ABSTRACT

This paper seeks to examine the compatibility between the blasphemy laws in Pakistan and the traditional Islamic jurisprudence governing the same. In order to achieve its aim, this paper undertakes a discussion of the historical context in which the traditional Islamic principles governing ‘blasphemy’ and ‘apostasy’ were enunciated. This context provides a working standard for a critical assessment of the Pakistani law against apostasy and blasphemy. However, any assessment of the current legal framework in Pakistan remains incomplete without an analysis of the historical and constitutional context in which the blasphemy laws were introduced in British India and, subsequently, in Pakistan. Accordingly, this paper offers a comparative analysis of the laws introduced in these territories in terms of definition, intention and their relation to religion, and will examine the extent to which the blasphemy laws in Pakistan reflect traditional Islamic law. The analysis will highlight the difference in the spirit of these laws in order to unravel the precise legislative intent underlying the penalisation of blasphemy in traditional Islamic jurisprudence, in the legal provisions of British India and, subsequently, in the Pakistani legal landscape. The benefit of this approach is to provide assistance in drawing a comparative contrast between the legal elements, such as the actus reus, intention, evidence, defences, procedure and punishment, in traditional Islamic jurisprudence and that of the law in Pakistan. Where necessary, a resort to case law, enunciated by the higher judicature of Pakistan, has been made in order to facilitate the discussion regarding the meaning and operation of these laws.
INTRODUCTION

This paper seeks to examine the compatibility between the blasphemy laws in Pakistan and traditional Islamic law\(^1\). Part I of the paper seeks to give an overview of the law against blasphemy and apostasy as contained in traditional Islamic jurisprudence or *fiqh*. To extract any law from traditional Islamic law is a task of legal construction and a matter of great intellectual resolve, especially in relation to much disputed laws such as those regarding blasphemy and apostasy. To discuss the jurisprudence of pertaining to these, Part II will provide a discussion on the various interpretations of these concepts. At the top of the hierarchy of the sources of Islamic law are the primary sources of Quran and Sunnah, followed by the consensus of the companions, their successors and the early jurists, which is known as *Ijma*.\(^2\) This will be followed by the legal elements of the laws against apostasy and blasphemy in traditional Islamic law, such as, the *actus reus*, procedure, punishment, and legal effects of the offence. These will be found in the *fiqh* developed by the well-established schools of Islamic jurisprudence, namely, the Hanafi, Shafi’i, Hanbali, Maliki, and the Ithna-Ashari School of the Shiite sect. The first chapter will be concluded with a critical analysis of the law against apostasy and blasphemy in traditional Islamic law.

Part II will analyse the historical and constitutional context in which the blasphemy laws were introduced to British India and Pakistan. It will be followed by an analysis of the difference between the laws introduced in British India and later in Pakistan, in terms of definition, intention and their relation to religion. To understand the development of the law in Pakistan, this part of the paper will also engage statistics related to the cases litigated under the blasphemy laws in Pakistan and their effect on society. A more holistic discussion of cases would follow in the ensuing parts.

The Third Part will form the main portion of analysis in the paper and will examine the extent to which the blasphemy laws in Pakistan have managed to reflect the traditional Islamic law. It will begin by comparing the spirit of the two different sets of laws in terms of the offence they intend to penalise. This will be followed by a comparative analysis between the legal elements of the two sets of laws including the *actus reus*, intention, evidential requirements, defences, procedure, and punishment. This comparison will not only be done with regards to the anti-blasphemy provisions in the Pakistan Penal Code, 1860\(^3\), but also with respects to case law before the Pakistani courts, as the latter will assist in understanding the

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\(^1\)See Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, Oxford) (1982), where traditional Islamic Law or *Sharia* Law is defined as “an all-embracing body of religious duties, the totality of God’s commands that regulate the life of every Muslim in all its aspects; it comprises on an equal footing, ordinances regarding worship and ritual, as well as political and legal rules”. The primary sources of traditional Islamic Law are the *Quran* and *Sunnah*, while the secondary sources are *Ijma* and *Qiyas*.


\(^3\)Pakistan Penal Code, 1860, No. XLV of 1860. Hereinafter referred to as the “PPC”. 
way the laws have been interpreted and what they have been made out to mean. For this, the cases between 2000 and 2011 of the Supreme Court and High Courts of Pakistan dealing with all the blasphemy laws have been selected as a sample. This will finally be followed by a conclusion.

I.

THE LAWS AGAINST APOSTASY AND BLASPHEMY UNDER THE TRADITIONAL ISLAMIC LAW

A. The Interrelation Between Apostasy and Blasphemy in Sharia law

Within traditional Islamic law, the commission of the offence of blasphemy by a Muslim was recognised as a mode of committing the offence of apostasy⁴. Black’s Law Dictionary, Eighth Edition, defines ‘blasphemy’ as ‘irreverence towards God, religion, a religious icon or something else considered sacred’ or ‘the malicious revilement of God and religion’. There is, however, no fixed definition of the offence of blasphemy under traditional Islamic law. As will be seen further, different Islamic jurists considered acts or omissions ‘blasphemous’ over time. These very acts and omissions, when committed by a Muslim, were construed as evidence of the latter’s renunciation of Islam, and also of having committed apostasy or riddah⁵. This severance of ties with the religion of Islam can be completed through acts or omissions amounting to ‘expressions of unbelief,’ whether explicit or implicit⁶.

In short, the question of blasphemy as an offence, independent of apostasy, only arises, under traditional Islamic law, in relation to non-Muslims. Whereas, where alleged blasphemer is a Muslim, the offence of blasphemy is subsumed under the offence of apostasy. Therefore, this Chapter will critically analyse both concepts, apostasy and blasphemy, since, the laws against blasphemy in Pakistan are applicable against both Muslims and non-Muslims, and any comparative legal analysis regarding one would be incomplete without the other.

⁴See David Forte, Apostasy and Blasphemy in Pakistan, 10 CONN. J. INT'L L. 27 (1994).
⁵Riddah, or apostasy, is the renunciation of Islam by a Muslim.
⁶That Muslim individual may have been born as a Muslim or could have been converted later on in his life. It also does not matter whether he or she would have converted to another religion after leaving Islam or not. See Rudolf Peters & Gert J. J. De Vries, Apostasy in Islam, 17:1 DIE WELT DES ISLAMS 1-25 (1976-77).
B. ‘Apostasy’ and ‘Blasphemy’ Within the Sources of Traditional Islamic law

1. Apostasy and Blasphemy as Addressed in the Quran

At the outset, it must be stated that the Quran mentions apostasy at least thirteen times, but does not talk about any worldly punishment for this. However, it is declared to be a religious sin that would have negative consequences for the offender in the after-life. Verse 16:108 of the Quran states:

“Who so disbelieves in God after having believed, unless it be one who is forced and whose heart is in the quiet in the faith, but whoso expands his breast to misbelieve, on them is the wrath from God, and for them is mighty woe. That is because they preferred the love of this worlds life to the next; but verily God guides not the unbelieving people”.

Similarly, verse 2:214 of the Quran warns and further stigmatises the Muslim blasphemer or apostate by stating “Whosoever shall apostatise from his religion and dies, he is an infidel”. Thus, many of these verses warn Muslims of grave consequences for the act of repudiating Islam7.

