

On Trial: The Implementation of Pakistan's Blasphemy Laws

November 2015

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TABLE OF CONTENTS

METHODOLOGY AND ACKNOWLEDGMENTS	4
1. INTRODUCTION	5
2. BACKGROUND AND CONTEXT	8
2.1. AMENDMENTS DURING GENERAL ZIA-UL-HAQ’S REGIME	9
3. NATIONAL LEGAL FRAMEWORK	12
3.1. FAIR TRIAL	12
3.2. OFFENCES RELATED TO RELIGION	12
3.3. PERMISSION (SANCTION)	13
3.4. INVESTIGATION	14
3.5. REQUIREMENT OF A MUSLIM PRESIDING JUDGE	14
3.6. THE FEDERAL SHARIAT COURT JUDGMENT ON SECTION 295-C	14
3.7. ANTI-TERRORISM ACT, 1997	15
4. INTERNATIONAL LEGAL FRAMEWORK	16
4.1. FREEDOM OF EXPRESSION	16
4.2. FREEDOM OF RELIGION, THOUGHT, CONSCIENCE AND BELIEF	16
4.3. EQUAL PROTECTION OF THE LAW	17
4.4. RIGHT TO LIFE AND THE DEATH PENALTY	17
4.5. THE RIGHT TO A FAIR TRIAL	18
4.5.1. PRINCIPLE OF LEGALITY	18
4.5.2. INDEPENDENT AND IMPARTIAL TRIBUNALS	19
4.5.3. RIGHTS TO DEFEND AND TO ASSISTANCE OF A LAWYER	20
4.5.4. THE DUTIES OF PROSECUTORS	22
4.5.5. THE RIGHT TO LIBERTY AND PRESUMPTION OF RELEASE AND BAIL	22
4.5.6. TRIAL WITHIN A REASONABLE TIME	23
4.5.7. CONDITIONS OF DETENTION AND IMPRISONMENT	23
4.5.7.1. THE RIGHT TO PRIVATE AND FAMILY LIFE	24
5. VIOLATION OF RIGHTS –BLASPHEMY PROSECUTIONS IN PAKISTAN	25
5.1. LEGALITY AND THE DOCTRINE OF VAGUENESS	28
5.2. INTENTION AND THE PRESUMPTION OF INNOCENCE	31
5.3. INDEPENDENT AND IMPARTIAL COURTS	33
5.3.1. TRIAL BEFORE AN INDEPENDENT COURT	33
5.3.2. TRIAL BEFORE AN IMPARTIAL COURT	34

5.4. RIGHT TO DEFEND ONESELF AND THE EFFECTIVE ASSISTANCE OF COUNSEL	37
5.4.1. RISKS AND CHALLENGES FACED BY LAWYERS	38
5.4.2. EFFECTIVE ASSISTANCE OF COUNSEL	39
5.4.2.1. REPORTS OF UNETHICAL CONDUCT BY LAWYERS	39
5.4.2.2. REPORTS OF INEFFECTIVE ASSISTANCE OF COUNSEL	40
5.4.2.3. COUNSEL APPOINTED BY THE STATE	40
5.4.3. JAIL TRIALS AND <i>IN CAMERA</i> PROCEEDINGS	41
5.5. BAIL AND THE PRESUMPTION OF INNOCENCE	43
5.5.1. STATUTORY BAIL IN CASES OF DELAY	45
5.6. TRIAL WITHOUT UNDUE DELAY	47
5.7. CAPACITY AND COMPETENCY	50
5.7.1. FAILURE TO APPLY THE LAW	50
5.8. CONDITIONS OF DETENTION AND IMPRISONMENT	53
5.8.1. SECURITY OF DETAINEES	53
5.8.2. SOLITARY CONFINEMENT/ISOLATION	53
5.8.3. RIGHT TO PRIVATE AND FAMILY LIFE	55
6. CONCLUSION AND RECOMMENDATIONS	57
PARLIAMENT	57
FEDERAL AND PROVINCIAL GOVERNMENTS	58
SUPREME COURT AND PROVINCIAL HIGH COURTS	59
JUDGES	60
THE BAR	61

METHODOLOGY AND ACKNOWLEDGMENTS

This report builds on the work of the International Commission of Jurists on assessing the independence of the judiciary and the situation of human rights in Pakistan within the framework of international standards on the administration of justice, and in particular the international treaties to which Pakistan is a party.

The findings of this report are based on meetings with individuals accused of and convicted for blasphemy-related offences; their families; lawyers; judges of the superior and lower judiciary; human rights activists and police officials between December 2014 and October 2015.

In addition, the findings are based on the analysis of over one hundred reported judicial decisions as well as a dozen unreported cases from sessions courts and high courts on blasphemy-related offences under the Pakistan Penal Code from 1982 to 2015.

The report also draws from academic publications, reports of NGOs, and media reports on issues related to blasphemy in Pakistan.

The ICJ is grateful to the many distinguished Pakistani lawyers, judges and activists who shared their insights on blasphemy prosecutions in Pakistan and gave their valuable recommendations for reform.

The ICJ is particularly grateful to individuals acquitted of, accused of or convicted for blasphemy-related offences and their families, who met with the ICJ and shared their experiences. To protect their identity for security reasons, the names of the defendants in the case studies have been changed.

To all those engaged with the ICJ in this process, thank you.

1. INTRODUCTION

Pakistan's laws on "offences related to religion", commonly known as "blasphemy laws", include a variety of crimes including misusing religious epithets, "defiling" the Holy Quran, deliberately outraging religious sentiment, and using derogatory remarks in respect of the Prophet Muhammad. Sentences for these offences range from fines to long terms of imprisonment, and in the case of defamation of the Prophet Muhammad (section 295-C), a mandatory death sentence.

Since their promulgation, these oppressive and frequently misused blasphemy laws have been denounced by Pakistani civil society activists and human rights groups; academics; and members of the judiciary and government. Concerns about these laws have also been raised during the review by UN Member States of Pakistan's human rights record at the UN Human Rights Council,¹ as well as by UN human rights mechanisms² and international human rights organizations,³ who have all observed that Pakistan's offences against religion violate its obligations under international human rights law and have urged that Pakistan repeal or radically amend them.

The UN Special Rapporteur on the Independence of Judges and Lawyers, for example, following a mission to Pakistan in 2012, found that

These laws serve the vested interests of extremist religious groups and are not only

¹ During Pakistan's second Universal Periodic Review in 2012, Pakistan received seven recommendations related to the blasphemy laws. Pakistan rejected recommendations 122.30, which called for the derogation of the law on blasphemy to guarantee in practice the right to freedom of religion. Pakistan noted a number of recommendations including recommendation 122.28, which asked the Government to ensure that blasphemy laws and their implementation are in line with international law (Switzerland); Enact legislation ensuring freedom of religion and belief for all religious groups and consider abolishing the so-called blasphemy laws; Repeal or reform thoroughly the so-called blasphemy law; recommendation 122.31, which asked Pakistan to modify or repeal the blasphemy laws in order to bring them in line with the principles related to freedom of thought, conscience and religion, and in particular with its obligations under the International Covenant on Civil and Political Rights (ICCPR); recommendation 122.32, which called for repealing the discriminatory blasphemy laws against religious minorities and ensure that there is no impunity for those who commit hate crimes /Repealing the blasphemy law and respect and guarantee freedoms of religion or belief and of expression and opinion for all, including Ahmadis, Hindus and Christians; and recommendation 122.33, which called for repealing the blasphemy law, or at least amend it to protect persons from eventual abuses or false accusations and lighten corresponding penalties, that are currently disproportional. Pakistan accepted recommendation 122.121, which called on the Government to continue its efforts to enhance legislation and measures to further address the situation of religious minorities, including blasphemy laws, forced conversion and discrimination against non-Muslim minorities, and recommendation 122.156, which asked the Government to adopt measures to ensure the protection of religious minorities, including Ahmadis, Christians, Hindus and Sikhs, prevent the abuse of blasphemy legislation, halt forced conversions, and take necessary steps to prevent violence against members of religious minority communities. The list of recommendations and Pakistan's responses can be accessed here:

http://www.upr-info.org/sites/default/files/document/pakistan/session_14_-_october_2012/recommendationsandpledgespakistan2012.pdf

² See, for example, Report of the Special Rapporteur on Freedom of Religion or Belief, 2012, Heiner Bielefeldt: "States should repeal any criminal law provisions that penalize apostasy, blasphemy and proselytism as they may prevent persons belonging to religious or belief minorities from fully enjoying their freedom of religion or belief", UN Doc. A/HRC/22/51 accessed at: http://www.ohchr.org/Documents/Issues/Religion/A.HRC.22.51_English.pdf; Abdelfattah Amor, following his visit to Pakistan in 1995: "Generally speaking, blasphemy as an offence against belief may be subject to special legislation. However, such legislation should not be discriminatory and should not give rise to abuse. Nor should it be so vague as to jeopardize human rights, especially those of minorities. If offences against belief are made punishable under ordinary law, then procedural guarantees must be introduced and a balanced attitude must be maintained. While protecting freedom of conscience and freedom of worship is clearly a necessity, applying the death penalty for blasphemy appears disproportionate and even unacceptable, especially in view of the fact that blasphemy is very often the reflection of a very low standard of education and culture, for which the blasphemer is never solely to blame." UN Doc. E/CN.4/1996/95/Add.1; and Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, following her mission to Pakistan in 2012, UN Doc. A/HRC/23/43/Add.2 (2013) para 117: "Blasphemy laws, Hudood Ordinances, and anti-Ahmadi laws, as well as any other discriminatory legal provisions, should be repealed and replaced with provisions in conformity with Pakistan's Constitution and the international human rights law instruments to which Pakistan is a party", accessed at:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/126/79/PDF/G1312679.pdf?OpenElement>

³ See, for example, Amnesty International, *Pakistan: Use and Abuse of the Blasphemy Laws*, July 1994; Freedom House, *Policing Belief: the impact of blasphemy laws on human rights*, October 2010, accessed at: https://freedomhouse.org/sites/default/files/Policing_Belief_Full.pdf, pp. 69-89; and "UN rights experts call for urgent measures to protect Pakistan's religious minorities", 2 June 2014, accessed at:

<http://www.un.org/apps/news/story.asp?NewsID=47938#.VdIjSEUeXVY>

*contrary to the Constitution of Pakistan, but also to international human rights norms, in particular those relating to non-discrimination and freedom of expression and opinion.*⁴

The Special Rapporteur went on to recommend that Pakistan should repeal or amend the blasphemy laws in accordance with its human rights obligations.

