma Jahangir, was attacked by religious fundamentalists for supporting the alleged blasphemers. Lastly, Mr. Justice Iqbal Bhatti, the retired Judge of the Appellate Court, was murdered when he was sitting in his law chamber in 1997. He continuously received death threats from the religious fanatics after he acquitted Salamat and Rahmat.

4.2. C Muhammad Mahboob vs. the State (2002)²⁵³

In this case, a Muslim man was convicted by the trial court for pasting hand written derogatory posters on the wall of a mosque. Those posters contained false accusations about the holy prophet Muhammad (P.B.U.H) claiming that he had illicit relationships with young boys and women, thus defiling his sacred name attracting the penal provision under section 295-C of PPC, 1860. The police had collected a writing sample of the accused during investigation which became the basis of conviction during trial, since the ink of that sample matched with the one on the posters in forensic examination. As a result of this incriminating evidence and ocular

²⁵³*Muhammad Mahboob v the State*, [2002] PLD 587, Chowhan J (Lahore) (Pak) [*Mahboob*].

statements by witnesses, the accused was convicted. He was sentenced to death under section 295-C PPC, and a fine of 50,000 Pakistani rupees was also imposed on him.

He appealed to the Appellate Court which observed that the ocular evidence of witnesses was full of discrepancies and contradictions, so it was unreliable and insufficient to prove the guilt of the accused beyond a reasonable doubt. The Court also noted that the complainant was barely literate as he had only passed high school. Besides this, he did not possess even sufficient knowledge of Islam. He was also a quack and posed himself as a homeopathic doctor but he could not produce his degree to prove this fact in evidence. Furthermore, there were serious lacunas and contradictions in the statement of the prosecution witnesses since they frequently resorted to dishonest improvements to what they said.

For instance, when the complainant appeared as witness, he deposed that the accused never offered prayers in the mosque where the alleged posters were found. On the other hand, the second witness claimed that the accused regularly offered prayers in the said mosque. Likewise, it was argued by the third witness during examination that many other people from the vicinity had seen the accused when he was pasting the alleged posters on the wall of the said mosque. However, no such person from the vicinity ever appeared before the court to verify or corroborate this story.

The accused pleaded that he was falsely implicated by the police in connivance with the complainant only on account of his different religious beliefs. He was maliciously

prosecuted because he followed a religious school of thought different from that of the complainant. The accused also raised objections regarding the credibility of the handwriting sample produced by police in evidence, claiming that he was subjected to torture by police who compelled him to write on a blank paper with the markers given by them. These were the same markers with which the alleged posters were written, hence the ink matched in both specimens during forensic examination.

The court observed that the extra-judicial confession of the accused before police was inadmissible in evidence. Likewise, the doubtful nature of evidence relating to writing samples coupled with the lack of religious knowledge on the part of investigating officer and witnesses greatly influenced the mind of the court to remark as “such quality of evidence could not be relied upon in a case as serious as the present one, and, thus reflected inefficiency, inaptitude, apathy and perfunctory working on the part of police officials and the way they collect evidence.”²⁵⁴ The Appellate Court also noted that:

The nature of the accusations overshadowed the Trial Court to such an extent that the court became oblivious of the fact that the standard of proof for establishing such an accusation, as required, is missing... Mere accusations should not have created a prejudice or a bias [in the court’s mind] and the duty of the court as ordered by the Holy Prophet (P.B.U.H) was to ascertain the facts and circumstances, and look for the truth with all the perseverance at its command...The trouble is that over the years bigotry and intolerance have made such deep inroads in our society that all three parties in the blasphemy cycle__ complainant, police officer and judge__ think that they are doing the right thing, and also earning divine favour into the bargain, when they are pressing charges under this [blasphemy] law. This zeal is sanctioned by law and clothed in self-righteousness.²⁵⁵

²⁵⁴*Ibid* at 588.

²⁵⁵*Ibid* at 589.

Finally, the Court cited a quotation (Hadith) of the Prophet (P.B.U.H) that “whenever even there is a mild chance, release the accused. For, releasing someone by an error on the part of a jurist is better than punishing someone by an error.”²⁵⁶ Hence, the court acquitted the accused from all the charges leveled against him, keeping in view the true teachings of Islam regarding the dispensation of justice.

A more detailed criticism of the blasphemy law in Pakistan is the subject of next section.

5. Critical Analysis of Pakistan’s Blasphemy Laws

5.1. Basis of Pakistan’s Blasphemy Law is Wrong

The Quran is the primary source of ‘Shariah’²⁵⁷ for Muslims, and it encourages freedom of expression. It directs Muslims not to be blind to their surroundings, but to try to find rational answers for questions relating to the existence of God and the

²⁵⁶*Ibid* at 598.

²⁵⁷Islamic canonical law based on the teachings of the Quran and the traditions of the Prophet Peace Be upon Him (Hadith and Sunnah), prescribing both religious and secular duties and sometimes retributive penalties for law breaking. It has generally been supplemented by legislation adapted to the conditions of the day, though the manner in which it should be applied in modern states is a subject of dispute between Islamic fundamentalists and modernists. Shariah or Islamic law consists of two sources which are the holy Quran and the life of Prophet Muhammad (P.B.U.H) also known as ‘Sunnah’. It is an Arabic word and originates from ‘shar’ that means a clear road to water. Thus, Shariah is considered to be the right path and the most authentic way towards accomplishment of real success in life. ‘Sunnah’ means the practical demonstration of these golden principles by Prophet Muhammad (P.B.U.H) in his lifetime. In sum, Shariah is the guiding set of rules deduced by the Muslim scholars after a detailed analysis of two primary sources of Islamic law i.e, Quran and Sunnah, the life of the Prophet Muhammad (P.B.U.H).

creation of this universe. The vast spread of Islam could be attributed to its support for freedom of opinion and rational reasoning. For instance, the Quran invites people, at multiple places, to ponder over, investigate and explore the truth by using their wisdom. Islam does not prohibit sincere efforts to explore the truth, and condemns baseless and frivolous allegations. These prohibitions are intended to create a society based on principles of mutual respect, tolerance and peaceful co-existence. In this respect, Prophet Mohammad (P.B.U.H) once stated "A Muslim is one from whose tongue and hands other Muslims are safe."²⁵⁸

Keeping in view these reflections, it is argued that the prohibition on blasphemers in Islam is justified because they make false accusations against sacred ideals in contemptuous language, and this can cause turbulence in an otherwise peaceful society. At this critical juncture, the question arises as to what is, indeed, the true Islamic approach to dealing with unjustified blasphemous expressions? As well, whether such an approach is being followed in modern Islamic countries that have blasphemy laws?