As far as blasphemy by a non-Muslim is concerned, the Quran does not talk about it explicitly, however, there are verses that could be interpreted to signify the amount of sin one could incur by mocking the Prophet or any other part of Islam. This can be seen in the Quran’s attitude towards the ‘hypocrites’8. The Quran describes them with various negative connotations such as ‘liars’ (2:10), ‘corruptors’ (2:12) and ‘unbelievers’ (2:19). Their ‘heresy’ or ‘blasphemy’ is illustrated in the Quran through such statements as:

“And when it is said to them, ‘Believe as the people believe’, they say, ‘Shall we believe as the fools believe?’ Is it not that they themselves are the fools, but they know not? When they meet those who believe they, say, ‘We believe’. But when they secretly withdraw to their devils, they say, ‘we hold with you. We are only mocking’” (2:13-4).9

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8Hypocrites were those during the time of the Prophet who outwardly posed themselves as Muslims, yet, remained unbelievers inwardly. See, Abdullah Saeed, “A Fresh look at Freedom of Belief in Islam” in DAMIEN KINGSBURY & GREG BARTON, DIFFERENCE AND TOLERANCE: HUMAN RIGHTS ISSUES IN SOUTHEAST ASIA (Geelong Vic. ed., Deakin University Press) (1994).

Interestingly, the only verses that do talk about the punishment of blasphemers, Muslims or otherwise, when they pose a threat to the Muslim community through treason or war. Verse 5:33 of the Quran states that:

“The only reward for those who make war upon Allah and his messenger and strive to create disorder in the land, will be that they will be slain or crucified or have their hands and feet on alternative sides cut off, or will be expelled from the land. Such will be their degradation in the world, and in the hereafter theirs will be an awful doom, save those who repent before you empower them”\(^{10}\)

With the historical context in mind where Muslims were engaged into an existential struggle, it can be deduced that the aim of the verse is to penalise treason, rebellion or threat to the state.

2. Concept of Apostasy and Blasphemy within the Sunnah or Traditions of the Prophet

The binding authority, prescribing death as punishment for blasphemy, is a tradition (or Sunnah) of the Prophet. According to Bukhari’s collection of hadith\(^{11}\), the Prophet is reported to have said ‘Whoever changes his religion, kill him’ (9:57). However, the historical context of this statement\(^{12}\) becomes clear when it is read with another tradition of the Prophet where he stated that an individual could be executed, ‘who repudiates his religion and separates himself from the community’ (8:194) as narrated in Al-Bahyaqi’s collection\(^{13}\). One tradition that

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\(^{10}\) Similarly, the Quran states “But if they repent and establish worship and pay the poor-due, then are they thy brethren in religion. We detail our revelations for a people who have knowledge. And if they break their pledges after their treaty (hath been made with you) and assail your religion, then fight the heads of disbelievers”. See ABUL ALA MAUDUDI, THE PUNISHMENT OF THE APOSTATE ACCORDING TO ISLAMIC LAW (Voice of Martyrs) (1994).

\(^{11}\) Another tradition of the Prophet holds that he said, “The blood of a believer should never be shed except in three cases; that of the adulterer, the murderer and whosoever forsakes the religion of Islam”. See, SAMUEL M. ZWEMER, THE LAW OF APOSTASY IN ISLAM (Marshall Brothers, UK) (2006). Interestingly, according to some sources, this verse ends with ‘…forsakes (or abandons) his religion and separates himself from the community’. Hence, the additional element of separation from the community is equated with repudiation of Islam. See Abdullahi A. An-Na’im, The Islamic Law of Apostasy and its modern applicability: A case from the Sudan, 16:3 RELIGION (ROUTLEDGE), 197-224 (1986).

\(^{12}\) Indeed, a historical or contextual interpretation of a hadith is nothing new to Islamic law, provided that it is the only sensible interpretation of the hadith. See, Mohd H. M. Kamal, ‘Meaning and Method of the Interpretation of Sunnah in the Field of Siyar: A Reappraisal’ in 7 MARIE-LUISA FRICK & ANDREAS TH. MÜLLER, ISLAM AND INTERNATIONAL LAW: ENGAGING SELF-CRITICISM FROM A PLURALITY OF PERSPECTIVES, (Martinus Nijhoff Publishers) (2013).

\(^{13}\) Saeed, supra note 8. Saeed (1994) also uses other hadith as legal sources to interpret the law against apostasy as found in this hadith. He narrates (168-9) from Al-Bahyaqi’s collection where the Prophet refused to execute apostates, when suggested by his companions to execute hypocrites, merely because they were apostates, as they didn’t rebel against the Muslim community.
further testifies to the admixture of apostasy and rebellion against the state is when the Prophet sent for the execution of some members of the Ukl tribe, after they had converted to Islam and then murdered the shepherds and stole their camels after having apostatised and gone on leave due to their sickness. One may argue that, in addition to the expressions of apostasy, since these acts also involved threat to life and destruction of property, the latter played a material role in the Prophet’s reliance on verse 5:33 of the Quran. However, it is quite noteworthy that the same Sunnah offers nothing on blasphemy when committed by a non-Muslim.

3. The Consensus of the Jurists on ‘Blasphemy’ and ‘Apostasy’

After the death of the Prophet, the first Caliph, Abu Bakr prescribed death as a penalty for blasphemers and apostates, such as the false prophets, who lead their followers and tribes to not only apostatise from Islam but also to wage war against the Muslim state. This was followed by his successors, and was found to be well within the justification provided in the verse 5:33 of the Quran. However, the early jurists from the different schools of fiqh transformed the offences of blasphemy and apostasy as offences existing independently from the elements of treason. This development was in contrast to the reasoning given in the primary sources of the law.

At times, an individual jurist has even applied the law in order to assert his theological dominance. It is reported of Abul-Hasan al-Ashari, an adherent of the Shafi‘i school, to have applied his harsh construction of the term ‘ilhad’ both to non-believers and Muslim freethinkers alike.

For the Maliki jurist, Abu Bakr Muhammad al-Turtushi, it is important for non-Muslims not to express contempt for God or the Prophet in order to preserve their dhimmi pact with the Muslim state. An expression of blasphemy, according to al-Turtushi, would result in the loss of legal protection to the non-Muslim and

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14 Hadith 794, Sahih Al-Bukhari, Book 82, Volume 8.
15 Kamal, supra note 12.
16 Different fiqh schools or schools of jurisprudence give detailed explanations on the law against apostasy in their legal manuals. These texts include the classification of the crime, whether it is a hadd or a ta‘azir offence, the criminal procedure, punishment, civil consequences, actions that would amount to apostasy and conditions necessary to be liable. Examples of such legal manuals include ‘The Reliance of the Traveller and the Tools of the Worshipper: A Classic Manual of Islamic Law’ by Ahmed Ibn Naqib Al-Misri, an adherent of the Shafi‘i school.
17 lit: ‘deviate from.’ al-Ashari construed this to be synonymous with apostasy.
19 Zwemer, supra note 11. The dhimmi pact is the agreement between non-Muslims such as Jews and Christians, that are known as the ‘people of the book’, and the Muslim state, whereby the former pay a tax known as Jizya to the latter which results in their legal protection.
the transgression of the dhimmi pact and would result in punishment. Hence, the use of the offence of blasphemy against non-Muslims was inherently political.

4. The Actus Reus Elements of the Offences

It would be reasonable to state that, with a few exceptions, the same actions or conduct would come to constitute apostasy when committed by a Muslim, and blasphemy when committed by a non-Muslim. Contempt shown towards God, Prophet Muhammad, the Quran or any other article of the Islamic faith by a Muslim or non-Muslim would constitute apostasy and blasphemy, respectively. Apostasy can be committed through words or conduct. It can be implied or explicit.

Legal manuals by early traditionalists give extensive examples of acts that could amount to apostasy. The Hanafi scholar Shaykhzadeh, in his book ‘Madjma-al-ahnur’ holds that believing each species to have their own prophets, believing Jesus to be the son of god, and doubting the effectiveness of the angel of death, would all amount to blasphemy by a Muslim and hence apostasy. Furthermore, he holds that preferring an ascetic to a sinful scholar or translating the Quran into Persian would also amount to apostasy. Indeed, different sects clashed with each other on acts that would constitute apostasy. The Kharijites labelled grave worshippers as apostates, while the majority of Hanafi legalists deemed the ecstatic sayings such as “I am the truth” by Sufis, such as, Mansur-Al-Hallaj and Yazid-Al-Bistami, to be blasphemous.