Moreover, human rights bodies and mechanisms have clarified that the mandatory imposition of the death penalty, which is prescribed under section 295-C, is prohibited under international human rights law.⁵

The International Commission of Jurists (ICJ) opposes the criminalization of the exercise of the rights to freedom of expression and religion or belief in Pakistan in the shape of the blasphemy laws and considers them a flagrant violation of Pakistan's international human rights obligations, including its obligations to respect the rights to freedom of thought, conscience and religion; freedom of expression; and equal treatment before the law. Furthermore, the retention of the mandatory death sentence as a penalty upon conviction for a crime, including under 295-C of the Penal Code, violates Pakistan's obligations under the International Covenant on Civil and Political Rights (ICCPR), including to respect the rights to life, to a fair trial, and to prohibit torture and other cruel, inhuman or degrading treatment or punishment.

For these reasons, the ICJ considers that the blasphemy laws should be repealed or substantially amended to bring them in line with Pakistan's international legal obligations. The organization is aware, however, that repeal or substantial amendment may not be immediately feasible, given the threat of violent reprisals against advocates and Pakistan's fraught political conditions. However, there is no credible reason for the responsible officials in Pakistan not to address, as a matter of urgency, the glaring legal and procedural issues that contribute to making criminal proceedings on blasphemy charges in Pakistan fundamentally unfair.

In this report, therefore, the ICJ will highlight a neglected aspect of the operation of Pakistan's blasphemy laws: the failure of Pakistani authorities to adhere to national and international fair trial standards in cases involving allegations of blasphemy under section 295-A (deliberately and maliciously outraging religious feelings of any class by insulting its religion or religious beliefs), section 295-B (defiling the Holy Quran), and in particular, section 295-C (defaming the Prophet Muhammad) of the Pakistan Penal Code.

All institutions of the Pakistani State –the executive, the parliament, and members of the judiciary –have effectively abdicated their responsibilities under human rights law when people are accused of committing blasphemy, knowingly leaving them either at the mercy of mobs and organized extremist religious groups or facing trials that are fundamentally unfair.

Many blasphemy-related allegations are motivated by personal vendettas and political interests. In the 25 cases reviewed by the ICJ where high courts have heard appeals challenging conviction by trials courts for section 295-C, in 15 cases (60 per cent) they have acquitted the appellants on the grounds that the complaints against them had been either fabricated, or made maliciously for personal or political reasons. It is interesting to note that though laws exist that criminalize perjury, the ICJ is unaware of any charges having been filed against persons responsible even after courts have expressly ruled that the complainants and witnesses gave false evidence.

Once allegations of blasphemy are made, persecution of those who have been accused of it often begins even before formal action in the legal system kicks in. On many occasions since the 1980s, people accused of blasphemy, their families, as well as their neighborhoods have been targeted by mobs and organized extremist religious groups following mere allegations of blasphemy, particularly where the individual belongs to a religious minority community. Such

⁴ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 2012, UN Doc. A/HRC/23/43/Add.2, para 57, p. 13.

⁵ See, for example, Special Rapporteur on extrajudicial executions: UN Doc. A/HRC/14/24 (2010), para. 51(d) and UN Doc. A/HRC/4/20 (2007) paras 55-66; Human Rights Committee: *Thompson v Saint Vincent*, UN Doc. CCPR/C/70/D/806/1998 (2000) para. 8.2, *Kennedy v Trinidad and Tobago*, UN Doc. CCPR/C/74/D/845/1998 (2002) para. 7.3, *Carpo et al v The Philippines*, UN Doc. CCPR/C/77/D/1077/2002 (2003) §8.3, *Larrañaga v The Philippines*, UN Doc. CCPR/C/87/D/1421/2005 (2006) para 7.2, *Mwamba v Zambia*, UN Doc. CCPR/C/98/D/1520/2006 (2010) para 6.3 and Human Rights Committee Concluding Observations: *Botswana*, UN Doc. CCPR/C/BWA/CO/1 (2008) para 13.

targeting has also involved attacks on homes and places of worship, which in some cases has resulted in forced evictions, and at times, has even pushed families into exile. Despite having prior knowledge of threats of violence, the police reportedly frequently fail to take necessary preventive measures to stop such attacks or respond swiftly and in adequate numbers to protect the blasphemy accused and their communities.

Individuals accused of blasphemy continue to be vulnerable even after formally coming within the ambit of the criminal justice system. In many cases, blasphemy accused awaiting trial or serving sentences following convictions have been assaulted while held in custody and authorities have failed to protect them. Some have even been killed. In a few cases, police officials themselves have reportedly been the perpetrators.

Individuals who are prosecuted for blasphemy are also routinely denied fair trial guarantees: blasphemy-related proceedings are unduly protracted; prior to trial accused persons are frequently unduly denied bail and are held in custody for extended periods of time awaiting trial; and while detained, they are often held in solitary confinement for prolonged periods.

The trial proceedings in blasphemy cases themselves, particularly at first instance, are also frequently fundamentally unfair. Members of extremist religious groups often pack courtrooms, especially at the trial court level, creating an intimidating atmosphere for the accused and their lawyers as well as for judges. As a result, authorities often hold blasphemy-related trials in jails or *in camera*, impeding on the right to a public hearing and the accused's right to an effective defense.

Reprisals against lawyers and judges associated with blasphemy cases take other forms as well. It is common, for example, for lawyers to be threatened to stop defending those accused of blasphemy. At times, these threats also materialize: In May 2014, for example, Rashid Rehman Khan, a human rights lawyer, was killed in his office after he had been repeatedly threatened to stop defending a person accused of blasphemy. Judges who hear blasphemy cases also report being intimidated, threatened and harassed, compromising their independence to decide the case free from external influence.

At times, there is also evidence that the personal and religious predilections of judges mar the outcome of the trial, and the judges' bias against the accused, reflected both during trial and also in judgments, impedes on the defendant's right to be tried by an impartial court.

In more than 80 per cent of reported cases,⁶ those accused of blasphemy are eventually acquitted on appeal, with judges expressly stating in a large majority of such cases that the complaint was fabricated and spurred on by personal vendettas.

Yet, the State continues to turn a blind eye to these gross injustices. Urgent reform at all levels is necessary to address the glaring reality of the blasphemy laws, which continue to intimidate, persecute and violate the rights of the accused.

⁶ Out of the 25 section 295-C cases decided on the merits (i.e. on the basis of an examination of the lawfulness of conviction handed down by the court of first instance) by the Supreme Court and high courts across the country since 1986, in six cases convictions have been upheld (24%). Appeals before the Supreme Court are pending in at least three cases. The acquittal rate for sections 295-A and 295-B cases are much higher: out of the 12 reported cases since 1986 decided on merit by the high courts, only one conviction has been upheld (8%).

2. BACKGROUND AND CONTEXT

Offences against religion in Pakistan are, in part, based on laws promulgated during British colonial rule, as significant sections of the Indian Penal Code (IPC), 1860, are still applicable in Pakistan, India, Bangladesh and Myanmar. During colonial rule, five provisions relating to offences against religion were introduced in the sub-continent. Four of them, sections 295 (intentional damage or defilement of a place or object of worship), 296 (disturbing religious ceremonies or gatherings), 297 (trespassing on places of burial), and 298 (intentionally insulting an individual's religious feelings) were introduced in 1860.⁷

The justification for introducing these provisions was initially the maintenance of law and order. In multi-cultural India, where people from different religions were living together, avoiding conflict between different groups was considered essential for controlling the colonized populations.

Section 295-A was added to the Indian Penal Code in 1927 following a rise in tension between Hindu and Muslim communities. In 1924, a pamphlet titled "Rangila Rasool",⁸ purporting to describe real events in the life of the Prophet Muhammad, written by an anonymous author, was circulated in Punjab. The pamphlet triggered angry responses from segments of the Muslim community, and a case was registered against the publisher, Mahashe Rajpal, under section 153 of the Indian Penal Code for provocation with the intent of causing a riot. Mahashe Rajpal was convicted by the trial court, but the Punjab High Court in 1927 acquitted him on the grounds that the intention "to attack the Mahomedan religion as such or to hold up Mahomedans as objects worthy of enmity or hatred" could not be proven. The Court further added that section 153 of the IPC was not intended to "prevent all adverse discussions of the life and character of a deceased religious leader".⁹

Following widespread agitation against Mahashe Rajpal's acquittal and calls for reform in the penal code to adequately protect the dignity of the Prophet Muhammad, the Government introduced section 295-A in 1927 to criminalize "deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious believers".

During the debates around the wording of the new law, the founder of Pakistan, Muhammad Ali Jinnah, highlighted that it was of paramount importance that "those who are engaged in historical works, those who are engaged in the ascertainment of truth and those who are engaged in *bona fide* and honest criticism of a religion shall be protected".¹⁰

⁷ These provisions defined the offence as well as the punishment as follows:

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

S. 296: Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

S. 297: Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sculpture, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

S. 298: Uttering words, etc. with deliberate intent to wound religious feelings. Whoever, with any deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

⁸ "The Promiscuous Prophet".

⁹ See, Neeti Nair, "Beyond the 'Communal' 1920s: The Problem of Intention, Legislative Pragmatism, and the Making of Section 295A of the Indian Penal Code", *Indian Economic Social History Review*, 2013, pp. 319-324.

¹⁰ *Ibid.*, p. 331.

Promulgation of the new law did not mark the end of the matter. In April 1929, Ilm Din, a 19-year old boy, killed Mahashe Rajpal for defaming Prophet Muhammad through the publication of the pamphlet. Ilm Din was later convicted for murder and hanged.

People in both Pakistan and India have remembered the perpetrator and victim of the killing for different reasons. While Mahashe Rajpal is widely remembered as a martyr in India, having sacrificed his life for freedom of expression, his killer Ilm Din is widely revered in popular culture and parts of the media in Pakistan as Ghazi Ilm Din "Shaheed" (martyr), having sacrificed his life in defense of the honor of the Prophet Muhammad.¹¹

2.1. Amendments during General Zia-ul-Haq's regime

Following independence in 1947, Pakistan retained the penal code inherited from the British. During the period spanning from 1947-1977, there are only ten reported judgments that relate to offences against religion.¹²

A majority of complaints made under section 295-A were either dismissed by the courts as the requirement of a prior authorization of the central or provincial government was not fulfilled (see section 3.3), or they were dismissed by the high courts for failing to meet the requirement of "deliberately and maliciously" hurting religious sentiment. In this period, complaints were mostly made by Muslims against other Muslims, or by non-Muslims against Muslims: no case was registered by a Muslim against a non-Muslim for committing an act of blasphemy against the Prophet Muhammad or for "defiling" the Holy Quran.¹³

In 1974, during Prime Minister Zulfikar Ali Bhutto's first term in office, the Parliament amended the Constitution of Pakistan, 1973, to declare that any person

who does not believe in the absolute and unqualified finality of The Prophethood of Muhammad (Peace be upon him), the last of the Prophets or claims to be a Prophet, in any sense of the word or of any description whatsoever, after Muhammad (Peace be upon him), or recognizes such a claimant as a Prophet or religious reformer, is not a Muslim for the purposes of the Constitution or law¹⁴

Pursuant to the second Constitutional amendment, members of the Ahmadiyya community, who consider themselves as a sect within Islam, were specifically labeled as a non-Muslim religious minority community.¹⁵

A few years later, a *coup d'état* brought General Zia-ul-Haq to power and ushered in a period of "Islamization" that led to major changes to the Pakistan Penal Code (PPC).¹⁶ Five provisions relating to blasphemy and other offences against religion were added to the PPC between 1980-1986.¹⁷

¹¹ "Blasphemy laws in Pakistan A Historical Overview", *Center for Research and Security Studies*, accessed at: <https://alaiwah.wordpress.com/2012/09/21/blasphemy-laws-in-pakistan-a-historical-overview/>

¹² Reported judgments only include judgments of the superior judiciary e.g. the Supreme Court, the high courts, and the Federal Shariat Court. These ten judgments include 3 under section 295; 5 on section 295-A, and two under section 297. Data on the number of cases registered under these provisions and findings of trial courts is not available to the ICJ.