At the very outset, it is important to understand the meaning of blasphemy from the perspective of Islamic thought. Ibn Taymiyyah, a very eminent Islamic scholar and jurist who wrote extensively on the issue, explained blasphemy as a grave crime since the speaker insults, denigrates and ridicules the most important personages of Islam, like God and Prophets (Peace Be upon Them). He considers blasphemy as

²⁵⁸ Mohammad Hashim Kamali, *Freedom of Expression in Islam: Fundamental Rights and Liberties in Islam Series* (Islamic Texts Society, 1997) at 169.

“expressions of contempt for God, [ridiculing of his] names... laws, commands and prohibitions...[and] scoffing of prophets.”²⁵⁹ Others also say that a rejection of Angels, Holy Books and the Judgment Day also amounts to blasphemy of which the only prescribed punishment in Islam is death.²⁶⁰

But does ‘Shariah’ explicitly call for killing blasphemers? And is this a correct interpretation of the Islamic approach? These are the question that are analyzed in the remainder of this chapter. For this purpose, it is important to see how the Prophet of Islam, Muhammad (P.B.U.H), responded to incidents of blasphemy in the nascent state of Islam.

Prophet Muhammad (P.B.U.H) spent his life up to the age of forty in the city of Mecca as a common Arabic man. He was not a literate person, but was known as the most honest among Arabs. He married his first wife Khadijah, a renowned business woman, at her own proposal as she was impressed by his (P.B.U.H) honesty and uprightness.²⁶¹ At the age of forty, when revelations from God started, Muhammad (P.B.U.H) went near Kabah²⁶² and addressed Arabs asking if he told them that a huge army was to attack Mecca very soon, would they believe? Interestingly, everybody unanimously answered in the affirmative. At that moment, Muhammad (P.B.U.H), expecting that people would now listen to his message, declared his prophecy to the

²⁵⁹*Ibid* at 214 & 230.

²⁶⁰*Ibid*.

²⁶¹ Prophet Muhammad (P.B.U.H) was twenty five years old at the time of his first marriage.

²⁶² It is an ancient building of utmost religious importance in Mecca around which Muslims from all parts of the world perform pilgrimage.

people of Mecca. Unfortunately, with the exception of some, all others became his enemies. This enmity lasted for the next twenty three years until the peaceful transmission of power to the nascent Islamic state in 630 C.E.

During the intervening period of struggle, agony and grief, his opponents insulted and ridiculed him on numerous occasions. He was called a magician, a cunning poet, a mad man, a self-proclaimed prophet, and himself the writer of the Quran. But despite all these insults, he always showed patience, tolerance, persuasion and forgiveness for those who rejected his message. He always tried to give sound answers to the questions and objections put forth by his adversaries. For, in the Quran, God Almighty had instructed him to follow the aforementioned principles on various occasions. Some of these principles are as follows:

The Quran says to (Muhammad P.B.U.H):

And you shall certainly hear much that will insult you from those who received the Scripture before you and from the polytheists. But, if you persevere patiently and guard against evil, this will be the best cause with which to determine your affairs.²⁶³

In another place the Quran says:

Among the followers of the Book, many would wish that they could turn you back to infidelity after you have believed— because of their envy after the truth is manifest to them. But forgive and overlook until God accomplishes his purpose.²⁶⁴

Muhammad (P.B.U.H) was so generous a human being that he forgave blasphemers and opponents in the name of God Almighty, as he was taught by his Lord in the Quran. However, some scholars believe that Muhammad (P.B.U.H) did not prosecute

²⁶³ The Holy Quran, Chapter III: Verse186.

²⁶⁴ The Holy Quran, Chapter II: Verse109.

blasphemers in his time because of the feebleness and nascence of the Islamic state. Others contend that if Islam had permitted capital punishment for the offence of blasphemy, then he (P.B.U.H) would have ordered so. However, Muhammad (P.B.U.H) did not even impose any lesser punishment upon a blasphemer, saying at one occasion, “Let him who deliberately attributes a lie to me, take his seat in the fire [of hell].”²⁶⁵ Furthermore, the Prophet (P.B.U.H) pronounced a general amnesty for all and sundry in the city of Mecca when it yielded to become a part of the Islamic empire in 630 A.D. Therefore, scholars hold that according to the true spirit of Shariah, as ordained in the Quran and Sunnah, patience and reasoned response towards blasphemers is the true Islamic approach; it is the prerogative of God in the hereafter to decide whether to punish them or not. Thus, Prophet Muhammad (P.B.U.H) said, “No one may accuse another of disbelief, blasphemy or apostasy without manifest evidence and anyone who does so partakes of the charge himself.”²⁶⁶

Scholars supporting blasphemy laws justify their stance in the light of the following Quranic verse which states:

Verily, those who insult/annoy God and His Messenger have been cursed by God in this world and in the hereafter, and He has prepared for them a humiliating punishment. And those who insult/annoy— bear on themselves a calumny and a glaring sin.²⁶⁷

²⁶⁵*Kamali, supra* note 258 at 228.

²⁶⁶*Ibid* at 220.

²⁶⁷ Quoted in *Ibid* at 240.

They believe that a person who commits blasphemy against God or His Messenger must be put to death because he has already been expressly cursed and pledged to a humiliated life in this world and hereafter by God Himself. He is considered one whose blood is 'vain' according to Quran and Sunnah. They maintain that such a person cannot claim any benefit or value for the property he accumulated, for he has created chaos and disorder in this world, so the only punishment suitable for him is death as a price for his sinister sin.²⁶⁸

However, one does not find any references in either the Quran or the life of Prophet Mohammad (P.B.U.H) which explicitly mention that the only valid punishment for the offence of blasphemy is the sentence of death. Put another way, Islam prescribes punishments which are logical and just, thus insisting upon proportionality to encourage religious tolerance for accruing future benefits.²⁶⁹ As a matter of fact, the inference of capital punishment for blasphemy is a subjective interpretation of the above mentioned verse of the holy Quran. God has shown his displeasure against blasphemers by intimidating them with a cursed and humiliated life in this world and the hereafter. Nowhere in the Holy Quran did he order to killing these persons specifically.²⁷⁰ Therefore, some Muslim scholars contend that this sort of speculative interpretation of the Quran amounts to misinterpretation which should never be resorted to in an issue as important as blasphemy.

²⁶⁸*Ibid* at 238-239; M. Mahmood, *Pakistan Penal code*, 1860 (Lahore: Mahmood Publishers, 2007) at 892; *Wasti, supra* note 224 at 31.

²⁶⁹*Ibid* at 10.

²⁷⁰*Kamali, supra* note 258 at 244.