C. The Legal Effects of Apostasy and Blasphemy

There is a lack of consensus amongst the schools in relation to the legal effects of the said offences. Firstly, not all schools classify apostasy as a hadd offence whose penalty is fixed in the Quran and the Sunnah and which violates all the claims of God. The Hanafis and the Shiites claim it to be a ta’azir offence as, according to them, it does not violate all of the claims of God. All five of the main

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20Forte, supra note 4. It is important to note that although these jurisprudential schools made out blasphemy to be a strict religious offence apart from rebellion, the reasoning of the original law against state rebellion mixed with blasphemy and apostasy seeped into their reasoning of the separate offence of blasphemy. Hence, the Hanbali scholar Ibn Taymiyyah requested the execution of a Christian woman who had insulted the Prophet for the necessary good order or effective functioning of the state.


22Peters & De Vries, supra note 6.

23However, this opinion did not ultimately prevail. See, Frank Griffel, TOLERATION AND EXCLUSION: AL-SHAFI’I AND AL-GHAZALI ON THE TREATMENT OF APOSTATES by, 64:3 BULLETIN OF THE S.O.A.S, 339-354 (2001).

24Ernst, supra note 9. A minority of Hanafi legalists, though, did not consider ecstatic sayings of Sufis to amount to apostasy. Sufi Islam with its emphasis on the internalization of Quran was less concerned with textual strictness.

25Peters, supra note 21.
schools do, however, consider blasphemy when committed by a non-Muslim to be a *ta’azir* offence where punishment is to be awarded at the discretion of the judge.

1. **Punishment for Apostasy and the ‘Repentance and Delay’ Procedure**

   Although there is a consensus amongst the jurists from the early centuries of Islam regarding death as the punishment for apostasy, with beheading as the normal method of execution, the difference that arises between the different schools with regards to whether a convicted apostate is to be executed immediately, or whether he is to be provided with, what one may term as the ‘repentance and delay procedure’ or what was traditionally termed as *istitaba*.

   *Al-Bahyaqi’s* collection of *Hadith* (168-9) reports that the Prophet had reprimanded his companion, Usama Bin Zayd, for killing a perceived apostate when the latter had recited ‘I believe in Allah’. It did not matter that the companion had argued that the perceived offender did so under the threat of retaliation.  

   This acknowledgement of repentance seeped into the reasoning of some of the schools. The repentance and delay procedure entails that after the apostate had been fully convicted by a traditional Islamic court, his execution shall be delayed for three days during which he would have the option of repenting through reflection. The reasoning behind this is that certain doubts may have entered the offender’s mind and this procedural option is available to him to dispel those. Also, since apostasy, is deemed by schools such as the *Shafi‘i* school to be a *hadd* offence that violates the claims of God and not men, it would be prudent to offer the offender a chance at repentance or to make a decision not to sever his ties with Islam.  

   Both the *Shafi‘i’s* and the *Hanbalis* consider the repentance option for a convicted apostate to be obligatory, while the *Hanafis* consider it as recommended but not obligatory. The *Shiites* consider it necessary only for an apostate that had converted to Islam, while a born Muslim is to be put to death immediately. In the *Maliki* jurisprudence, however, such a requirement does not exist at all.

   The *Hanafis* argue that although it is reasonable to defer the punishment, the procedural option is not obligatory since the apostate, after his crime, turns into an infidel enemy rather than a *dhimmi* under the protection agreement. The *Hanafis* may also at times apply a *ta‘azir* punishment for blasphemy by a Muslim and not consider the offence to be apostasy due to the offence not being proved beyond shadow of a doubt. The *Malikis*, however, always constitute blasphemy by

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26 Saeed, *supra* note 8.  
27 Peters, *supra* note 21. This option was also reasoned to be available to dispel the defense of *shubha* or uncertainty, which is a defense in *Shariah* against most if not all offences.  
a Muslim to be apostasy and mandate immediate execution. This distinction between the two schools can be seen from the trial of the Sufi mystic, Mansur-al-Hallaj, with the Hanafi judge accepting repentance whilst the Caliph choosing the Maliki judge’s opinion and ordering the immediate execution of Hallaj.

a. Exceptions to the ‘Repentance and Delay’ Procedure

Even the schools which maintained the repentance-option as obligatory, had chosen to do away with it in certain exceptional scenarios. According to the Hanafi scholar Shaykhzadeh, a certain set of apostates, including magicians and those who keep on committing apostasy again and again, were not to be given the repentance option as their crimes were irrevocable. Most importantly, there is a consensus between all schools that an apostate who insults Prophet Muhammad was to be executed immediately without the repentance option. Also, historically, zindiqs, were not offered the repentance option since they were deemed to be secret apostates and no one could really decipher their change of loyalty to Islam. However, execution of the zindiqs seems to be attributable to the then prevalent historical and socio-political elements, as opposed to juridical reasoning stricto sensu. Shafi’i himself held that the Quran stresses that nobody can judge the faith of a Muslim and that hypocrites who were also secret apostates were to be judged in the next life only.

2. Treatment of a Female Apostate

Differences also exist between the different schools with regard to the execution of the female apostate. The Shafi’is, Malikis, and the Hanbalis believe that a female apostate should face the death penalty, as she would have committed a crime of great magnitude similar to that of the male apostate. However, the Shiites and the Hanafis do not prescribe the death penalty for female apostates as they argue that the female is physically too weak to challenge the Islamic state. They point to a tradition by Abu Dawud, where the Prophet while riding, passed by a woman who had been killed and commented that the woman was not capable of fighting after which he ordered others not to kill women, serfs and children. The

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30They may only give a discretionary punishment when the blasphemy is minor and when there is only one witness. Repentance, however, is still not an option. See Blasphemy: Islamic Concept (1987) by Carl. W. Ernst.
31Kadri, supra note 7, Chapter 11 ‘No Compulsion in Religion? Apostasy, Blasphemy and Tolerance’.
32Peters & De Vries, supra note 6.
33The term ‘Zindiq’ is a pre-Islamic Persian term that was used to describe the religion of ‘Manichaeism’ that was not offered protection under the dhimmi pact. Gradually, it came to denote ‘any deviation from Islam’ that was ‘not openly expressed’. For more on Zindiqs, see, Kersten, supra note 20; see, also, Kadri, supra note 9.
34Peters, supra note 21.
35Griffel, supra note 23.
37Alsoufi, supra note 28.
Hanafis prescribe women to be held as hostage where they would be beaten after every three days until they return to Islam. The Shiites, on the other hand, hold that they should be beaten during every prayer time until they return to Islam. 38

3. Punishment for a non-Muslim Blasphemer

All schools are unanimous in maintaining that a non-Muslim blasphemer is to be put to death, since the expression of blasphemy entails a violation of the dhimmi agreement with the state, as a result of which he may even be treated as a prisoner of war. The theological background for the punishment of the blasphemer was to avoid fitna or chaos, as blasphemy against Islam could undermine the faith and enable Muslims to turn away from Islam 39. The underlying reasoning which supported death penalty as a legal consequence for the offence of blasphemy was to remove any threat to the state that the offence may have posed, and the punishment for the offence was deemed necessary for the ‘good order’ of the state 40. The punishment for blasphemy was seen as preserving the ideological legitimacy of the state, which was seen as a necessity for the existence and effective functioning of the state making the offence of blasphemy akin to high treason.