¹³ *Ibid.*

¹⁴ Article 260 (3), Constitution of Pakistan, 1973. The third constitutional amendment, promulgated by General Zia-ul-Haq in 1985, substituted the provision with Article 260(3), which reads: "In the Constitution and all enactments and other legal instruments, unless there is anything repugnant in the subject or context: (a) "Muslim" means a person who believes in the unity and oneness of Almighty Allah, in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon him), the last of the prophets, and does not believe in, or recognize as a prophet or religious reformer, any person who claimed or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon him); and (b) "non-Muslim" means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Qadiani Group or the Lahori Group who call themselves 'Ahmadis' or by any other name or a Bahai, and a person belonging to any of the Scheduled Castes.

¹⁵ Article 106(3), Constitution of Pakistan, 1973.

¹⁶ General Zia ul Haq was the sixth President of Pakistan from 1978 until his death in 1988. He declared martial law for the third time in the country's history in 1977. He was Pakistan's longest-serving head of state, ruling eleven years.

¹⁷ S. 295-B: Defiling, etc. of copy of Holy Qur'an. Whoever willfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract there from or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.

S. 295-C: Use of derogatory remarks, etc. in respect of the Holy Prophet. Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred

Whereas laws related to offences against religion introduced by the British were not specific to any religion and addressed all religious beliefs, blasphemy laws enacted during the 1980s were specific to Islam and Muslim beliefs: blaspheming against Prophet Muhammad and defiling of Quran were inserted as separate offences, and offences specifically targeted members of the Ahmadiyya community, making it an offence, punishable by imprisonment and/or a fine, for them to freely express or practice their religious beliefs.¹⁸

In a report following a mission to Pakistan in December 1986 to study the process of return to democracy after eight years of martial law rule, the International Commission of Jurists (ICJ) expressed grave concern at the new laws on offences against religion and cautioned that not only did they violate freedom of expression and religious belief, their vague wording made them open to abuse.¹⁹

The report stressed

*Some of the offences are also framed in such broad and subjective terms that considerable discretion is left to the courts, and it is scarcely possible to know in advance whether the section is being transgressed. This is particularly true of the prohibitions on posing, directly or indirectly, as a Muslim and on outraging 'in any manner whatsoever' the religious feelings of Muslims, and the range of activities caught by them has indeed proved to be extensive.*²⁰

It further added

*Despite the lifting of martial law there continue to be serious interferences with the freedom of religious minorities, to a very considerable extent in the case of the Ahmadis but also significant as regards the non-Muslim minorities.*²¹

name of the Holy Prophet (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to a fine.

S. 298-A: Use of derogatory remarks, etc., in respect of holy personages. Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, directly or indirectly, defiles the sacred name of any wife (Ummul Mumineen), or members of the family (Ahle-bait), of the Holy Prophet (peace be upon him), or any of the righteous Caliphs (Khulaf-e-Raashideen) or companions (Sahaaba) of the Holy Prophet (peace be upon him) shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

S. 298-B: Misuse of epithets, descriptions and titles, etc. reserved for certain holy personages or places. (1) Any person of the Qadiani group or the Lahori Group (who call themselves 'Ahmadis' or by any other name) who by words, either spoken or written, or by visible representation,

(a) refers to or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (PBUH), as 'Ameerul-Mumineen,' 'Khalifa-tul-Muslimeen', 'Sahaabi' or 'Razi Alah Anho';

(b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as 'Ummul-Mumineen';

(c) refers to, or addresses, any person, other than a member of the family (Ahle-bait) of the Holy Prophet Muhammad (peace be upon him) as Ahle-bait; or

(d) refers to, or names, or calls, his place of worship as 'Masjid';

... shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

(2) Any person of the 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.

S. 298-C: Person of Qadiani group, etc., calling himself a Muslim or preaching or propagating his faith. Any person of the Qadiani group or Lahori group (who call themselves 'Ahmadis' or by another 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 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.¹⁷

¹⁸ Osama Siddique and Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, *Minnesota Journal of International Law*, Vol. 17, No. 2, 2008 (Unholy Speech, Holy Laws), pp. 312-216.

¹⁹ International Commission of Jurists, "Pakistan: Human Rights After Martial Law", Geneva, 1987, accessed at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1987/01/Pakistan-human-rights-after-martial-law-fact-finding-report-1987-eng.pdf>

²⁰ *Ibid.*, p. 106.

²¹ *Ibid.*, p. 118.

While the ostensible justification for these laws may have been to provide a legal avenue for the adjudication of religious conflict, the outcome has resulted in restricting pluralism, persecution of religious minorities, and muzzling freedom of expression and religious belief.

Courts too have expressed concern at the misuse of blasphemy provisions. In 2002, for example, the Lahore High Court found that "ever since the law became more stringent, there has been an increase in the number of registration of the blasphemy cases" and "as we have seen in the recent past, cases of such-like nature are on the increase and we have also observed element of mischief involved."²²

While there is no accurate data on the number of blasphemy-related cases registered in Pakistan since 1986, data provided by human rights groups the National Commission for Justice and Peace (NCJP) and the Human Rights Commission of Pakistan (HRCP) shows a large increase of cases since the 1980s. According to NCJP, for example, a total of 633 Muslims, 494 Ahmadis, 187 Christians and 21 Hindus have been accused under various provisions on offences related to religion since 1987.²³ As is evident from the figures, religious minority communities are disproportionately affected by the various offences against religion given that non-Muslims constitute only three per cent of Pakistan's population. However, these laws do not just target non-Muslims, as nearly half of the victims of the blasphemy law are Muslims.

In addition to individuals prosecuted for blasphemy, as many as 53 others have been unlawfully killed merely on allegations of blasphemy since 1953;²⁴ countless families have been threatened, attacked and forced to leave their homes; and lawyers and judges have been persecuted for performing their duties independently and impartially.

²² PLD 2002 Lahore 587, para 30.

²³ See Human Rights Commission of Pakistan, *State of Human Rights*, 2014, pp. 46-51 and "What are Pakistan's blasphemy laws?", *BBC*, 6 November 2014, accessed at: <http://www.bbc.com/news/world-south-asia-12621225>.

²⁴ *Malik Muhammad Mumtaz Qadri v. the State*, Supreme Court of Pakistan, criminal Appeals No. 210 and 211 of 2015, p. 26. This judgment of the Supreme Court was delivered a few days before the launch of this Report, and has not been fully analyzed here.

3. NATIONAL LEGAL FRAMEWORK

Human rights, categorized as “fundamental rights” in the Constitution of Pakistan, 1973, are enumerated under Articles 8 to 28 of the Constitution and include: security of person (Article 9); safeguards as to arrest and detention (Article 10); right to a fair trial (Article 10A); inviolability of dignity of man (Article 14); freedom of speech (Article 19); right to information (Article 19A); freedom to profess religion and to manage religious institutions (Article 20); equality of citizens (Article 25); non-discrimination in respect of access to public places (Article 26); and safeguards against discrimination (Article 27).

3.1. Fair trial

The right to a fair trial was included as a fundamental right in the Constitution in 2010, as part of the 18th Amendment to the Constitution of Pakistan, 1973.

The Supreme Court of Pakistan has stated that the right to a fair trial and due process have “always been the golden principles of administration of justice but after incorporation of Article 10-A in the Constitution of the Islamic Republic of Pakistan, 1973 vide 18th Amendment, it has become more important that due process should be adopted for conducting a fair trial and order passed in violation of due process may be considered to be void.”²⁵

The Supreme Court has also held that the right to a fair trial “should be read in every statute even if not expressly provided for”. It has further clarified that since the legislature did not define or describe the requisites of a “fair trial”, “the intention was to give it the same meaning as is broadly universally recognized and embedded in jurisprudence in Pakistan.”²⁶

Some rights expressly enumerated by courts as part of a fair trial include:²⁷

- All courts/tribunals shall be independent, impartial and established under the law;
- All persons shall be equal before the courts/tribunals in the determination of their rights and obligations;
- Every one shall be entitled to a fair hearing within a reasonable time;
- Every one shall have a right of counsel;
- One shall have a right of public hearing if not prohibited by law;
- The procedure of trial as provided by the statute shall be followed; and
- The statute must provide a remedy of appeal.

3.2. Offences related to religion

Sections 295 to 298-C of the Pakistan Penal Code proscribe acts deemed to be offences against religion. They consist of a variety of offences, including misusing religious epithets, “willfully defiling” the Holy Quran, deliberately outraging religious sentiment, and using derogatory remarks in respect of the Holy Prophet. Sentences for these offences range from fines to long terms of imprisonment, and for the defamation of the Prophet Muhammad under 295-C, a mandatory death sentence.

A majority of these offences are, by law, “non-bailable”, which in Pakistani law means bail may be granted at the discretion of the court and cannot be claimed as a matter of right. A majority of these offences are also “cognizable”, which means the police may start an investigation and arrest suspected offenders without a warrant.

²⁵ 2012 SCMR 1235.

²⁶ PLD 2012 SC 553.

²⁷ PLD 2015 Lahore 272.