Likewise, Prophet Muhammad (P.B.U.H) stated, “Whoever charges another person [Muslim] with disbelief, or calls him an enemy of God while this is not so, will have the charge rebound upon himself.”²⁷¹ Imam Abu Hanifa, an eminent Muslim legal scholar and the founder of ‘Hanafi’ school of thought, the largest one in Islam, said that not even ninety nine percent of doubt is sufficient to declare a Muslim as blasphemer or heretic, because it is up to God only to decide. Thus, Muslims are only burdened with the responsibility to guide others to the right path with reasoning, but they should not coerce or compel others by taking the law into their own hands to avenge blasphemy.²⁷²

According to Islamic principles, no Muslim could be a blasphemer because the faith of a person ought not to be challenged on flimsy grounds, as it certainly requires a very high standard of proof in evidence. Specifically speaking, Pakistan follows the Hanafi school of thought, and in light of the teachings of Imam Abu Hanifa, the current procedure adopted under the blasphemy laws in Pakistan is totally un-Islamic. People are readily prosecuted under this system, but Imam Hanifa demands strong evidence in cases of blasphemy. The prevailing legislation is thus conducive to frantic, malicious prosecutions without the backing of appropriate evidence.

Unfortunately, many modern Islamic states like Pakistan, Saudi Arabia, and Iran etc., do not observe the true guidance or teachings of Shariah, instead they enforce harsh laws pertaining to blasphemy on the pretext of their being based on Islamic

²⁷¹*Ibid* at 188.

²⁷²*Ibid* at 186.

principles. In essence, a Muslim cannot be convicted under the offence of blasphemy as provided in Pakistan *Penal Code*, 1860 because heresy is an offence of 'Hadd' for which no provision is available either in PPC or the Hudood Ordinance, 1979 stating that the punishment for heresy must be death. Therefore, I would reiterate my point that the very foundation of blasphemy laws in Pakistan is against the true spirit of Islam and teachings of the Holy Prophet (P.B.U.H), because Islam forbids Muslims from accusing others of the offence of blasphemy. It demands for strong evidence and expressly makes the punishment of blasphemy a prerogative of God. However, these fundamental ideals of Islam are ignored under the current Pakistani legal regime. Thus, it is appropriate to say that the current law of blasphemy in Pakistan has become a source of ridicule and mockery of religion, attracting enormous amount of misuse and criticism from the local public and western democratic societies. Next I discuss criticism of Pakistan's blasphemy laws on Constitutional grounds.

5.2 Challenging Blasphemy laws on Constitutional Grounds

Against suppression or abuse of power by the government, freedom of expression and freedom of religion are two of the most important fundamental rights of citizens guaranteed by the Constitution of Islamic Republic of Pakistan, 1973.

The relevant articles of the Constitution read as follows:

Article 19: Freedom of Speech, etc.

Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to reasonable restrictions imposed by law in the interest of the glory of Islam or integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign states,

public order, decency or morality, or in relation to contempt of Court, [commission of] or incitement to an offence.

Article 20: Freedom to Profess Religion and to manage religious institutions

Subject to law, public order and morality—

- (a) every citizen shall have the right to profess, practice and propagate his religion; and
- (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

The prohibitions on blasphemy may give an impression of being justified because they are seemingly meant for the protection of the “glory of Islam”, “public order”, and “decency or morality” as enshrined in article 19, and “subject to law, public order and morality” under article 20 of the Constitution.²⁷³ But these provisions must not be construed as reasonable restrictions imposed by law on freedom of expression and religion because of their immensely broad nature and disproportional effects on fundamental rights. These constitutional provisions show that freedom of expression and religion are not absolute. However, they are also not completely unavailable to Pakistani citizens. The Judiciary has enough room to decide when these fundamental rights may reasonably be curtailed. However, no specific test or guidance, on how to achieve such a balance or determine which expression falls under the prohibited category, exists in Pakistan. Courts perform balance on a case by case analysis on the pretext of reasonableness. However, a basic theme that emerges from famous freedom of speech cases shows that the Supreme Court of Pakistan has interpreted these constitutional provisions to

²⁷³*The Constitution of Islamic Republic of Pakistan*, 10 April 1973, Ch 1, Art 19.

expand the ambit of fundamental rights rather than curtail them despite the presence of overbroad prohibitory language in the above said provision.²⁷⁴

Courts in Pakistan consider fundamental rights of expression and religion important for democracy. Thus recent court decisions have shown a tendency towards protecting fundamental freedoms against undue state restrictions where substantial communitarian welfare was at risk due to governmental regulations. However, courts have also prohibited hateful expression because it reasonably fell under the restricting grounds as contained under article 19 and 20 mentioned above.

Given this, I argue that blasphemy law in Pakistan although falls under the prohibitory scope of article 19 and 20, is repugnant to the underlying principles of both above mentioned articles. This is so because article 19 and 20 are invoked whenever state restrictions are so broad that they cannot reasonably justify prohibition on a fundamental right. In spite of this rendition, no court has ever tried to adjudicate a case of blasphemy under the rationale of freedom of expression or religion. Courts never saw blasphemy as an objectionable speech offence, but rather as an insult to God. They considered this area of law as out of their reach, such that a mere allegation of blasphemy superseded all principles of customary criminal law, such as innocence of the alleged, benefit of doubt and *mens rea* etc. But if they had adjudged blasphemous expression as an objectionable speech, they would have produced a more rational guidance for society regarding which expression is prohibited and what type of punishments would be more appropriate on grounds of

²⁷⁴*Siddique, supra* note 30 at 372.

reasonableness. This approach would, therefore, have helped the society in becoming more tolerant of offensive expression, rather than adopting the fundamentalist nature that is being practiced now in Pakistan due to the religious aspect of the blasphemy law.

Similarly, when a constitutional challenge was initiated in 1994 before the Supreme Court of Pakistan regarding blasphemy laws under article 20 of the Constitution, the Court, with respect, wrongly validated the law holding that regulation of freedom of religion was justified in Pakistan. I believe, had the Court paid heed to this sensitive issue and rightly decided blasphemy law as a prohibition severely limiting freedom of religion under article 20 of the Constitution of Pakistan, many innocent lives would have been saved who became victims of extra-judicial killings at the hands of religious fanatics in these past years. Likewise, as indicated above, punishments could also have been reviewed and legitimized to be commensurate with the intensity of the act as a speech offence instead of an obstinate insistence on the death sentence due to considering it as an insult to God.

5.3 Challenging Blasphemy Laws on the Basis of International Human Rights

Law

Apart from challenging blasphemy law as being un-Islamic or full of textual lacunas, they could very well be challenged on the basis of international human rights law. Despite the fact that Pakistan is a signatory to many international human rights

instruments, like the Charter of the United Nation (1945),²⁷⁵ International Covenant on Civil and Political Rights (1966),²⁷⁶ and International Convention on the Elimination of all forms of Racial Discrimination (1969),²⁷⁷ it has miserably failed to perform its international obligations in this regard. More so since these important international covenants require the member states to eliminate all forms of discrimination so as to promote equality, liberty and freedom. Unfortunately, governments in Pakistan have successively failed to achieve these goals.