D. A Critique of the Laws against Apostasy and Blasphemy under Traditional Islamic law

The first two sources of Islamic law, i.e., the Quran and Sunnah, being divine sources, are referred to as the revealed and inspired portion of traditional Islamic law, whereas, the consensus and opinion of the jurists can be deemed to be the evolutionary portion of Sharia law, which according to modernist scholars, can change with time. 41

The debate between modernist and traditionalist Islamic scholars today is whether the primary sources had ever meant to prescribe laws against apostasy and blasphemy independent of treason, threat to the state or rebellion. Contrary to other modernist scholars, An-Na’im (1986) agrees with the traditionalists that the Quran does prescribe laws against apostasy and blasphemy independent of the political crimes and that the modernist argument has no basis in traditional Islamic law. 42 However, the aforementioned interpretation of the primary sources runs counter to An-Na’im’s assertion and lends legitimacy to the modernist argument.

A number of reasons support the argument that the primary sources of traditional Islamic law, such as verse 5:33 of the Quran, were intended to prescribe

38Peters & De Vries, supra note 6.
40Forte, supra note 4.
41See Freedom of Thought and Expression in Iran: A comparative study of the ICCPR, Islamic Laws and Iranian Laws by Nargess Tavassolian.
42An-Na’im, supra note 11.
laws against political crimes in the form of apostasy and blasphemy due to a very peculiar social context. The Prophet’s disapproval of the killing of female apostates, based on the reasoning that the latter could not pose any threat to the state is one of them. Moreover, Saeed (1994) argues that the Quran mentions punishment for minor offences such as theft and adultery, and if it wanted to prescribe a law against apostasy alone, it would have done so. More noteworthy is the fact that neither the Quran nor the Sunnah prescribe any penalty to hypocrites, who were the first apostates.

Accordingly, the argument of the traditionalist that apostasy has its source from the Quran and the Hadith, cannot be plausible without the element of treason. It seems that the jurists themselves were confused in relation to the classification of the offences, since, although they had classified them as religious crimes independent of any political characteristic, their application of the law and the reasoning for it was political, as shown above, where they too foresaw a threat to the established socio-political order.

II.
THE DEVELOPMENT OF BLASPHEMY LAWS IN PAKISTAN

Sections 295 to 298 of Chapter XV of the PPC are the anti-blasphemy provisions entitled ‘Of Offences relating to Religion,’ and are generically known as the ‘blasphemy laws’. Their meaning, purpose and objective remains unclear unless understood in the context in which these previsions were legislated. The blasphemy laws were promulgated with distinct paraphernalia and, therefore, it is essential to illustrate the socio-historic context and constitutional background in which the blasphemy laws came into being.

A. Blasphemy Laws during the Colonial Era

The intention of the British Raj or the British colonial state in India in doing away with Islamic Criminal law, led it towards drafting the Indian Penal Code which was ultimately passed as the Indian Penal Code, 1860. Furthermore, taking

43Saeed, supra note 8.
44See, Osama Siddique & Zahra Hayat, Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan-Controversial Origins, Design Defects and Free Speech Implications, 17:2 MINN. J. INT'L L. 304-385 (2008). The Indian Law Commission that was formed in 1837 to draft the Indian Penal Code commented that Islamic Criminal law would be the last form of criminal law that any enlightened or humane government would approve of.
account of the teeming religious diversity of British India, it is clear that the intention of including Chapter XV into the Indian Penal Code was to maintain harmony between the different religious groups. The Preface of Chapter XV itself provides confirmation this motive. It states that:

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

Initially, Chapter XV ranged from Sections 295 to 298. Section 295, which was titled “Injuring or defiling place of worship, with intent to insult the religion of any class,” provided that:

“Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both”.

Similarly, Section 298, which was titled “Uttering words, etc., with deliberate intent to wound religious feeling” provided as follows:

“Whoever, with the deliberate intention of wounding the religious feeling of any person, utters any word or makes any sound in the hearing of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both”.

Between 1860 and 1927, there were seventy riots in India between the majority Hindu and minority Muslim communities, due to politico-religious issues such as the performance of religious rituals or conflicts between various revivalist movements. These riots resulted in massive destruction of life and property. In order to prevent such breakdown of law and order, the colonial state sought to protect the religious sentiments of all communities by inserting Section 295-A into Chapter XV of the PPC through the Criminal Law Amendment Act (XXV of 1927).

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45See MEHRO SIDDQUI & ASMA JEHANGIR, FROM PROTECTION TO EXPLOITATION: THE LAWS AGAINST BLASPHEMY IN PAKISTAN (AGHS Legal Aid Cell, Lahore) (2007).
Section 295-A was titled ‘Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs’ and provided that:

‘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 the religion or 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’\(^{48}\).

With the partition of India and the independence of Pakistan in 1947, Pakistan inherited the same anti-blasphemy sections along with everything else in the Penal Code in the form of the Pakistan Penal Code.

B. Islamisation of Laws in the 1980s

Up until 1982, the only amendments to the already existing blasphemy laws had been the replacement of ‘His Majesty’s subjects’ with ‘the citizens of Pakistan’ through the Adaption Order 1961. Pakistan’s third and incumbent Constitution was prepared in 1973 during the regime of Pakistan’s first democratically elected Prime Minister Zulfikar Ali Bhutto through the consensus of elected representatives. The Constitution contained a number of Islamic provisions\(^{49}\), establishing a parliamentary democracy and a federation at the same time. The Islamic provisions of the Constitution, provided that, no law may be passed against the injunctions of Islam\(^{50}\), for offices of the head of the state and that of the Prime Minster to be occupied by persons who shall be Muslims\(^{51}\)\(^{52}\).

The then Prime Minister gradually gave way to more religious legislation in response to mounting pressure from his right-wing fundamentalist opponents. The Second Amendment to the Pakistan’s Constitution was passed in 1974, which had the effect of declaring the Ahmadiyya community ‘non-Muslim’\(^{53}\). The Ahmadi

\(^{48}\)See Blasphemy Laws in Pakistan: A Historical Overview, published by Centre for Research and Security Studies (CRSS).

\(^{49}\)The Objectives Resolution that itself contained a number of Islamic guidelines such as ((1) Sovereignty belongs to Allah, (3) The principles of democracy, freedom, equality tolerance and social justice, as enunciated by Islam, shall be fully observed, (4) Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings of Islam as set out in the Quran and Sunnah), was made the preamble of the constitution. See Religious Minorities in Pakistan by Iftikhar. H. Malik.

\(^{50}\)PAKISTAN CONST art 227.

\(^{51}\)PAKISTAN CONST art 41(2).

\(^{52}\)PAKISTAN CONST art 91(3).

\(^{53}\)The main conflict between the ahmadiyya and mainstream Muslims seems to be on the status of Mirza Ghulam Ahmed, who founded the movement in 1889 and claimed to be a Messiah. Orthodox Sunni Muslims deem the finality of the Prophethood of Prophet Muhammad to be a central tenet of faith, whereas, Ahmadi’s consider him to be the last law-bearing Prophet. The Ahmadiyya movement is itself split into the Qadiani group and the
community was listed as such alongside several other non-Muslim minority communities under Article 260(3) of Pakistan’s Constitution.

After coming into power through a military coup, General Zia-ul-Haq’s decade-long dictatorship had sought to introduce various legal initiatives under the garb of Islamisation, in order to give a semblance of legitimacy to the regime. The Federal Shariat Court (FSC) was created and was bestowed with the power to examine the compatibility of any law with the injunctions of Islam. Its decisions were subject to appeal from the Shariat Appellate Bench (SAB) of the Supreme Court that was created at the same time. The Objectives Resolution was inserted as Article 2-A directly into the Constitution through the President’s Order 14 of 1985 or the ‘Revival of the Constitution of 1973 Order’ 1985. The Ninth Amendment to the Constitution of Pakistan, enacted in 1985, sought to make the Holy Quran and Sunnah, the supreme law of the land, which were to act as guidance for legislation. Before this amendment, constitutional law in Pakistan only mandated all laws to be in conformity with Shari'a law. This was intended to make traditional Islamic law supreme.