Table no. 1: Summary of Offences Related to Religion

Sec. of Penal Code	Offence	Sentence	Year	Bailable and cognizable?
295	Injuring or defiling place of worship, with intent to insult the religion of any class	Up to two years imprisonment, rigorous or simple, or fine, or both	1860	Bailable and cognizable
295-A	Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs	Up to ten years imprisonment, rigorous or simple, fine, or both	1927	Non-bailable and non-cognizable
295-B	Defiling the Holy Quran	Mandatory imprisonment for life	1982	Non-bailable and cognizable
295-C	Use of derogatory remarks, etc., in respect of the Holy Prophet	Mandatory Death sentence	1986	Non-bailable and cognizable
296	Disturbing religious assembly	Up to one year imprisonment, or fine, or both	1860	Bailable and cognizable
297	Trespassing on burial places, etc.	Up to 1 year imprisonment, rigorous or simple, or fine, or both	1860	Bailable and cognizable
298	Uttering words, etc., with deliberate intent to wound religious feelings	Up to 1 year imprisonment, rigorous or simple, or fine, or both	1860	Bailable and non-cognizable
298-A	Use of derogatory remarks in respect of holy personages	Up to 3 years imprisonment, fine, or both	1980	Bailable and cognizable
298-B	Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places	Up to 3 years and fine	1984	Non-bailable and cognizable
298-C	"Person of Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name)" who "directly or indirectly" pose as a Muslim	Up to 3 years imprisonment, rigorous or simple, and fine	1984	Non-bailable and cognizable

While all "offences against religion" are commonly referred to as "blasphemy offences" in Pakistan, this Report focuses on sections 295-A, 295-B and 295-C of the Penal Code. Prosecutions under section 295-C will be specifically highlighted, since it appears that violations of the defendants' fair trial rights are most severe in cases where they are alleged to have blasphemed against the Prophet Muhammad. This is also one of the most frequently used provisions in the chapter on "offences against religion".

3.3. Permission (sanction)

The Pakistan Code of Criminal Procedure (CrPC), 1898, provides certain conditions for the institution of criminal proceedings for "offences against the State". Section 196 of the CrPC provides that no court shall take cognizance of any offence punishable under 295-A (deliberate

and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs) of the Pakistan Penal Code unless a complaint is made by, or under authority from, the Federal Government or the concerned Provincial Government. If prior permission (referred to as "sanction") is not obtained, a judge cannot take cognizance of a private complaint under section 295-A. In many cases, this has served as a protection mechanism against frivolous or malicious complaints.²⁸

The requirement of obtaining prior approval, however, is not applicable to other blasphemy-related provisions, including sections 295-B and 295-C of the Penal Code.

3.4. Investigation

The CrPC provides that any officer in charge of a police station may, without the order of a Magistrate, investigate any case on complaint of a cognizable offence. For non-cognizable offences, police officers may only launch an investigation after obtaining a warrant by a Magistrate of first or second-class having power to try such cases.

In 2004, ostensibly as a measure to ensure low-ranked police officers are not coerced into conducting biased investigations, the Parliament introduced an amendment to the CrPC. The newly inserted provision, section 156-A, provides that for complaints under section 295-C, no officer below the rank of a Superintendent of Police shall investigate the complaint. However, according to lawyers interviewed by the ICJ, this provision is rarely implemented.

3.5. Requirement of a Muslim presiding judge

Schedule II of the CrPC provides that only a Muslim Presiding judge shall hear cases registered under section 295-C of the Penal Code in the court of first instance (Sessions Court). This requirement is only applicable for section 295-C: for all other offences related to religion, including section 295-B which criminalizes defiling the Quran, the law does not make it mandatory for the judge presiding over the trial to be a Muslim.

3.6. The Federal Shariat Court judgment on section 295-C

The Federal Shariat Court (FSC) was established in 1980. Its jurisdiction includes the power to "examine and decide the question whether any law or provision of law is repugnant to the injunctions of Islam".²⁹ The Federal Shariat Court's decisions are binding on the Government, unless the Government successfully appeals to the Shariat Bench of the Supreme Court. If the Federal Shariat Court orders amendments to any law, such an amendment is deemed to be in effect even if the Government fails to pass legislation by the deadline set by the FSC.

In 1990, responding to a petition demanding mandatory death penalty in cases of blasphemy against the Prophet Muhammad under section 295-C, the Federal Shariat Court ruled:³⁰

- The death penalty under section 295-C was mandatory as the "alternate punishment of life imprisonment as provided in section 295-C...is repugnant to the Injunctions of Islam" and Parliament should delete the option of life imprisonment from the provision;
- 295-C should be amended to make "the same acts or things when said about other Prophets, also an offence with the same punishment as suggested above"; and
- Blasphemy under section 295-C was an "intentional or reckless wrong", and required the requisite *mens rea* of "intention, purpose, design, or at least foresight."

The Government was given until 30 April 1991 to implement the FSC's judgment. Since the Government did not appeal to the Supreme Court, under Pakistani law, the order of the Federal Shariat Court judgment attained finality, and its interpretation of section 295-C is now binding on all courts.

Disturbingly, while courts now consistently impose the death penalty where the offence under 295-C is proven, they do not require proof of specific intent to defame the Prophet Muhammad as a requisite condition to prove the offence.

²⁸ The sanction provision is also applicable for offences in Chapter VI or IX-A of the Pakistan Penal Code (except Section 127), or offences punishable under Section 108-A, or Section 153-A or Section 294-A, or Section 505 of the same Code.

²⁹ Article 203D (1), Constitution of Pakistan, 1973.

³⁰ PLD 1991 Federal Shariat Court 10.

3.7. Anti-Terrorism Act, 1997

The Anti-Terrorism Act, 1997, includes section 295-A of the PPC (deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs) as one of the scheduled offences that may be tried by special anti-terrorism courts established under the Act.

Provisions of the Anti-Terrorism Act (ATA) have been found to be incompatible with the right to fair trial, most recently by the UN Working Group on Enforced or Involuntary Disappearances.³¹ The ATA gives law enforcement broad powers to detain individuals preventively and denies due process rights to accused persons.³² If charged and convicted under section 7 of the Anti-Terrorism Act, the accused may be given much longer sentences than under the Pakistan Penal Code.

³¹ Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan, UN Doc. A/HRC/22/45/Add.2, para 29.

³² See *International Commission of Jurists, Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, 2009, accessed at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Report-on-Terrorism-Counter-terrorism-and-Human-Rights-Eminent-Jurists-Panel-on-Terrorism-series-2009.pdf>, pp. 139-140.

4. INTERNATIONAL LEGAL FRAMEWORK

Pakistan ratified the International Covenant on Civil and Political Rights (ICCPR) in 2010. The ICCPR provides the principal legal framework for Pakistan's international human rights treaty obligations in relation to the protection of freedom of thought, conscience and religion or belief (Article 18); freedom of opinion and expression (Article 19); equality before the law and the prohibition of discrimination (Articles 2, 26 and 27); and fair trial (Article 14). All branches of the State are required, both under the ICCPR and under general international law, to give domestic effect to its provisions and to bring domestic laws in line with the ICCPR.³³

Provisions of Pakistan's laws on offences against religion, particularly section 295-C of the Pakistan Penal Code which criminalizes words, representations, imputations, innuendos, or insinuations, which directly or indirectly, defile "the sacred name of the Holy Prophet", are fundamentally incompatible with Pakistan's obligations under international law, including to guarantee freedom of expression; freedom of thought, conscience and religion; and equal protection of the law.

4.1. Freedom of expression

Article 19(1) of the ICCPR states that everyone has the right to hold opinions without interference and Article 19(2) states that everyone has the right to freedom of expression, including to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

The UN Human Rights Committee,³⁴ the body of independent experts mandated by the treaty to monitor states implementation of its provisions, expounding on Article 19 of the ICCPR, has specifically stated: "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant".³⁵ The Human Rights Committee has further clarified that it is impermissible for any such laws to discriminate in favor of or against a particular religion or belief system, or their adherents over another, or religious believers over non-believers. It is also impermissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.³⁶

Additionally, the Human Rights Committee has stated that criminalizing the holding of an opinion, no matter what the opinion, is incompatible with Article 19.³⁷

4.2. Freedom of religion, thought, conscience and belief

The right to freedom of thought, conscience and religion enshrined under Article 18(1) of the ICCPR includes both the right to hold beliefs and the right to manifest them individually or in community with others and in private or public through worship, observance, practice and

³³ Article 2 of the ICCPR; Human Rights Committee General Comment No. 31: The Nature of the General Obligation Imposed on States Parties to the Covenant, UN Doc.CCPR/C/ 21/Rev.1/add.13, 2004, (Human Rights Committee, General Comment 31) para 4; Vienna Convention on the Law of Treaties, Article 27.

³⁴ Established under the ICCPR, the Human Rights Committee is a monitoring body of 18 experts. The Committee monitors the implementation of the ICCPR and its Second Optional Protocol. The General Comments of the Human Rights Committee provide authoritative guidance on interpretation of the ICCPR. See *Republic of Guinea v Democratic Republic of the Congo*, International Court of Justice (2010), paras 66-68.

³⁵ UN Human Rights Committee, General Comment No. 34, Article 19: freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, 2011 (Human Rights Committee, General Comment 34), para 48. Under Article 19(3) of the ICCPR, certain restrictions on the exercise of the right to freedom of expression may be permissible, for the purpose of ensuring respect for the rights of others, or the protection of national security or of public order, or of public health or morals. However, such restrictions must be made by a precisely formulated law that complies with human rights; must be demonstrably necessary and proportionate to the one of the above-stipulated purposes; and must not put the right itself in jeopardy. Additionally, restrictions must not be overbroad – they must conform to the principle of proportionality and must be the least intrusive instrument amongst those which might achieve their protective function and proportionate to the interest to be protected; the principle of proportionality must be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.

³⁶ Human Rights Committee, General Comment 34, , para 48.

³⁷ *Ibid.*, para 9.

teaching. Freedom to profess religion covers the protection of individuals with diverse interpretations of religions and protects their ability to hold and manifest their religious beliefs.

The Human Rights Committee has stated that the terms "belief" and "religion" are to be broadly construed and include theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.³⁸ Moreover, it has underlined that Article 18 of the ICCPR is not limited in its application to traditional religions or to religions and beliefs, and has expressed concern about tendencies to discriminate against any religion or belief or religious minorities that may be the subject of hostility on the part of a predominant religious community.³⁹

4.3. Equal protection of the law

Article 26 of the ICCPR guarantees equal protection of the law:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The UN Human Rights Committee has stated that the term "discrimination" as used in the Covenant, including in Article 26, should be understood to imply "any distinction, exclusion, restriction or preference which is based on any ground...which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."⁴⁰

4.4. Right to life and the death penalty

The ICJ, among an increasing number of human rights bodies and other organizations, considers that imposition of the death penalty in all cases constitutes a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading punishment.

In December 2014, a majority of 117 UN Member States voted at the UN General Assembly in favor of a resolution emphasizing that the use of the death penalty undermines human dignity.⁴¹ The resolution called on those countries that maintain the death penalty to establish a moratorium on its use, with a view towards abolition. Only 37 states, out of 195, opposed the resolution. Passed for the fifth time since 2007, the resolution demonstrated, once again, the ever-strengthening global trend that views the death penalty as a violation of the right to life, and a cruel, inhuman and degrading punishment. Currently, more than 150 countries worldwide have abolished the death penalty in law or in practice. This includes 30 states in the Asia-Pacific region, including Nepal and Sri Lanka.