Further, the political leadership in Pakistan has not been able to control religious fundamentalists, though the governments of Prime Minister Benazir Bhutto (1988-1990 & 1993-1996), President Musharraf (1999-2008) and Prime Minister Gillani (2008-2013) sought to amend the blasphemy law. But eventually, they yielded to the religious radicals because they needed the support of the religious parties for the smooth running of their governments. It is more important to the politicians in Pakistan to protect their office than waste their time to protect innocent citizens. In this scenario, I take the initiatives promoted by Pakistan as hypocritical, suggesting it is intended to improve interfaith harmony and religious tolerance among Muslim nations. Since “charity begins at home,” so it is incumbent upon the government in

²⁷⁵ *Charter of the United Nations*, 26 June 1945 Can TS 1945 No 7.

²⁷⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol.999, p.171.

²⁷⁷ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol.660, p.195.

Pakistan to create interfaith harmony between its own citizens. Then, it can suggest it others to do the same.²⁷⁸

Therefore, I argue that the current blasphemy laws create radicalism and discrimination, in the society, thus making minorities petrified for their fate in the hands of majority. However, the Canadian criminal code hate speech provision (s. 319 (2)) helps in achieving this objective of equality. It does not favour any particular religion, sect, cast, class or creed, and, thus, provides an atmosphere of mutual harmony in the society. I believe that adopting a hate speech provision based on the Canadian model in Pakistan would put Pakistan in conformity with its international obligations, and only then can it move towards creating Muslim brotherhood and achieving other godly goals.

5.4 Political rather than Religious Background of Pakistan's Blasphemy Laws

As discussed earlier, blasphemy laws in Pakistan originated from the Indian *Penal Code*, 1860, which was promulgated by the British for undivided India. Their objective was not to protect any particular religion, but only to ensure peace and order in the society by not letting anyone disturb the other's religious feelings. In sum, these laws were designed to defend minorities so that they would not feel oppressed at the hands of the majority which gives an impetus to them for causing disturbance by rising against the oppressors.²⁷⁹ However, after the emergence of Pakistan, president Zia-ul-Huq used the notion of Islam to protect and legitimize his

²⁷⁸Hayee, *supra* note 230 at 25-40.

²⁷⁹Siddique, *supra* note 30 at 336.

own despotic regime. Therefore, pre-partition laws were transformed into prosecuting devices to be used against minorities and political rivals, providing protection to the religion of majority thereby deviating from the original goals set up in the Indian *Penal Code*.²⁸⁰

The concept of blasphemy in Islam was intertwined with politics since the Prophet's (P.B.U.H) days. Prosecution for renunciation of belief was ordered not because of religious concerns but because such acts were considered as rebellion against the newly born Islamic state.²⁸¹ Prophet Muhammad (P.B.U.H) ordered executions in almost a dozen cases which had a political nature, but he granted pardon in numerous cases which involved contours of blasphemous acts. The literature indicates that those dozen cases involved a combination of actions like treason, hostility to Islam, vilification of the Prophet (P.B.U.H), and rebellion in the form of helping the infidels of Mecca during war. Therefore, it is not correct historically to say that Prophet (P.B.U.H) ordered execution of blasphemers, as, clearly he granted pardon to those who insulted him as a religious person leaving this matter to God Almighty to decide, thus showing patience and tolerance as ordained in the holy Quran.²⁸² But since he was also head of the state, he had the responsibility to protect the Islamic state from the dangers of mutiny. Therefore, he was constrained as the

²⁸⁰*Supra*, Chapter 3.ii "The Zia Regime and the Death of a Secular State: Manipulation of Islam to Legitimize Dictatorship"

²⁸¹*Forte, supra* note 227 at 44.

²⁸² Please refer to the verses of the Holy Quran discussed above at 96-97.

head of state to punish those who revolted against the state by helping rivals of Islam, thus committing treason.²⁸³

Therefore, I would argue that blasphemy is not a religious but political offence, according to Islamic perspectives. It ought not be punished as an offence because of its religious nature but it should be prosecuted on the grounds of maintenance of public peace and tranquility in society. As such, this focus on the political ramifications of blasphemy, rather than on limiting the expression of religious or political views is actually more in keeping with how blasphemy was used in pre-partition India or in early days of Islam. Likewise, it should not entail such severe punishments since it is not a religious offence but instead those should be lighter ones enforced through narrowly designed provisions. This modern enlightened approach would help in saving the Pakistani society from the age old clutches of orthodoxy and intolerance that radicals have enslaved it.

Some argue that Pakistan's blasphemy laws are discriminatory as they only protect one particular religion. They consider "punishment under section 295-C PPC as a tempting tool in the hands of Muslim extremists to hold members of the religious minorities in religious-cum judicial blackmail for personal vendettas."²⁸⁴ In their view, a government's attestation that one religion is superior to others automatically results in oppression and discrimination towards minority religions

²⁸³*Kamali, supra* note 258 at 237-247.

²⁸⁴ "Ending the abuse of the blasphemy laws" online: Pakistan Blasphemy Laws <<http://www.pakistanblasphemylaw.com/>>.

in a community.²⁸⁵ These scholars suggest that the scope of blasphemy laws in Pakistan must be expanded to include blasphemy towards other prophets (P.B.U.T) also as a criminal offence. This, they believe, would end the discrimination, vilification and social tension in society which springs from religious differences.²⁸⁶

I do not agree with this argument, since a law which is already so broad in scope, if expanded, will increase the number of prosecutions. Moreover, Pakistan is a multi-religious community with a difference in ideals between Islam and other religions. Therefore, a provision which is already so broad in nature cannot be expected to equally protect two different opinions. For example, Muslims believe that there is no god but God Almighty having no successor or offspring, while Christians believe that Jesus Christ (P.B.U.H) is the son of God. Now, to put these two contradictory concepts in a provision would be logically incorrect, so a consensus over the precise definition of blasphemy is very difficult to achieve. Instead, I would again recommend modernizing the idea of punishing blasphemy as a breach of peace [hate speech] offence, rather than a religious one. Since, an amended law will have a proviso relating to hatred spread on the basis of religion, and would not favour any particular religion etc., consequently ending discrimination in the society.

5.5 Overbroad Nature of Blasphemy Laws

Pakistan is a common law country and its penal code is largely the same as was designed by the British in 1860, except the blasphemy laws. The common law

²⁸⁵*Neu, supra* note 1 at 193; *Lawton, supra* note 9 at 8.

²⁸⁶*Siddique, supra* note 30 at 339.

principles require that a penal provision must clearly describe the act or omission which is prohibited and liable to be prosecuted by the state. Therefore, legislation which is too broad in scope is considered flawed, if it enhances the risk of arbitrary action or enforcement, creating room for its misuse. The laws related to blasphemy in Pakistan are one such example because they are also too broad in scope. They are not based on Islamic injunctions or teachings which they claim to protect. And, the text used in this provision is so vague in meaning that it could be dragged in any direction through an interpretation which extends the possibility of malicious prosecution of innocent citizens. For instance, I am a true Muslim who loves the Prophet Muhammad (P.B.U.H), and I have staunch faith in Islam. I have written this paper sincerely to do an objective analysis of the precarious situation in Pakistan, and to figure out a solution for the chaos. But even this neutral academic effort may be dragged into the ambit of blasphemy because of the vague and open ended provisions in Pakistani Laws on the subject. This is so because, “words [which] either spoken or written, or by visible representation or by any imputation, innuendo or insinuation directly or indirectly, defile the sacred name of the Holy Prophet Muhammad (P.B.U.H)” is the criterion for establishing guilt.