C. The Insertion of New Blasphemy Laws into the PPC

During this period of Islamisation, a number of new anti-blasphemy provisions were added to the PPC. In 1980, Section 298-A was added to the PPC, and is titled ‘Use of derogatory words, etc., in respect of holy personages.’ The provision provided as follows:

‘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 any wife or members of the family, of the Holy Prophet, or any of the righteous Caliphs or companions of the Holy Prophet shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or both.’

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54Siddique & Hayat, supra note 44.

55PAKISTAN CONST art 203-D. The Federal Shariat Court can declare void any law that it declares ‘repugnant to the injunctions of Islam’ and refer it to the Parliament for repeal.

56PAKISTAN CONST art 203-F.


58The Bill was never passed by the National Assembly because it was dissolved. See Amendments to the Constitution of Pakistan, published by the Pakistan Institute of Legislative Development and Transparency.

59The Enforcement of Shariah Ordinance followed this amendment, in 1988 that was aimed at enforcing Shariah law. Forte, supra note 6.

60PPC, Section 298-A.
In 1982, Section 295-B was also added to the PPC. It is titled ‘Defiling, etc., of Holy Quran’ and provides that ‘Whoever wilfully defiles, damages or desecrates a copy of the Holy Quran or an extract therefrom or uses it in any derogatory manner or any unlawful purpose shall be punished with imprisonment for life’.

In 1984, Ordinance XX titled ‘Anti-Islamic Activities of Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984’ was passed. It added Section 298-B and 298-C to the PPC. Section 298-B is titled ‘Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places’ and states the following:

“(1) Any person of the Qadiani Group or Lahori Group (who call themselves Ahmadis or by any other name) who by words, either spoken or written, or by visible representation (a) refers to or addresses any person, other than a Caliph or companion of the Holy Prophet Muhammad (peace be upon him), as ‘Ameer-ul-Mumineen’, ‘KhalifatulMumineen’, ‘Khalifa-tul-Muslimeen’, ‘Sahaabi’ and ‘Razi Allah Anho’; (b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as ‘Ummul-Mumineen’; (c) refers to, or addresses, any person, other than a member of the family (Ahle-bait); or (d) refers to, or names, or calls, his place of worship as ‘Masjid’; shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine. (2) Any person of the Qadiani Group or Lahori Group (who call themselves Ahmadis or by any other name) who by words, either spoken or written, or by visible representation, refers to the mode or form of call to prayers followed by his faith as ‘Azan’, or recites ‘Azan’ as used by the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.”

Section 298-C, titled ‘Person of Qadiani Group, etc., calling himself a Muslim or preaching or propagating his faith,’ provides the following:

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

61 PPC, Section 295-B.
63 See, the report, supra note 49.
64 PPC, Section 298-B.
punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine’.  

These two provisions were intended to restrict the Ahmadiyya community from performing religious worship as ‘Muslims’, or to restrict them from using certain terms to refer to their places of religious worship. It was nothing but a deliberate attempt on part of the dictatorial regime to segregate the Ahmadiyya community and reduce their status as non-Muslims. The public expression of Ahmadi faith was regarded as blasphemous, and hence, was criminalised. As will be shown later, these laws have severely restricted the freedom of religion of the Ahmadi community.

In 1985, the non-representative assembly pushed for the addition of another anti-blasphemy provision. This took effect in 1986 in the form of Section 295-C of the PPC. The Section is titled ‘Use of derogatory remarks, etc., in respect of the Holy Prophet’ and provides: ‘Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine’.

In Muhammad Ismail Qureshi v Pakistan, the petitioner argued before the Federal Shariat Court that the ‘life imprisonment’ option under Section 295-C was repugnant to Islam because, he argued, the death penalty was prescribed in the Quran and Sunnah and could not be changed. The court after deliberating upon certain facets of Sharia law, accepted the petition, and argued that all jurists of different schools were unanimous that verse 2:136 of the Holy Quran prescribed death as a punishment for the insult of all Prophets. The court sent an order to the President of Pakistan asking him to take constitutional steps that would delete the ‘life imprisonment’ clause in Section 295-C, and if no changes were made before 30th April 1991, the words ‘imprisonment for life’ would cease to have effect. The amendment, however, was not made and the ‘life imprisonment’ option remains part of the law.

In the same year, the Criminal Law (Second Amendment) Act, 1991, was passed, which replaced the words ‘two years’ in Section 295-A of the PPC with ‘ten

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65 PPC, Section 298-C.  
66 It was presumed that since the Ahmadis consider Mirza Ghulam Ahmad to be a Messiah, they violate the central Islamic tenant of Prophet Muhammad being the last and final Prophet. Hence, the very public practice, so the presumptions holds, of the Ahmadi faith was to hurt the religious sentiment of Muslims. See, M. Nadeem A. Siddiqi, Enforced Apostasy: Zaheeruddin v. State and the Official Persecution of the Ahmadiyya Community in Pakistan, 14:1 LAW & EQUALITY: A JOURNAL OF THEORY AND PRACTICE 275-338 (1995).  
67 Siddiqui & Jehangir, supra note 45.  
68 PPC, Section 295-C.  
69 Muhammad Ismail Qureshi v. Pakistan, PLD 1991 FSC 10.  
70 Siddique & Hayat, supra note 44.
years’, hence, providing a stricter penalty than before. More importantly, Section 2 of the Enforcement of Shar’iah Act, also passed in 1991, defined Shariah as ‘the Injunctions of Islam as laid down in the Holy Quran and Sunnah.

D. Differences between Older and Newer Blasphemy Laws

As shown above, the context in which the pre-1980 and post-1980 blasphemy laws were introduced was remarkably different. While the former were the result of a colonial state trying to establish law and order in a society marred with religious diversity, the latter were the result of a military dictator resolving to legitimise his regime through a set of laws that were part of a larger Islamisation process in a state where Muslims already constitute the overwhelming majority. This itself leads to the main difference between the two sets of laws, i.e., the pre-1980 laws through their wording, aimed to penalise blasphemy against all religions, whereas, the post-1980 blasphemy laws only purport to penalise blasphemy against Islam: Section 295-B penalises the defiling of the Quran; Section 295-C penalises ‘Use of derogatory remarks’ in relation to Prophet Muhammad; Section 298-A penalises the ‘Use of derogatory remarks’ in relation to Islamic figures; and Section 298-B and 298-C, penalise blasphemy in the form of Ahmadis making themselves out to be Muslims.

Similarly, the wordings in the pre-1980 blasphemy laws place a great emphasis on the intent of the defendant, a requirement for one to be liable. For example, Section 294 mentions ‘intent to insult’; Section 295-A mentions ‘Deliberate and malicious acts intended’; and Section 298 mentions ‘with deliberate intent to’. This is in contrast to the post-1980 blasphemy law where the intention of an accused plays a substantially lesser role. Secondly, the provisions under the newer blasphemy laws are too broad, vague, and could lead to a number of diverse interpretations. Accordingly, acts or words which may not be disrespectful to Prophet Muhammad could be made out as such. This can be illustrated from the wording of Section 295-C, for which an ‘imputation, innuendo or insinuation’ is sufficient.