While Article 6 of the ICCPR does not expressly obligate States Parties to abolish the death penalty completely, they are obliged to limit its use and, in particular, to abolish it for all but the "most serious crimes". The UN Special Rapporteur on extrajudicial, summary or arbitrary executions and other authorities have interpreted "most serious crimes" in Article 6 of the ICCPR very restrictively, limited to those cases where there was an intention to kill which resulted in the loss of life.⁴²

Article 6(2) of the ICCPR also clarifies that imposition of the death penalty following violation of other rights of the ICCPR, such as the freedom of thought, conscience and religion; freedom of

³⁸ *Ibid*, para 2.

³⁹ Para 2, UN Human Rights Committee, General Comment No. 22, UN Doc. CCPR/C/21/Rev.1/Add.4.

⁴⁰ UN Human Rights Committee, General Comment No. 18: *Non-discrimination*, 10 November 1989, available at: <http://www.refworld.org/docid/453883fa8.html>

⁴¹ Resolution adopted by the General Assembly "Moratorium on the use of the death penalty" A/RES/69/186, 4 February 2015.

⁴² See for example, Para 3 and more generally, Part C, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/4/20, 29 January 2007. See also: "Death penalty, if retained, only permissible for 'most serious crimes' – UN rapporteur on arbitrary executions" 25 October 2012 available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12698&LangID=E>

expression; equal protection of the law or the right to and guarantees of a fair trial, is prohibited.⁴³

Where permissible under international standards, the death penalty may only be imposed pursuant to a final judgment rendered by a competent court after a legal process which affords all possible safeguards to ensure a fair trial, including those set out in Article 14 of the ICCPR. The UN Human Rights Committee has stressed that in cases where the death penalty is imposed, scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a death sentence following a trial that does not meet the minimum requirements of fairness, including as guaranteed under Articles 9 and 14 of the ICCPR, is a violation of the right to life guaranteed under Article 6 of the ICCPR.⁴⁴

Furthermore, as noted, the mandatory imposition of the death penalty, for any crime, is prohibited.

4.5. The right to a fair trial

The right to a fair trial is a fundamental safeguard of the rule of law, which among other things aims to ensure that individuals are not unjustly punished, and is guaranteed under international law, including the ICCPR. A fair trial is essential not only for protecting the human rights of the accused and victims, but also to ensure proper administration of justice, which is a key component of the rule of law.

Article 14 (1) of the ICCPR stipulates that "all persons shall be equal before the courts and tribunals" and that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The Human Rights Committee has unequivocally stated that the right to be tried by an independent and impartial tribunal "is an absolute right that may suffer no exception".

The range of standards that safeguard the right to a fair trial extend from the moment suspicion is aimed at a person and continues to when the final appeal and sentence. They are considered to be minimum guarantees.

The right to a fair trial is broader than the sum of the individual guarantees. This means that observing each of the fair trial guarantees does not, in all cases and circumstances, ensure that a hearing has been fair. Conversely, a fair trial may not necessarily require that there have been no errors made and no defects in the process. In some instances, a trial may be flawed in one aspect alone, which may or may not taint the proceedings as a whole.

Furthermore, it should be noted that an assessment of the fairness of criminal proceedings depends on the entire conduct of the proceedings, including appeals, where breaches of standards during trial may be corrected.

As mentioned, the prosecution of an individual solely for the exercise of his or internationally guaranteed human rights, including the rights to freedom of expression or freedom of thought, conscience and religion is fundamentally unfair. Those detained pending trial or imprisoned following conviction solely for the exercise of their fundamental human rights, including the rights to freedom of expression or freedom of thought, conscience and religion, are subjected to arbitrary detention.⁴⁵

4.5.1. Principle of legality

A key precondition to a fair trial recognized globally is that criminal offences must be prescribed by law and must conform to the principle of legality. This means that the laws proscribing acts or omissions as criminal must be formulated clearly and precisely to ensure individuals can regulate their conduct accordingly.

⁴³ See Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994), para 7.

⁴⁴ Article 6(2) of the ICCPR; Human Rights Committee, General Comment 32, para 59.

⁴⁵ UN Human Rights Committee General Comment No. 35, UN Doc CCPR/C/GC/35, 2014 (Human Rights Committee, General Comment 35), para 17; Working Group on Arbitrary Detention, Fact Sheet No 26, Section IV (B) "When does deprivation of liberty become arbitrary?", para B.

Crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense. This means that there must be a clear definition of the criminalized conduct, that establishes its elements and the factors that distinguish it from conduct that is permissible.⁴⁶

Vague laws undermine the rule of law because they leave the door open to selective prosecution and interpretation, based on discriminatory policies of government officials and the personal predilections of judges.

The UN Human Rights Committee has emphasized that laws must not confer unfettered discretion to those responsible for their execution and must provide sufficient guidance to enable law enforcers and the general public to determine what kinds of expression are restricted.⁴⁷

The principle of legality, as well as the presumption of innocence, also requires that the prosecution prove each element of the crime to the required legal standard⁴⁸ (in criminal cases beyond a reasonable doubt).

4.5.2. Independent and impartial tribunals

Independent and impartial tribunals are at the heart of a judicial system that guarantees human rights in full conformity with international human rights law. The constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment or persecution as they carry out their professional activities. They

should, in turn, be active protectors of human rights, accountable to the people and must maintain the highest level of integrity, and act in accordance with internationally recognized ethical standards.⁴⁹

For legal proceedings to be fair, the judge or judges deciding the case must be independent.⁵⁰ The UN *Basic Principles on the Independence of the Judiciary* lay out requisites of and factors that safeguard judicial independence. The first Principle clarifies that

*The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*⁵¹

In addition to independence, courts must also be impartial. Independence and impartiality are closely linked requirements: however, each has its own distinct aspects. In general terms, "independence" refers to the autonomy of a given judge or tribunal to decide cases applying the law to the facts. This independence pertains to the judiciary as an institution (independence from other branches of power, referred to as "institutional independence") and to the particular judge (independence from other members of the judiciary, or "individual independence"). "Independence" requires that neither the judiciary, nor the judges who compose it when exercising their judicial functions, be subordinate, including by those that exercise other public powers such as members of the executive or legislative branches of government.

Courts must also be impartial and appear impartial. "Impartiality" refers to the state of mind of a judge or tribunal towards a case and the parties to it. The Human Rights Committee has

⁴⁶ See, *Castillo Petruzzi et al v Peru*, Judgment of the Inter-American Court of Human Rights (1999), para 121.

⁴⁷ Human Rights Committee, General Comment 34, *supra* fn. 35, para 25.

⁴⁸ See, Human Rights Committee, *Nicholas v Australia*, UN Doc. CCPR/C/80/D/1180/2002 (2004), para 7.5; and UN Human Rights Committee, General Comment No. 32, UN Doc. CCPR/C/GC/32, 2007 (Human Rights Committee, General Comment 32), para 30.

⁴⁹ See *International Commission of Jurists*, International Principles on the independence and accountability of Judges, Lawyers and Prosecutors (ICJ, independence and accountability of Judges, Lawyers and Prosecutors), 2007, accessed at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Principles-independence-lawyers-publication-2007.pdf>

⁵⁰ Article 14 of the ICCPR.

⁵¹ *United Nations Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (*UN Basic Principles on the independence of the judiciary*).

stated that in the context of article 14(1) of the ICCPR, "impartiality of the court implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties".⁵²

The impartiality of a court can be defined as the absence of bias, animosity or sympathy towards the parties. Thus, judges have a duty to step down from cases in which they are unable to decide the matter impartially or in which it may appear to a reasonable observer that they are unable to do so.⁵³

Under international standards, judges have a right and a duty to decide cases before them according to the law, free from fear of reprisals of any kind. The UN *Basic Principles*, for example, provide

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (Principle 2)

The *Bangalore Principles of Judicial Conduct* include impartiality as one of the fundamental values inherent in the judicial function.⁵⁴

The UN Human Rights Committee has clarified the objective and subjective tests for impartiality

*First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.*⁵⁵

Judges are required to ensure the fairness of criminal proceedings and that the rights of all parties are respected, without discrimination.⁵⁶

4.5.3. Rights to defense and to assistance of a lawyer

Article 14(3)(d) of the ICCPR provides that in the determination of a criminal charge against them, all individuals shall be guaranteed the right to defend themselves in person, or through legal assistance of their choice.

All persons charged with a criminal offence have the right to adequate time and facilities to prepare a defense.⁵⁷

An accused who decides not to represent him or herself has the right to be represented by counsel.

Lawyers are, with judges and prosecutors, one of the pillars upon which human rights and the rule of law rest. Lawyers play an essential role in protecting human rights and in guaranteeing that the right to a fair trial is respected by providing accused persons with a proper defense in court.

The right of a person accused of a criminal offence to be represented by a lawyer constitutes an integral part of the right to a fair trial as recognized by international law.⁵⁸

All suspects and accused persons, whether detained or not, have the right of access to and assistance of counsel from the very start of a criminal investigation, including during questioning. A person arrested or detained should have access to a lawyer as soon as they are deprived of their liberty.⁵⁹

⁵² UN Human Rights Committee, *Arvo. O Karttunen v. Finland*, Communication 387/1989 (Views adopted on 23 October 1992), UN Document CCPR/C/46/D/387/1989 (Jurisprudence), para. 7.2

⁵³ Principle 2.5 of the Bangalore Principles of Judicial Conduct, Adopted by the Judicial Group on Strengthening Judicial Integrity and noted by the UN Commission on Human Rights.

⁵⁴ *Ibid.*

⁵⁵ Human Rights Committee, *General Comment 32*, *supra* fn. 48.

⁵⁶ Principle 6, UN Basic Principles on the Independence of the Judiciary, *supra* fn. 51.

⁵⁷ Article 14(3)(b) of the ICCPR

⁵⁸ See, for example, articles 14 (3) (b) and 14 (3) (d) of the ICCPR.

⁵⁹ Amnesty International, *Fair Trial Manual*, *supra* fn. 76, section 3.1.

In order for lawyers to effectively represent their clients, communications between an individual and his or her lawyer are confidential. The competent authorities, including police, detaining authorities and the courts, must respect and protect the confidentiality of lawyer-client communications, which are the cornerstone of the lawyer-client relationship. To this end, the *UN Basic Principles on the Role of Lawyers* clarify that

*Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential*⁶⁰

In accordance with international standards, lawyers who represent individuals who are charged with a crime have a duty to defend the rights of their clients throughout the proceedings, including the rights of accused to receive a fair trial by an independent and impartial tribunal.