Another aspect worth mentioning here is the fragility of academic discussions on the issue of blasphemy in Pakistan. These are scant due to an overwhelming risk of being dragged into the broad ambit of blasphemy. One example was Dr. Younas Sheikh’s case discussed earlier. This is so because no proviso on any exceptions or defenses has been attached to the penal provision of blasphemy S.295-C in Pakistan. This fact also reinforces the idea that these laws are intended to proscribe any

disregard for the principles and teachings of Islam. Clearly, this is evident from even a bare reading of the Holy Quran which explicitly invites people to ponder on the universe and their own existence. Unfortunately, blasphemy laws do not allow the raising of any questions against a misinterpreted religious idea prevalent in society. In addition, those who dare to do this face being charged for the offence of blasphemy themselves. Likewise, these individuals become prey to extra-judicial killings at the hands of extremists if they are somehow saved from prosecution. Extremists impliedly consider their barbaric acts as legitimate because of the existence of the death penalty as the only valid sentence for blasphemy in law. So in their zeal to gain religious virtue, they kill those they consider to be blasphemers.

As well, S. 295-C PPC has no proviso referring to the defense of private conversations, and, thus anyone could accuse another of committing blasphemy without even having fair evidence to prove this allegation. In this regard, the likelihood of the blasphemy law being misused to victimize an opponent is clear, as already discussed. Thus, it is quite possible that a person can be falsely accused of blasphemy committed in private communications. Similarly, he might be killed extra-judicially by a religious fanatic or a self assumed 'soldier of Islam' for whom it is sufficient evidence of guilt if a person is merely accused of blasphemy.

In my view, these provisions have no justification under the common law because of their vagueness and ambiguity. They do not give clear guidance as to what expression may be considered blasphemous, and are conducive to creating a more

radical society in Pakistan.²⁸⁷ Therefore, I would suggest that the law must be modernized by providing safeguards to minimize the likelihood of its misuse. I propose the Canadian hate speech model as a guideline provided under section 319(2) of the Canadian Criminal Code. These concerns were also raised against this provision, but the Supreme Court of Canada repeatedly held that it is not a broad law, and gives proper guidance/defenses in relevance to speech which may or may not be censored. The Court opined in the Whatcott case in 2013 that the section only curtails intentionally damaging hateful expression while allowing inquiries made in good faith and for research purposes. Thus, I argue that Pakistan must also adopt a similar approach instead of blasphemy laws. This new law must consist of defenses such as mens rea; good faith; private conversation; research; religious freedom etc., thus limiting its misuse to a great extent.

5.6 The *Mens Rea* Dilemma

Intent is an essential ingredient in most of criminal offences. Same is the case with blasphemy, since it must also require proving that the accused had a reasonable knowledge and intention of the consequences of his malicious acts regarding their capability to outrage the feelings of a particular class of people. Now if being cognizant of the consequences, the accused still deliberately resorts to malicious actions conducive to causing turbulence in the society, then he should bear the consequences of his deeds.²⁸⁸

²⁸⁷*Ibid* at 352-359.

²⁸⁸*Hare, supra* note 4 at 296; *Buzzanga, supra* note 54.

Keeping this in view, in both England and India, the common law countries which have greatly inspired the legal regime in Pakistan, 'intent' was the most essential ingredient to constitute the offence of blasphemy. However, an orthodox or conservative version of both Islamic and common law regimes is being currently followed in Pakistan. According to section 295-C PPC, intention is not an important ingredient of the offence of blasphemy. The mere act is considered punishable if it is committed without any extraneous pressure or duress. The said provision is founded on the presumption that intention is not needed to be proven since a person speaks what is in his mind and heart. So, intention is presumed from the nature of an accused's statement, whether he actually intended to renounce Islam or outrage people.²⁸⁹ This makes it an orthodox strict liability offence.²⁹⁰ Needless to say, it is extremely undesirable for a crime which carries the death sentence as its only valid punishment, to infer intention from a statement without resorting to its context or the element of intention. For example, if a common man is asked some religious questions touching faith and he answers them according to his understanding, he may be dragged as a blasphemous in the course of giving answers without considering the context in which those statements were made. On the other hand, a dexterous writer may escape liability for his blasphemous statements if he camouflages his words by employing literary tactics.²⁹¹

²⁸⁹*Kamali, supra* note 258 at 224.

²⁹⁰*Hare, supra* note 4 at 302; See *R. v. City of Sault St. Marie*, [1978] 2SCR 1299 [Sault].

²⁹¹*Neu, Supra* note 1 at 201.

Furthermore, exceptions like unsound mind, forced intoxication, good faith, and age are common considerations before affixing criminality all over the world. However, it is very strange that people accused of blasphemy have been denied all these genuine defenses even which could have had them exonerated from criminality or reduced their punishments to a minimum. As discussed earlier, this was the situation for Salamat Masih and Rimsha Masih, the teenagers charged under this law.

Many such cases exist in Pakistan. In fact, online news articles on blasphemy laws in Pakistan provide details of such cases. All the cases demonstrate that section 295-C PPC, 1860, just like the defenses of intellectual discussion and intention, does not accommodate defenses like insanity, minority and old age etc. While, it is an acknowledged fact that these persons do not have control over their mind to foresee the consequences of their act, so in absence of malicious intention it is highly unjust to charge them for blasphemy. Given this, it is very unfortunate that blasphemy laws being broad in scope are implemented on everyone alike without any exceptions.

I believe the way blasphemy law is being construed in the legal system of Pakistan is against the spirit of natural justice, and it is inhumane and un-Islamic. Islam sets a very high standard of evidence to prove the guilt of an accused considering him innocent until proven guilty. Prophet Mohammad (P.B.U.H) declared on numerous occasions that it is better to set free a hundred culprits than convict an innocent person. Likewise, he said that the killing of one man without legal justification is like killing the whole of humanity. Indeed, Islam puts a very high burden of proof on the

complainant to prove the guilt of the accused beyond any shadow of reasonable doubt before punishing him.²⁹²

Therefore, I would argue that authorities in Pakistan must not infer or presume the existence of malicious intention in cases of blasphemy from the mere statements only. One suggestion is to modernize these blasphemy laws by providing exceptions or defenses. Similarly, Courts should take judicial notice of the quantum and proportionality of the sentence whenever a case of blasphemy comes before them for adjudication on a case by case basis considering it a speech offense rather than an insult to God and religion.