E. Case Statistics and Societal Impact from the New Blasphemy Laws

Since the 1980s, accusations of blasphemy have increased phenomenally. The political context in which the post-1980 laws were introduced may explain the

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71See, the report, supra note 47.
72Malik, supra note 57.
73One can decipher this through the wordings of all the pre-Independence blasphemy laws as Section 295 states ‘intent to insult the religion of any class’. See, PPC, Chapter XV titled ‘Of Offences relating to Religion’.
74Siddique & Hayat, supra note 44. These words do not explicate on what would ‘derogatory remarks, etc., in respect of the Holy Prophet’ would be.
reason underlying their misuse. Most blasphemy cases are dealt with at the trial court level. According to one study, the total high court cases, between 1960-2007, were ninety-one, while, the total number of apex court cases between 1960-2007 were thirteen. In this time-period, the highest numbers of cases were a combination of accusations brought under Section 295-C and other Chapter XV provisions, numbering forty-one, followed by thirty-nine alleged violations of Section 295-A. There were no blasphemy cases between 1981-1986. From 1986-1989, eleven cases alleging blasphemy were registered, a figure which rose to thirty-six between 1990-1994, and finally, up till forty-eight between 2000-2013.\(^{75}\)

No Muslim was accused of blasphemy pre-Independence, whereas, from 1953 to 2012, 253 Muslims along with 114 Christians, fifty-seven Ahmadis, and four Hindus have been accused of blasphemy.\(^{76}\) Naturally, the misuse of laws dealing with a matter as sensitive as blasphemy has translated itself into injustice being meted out to those accused of violating the laws. While before independence, only two people were extra-judicially murdered for blasphemy, the figure for post-independence has arisen to fifty-nine. This includes men, women, children, and old men. It is reasonable to claim that the new laws have emboldened encouraged vigilantism. Between 1990 and July 2012, nine people who had been accused of blasphemy became victims of mob violence, five had died in prison, one had been lynched, and one had committed suicide. Between July and August of 2012 two mentally challenged people were burnt alive on the accusation of blasphemy.\(^{77}\)

Pressure from fundamentalist political groups is the main factor in judges hasty deciding blasphemy cases impartially against the accused in trial courts. Perception against the defendant changes when he or she is a non-Muslim and it further impedes the right to a fair trial.\(^{78}\)


In Zaheeruddin v. State,\(^{79}\) the appellants challenged the constitutionality of Ordinance XX, by arguing that it conflicted with Article 20 of the Constitution.\(^{80}\) The court, in its majority judgment of four to one, held the Ordinance to be constitutional. Since Muslims, the court argued, were entitled to exclusive use of their epithets under the trademark and company laws of western countries, the

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\(^{75}\)Siddique & Hayat, *supra* note 44.

\(^{76}\)See, the report, *supra* note 47.

\(^{77}\)Id.

\(^{78}\)Mr. Mahbub Ahmad Khan gave this information to me in a research interview for the purposes of this paper. The interviewee was a legal advisor at the Human Rights Commission of Pakistan and was the defense counsel in State v Salamat Masih and Rehmat Masih (1995).

\(^{79}\)Zaheeruddin v. State, 1993 SCMR 1718.

\(^{80}\)PAKISTAN CONST art 20, is titled ‘Freedom to profess religion and to manage religious institutions’.
Ahmadi use of these epithets could be prohibited since it would enrage Muslims and result in the breakdown of law and order.81

This reasoning forwarded by the Court reflects sufficiently that the mainstay for the incorporation of the Ordinance XX into the PPC was to exclude the Ahmadi community from mainstream Islam at the behest of fundamentalist pressure, and to criminalise any attempt at their inclusion.

III.

A CRITICAL ANALYSIS OF THE BLASPHEMY LAWS IN PAKISTAN IN RELATION TO THE TRADITIONAL ISLAMIC LAW

Article 227 of the Constitution of the Islamic Republic of Pakistan stipulates that no law shall be enacted that is contrary to the Quran and Sunnah. In such circumstances, it is important to determine the extent to which Pakistani laws on blasphemy reflect the traditional Islamic law. The first chapter has already identified an anomalous gap between the offences of apostasy and blasphemy and their criminality according to the Quran and Sunnah, along with the interpretational stretch of its criminalisation offered by the early Muslim jurists.

It must be noted that Article 227 itself demands conformity with the Quran and Sunnah. Therefore, one has to give prime importance to the two primary sources of traditional Islamic law, i.e. the Quran and Sunnah, for comparative analytical purposes as far as the spirit of the laws are concerned. For the legal elements of the offences, the different schools of fiqh will be primarily used for comparative purposes; since, it is only in the fiqh, pronounced by jurists, that one finds the existence of the above mentioned legal elements, and Pakistani courts themselves use different schools of jurisprudence in their reasoning as shown above in Muhammad Ismail Qureshi v. State.82

A. The Spirit of the Laws and the Nature of the Crime

The crime envisaged by each of the anti-blasphemy provisions under Chapter XV of the Pakistan Penal Code, does not seem to involve elements of rebellion, treason or a threat to the state. It is plain blasphemy. The preamble to Pakistan’s existing Constitution lays out a consensus of sorts where, although sovereignty rests with god, it is ‘the will of people to establish an order’ while the

81 Siddiq, supra note 66.
82 Muhammad Ismail Qureshi v. Pakistan, PLD 1991 FSC 10.
‘state shall exercise its power and authority through the chosen representatives of
the people’, hence, envisioning a parliamentary democracy. Due to this
compromise, the Pakistani Constitution does not see blasphemy and political
offences such as treason in the same light, as the context in which the laws were
prescribed by the primary sources seems to be missing here.

Pakistan has separate laws such as Article 6 of the Constitution titled ‘High
Treason’ and those under Chapter VI of the PPC titled ‘Of Offences against the
state’ to deal with treason or sedition. Ironically, Chapter VI of the PPC can better
serve to penalise offences such as the ones referred to in verse 5:33 of the Quran.
Elements from Chapter XV such as ‘Use of derogatory remarks’ in respect of
Prophet Muhammad or any other holy personality cannot be made out to be treason
or rebellion against the state of Pakistan.

Similarly, while Ahmadis have been reduced to a status of non-Muslims,
they haven’t been made out to be enemies of the state. It is interesting to note the
Prophet’s statement (Al-Bahyqi, n.d., 8:194) where he held that grave
consequences would await those who separate from the community, and this
statement is held to be one of the founding authorities for the law against blasphemy
and apostasy in traditional Islamic law. Despite this, Sections 298-B and 298-C
penalise the inclusion of Ahmadis into the community or Ummah. The Quran and
the Constitution of Medina held monotheistic communities such as Jews and
Christians to be part of the Ummah, whereas, Ahmadis as a monotheistic group
have more in common with Sunni and Shiite Muslims than the Jews and Christians
of Medina. Hence, arguably the two sections tend to go against the spirit of the
Quran.

Sections 295-298C of the PPC mention no linkage between the
commission of the offence by a Muslim and the repudiation of Islam. Hence, not
only do the statutory words fail to reflect the spirit of the law against blasphemy
and rebellion as found in the primary sources of Sharia, they also err in classifying
the offence in accordance with traditional Islamic jurisprudence or fiqh. The blasphemy
laws do not differentiate between a Muslim and a non-Muslim
defendant, and apply to both. Although, the lack of differentiation between a
Muslim and a non-Muslim defendant can be deemed condemnable from an
international legal perspective, it is also contrary to all the schools of fiqh, as
illustrated in the discussion that took place in the First Chapter.

B. Interpretation and Application by the Courts

After analysing case law from 2000-2011 in relation to Chapter XV of the
PPC at the Supreme Court and High Court levels, it can be deduced that the courts
have attempted to bring the laws closer to fiqh and, in some cases, even with the
primary sources of traditional Islamic law. This has been mainly possible due to the

83See, Chapter 4 ‘Fight in the Way of God’ in REZA ASLAN, NO GOD BUT GOD 76-108 (Trade
golden rule of statutory interpretation, although, in some cases a plain textual interpretation too has been used.

In Ashiq Hussain v State, the Lahore High Court interpreted Section 295 in a literal manner and upheld the conviction by the lower courts against four Sunni appellants who had defiled holy objects inside a Shiite mosque. The appellants were members of a hard-line Sunni faction that had taken a procession near a Shiite mosque and the neighbourhood due to the assassination of their leader. They subsequently broke into the mosque and set it on fire, which also lead to the burning of a Quran inside the mosque. Hence, even with a literal interpretation such as this, the courts have followed traditional Islamic law in deeming the defilement of the Quran as blasphemous.