Lawyers, among other things, have a duty to raise issues which impact on an accused's right to be tried by an independent and impartial tribunal in the course of fair proceedings, and to take such other measures with a view to ensuring that the defendant's rights are respected in the course of the proceedings. Other duties of lawyers include: advising their clients as to their legal rights and obligations, assisting clients in every appropriate way, and taking legal action to protect their interests; assisting clients before courts, tribunals or administrative authorities, where appropriate; and loyally respecting the interests of their clients.⁶¹

Furthermore, the *UN Basic Principles on the Role of Lawyers* provide that in protecting the rights of their clients and in promoting the cause of justice, "lawyers shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession."⁶²

For lawyers to carry out their professional functions in an independent manner, it is necessary for States to protect them from any unlawful interference with their work. This interference can range from obstacles to communicating with their clients to threats and physical attacks.

The *UN Basic Principles on the Role of Lawyers* clarify, in this respect, that

*Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.*⁶³

The *UN Basic Principles on the Role of Lawyers* also specify obligate States to "ensure that lawyers are not identified with their clients or their clients' causes as a result of discharging their functions".⁶⁴

The *Basic Principles* stipulate that "where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities".⁶⁵

Accordingly, States must also take measures to ensure that lawyers involved in bringing a complaint about or in the investigation of alleged human rights violations are protected against ill-treatment, intimidation or other reprisals.⁶⁶

⁶⁰ *United Nations Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (*UN Basic Principles on the Role of Lawyers*), principles 13 and 15.

⁶¹ Principle 22, *UN Basic Principles on the Role of Lawyers*, *supra* fn. 60.

⁶² *Ibid.*, Principle 14.

⁶³ *Ibid.*, Principle 16.

⁶⁴ *Ibid.*, Principle 18.

⁶⁵ Principle 17, *UN Basic Principles on the Role of Lawyers*, *supra* fn. 60.

⁶⁶ Article 13, CAT, and CAT General Comment No. 3, UN Doc CAT/C/GC/3, para 31; *UN Basic Principles on the Role of Lawyers*, *supra* fn. 60, Principle 20.

4.5.4. The duties of prosecutors

Prosecutors play a crucial role in the administration of justice. Respect for human rights and the rule of law presupposes a strong prosecutorial authority in charge of investigating and prosecuting criminal offences with independence and impartiality. Within the prosecuting institution, each prosecutor must be empowered to fulfill his or her professional duties in an independent, impartial and objective manner.

The *UN Guidelines on the Role of Prosecutors* were formulated to assist States "in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings".⁶⁷

As essential actors in the administration of justice, prosecutors are entrusted with a number of functions, which they must carry out in an impartial and objective manner and avoiding political, social, religious, racial, cultural, sexual or any other kind of discrimination.⁶⁸ This duty constitutes a guiding principle for the proper discharge of prosecutorial functions and implies that prosecutors shall be free from any bias when carrying out all their professional duties.

Furthermore, prosecutors have special duties related to the protection of human rights, due process and the correct administration of justice.⁶⁹ In particular, the Guidelines on the Role of Prosecutors clarify that prosecutors shall respect and protect human dignity and uphold human rights, and that they are enjoined from bringing or continuing the prosecution of a case when the charges are unfounded.⁷⁰

4.5.5. The right to liberty and presumption of release and bail

Article 9 of the ICCPR guarantees and prescribes safeguards of the right to liberty and security of the person.

Among other things, Article 9(3) of the ICCPR provides that "it shall not be the general rule that persons awaiting trial shall be detained in custody."

Under international law and standards, States may only detain individuals pending trial where it is both necessary and proportionate to a legitimate aim such as ensuring the presence of the accused at trial, to prevent interference with the investigation or course of justice or to prevent serious crime. The Human Rights Committee has clarified that in accordance with Article 9(3) of the ICCPR

*Pre-trial detention should be the exception and...bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee the jurisdiction of the state party.*⁷¹

Under Article 9(3), in accordance with the right to liberty, there is a presumption that people charged with a criminal offence will not be detained while awaiting trial.

The burden rests on the state to establish in each particular case, taking into account all of the circumstances, that it is necessary and proportionate to deprive an individual of their liberty, including pending trial.⁷² It must establish that release of the individual, in the particular circumstances, would create a substantial risk of flight, harm to others, or interference with the investigation that cannot be allayed by other means.⁷³ In accordance with these principles the

⁶⁷ United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (United Nations Guidelines on the Role of Prosecutors).

⁶⁸ *Ibid.*, Guideline 13, para. (a).

⁶⁹ See *International Commission of Jurists*, « International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors », Practitioners Guide No. 1, 2007 (International Commission of Jurists, Practitioners Guide No. 1), pp. 71-75.

⁷⁰ Guidelines 12 and 14 of the Guidelines on the Role of Prosecutors, *supra* fn. 67.

⁷¹ Communication No. 526/1993, *M. and B. Hill v. Spain*, (views adopted on 2nd April 1997) see UN doc. GAOR, A/52/40 (vol. II) p. 17.

⁷² Human Rights Committee General Comment 35, *supra* fn. 45, para 37.

⁷³ *Ibid.*, para 38; Rules 7, 8(2) and 9 of the Council of Europe Rules on the use of remand in custody the conditions in which it takes place and the provision of safeguards against abuse, adopted by the Committee of Ministers of the

Human Rights Committee has clarified that pre-trial detention should not be mandatory for all person charged with a particular crime.⁷⁴

In accordance with Article 9 of the ICCPR amongst other standards, arbitrary detention is absolutely prohibited at all times. As noted above, the UN Human Rights Committee and the Working Group on Arbitrary Detention, among others, have clarified that the detention or imprisonment of an individual solely for the exercise of his or her rights to freedom of expression or freedom of thought, conscience or religion, as guaranteed under the ICCPR, would amount to arbitrary detention.⁷⁵

4.5.6. Trial within a reasonable time

Article 9 of the ICCPR enshrines a number of rights that apply to individuals who are arrested or detained. Among its provisions, Article 9(3) requires States Parties to the ICCPR, including Pakistan, to respect and ensure that

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

In accordance with Articles 9(3) and 14(3)(c) of the ICCPR, criminal proceedings must be started and completed within a reasonable time. If the accused is detained pending trial, the obligation on the state to expedite the trial is even more pressing, since less delay is considered reasonable.⁷⁶

What constitutes a "reasonable time" is judged according to the circumstances of the individual case. Factors to be considered include: the complexity of the case; the conduct of the accused; the conduct of the authorities; what is at stake for the accused, including whether they are in custody and their state of health; and the seriousness of the charges and potential penalties.⁷⁷

The guarantee of a prompt trial serves the interests of justice for the accused, victims of the crime and the public at large, while the violation of this guarantee encapsulates the maxim that "justice delayed is justice denied". The right to trial without undue delay is linked to other rights, including the rights to liberty, to be presumed innocent and to defend oneself. While it is to be balanced against the right of the accused to adequate time and facilities to prepare a defense, it aims to limit the uncertainty faced by an accused person and any stigma attached to the accusation, despite the presumption of innocence. Moreover, if there is inordinate delay, this may impair the quality or availability of the evidence, or evidence disappears, degrades or is destroyed.

Undue delays arising from court backlogs, adverse economic conditions, and shortage of judges have not been considered justifications for undue delay.⁷⁸

4.5.7. Conditions of detention and imprisonment

Article 10(1) of the ICCPR requires that States guarantee that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

The Human Rights Committee has explained that detained persons retain all of their rights, including those enshrined in the Covenant, subject only to "the restrictions that are unavoidable

Council of Europe and Annexed to Recommendation (Rec 2006)13, accessible at: <https://wcd.coe.int/ViewDoc.jsp?id=1041281>

⁷⁴ Human Rights Committee, General Comment 35, *supra* fn. 45, para 38.

⁷⁵ Human Rights Committee General Comment 35, para 17, and Working Group on Arbitrary Detention - Fact Sheet 26, Section IV B(B).

⁷⁶ Amnesty International Fair Trial Manual, 2nd edition, 2014 (Amnesty International, Fair Trial Manual), section 19.1: the right to trial without undue delay, and sections 7.1 and 7.2, the right of detainees to a trial within a reasonable time or to release, accessed at: <https://www.amnesty.org/en/documents/POL30/002/2014/en/>

⁷⁷ *Ibid.*, section 19.2; Human Rights Committee, General Comment 35, *supra* fn. 45, para 37; and Human Rights Committee, General Comment 32, *supra* fn. 48, para 35.

⁷⁸ See Amnesty International, Fair Trial Manual, *supra* fn. 76, p. 144.

in a closed environment."⁷⁹ This includes, among others, the right to freedom from torture and other ill-treatment.

The Convention against Torture, ratified by Pakistan in 2010, clarifies that States are responsible for not only acts of torture committed by government officials, but also those committed with their consent or acquiescence.⁸⁰

The UN *Basic Principles for the Treatment of Prisoners* further provide that: all prisoners shall be treated with respect due to their inherent dignity and value as human beings; efforts shall be made towards the abolition of solitary confinement as a punishment, or to the restriction of its use; and prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.⁸¹

Under international human rights law, in addition to the obligations imposed upon States to refrain from violating the human rights of those within its jurisdiction, States also have an obligation to exercise "due diligence" in securing the enjoyment of human rights, including against violations by non-state actors. States are required to exercise such due diligence to prevent human rights abuses by private persons or entities, and to investigate and ensure remedies in the event of such abuses.

In the context of detention, this includes the duty to take measures to prevent and to protect detainees from physical attack from other inmates; and if such attacks occur, to ensure a prompt, thorough and independent investigation, followed by appropriate measures, such as prosecution, sanction and compensation.⁸² Authorities must also pay special attention to ensuring the rights, safety and dignity of detainees and prisoners who are at risk because of their identity or status.⁸³ The measures taken to protect such detainees and prisoners, however, when imposed on the individual at risk, should preferably be voluntary and must not be punitive in nature or effect and must be consistent with and respect their rights.

4.5.7.1. The right to private and family life

The rights of detainees to communicate with the outside world and to receive visits are fundamental safeguards against human rights violations, including torture or other ill-treatment and enforced disappearance. They affect the ability of an accused to prepare their defense and are required to protect the right to private and family life and the right to health.⁸⁴

Detainees are to be given all reasonable facilities to communicate with and receive visits from family and friends. The right to receive visits applies to all detainees, regardless of the offence of which they are suspected or accused. The Committee against Torture has also called for detainees to be given access to their families from the time that they are taken into custody, including police custody.⁸⁵ The Human Rights Committee has clarified that the right of persons held in police custody or pretrial detention to access defense counsel, a doctor and their families should be enshrined in law.⁸⁶

⁷⁹ UN Human Rights Committee, General Comment No. 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), para 3. See also, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), May 2015, UN Doc. E/CN.15/2015/L.6/Rev.1.