5.7 Burden of Proof or “TAZKIYAH-TU-SHAHOOD”²⁹³

The qualification of a witness and standard of evidence to prove a certain fact has been amply elucidated in the Holy Quran. In Zia regime, Qanun-e-Shahadat Order 1984(Q.S.O)²⁹⁴ was introduced to make the law of evidence accord with injunctions

²⁹² “Tazkiyah-tu-Shahood” is a test for appraising the credibility of the witnesses according to Islamic standards of piousness and truthfulness. See discussion, *infra*.
²⁹³ In sum, it means that the witnesses must be highly virtuous and pious people, and their number should be between 2- 4 ‘male’ witnesses as required by the intensity of the crime. For example, in rape cases the intensity is higher so 4 people are required; in cases of drug or alcohol use the intensity is lower so less witnesses are required. In this light, my view is that in blasphemy the intensity is much higher so more witnesses should be required. The test also demands that if a witness is unable to fulfill these requirements of piety and truthfulness or at anytime makes a contradictory statement his credibility must not be accepted, thus making him a hostile witness.

²⁹⁴*The Qanun-e-Shahadat Order, 1984, Act No. 10*; This is the amended version of the same Evidence Act, 1872 that British promulgated for undivided India. Eventually, Pakistan adopted the Act on its independence in 1947 and the title of the Act was then changed by Zia during his regime to bring it in conformity with his islamization claims. The content of the law barely changed however; changing the title was still

of Islam as laid down in the Holy Quran and Sunnah. According to Islamic injunctions, the burden and quality of evidence to prove guilt increases with the nature and sensitivity of a crime. The Holy Quran ordains that witnesses must conform to the test of 'Tazkiyah-tu-Shahood' in those crimes where punishment is very high as in the case of Zina.²⁹⁵This would include blasphemy as it entails capital punishment, so Islam has forbidden Muslims from raising false allegations of disbelief against someone, and required substantial proof wherever guilt is alleged. Unfortunately, however, the credibility of witnesses and quality of evidence adduced in cases of blasphemy in Pakistan has been very weak. Despite this, as is evident from the cases reviewed above, judges have convicted and sentenced to death many accused persons by relying on mere allegations in the absence of sound and credible incriminating evidence. The basic reason behind this casual manner of the judges is the very text of the provision under section 295-C PPC,1860, which does not make 'intention' an essential element to prove the offence of blasphemy, so it does not require any evidence to prove the same. On another note, it is a biased system of prosecution since it is sensitive to the emotions of only one side completely ignoring the other which is not even given the right to fair trial to agitate its' innocence. Although the principle behind penalizing blasphemy may be correct religiously, but Islam is a religion of peace and forgiveness so it prefers to pardon than to penalize.

seen by many as a positive step toward achieving the so called Islamic goals acclaimed by Zia.

²⁹⁵ An offence of forcibly committing rape as defined in Hudood Ordinance, 1979 i.e sexual harassment etc. The punishment is expressly defined in the Holy Quran.

Where the state decides to prosecute a person then a very heavy burden of proof is laid on the prosecution to prove its case beyond a reasonable doubt, which in the current scenario is completely absent. Thus, it has been observed in a number of blasphemy cases that both the requirements of heavy burden of proof on prosecution and sound reliable evidence have been miserably ignored by trial courts in Pakistan. However, at the Appellate level, Courts have been gracious enough in solving the matter seriously by not confirming to the biased and orthodox legal trends, since they correctly appraised evidence and released many innocent victims. Thus, in my view, as the proposed hate speech law would require substantial evidence to prove intention and provide relevant defenses, trial courts would acquit victims at the early stage due to lack of evidence. They would test the credibility and quality of incriminating evidence or witnesses and, thus, this approach would drastically limit the misuse of the blasphemy law in Pakistan.

Further, those who falsely accuse others of blasphemy have impunity because there is no punishment provided in law for making a false allegation of blasphemy against someone. Therefore, many people suggest that the cases of blasphemy must only be heard by courts at the Appellate level, so that the constitutional requirements of fair trial and due process may be ensured. Consequently, the accused may also be saved from the agony of misuse of law which often and continuously results in false conviction or extra-judicial killings in Pakistan.²⁹⁶ However, I believe that

²⁹⁶*Mahboob, supra* note 253: the Honourable *Chowhan J* of the Appellate Court analyzed the history of blasphemy laws in Islam and Pakistan to conclude that Islam does not recommend such an orthodox ideology. He vehemently criticized the prevalent investigatory and prosecutorial system in Pakistan taking note of the

introduction of a hate speech law in Pakistan's penal code would also reduce such incidents because people would not be sentenced so frantically as done now under the current blasphemy law. Along with other defenses (i.e lack of *mens rea*, good faith, academic discussions and private communication), the law must have a proviso requiring the Attorney General's approval before commencing criminal proceedings against those alleged of blasphemy. Similarly, if the law also had a proviso to punish those who falsely accuse others of blasphemy, the remaining misuse potential of this provision and other contributing factors would also mitigate.

5.8 Miscalculated Objectives of Pakistan's Blasphemy Laws and Strict Punishments

It is noteworthy that section 295-C PPC, 1860, provides the strictest punishment known under Pakistan's criminal law. Originally, the punishment was up to life

minimum efforts done by the investigating officers and the prosecutors in furthering the ends of justice. Consequently, he encouraged legislators to adopt some suggestions made by him through which the defects so prominent in the law could be controlled. For instance, he put forth that only a Sessions judge should hear the case as a court of first instance because lower court judges have immense workload and pressure from the public, hence making them unable to handle matters of blasphemy effectively. Secondly, he suggested that a police officer having 17th scale should investigate matters of blasphemy, rather than current policemen who are barely educated and are severely corrupt. Third, he opined that the Attorney General must first approve of a complaint before criminal proceedings are initiated against someone accused of blasphemy. As well, prosecutors must carefully analyze evidence and circumstances of false allegation before laying charges so that the accused may be saved from going through the horrid agony of a false trial and possible death sentence or even extra-judicial killings. All these suggestions, even by the highest court of the largest province of Punjab, Pakistan, fell on deaf ears and nothing has changed in the draconian law to the present day.

imprisonment. The death sentence was added to it in 1986, and the sentence of imprisonment for life was removed in 1991. So now, the death sentence and fine are the only punishments.