The courts have also been somewhat hesitant to interpret the statute in a manner contrary to traditional Islamic law. In Ayub Masih v State, the Supreme Court granted leave to the appellant to consider whether Section 295-C constituted a hadd offence or not, along with evidence requirements. The court later acquitted the appellant on the merits of the case, and held that there was no point in answering the hadd query.

Another major trend, which emerges from the analysis of the case law, is the skilful usage of traditional Islamic law by the courts, leading to successful acquittals due to lack of evidence and in order to shore up public legitimacy. In Niaz Ahmed v State, after acquitting the appellant for the lack of evidence, the court held, obiter, that a true Muslim could never blaspheme, in light of the repentance option available in fiqh, hence drawing a linkage between Section 295-C and the hadd offence of apostasy. Similar was the fate of the defendants in Muhammad Ali v S.H.O, Police Station Lakseen Sargodha, where the offence could easily have been made out. While the courts did dismiss the case for a lack of evidence, they did not deny apostasy being outside the scope of the laws.

C. The Actus Reus of the Laws

In order to assess the conformity of blasphemy laws in Pakistan with traditional Islamic jurisprudence, the comparison of actus reus of both becomes essential. In this respect, each anti-blasphemy provision of Chapter XV has to be seen in its own right. The specific prohibited conduct required for conviction under Section 295 PPC is ‘injuring or defiling place of worship’. This has no mention in the legal manuals of the different schools of Islamic Jurisprudence, whether it is the Hanafi legal textbook, The Hedaya, or the Shafi’i manual ‘The Reliance of the Traveller: Tools of the worshipper’ or ‘Minhaj-ul-Muslim’; defiling a place of religious worship is not listed as one of the acts that would constitute apostasy by a

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84 Ashiq Hussain v The State, 2001 P. Cr. L.J. 1987 (Lahore).
85 Ayub Masih v State, PLD 2002 Supreme Court 1048.
86 Niaz Ahmad v. State, 2009 MLD 616 (Lahore).
Muslim or blasphemy by a non-Muslim. This is because different schools and sects of Islamic Jurisprudence had tried to assert their own theological dominance by emphasising less on the sanctity of places of worship in the domain of other schools or sects. In regard to non-Islamic places of worship, the *Hedaya* explicitly forbids non-Muslims to build their places of worship in a way that publicly expresses the superiority or equivalence of their religion to Islam. This might explain the exclusion of such an action from the classical legal textbooks, whereas Section 295 caters to all religions and penalises the defilement of any religious place of worship as a crime. The Lahore High Court in *Ashiq Hussain v State*\(^{88}\) followed the textual interpretation of this statute when it upheld the defilement of a Shiite mosque as an offence.

A considerable number of parallels from the *fiqh* could be drawn with ‘acts intended to outrage religious feelings of any class by insulting its religion or religion beliefs’ from Section 295-A and ‘Uttering words, etc., with deliberate intent to wound religious feelings’ from Section 298 of the PPC. To be sarcastic about God, to deny His existence or to deny the attributes that have been ascribed to Him\(^{89}\), or disavow or challenge the divinity of the Quran,\(^{90}\) as laid down by the traditional jurists, would outrage the religious feelings of Muslims.

The legal manual ‘*Minhaj*’ by *Abu Bakr Jabir Al-Jaza’iri* provides that acts, such as throwing the Quran in a dirty place constitute apostasy by a Muslim. This is akin to the ‘Defiling of Holy Quran’ under Section 295-B of the PPC. In *Hussain Masih v S.S.P.*,\(^{91}\) the appellant was on trial under Section 295-B for allegedly throwing burnt pieces of the Quran into the house of the complainant.

All schools are unanimous on insult towards the Prophet as constituting apostasy when committed by a Muslim and blasphemy when committed by a non-Muslim. Therefore, there is little doubt that the *actus reus* demanded by Section 295-C of the PPC, namely, ‘use of derogatory remarks in respect of Holy Prophet’ is compatible with all schools of Islamic Jurisprudence. The largest number of blasphemy laws litigated between 2000 and 2011 were under this provision of the PPC. However, there was only one conviction. In *Haji Bashir Ahmed v State*,\(^{92}\) the Lahore High Court upheld the death sentence against the accused under Section 295-C. It was argued that there was ample and sufficient evidence against the accused in the form of four prosecution witnesses and five audiocassettes containing the accused’s voice uttering the blasphemous statement. The defendant had stated that Prophet Muhammad fell in love with a boy before he met one of his wives.

The prohibited conduct under Section 298-A involve ‘spoken or written words that may imply unbelief’, something that is also seen blasphemous in ‘*Reliance of the Traveller*’. Insulting remarks against the family or one of the companions of Prophet Muhammad or one of the first Caliphs, all of whom were

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88 Ashiq Hussain v The State, 2001 P. Cr. L.J. 1987 (Lahore).
89 See ‘*Reliance of the Traveller*’ ‘Tools of the worshipper’ by Ahmad Ibn Naqib Al-Misri.
90 See ‘*Madjma-al-ahmur*’ by Shaykhzadeh.
91 Hussain Masih v. S.S.P., 2001 P. Cr. L.J 1003 (Lahore).
ideal Muslims, could denote opposition to the Prophet and his teachings and hence, constitute blasphemy.

However, the prohibited conduct (or *actus reus*) under Sections 298-C and 298-B does not find reference in most sources of *fiqh*. There is nothing in the schools of jurisprudence that limits non-Muslims from identifying themselves as Muslims or using Islamic epithets.

D. The Requirement of *Mens Rea* in the Offences

Traditional Islamic law requires proof of *mens rea* in relation to every offence; this is particularly true for *hadd* offences, such as blasphemy by a Muslim or apostasy, as well as *ta’azir* offences such as for blasphemy by a non-Muslim. The requirement for *mens rea* is only found in the pre-Independence blasphemy laws, along with the mention of the term ‘wilfully’ in Section 295B. The lack of requirement for *mens rea* under Sections 295-C, 298-A, 298-B, and 298-C, makes them offences which are strictly liable (*i.e.* not involving an element of mental fault on part of the accused). If the court interprets Section 295-C textually, it will violate many principles of Islamic and Anglo-Saxon Criminal theory, since the *actus reus* elements of Section 295-C contain the jeopardy of death.

However, in some situations, courts have been more forthcoming in relation to Section 295-C, as compared to others. They have been willing to interpret the defendant’s act as lacking *mens rea*, by holding that the latter must have intended something else, giving him a margin. This brings us to the point that as the legislative construction of the provisions do not require the proof of *mens rea*, the courts have been arbitrary in their approach. This can encourage social disparity and arbitrariness in the interpretation of the law.

E. Pre-requisites for Liability, Evidence and Criminal Defences

Islamic Jurisprudence holds that a criminal must have the ‘power’ to commit an offence and must have known that he was committing an offence, and any doubt regarding the defendant’s capability can enable him to raise the defence of uncertainty or ‘shubha’. In almost all cases between 2000 and 2011, except for three, the courts have acquitted defendants because of lack of evidence and they have stressed doubt on the defendant’s culpability in the light of *fiqh*.

Other defences under Islamic Jurisprudence include insanity, unconsciousness, duress, and legal capacity. In regard to the latter, traditional Islamic Jurisprudence, on the whole, holds a person below the age of fifteen to be a

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95Niaz Ahmad v. State, 2009 MLD 616 (Lahore).
minor and, hence, without legal capacity. The defence of insanity was pleaded and proved successfully in *Shahbaz Masih v. State*, where the accused was acquitted because medical evidence had attributed insanity to him. In *Niaz Ahmed v State*, the court reiterated Prophet Muhammad’s saying that the ‘mistake of a Qazi in releasing a criminal is better than his mistake in punishing an innocent’. In *Muhammad Mahboob v State*, the court recommended an investigation procedure where two gazetted investigating officers along with an Islamic scholar would inquire into a blasphemy allegation in order to avoid doubt from the very beginning. In *Muhammad Ali v S.H.O*, the court’s decision was akin to *fiqh* as it did not accept the testimony on the basis of mere confessional declaration of others and acquitted the defendant for lack of eyewitneses.