⁸⁰ Article 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1).

⁸¹ UN Basic Principles for the Treatment of Prisoners. Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990, accessed at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx>

⁸² See Principle 9, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, May 1989, accessed at: <http://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf> and Principle 34, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 1988, UN Doc. A/RES/43/173.

⁸³ Amnesty International, *Fair Trial Manual*, *supra* fn.76, p. 92.

⁸⁴ *Ibid.*, chapter 4

⁸⁵ CAT Committee, *Concluding Observations, Russian Federation*, 6 June 2002, CAT/C/CR/28/4, para 8.

⁸⁶ UN Human Rights Committee, *Concluding Observations, Central African Republic*, 27 July 2006, UN Doc. CCPR/C/CAF/CO/2, para 14.

5. VIOLATION OF RIGHTS –BLASPHEMY PROSECUTIONS IN PAKISTAN

In 2006, the Peshawar High Court observed

*...Whenever a person is charged for such an offence (blasphemy), the print media give extensive coverage to such incident and the accused person is cursed and abused by the society/people-at-large. **So much so that even his life becomes at risk at the hands of certain segments of the society...**(emphasis added)⁸⁷*

The Court further elaborated

*Under the law of the land and even under the Islamic Injunctions, it is for the Judge/Qazi alone to decide about the guilt or innocence of an accused person on the basis of evidence brought before him and **no one can be allowed to forejudge and condemn any person accused of such an offence without facing proper and fair trial.** The level of tolerance in a segment of our society, in such-like cases has come down to a very low grade. **Accused persons thus facing charge of this nature go through very painful and hostile conditions and process of investigation as well** (emphasis added)⁸⁸*

These observations of the Peshawar High Court provide an accurate snapshot of the context in which blasphemy prosecutions take place in Pakistan, and highlight the impediments, prejudices and dangers faced by individuals charged with blasphemy that contribute to fundamentally unfair trials, particularly at first instance.

First, the blasphemy laws, particularly section 295-C of the Penal Code, serve as tools for people to settle personal vendettas and achieve political purposes. This misuse is facilitated by the vague language in which section 295-C is framed and the absence, within the provision, of the requirement that the act be carried out with the intent to defame the Prophet Muhammad.

In a recent judgment, the Supreme Court of Pakistan too noted with concern research by the Legal Aid Society in Karachi which demonstrates that

The majority of blasphemy cases are based on false accusations stemming from property issues or other personal or family vendettas rather than genuine instances of blasphemy and they inevitably lead to mob violence against the entire community⁸⁹

ICJ's analysis of case law on Pakistan's blasphemy laws supports these observations. Out of the 25 cases on section 295-C reviewed by the ICJ, for example, where high courts and the Supreme Court have decided appeals against convictions by the trial courts, in 60 per cent of the cases they held that the complaints were made for political interests or because the complainants and witnesses were interested parties with personal rivalries against the accused persons.

In 19 cases out of the 25 cases reviewed, the high courts or Supreme Court went on to acquit the appellants. Out of the 19 cases, courts found *mala fides* in the complaint and testimonies of the witnesses in 15 cases (80 per cent), which comprised the reasons for acquittal.

Table No. 2: Reason for acquittal by High Courts and the Supreme Court in section 295-C appeals

Fabricated complaints, malice or personal vendettas	Procedural flaws	Insanity
15	9	2

⁸⁷ PLD 2014 Peshawar 122.

⁸⁸ *Ibid.*

⁸⁹ *Malik Muhammad Mumtaz Qadri v. the State*, Criminal Appeals No. 210 and 211 of 2015, p. 26

In one case, for example, the trial court found that an office bearer of the Pakistan Sunni Tehreek, a religious organization, had turned a dispute between two neighbors into a criminal complaint under section 295-C of the Penal Code for "his own ulterior motives and reasons". However, instead of directing the authorities to take action against witnesses who had committed perjury to frame the accused, the Court concluded its judgment with a prayer that "God give them wisdom to understand and appreciate what is ordain(ed) and take care in future before making such types of accusations and avoid the mischief in future and shaitaan (Satan) who is always ready to attach (*sic*)."⁹⁰

In other cases, courts have criticized the failure of investigating and prosecuting agencies for their incompetence and negligence in blasphemy cases. In *Muhammad Mahboob v. the State*, for example, the Lahore High Court, after ruling that the 295-C case against the appellant was fraudulent, observed

*As we have seen in the recent past cases of such-like nature are on the increase and we have also observed element of mischief involved. This calls for extra care at the end of the Investigating Officers. Whereas, we have seen the failure inefficiency and incompetence of the Investigating Officer in handling the present case with all its consequences...*⁹¹

The conduct of the investigating and prosecuting agencies, as highlighted by the court, contravenes international standards on the role of prosecutors, which require prosecutors to carry out their role in an impartial and objective manner, avoiding political, social, religious or any other kind of discrimination, and specify that prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.⁹² (See section 4.5.4).

Lawyers and judges, as well as the ICJ's analysis, suggest that with respect to offences under section 295-A, the requirement to seek sanction from the federal or the provincial governments before proceedings can commence (see section 3.3), has served as a safeguard against malicious or frivolous complaints, as unlike investigators and prosecutors, who are more vulnerable to localized external pressures and influences, the provincial and federal governments are more likely to exercise their discretion to authorize commencement of proceedings independently after inquiring into the reasonableness of the allegations.

Second, blasphemy allegations often become religiously and politically charged, with real dangers to the life and liberty for the accused and his or her family on the one hand, and judges and lawyers associated with the case on the other. In a number of cases, members of extremist religious groups get involved in private altercations and give them the color of blasphemy. Often, they then make public announcements in mosques of the alleged blasphemous incident and the alleged blasphemer to organize mobs to intimidate, and even attack, the accused individuals and their families, as well as influence the outcome of the criminal proceedings.

In a recent judgment, the Supreme Court noted data collected by the Legal Aid Society, Karachi, indicating that at least 53 people have been unlawfully killed since 1953 in relation to blasphemy allegations, including not only those accused of committing blasphemy, but also members of their communities, their lawyers, as well as politicians who had called for amendments to the law.⁹³ Despite the Government's claims of a zero-tolerance policy towards militancy and religious extremism, it has failed to take concrete measures to address this damning reality of the blasphemy allegations in the country.

And third, various actors in the criminal justice system, including the police, lawyers and most significantly, judges, frequently demonstrate bias against those accused of blasphemy. Judges who appear to lack independence and impartiality often presume guilt on the part of the

⁹⁰ *The State v. Robina Bibi*, Sessions Trial No. 26 (Case no. 22) of 2010, para. 26

⁹¹ P L D 2002 Lahore 587, para 30.

⁹² Guidelines 13 and 14, the UN Guidelines on the Role of Prosecutors, *supra* fn. 57. Pakistani law contains various provisions to protect against frivolous prosecution. Section 494 of the Code of Criminal Procedure, for example, allows prosecutors to request the court for withdrawal of the case at any stage before the pronouncement of judgment. Section 249-A CrPC empowers a magistrate to acquit the accused at any stage of the case if after hearing, at the earliest stages of the case, he/she considers the charge is groundless or that there is no likelihood of conviction. These provisions are rarely used in blasphemy cases.

⁹³ *Malik Muhammad Mumtaz Qadri v. the State*, Criminal Appeals No. 210 and 211 of 2015, p. 26.

accused and some sections of the lawyers’ community create a hostile environment against the accused in court by raising slogans condemning the accused. The lack of accountability and disciplinary mechanisms within the judiciary and the bar, and non-compliance of their respective codes of conduct, allow individuals engaging in such misconduct to evade any responsibility.

The situation appears so bleak that one judge of the Supreme Court stated to the ICJ that all blasphemy trials in the country should be suspended unless the State can ensure at least a semblance of a fair trial.⁹⁴

Yet, despite widespread recognition of the injustices in related to the application of the blasphemy laws, dozens of people continue to be accused every year for blasphemy-related offences -often maliciously- putting their lives and liberty, as well as the security of their families, their lawyers, and their communities in serious jeopardy. Moreover, the ICJ has noted a worrying trend in recent years of high courts in Pakistan, particularly the Lahore High Court, confirming convictions and death sentences in cases involving blasphemy of the Prophet Muhammad. From 1986 to 2005, only one conviction was upheld by the high courts in section 295-C cases. Since 2005, however, the Lahore High Court has confirmed blasphemy convictions and death sentences of five individuals. In all five cases, there are serious concerns that the accused’s right to a fair trial had been violated, particularly the right to be tried before independent and impartial courts and defense rights.

Table No. 3: Section 295-C convictions upheld on appeal from 1986-2015

Time period	Number of appeals to high courts and Supreme Court	Acquittals	Convictions
1986-1994	1	1	0
1995-2004	10	9	1
2005-2015	14	9	5

⁹⁴ ICJ interview, December 2014.

5.1. Legality and the doctrine of vagueness

As highlighted above, a key precondition to a fair trial recognized globally is that criminal offences must be prescribed by law and conform to the principle of legality. This means that they must be formulated clearly and precisely to ensure individuals can regulate their conduct accordingly. Vague laws undermine the rule of law because they leave the door open to selective prosecution and interpretation, including based on discriminatory policies of government officials and personal predilections of judges. (See section 4.5.1).

The Supreme Court of Pakistan has held, in the context of deciding on the legality of the Anti-Terrorism Act, 1997, that "every citizen has an inalienable right under the Constitution to know what is prohibited by law and what the law does not require him to do." The Court interpreted this to mean that

*...the language of the statute, and, in particular, a statute creating an offence, must be precise, definite and sufficiently objective so as to guard against an arbitrary and capricious action on part of the State functionaries...*⁹⁵

Various provisions related to offences against religion are framed in overly broad, vague terms, and breach the principle of legality.

Section 295-C of the Pakistan Penal Code, for example, criminalizes words, representations, imputations, innuendos, or insinuations, which directly or indirectly, defile "the sacred name of the Holy Prophet". If proven, the offence carries a mandatory death penalty.

As is evident from a plain reading of the provision, elements of the offence are glaringly vague and overbroad, are open to subjective interpretations, and give virtually no instruction to the people or to law enforcement officials and the judiciary regarding what behavior is prohibited.

The UN Special Rapporteur on the Independence of Judges and Lawyers, in a report following a mission to Pakistan in 2012, made a similar observation

*The vague language of the blasphemy laws make no reference to a potential offender's psychological state or intention and represents an open door for abuse and the persecution of minorities, in particular by religious or sectarian groups.*⁹⁶

In practice, the vague and broad wording of the provision has allowed a wide range of acts and expression to be prosecuted under section 295-C, including, for example: using language resembling the Prophet's name on fabric; placing the Prophet's name in an allegedly insulting place on an advertisement; disputing Islamic beliefs and rituals; failing to remove an allegedly blasphemous post from a Facebook page, and even calling for reform or even critiquing provisions of offences against religion in the Pakistan Penal Code.