Given this, those who support the idea of imposing strict punishments for the offence of blasphemy argue that if there are no such penal laws or the judicial doors are closed, then every other person will dare to commit blasphemy with impunity. Moreover, in the absence of blasphemy laws or a regulatory mechanism, angry fanatics may take the law into their own hands to exact revenge on alleged blasphemers.²⁹⁷ However, in most of the cases relating to blasphemy which were initiated on account of malicious prosecutions, it has been observed that the accused are released by the Appellate courts. So in my view, the argument that the absence of such laws would encourage blasphemers to do the act more frequently does not hold good. For, despite the existence of such laws, accused are released by the Appellate courts in final appraisal due to faulty preceding prosecutions. On the other hand, these laws have played a negative role by encouraging intolerance in society, because mere statements or disagreement may be dragged within the pseudo definition of blasphemy. Thus, if the state is not willing to initiate prosecution, many would take it as their religious duty to purge the world of the alleged blasphemer. These laws are thus producing results which they were designed to avoid, because

²⁹⁷*Nafees, supra* note 217 at 39; There is no equivalent in the Pakistan Penal Code of Canadian Criminal Code s. 140—Public Mischief—i.e making false accusations

they prescribe capital punishment for the offence of blasphemy and so encourage assassins to enforce it extra-judicially out of their so called religious convictions.

In contrast, it could safely be argued that blasphemy is not an offence of 'Hadd' because nowhere in the Quran has the death penalty been described as a mandatory punishment for it. Therefore, it is indeed an offence of 'Ta'zir'²⁹⁸ in which the judge exercises his discretion to decide the quantum or nature of punishment for the offender. The punishments of 'Ta'zir' are lighter and lenient in nature as compared to the ones imposed as 'Hadd', since they have been deduced by religious scholars after a detailed scrutiny of the injunctions of Quran and Sunnah.²⁹⁹

It is noteworthy that 'heresy' has neither been defined as an offence in Pakistan nor any punishment of 'Hadd' is provided for the same. Therefore, logically speaking, if a Muslim cannot commit the offence of blasphemy then naturally non-Muslims could be the only target of this crime in Pakistan.

Further, this offence entails only 'Ta'zir' punishments, so in these circumstances its punishment should be lesser and lenient. Besides this, the sanction of government in favour of death penalty for blasphemy becomes conducive to extra-judicial killings of the victims because fanatics believe it as a warranted action. Therefore, law of blasphemy needs to be modernized instead of treating it as merely a religious

²⁹⁸A punishment which has not been specifically mentioned in the holy Quran is called 'tazir' or discretionary punishment. These are flexible punishments according to attending circumstances of the crime, and Muslim scholars have denoted them in the light of Islamic principles/ teachings over the various past centuries.

²⁹⁹*Kamali, supra* note 258 at 228; *Forté, supra* note 224 at 47.

legislation. For the sake of argument its rationale may be considered valuable for an Islamic society as in Pakistan, but abundance of textual flaws and procedural vacuums make it a defective legislation. In addition, it is so vulnerable to misuse that it needs to be rejuvenated according to the modern democratic standards. In this backdrop, I propose that the underlying objective of blasphemy law should be the same as of a narrowly designed provision of hate speech.³⁰⁰ For, prevention of hate propagated on the basis of religion is an important objective of most of the modern hate speech laws. Further, this objective has also been considered valid by various countries and international institutions. Therefore, adopting this objective would promote a culture of tolerance, thus limiting the extremist behavior manifested by certain sections of society in Pakistan. On the other hand, this extremist behavior is exacerbated by government's sanction of death penalty as the only solution to vindicate blasphemy. Thus, adopting right approach in this regard will prove helpful in controlling the misuse of law of blasphemy. Similarly, it will also save innocent victims from becoming prey to fanatics due to the vagueness or broadness of this law by providing defenses and lesser punishments for those who happen to commit the crime.

5.9 Blasphemy and Repentance

There are four famous Islamic schools of thought in various Islamic countries. They are Hanafi, Maliki, Shafi'i, and Hanbali. A majority in Pakistan follows the Hanafi school of thought which has its reflection in Pakistan's legislation. Categorically

³⁰⁰ Protection of peace and order in society through protection of religious hatred

speaking, blasphemy law is no exception, so it must also be in consonance with principles of Hanafi school of thought. But, section 295-C PPC, 1860, is not in accord with the jurisprudential spirit of Hanafi ideology. Rather, it contradicts on very basic grounds. One such contradiction is found in the concept of repentance. Hanafi scholars argue that anyone who commits blasphemy or apostasy must be given an opportunity to repent for his sins. They consider blasphemy, as discussed earlier, a 'Ta'zir' offence the punishment for which is decided by the judge according to circumstances of the case. They contend that Prophet Muhammad (P.B.U.H) was also merciful to his foes who were disrespectful to him and denied his prophet-hood providing them opportunities to repent for their sins and adopt the righteous path. For instance, on one occasion He (P.B.U.H), instead of penalizing instantly, gave three days for rethinking to a woman accused who had renounced Islam and aided the infidels of Mecca in war of 'Uhad.'³⁰¹ So, it is vehemently contended by Hanafi scholars that since repentance is an integral part of Islamic legal system, a person

³⁰¹ In early days of Islam, the infidels of 'Mecca' plotted to kill Muhammad (P.B.U.H). However, through God's revelation he was ordered to migrate to 'Medina' overnight. Islam prosperously flourished after this migration and his opponents detested this increase in his followers. Eventually, they organized a large army of over one thousand men to attack 'Medina' and the small number of Muhammad's followers. The confrontation took place near the mountain of 'U-had'. This is why the war is known as the war of 'U-hadd'. Further, since Islam was still at an early stage there were many hypocrites who claimed that they were Muslims but secretly helped the infidels of Mecca in this war. They provided information of the activities of Muslims and Muhammad (P.B.U.H) and assured their support through attack on Muslim women and children from inside Medina while Muslim men were engaged in fighting with the opponent army. However, Muslims dominated in this war and defeated the opponent army despite the sheer number of Muslim army. Later, many of these hypocrites were charged with treason and blasphemy where some of them were forgiven for their blasphemous act while others were prosecuted for treason.

who commits blasphemy should also be given a chance to repent before punishing him.³⁰²

In contrast, scholars from other schools of Islamic thought present a somewhat blurred picture. Some of them believe in an immediate conviction of the one who commits blasphemy, while others take a lenient view to give him the chance to repent for his sin. Further, scholars who support taking a lenient view have difference of opinion over the time given to the accused to repent as whether it should be one day, three days, one month or unlimited period. Likewise, they disagree over the issue of repentance by non-Muslims: some hold that it could only be accepted if the accused converts to Islam.

I believe that the silence of section 295-C PPC, 1860, over the issue of repentance has encouraged fundamentalists to take the law into their own hands without leaving any room for repentance. This is quite understandable, as these extremist elements get implied support from the very text of this provision. The provision supports the punishment by death only, without allowing any sort of repentance. So they consider their action of out-right killing of one accused of blasphemy to be warranted under the law. Similarly, the argument that repentance of a non-Muslim cannot be accepted unless they convert to Islam is not well founded in my view. Rather, it is against the express verse of the Holy Quran which says “There is no compulsion in the religion [Islam].”³⁰³

³⁰²*Kamali, supra* note 258 at P222-236.