In cases concerning non-Muslims, the courts have thoroughly utilised the ‘proof beyond reasonable doubt’ as a requirement, in order to convict a non-Muslim for blasphemy. In *Ayub Masih v State*, the court acquitted the defendant for lack of proof by relying on the maxim that it would be better for ten guilty persons to be acquitted in opposition to one innocent person being convicted.

### F. Recognisable Response

There is no provision in the PPC or the Criminal Procedure Code that provides for any ‘repentance and delay’ option. Procedural technicalities and the strict evidence requirements typical of *hadd* offences are available to the defendant as a deterrent against punishment. However, in situations where evidence for his or her culpability is available, there is no utilisation of the doctrine of clemency by courts as can be seen in *Ghafoor Aslam v State*. In *Muhammad Mahboob v State*, the court highlighted the doctrine of repentance as approved by *Ibn Taymiyyah*, even though like other cases, the defendant was acquitted due to lack of evidence rather than the use of any repentance option. Courts have also highlighted this doctrine in cases such as *Maulvi Tahir Asim v State* and *Hussain Masih v SSP*, where the defendants who were alleged to have committed an offence under Section 295-C, were acquitted due to the lack of evidence. This is contrary to *fiqh* as all schools of Islamic jurisprudence unanimously reject the repentance doctrine in their reasoning when it comes to insulting Prophet Muhammad.

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982009 MLD 616 (Lahore).
99PLD 2002 Lahore 587.
1002006 YLR 1766 (Lahore).
101Id.
102PLD 2002 Supreme Court 1048.
104PLD 2002 Lahore 587.
105See Maulvi Tahir Asim v. State, 2008 YLR 2798 (Lahore).
Section 196 of the Criminal Procedure Code is a favourable provision for defendants, as it enables the court not to entertain blasphemy charges where the complainant was not authorised by the provincial or central government, as can be seen in Abdul Razzaq v State.\(^\text{106}\) On the other hand, there is no requirement in fiqh for the necessity of the state in initiating the complaint, and it allows any two parties to bring claims to the Qadi. This may be explained by the relative informality of procedural rules in the fiqh due to the lack of state machinery.

G. Punishment

Barring Section 295-C, the punishments stipulated under the different Sections of Chapter XV of the PPC are far less severe than the punishment stipulated for convicted apostates and blasphemers in traditional Islamic Jurisprudence, with life imprisonment being the most severe penalty. The Hanafi and Shiite schools may have influenced this as they term apostasy as a hadd offence and may offer alternatives. The compatibility in terms of punishment may be even more vivid in the case of non-Muslims since blasphemy, being a ta'azir offence, does offer other punishments as alternatives to the death penalty such as imprisonment and flogging.

There is unanimous acceptance of the death penalty within traditional fiqh for the blasphemy in the form of insulting Prophet Muhammad, an element, which is present in Section 295-C of the PPC. The court, while upholding the sentence in Haji Bashir Ahmed v State,\(^\text{107}\) did reiterate that death, as a punishment for blasphemy against the Prophet, cannot be substituted.

In traditional fiqh, the Hedaya holds that the Caliph may discipline the murderer of an alleged blasphemer but he or she won’t be liable to punishment. The Pakistani courts, however, have been more cognisant of the rule of law in this regard. In Malik Zafar Awan v S.H.O,\(^\text{108}\) the petitioner argued before the Islamabad High Court for the release of the self-confessed murderer of the former governor of Pakistan’s largest province, Punjab. According to the petitioner, the governor had committed blasphemy even though no court had convicted him. The court, in rejecting the petitioner’s argument, held that the procedure of law could not be disturbed, as the state was responsible for the registration of criminal cases. It commented that Islam was a religion of peace and that cases under Section 295-C were to be decided in courts in light of evidence, and if they were to release the murderer, it would lead to social chaos, and open the door to more murders without proving allegations against individuals.

\(^{106}\)See Abdul Razzaq v. State, PLD 2005 Lahore 631.

\(^{107}\)Haji Bashir Ahmed v. State, 2005 YLR 985 (Lahore).

CONCLUSION

The development of the Muslim community or *Ummah* as a political entity happened almost congruently with the introduction of the religion of Islam. By the third century since the coming of Islam, the available religious principles and doctrines were adequately proportionate to its then political and social establishment. The *Quran* and *Sunnah* prescribed stringent measures to safeguard the newly formed Muslim community, from inner threats or intrigues that could have jeopardised its very existence. In its inherent sense, blasphemy and apostasy, both operated as safeguards protecting the fragile Muslim state from politico-religious threat and, hence, further cementing the Islamic religion as well as the state. On the contrary, the blasphemy laws in Pakistan do not serve the same purpose, as they are rather arbitrary laws aimed at criminalising any religious deviation, actual or perceived. The sensitive subject matter of these laws, coupled with the major defects within the criminal justice system of Pakistan, makes it possible for these laws to be misused for mischievous purposes, more often in the lower Courts at district and session divisions.

The quandary posed to the Pakistani state today in dealing with the compatibility of the blasphemy laws with traditional Islamic law has its origins in the latter itself. This problem can be owed to the classical jurists of traditional Islamic law who confused this law in its classification as well as its substantive and procedural interpretation. Interestingly, the socio-political context in which these laws were proscribed had many blatant markers, the absence of which in modern times has made it impossible for the interpreters and legislators to be clear in regards to their scope and application. Their early interpretation came in the era when religion and state were one and the same. The fault lies where jurists had restricted their emphasis on the form and method, rather than the much broader spirit behind it. Consequently, this has led to anomaly interpretations and conceptions of the law, hence, leading to the stunted development of this law in modern times.

Furthermore, compounding the problem is the fact that there were two very different socio-political contexts in which the pre-independence and post-independence blasphemy laws were legislated in Pakistan. The former ones were an attempt of the colonial state to maintain their grip on India, and to set such laws in motion that would act as a deterrent against the breakdown of law and order if different religious groups went to loggerheads against each other. On the other hand, the blasphemy laws legislated during the Islamisation period of the 80’s instead served a more sinister purpose, *i.e.* to give some semblance of legitimacy to a dictatorial regime, by using religion as a political tool. Although, both sets of laws were introduced in a political context, the post-independence blasphemy laws stand out starkly in their incompatibility with traditional Islamic law. The pre-independence blasphemy laws may have been entirely secular, but the aim of the colonial rulers was not wholly different from the reasons behind the prohibitions contained in verse 5:33 of the Quran.
On the whole, Chapter XV of the Pakistan Penal Code seems incompatible with the Quran and Sunnah in spirit, and with fiqh in relation to classification, even though certain prescriptive elements from these laws are akin to the prescriptive requirements proposed by the different schools of fiqh. The courts, specifically the ones that are superior in the judicial hierarchy, have been more forthcoming in their attempts to bridge the gap between blasphemy laws under the PPC and those under the traditional Islamic law, while, at the same time as attempting to uphold the rule of law at times in face of political pressure.

The dichotomy within traditional Islamic law in relation to apostasy and blasphemy needs to be realised by Muslim scholars and communities globally. The legislature while enacting such laws must utilise the socio-historical interpretations as argued in this paper. It is only then that legal reform of the blasphemy laws can take place in a modern nation state such as Pakistan, something that is critical if the state of Pakistan is to meet its constitutional responsibilities.
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