³⁰³ *Ibid* at 88.

Against this backdrop, it could be safely argued that the law of blasphemy as enshrined in section 295-C PPC, 1860, in its present form is not only repugnant to the common law, but also against the Islamic principles of the 'Hanafi' school of thought, the one followed by the majority in Pakistan. Moreover, the absence of the element of 'repentance' in the text of the said provision has also given rise to religious intolerance. It is imperative for the government to modernize the law of blasphemy with addition of the above said features keeping in view the lenient view taken in Islam so that misuse of law could be diminished. Thus, an amended law should be set in motion only against those individuals who have committed the act of blasphemy with deliberate knowledge and intention to outrage the religious feelings of the followers of a particular religion. Keeping in view the Islamic principle that exonerating hundred culprits would be better than punishing even a single innocent person, it is far better to free a real culprit owing to flawed legislation than to victimize any innocent soul on the altar of a broad and draconian law of blasphemy.

5.10 Judges and Blasphemy

Unfortunately, cases pertaining to blasphemy in Pakistan have been mishandled by trial courts since they are affected by their own peculiar problems and extraneous factors which have played a very negative role in the delivery of justice. Judges in Pakistan are paid normal salaries, but they have a huge amount of work to deal with, so they are always overburdened. They face pressures from different corners, such as government, higher judiciary, bars, press, and society. Thus, they cannot pay

equal attention to each case due to such an enormous amount of workload and pendency. So they treat cases of blasphemy in a routine way like other cases ignoring the sensitivities and implications attached to them.

It has been frequently observed that their judgments result in convictions since they do not want to risk their lives for saving the ones who are charged with blasphemy. They prefer to convict the accused, notwithstanding the standard or reliability of evidence, leaving the matter to be finally rectified by the courts at the Appellate level. The matter lingers on for a long time until the appeal is fixed before an Appellate court, thus wasting many precious years of the life of an innocent victim who also constantly faces the risk of being killed by fanatics during this period of detention. Increased salaries, less workload, better protection of life, and improved training could be a solution. But I think that if the law remains open ended, having no regard for intention, thus, providing no defenses to victims. And, if death sentence remains the only valid punishment for the offence, judges would still find themselves in a predicament position not favorable to acquit victims due to threats from fundamentalists. This is so because, so long as the focus is purely on religion, it is easier for these radicals to see every acquittal as an insult to God or another blasphemy in itself. However, if blasphemy is modernized under hate speech law and the focus is shifted from religion to political matters, there would be less for extremists to get upset about.

CHAPTER 5

5. Conclusion

In conclusion, I have described the gloomy and desperate picture demonstrating the misuse of blasphemy law in Pakistan. It has indeed become an easy way to unleash ones' vendetta against opponents by putting them in jail for many years for a false accusation over a crime they never committed. In the light of above discussion, I hold that textual broadness, procedural irregularities, social fanaticism, absence of defenses or exceptions in the law, and above all, harsh punishment like death penalty, have collectively contributed to make section 295-C PPC, 1860, a very dangerous legislation. There is a dire need to reform and modernize this law immediately keeping in view the real spirit of Islam and established principles of criminal justice. It is not only a defective legislation; it also gives rise to intolerance in society which ultimately plays havoc with other aspects of life that are already disturbed in Pakistan.

Thus, I have argued that blasphemous prosecutions are politically, socially, economically and culturally motivated while religion is only used as a legitimizing tool by opportunists. Freedom of expression is a quintessential right in a democracy. It has an interactive relationship with other fundamental rights. But no right is absolute; thus there is room for some regulation of free expression even in a society that has freedom of speech as a fundamental democratic value. For this reason, I believe that a narrowly designed criminal provision which prohibits hate speech,

while clearly defining what is prohibited and providing appropriate defenses, is a justified limit on freedom of expression.

I have argued that blasphemy, to the extent it should be dealt with by the law, should be regarded a sub-category of hate speech. My thesis is that blasphemy should not be a separate crime instead some aspects of blasphemy should be dealt with under a more modern conception of carefully designed hate speech laws. Similarly, punishments prescribed for the offence of blasphemy, after being stipulated as hate speech, must extensively be curtailed. Overall, I suggest, no punishment for orthodox blasphemy laws but a lesser degree of punishment for the modern hate speech offence.

The law should concern itself only with those aspects of blasphemy which incite hatred against a group which is identifiable on the basis of religion. More specifically, I have argued that Pakistan should repeal its blasphemy law and instead introduce a criminal provision patterned on the Canadian hate speech section of the *Criminal Code* (s319).

Canada has been selected as a cogent example for its extensive system of hate speech regulation, in light of the fact that the importance of free speech has not been denied there. Canada's example reinforces the argument that if a law to proscribe only a particular category of speech is carefully designed to extend reasonable exceptions to eliminate the chances of misuse, then it may be justified in a free and democratic society. Such legislation cannot be seen as blindly sweeping down the slippery slope, because it would limit only a particular kind of expression without

affecting other freedoms. It would also leave no unbridled discretionary powers in the hands of the government, courts, or the majority

These provisions would permit expressions like satire, humor and disagreement, and would be invoked only when the limits of decency are crossed and violence is apparent in light of the cultural, historical legal and religious context of the society at hand. The law would also provide measures or supervisory mechanisms to control its misuse or abuse. It would not only control hate speakers but also those who may try to take the law into their own hands to promote extremism.

Further, Canada has gone through the hate regulation debate and, having considered the arguments for and against regulation, has decided to uphold criminal hate speech prohibitions. It has succeeded in creating equilibrium between freedom of expression and censorship of hate speech, and, thus is a guiding model for countries that need to diminish hate and intolerance within their borders.

The hate speech provisions of the *Criminal Code* are much more precisely worded and have been upheld by the Supreme Court of Canada as a justifiable infringement of freedom of expression. Therefore, I believe that the harms relating to blasphemy which the state could justifiably attempt to control are those aspects which resemble hate speech. Section 319 is narrowly designed, has proper defenses and cannot be invoked without permission from the Attorney General. This seriously curtails the potential for the kinds of misuses described in the above discussion on Pakistan's blasphemy laws. While s. 319 does infringe freedom of religion and expression, I agree with the analysis of the Supreme Court of Canada that such an

infringement is justifiable. Once hate speech provisions are added to the criminal law in Pakistan, the current overly broad blasphemy section could be repealed.

Finally, I would again argue that the current blasphemy laws create radicalism and discrimination, in the society, thus making Pakistani society petrified for their fate in the hands of fundamentalists. However, the proposed Canadian criminal code hate speech provision helps in achieving the objective of equality and modernism. It does not favour any particular religion, sect, cast, class or creed, and, thus, provides an atmosphere of mutual harmony in the society. I believe that adopting a hate speech provision based on the Canadian model in Pakistan is an objective which must be achieved as soon as possible.

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