The vague wording of the law also has an adverse impact on framing of the charge against the accused. A criminal charge is the official notification of an allegation of a criminal offence provided to an individual. Under international standards, the accused must be given sufficiently detailed information about the charge(s) against them so that they can prepare a defense. The charge must consist of both the law and the alleged general facts on which the charge is based.⁹⁷

In blasphemy cases, criminal charges are often framed in vague language. Accused persons, for example, are charged with uttering "derogatory remarks against the Prophet Muhammad" or "defiling the Quran", but the exact words or conduct are not expressly included in the charge. In addition to running afoul with the principle of legality, this in itself is a violation of fair trial guarantees including among others, the right of individuals arrested or detained to be informed

⁹⁵ PLD 2000 Supreme Court 111.

⁹⁶ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 2012, UN Doc. A/HRC/23/43/Add.2 (Report of the Special Rapporteur on the independence of judges and lawyers).

⁹⁷ Article 14(3), ICCPR. See also, Human Rights Committee, General Comment 32, *supra* fn. 48, and Amnesty International, Fair Trial Manual, *supra* fn. 76, page 37.

in detail of the reasons why they are being deprived of their liberty, as well as their right to prepare and present a defense. (See also sections 5.4.1 and 5.4.2).

The jurisprudence of Pakistani courts has not provided further precision of the definition of this offence, and courts have not read a "reasonable person" standard into their application of section 295-C. A survey of case law on the provision shows that to prove the offence, the complainant does not have to prove the alleged blasphemous conduct was insulting to the Prophet Muhammad by any objective standard, but only has to establish the defendant's involvement in the alleged blasphemous conduct resulting in alleged provocation of the complainant(s).

In addition, because the overbroad and subjective language of section 295-C allows individual judges to interpret the "true" Islamic position on "defiling the sacred name of the Holy Prophet" based on their own individual reading of Islam, case law on the provision is disturbingly contradictory and arbitrary.

In 2002, for example, the Lahore High Court acquitted a Muslim man accused of pasting posters containing allegedly derogatory remarks about the Prophet Muhammad on the gate of a mosque, relying on traditions of the Prophet that taught mercy and forgiveness. The Court also prayed for Allah's mercy on him "so that he is pardoned of any sin which he may have committed."⁹⁸

In 2005, the Lahore High Court relied on a fundamentally different interpretation of Islamic jurisprudence. In this case, the trial court had convicted a Muslim man for uttering "derogatory remarks" against Prophet Muhammad. The Court dismissed the appeal and upheld the trial court's death sentence, reasoning that the Quran prohibited "even the slightest cause of annoyance" to Prophet Muhammad, and traditions of the Prophet demonstrated that the only punishment for insulting him was death.⁹⁹

Case law on whether apostasy amounts to blasphemy is also contradictory, with the judge's personal beliefs impacting the outcome of the trial. In a 2004 case, for example, a trial court rejected the allegation that converting to another religion from Islam was blasphemy, stating that there is no compulsion in religion.¹⁰⁰

A few years later, however, a trial court in Jhang reached a completely different conclusion. In a case where two individuals were accused of converting from Islam to another religion, the trial court held that "when any person terms superior anybody else from Almighty Allah or the Holy Prophet PBUH, it will be considered that he is making war with Allah and His Messenger and he is liable to be crucified." The Court went on to hold that individuals establishing a new faith were involved in "nefarious activities, which are not less than an Atom bomb in future for Islam".¹⁰¹

The vague wording of section 295-C has particularly affected members of the Ahmadiyya community. In some cases, judges have interpreted the expression of religious beliefs by Ahmadis, as understood by the court, as a form of blasphemy. In a 1994 case that related to the interpretation of section 295-C, the full-bench of the Lahore High Court held that the belief that "the status of Mirza Ghulam Ahmed was not less than that of Hazrat Muhammad (PBUH)" and that "the number of miracles of Mirza Ghulam Ahmed was three lakhs while that of the Holy Prophet Hazrat Muhammad (PBUH) three thousand" *prima facie* amounted to defiling and dishonoring the Prophet Muhammad, and was an offence under section 295-C. A similar position was taken by the Lahore High Court in a 1992 judgment as well.¹⁰² In both these cases, Justice (r) Mian Nazir Akhtar, who is reported to have made public statements calling for the killing of "blasphemers", was a member of the Bench.

In a previous case with similar facts before the Sindh High Court, the accused was charged with writing a letter offering blessings upon the Prophet Muhammad and Mirza Ghulam Ahmad. The complainant alleged that by blessing Mirza Ghulam Ahmed along with the Prophet Muhammad, the accused had defiled the Prophet Muhammad's name and had committed an offence under

⁹⁸ PLD 2002 Lahore 587, para 29.

⁹⁹ 2005 YLR 985, Lahore.

¹⁰⁰ *The State v. Iqbal*, Sessions Court of Faisalabad, Sessions Trial No. 25-7 of 2004, paras 19-20.

¹⁰¹ *The State v. Liaqat Ali and Umar Draz*, Sessions Court of Jhang, Sessions Trial No. 08 of 2009, para 10.

¹⁰² 1992 PLD 1, Lahore High Court.

section 295-C. Reaching a different conclusion to the Lahore High Court, the Sindh High Court held that it was a "cardinal principle of our penal law that *mens rea*, criminal intention, or guilty mind, evil intention or knowledge of the wrongfulness of the Act, is an essential ingredient of guilt of a criminal offence."¹⁰³

The Court further held that "using the above sentences by itself would not prove that the name of the Holy Prophet...has been defiled. It would be necessary for the prosecution to lead further evidence to prove as to what was actually intended by the applicant by using such sentences in the letter addressed to the complainant."¹⁰⁴ The Court, therefore, granted bail to the applicant.

The Supreme Court of Pakistan has interpreted the freedom to profess religion to mean that each citizen is free to exercise the right to profess, practice or propagate his or her religious views, even against the prevailing or dominant views of his or her own religious denomination or sect.¹⁰⁵

As illustrated by these cases, the over-broad wording of section 295-C has allowed courts to interpret the blasphemy law in ways that infringes upon, among other rights, the right to the freedom of religion, recognized by Article 20 of the Constitution of Pakistan as well as guaranteed under Article 18 of the International Covenant on Civil and Political Rights (ICCPR).

Furthermore, as detailed below, the vague wording of criminal charges under the offence has also had led to the violation of a range of fair trial rights, including the right to the presumption of innocence.

¹⁰³ *Mirza Mubarak Ahmed v. State*, 1989 MLD 896, p. 898.

¹⁰⁴ *Ibid.*

¹⁰⁵ S.M.C. No. 1 of 2014, Supreme Court, accessed at : http://www.supremecourt.gov.pk/web/user_files/File/smc_1_2014.pdf

5.2. Intention and the presumption of innocence

Under international human rights law, in accordance with the right of every person charged with a criminal offence to be presumed innocent unless and until proven guilty, the prosecution is required to prove every element of a crime, including the requisite criminal intent (*mens rea*) in order to convict a defendant.

Courts hearing section 295-C cases however, have not required proof of intent beyond a reasonable doubt in order to convict a person of the offence.¹⁰⁶ This is true even though the Federal Shariat Court in 1990 ruled that blasphemy under section 295-C was an "intentional or reckless wrong", in which the *mens rea* amounts to "intention, purpose, design, or at least foresight."¹⁰⁷

The conviction of an individual in the absence of proof beyond a reasonable doubt of all elements of a crime, including the requisite intent, would violate the presumption of innocence and consequently the right to a fair trial; and where, as in cases under 295-C, the conviction results in the imposition of a sentence of death, such conviction would also violate the right to life under Article 6(2) of the ICCPR. (See sections 4.5 and 4.6.1).

Unlike section 295-C, other provisions criminalizing offences against religion, particularly sections 295-A and 295-B of the Penal Code, expressly include the requirement of intent in the text. In such cases, courts in Pakistan have in most cases interpreted the criminal intent narrowly, and have read the "reasonable person" standard in their clarification of the provisions.

Interpreting the requirement to prove intention in section 295-A of the Penal Code, for example, the Lahore High Court held that the allegedly offensive material must be made with an

...intention to outrage the religious feelings of a class of people and that intention should not only be deliberate but also malicious. An intention itself contains the element of deliberation, but since a person may normally be assumed to intend the consequence of his acts, the word 'deliberate' was used to make it a very purposeful intention, and it was further strengthened by the use of a malicious adjective; so that we should have to find, before we can uphold the order of Government, that the primary purpose of the book was to outrage the feelings of Muslims, and to do so maliciously.¹⁰⁸

The Lahore High Court also read the reasonable person standard in its interpretation of section 295-A

But while pronouncing on the question whether or not the thing which insults the religious belief of someone was said or done with the deliberate and malicious intention of insulting that religion or the religious beliefs of the followers of that religion, the Court has to put itself in the place of a neutral person, that is to say, a person who is neither connected with the religion of the person who is alleged to have outraged the religious feelings of someone nor with that of the person or persons whose religious feelings are stated to have been outraged. The Court has further to consider the thing from the point of view of a person who consider not hypersensitive but is a person of normal susceptibilities.¹⁰⁹

Intention has also been held to be a prerequisite to prove the offence for section 295-B of the Penal Code, which criminalizes "willfully" desecrating the Quran. In a 2007 judgment, the Lahore High Court expounded on the meaning of "willfully", and held

In the context of the provision of section 295-B, P.P.C. "wilfully" would, therefore, mean that the act of defiling, damaging, desecrating or distorting the original text of the Holy Qur'an or part of it must be with intention to achieve a nefarious objective

¹⁰⁶ The only exception is a case involving the grant of bail by the Sindh High Court. See *supra* fn. 103.

¹⁰⁷ *Supra* fn. 30.

¹⁰⁸ PLD 1962 Lahore 850.

¹⁰⁹ PLD 1960 Lahore 629.

contemptuously and showing disrespect to the Holy Qur'an which he was forbidden by law not to do.

A similar interpretation was also made in the *Rimsha Masih* case, where the Islamabad High Court quashed charges under 295-B against a minor with mental disabilities because she was found not to have the requisite *mens rea* to commit the offence

Most important factor for consideration under S.295-B, P.P.C was whether there existed any mens rea on part of accused for committing the offence...Where accused did not have any intention of willfully defiling, damaging, desecrating, destroying or contemptuously disrespecting text of the Holy Qur'an or part of it, he/she could not be considered to have any mens rea to commit the offence under S. 295-B, P.P.C.¹¹⁰

¹¹⁰ PLD 2013 Islamabad 1.

5.3. Independent and impartial courts

The right to be tried by independent and impartial tribunals is at the heart of a judicial system that guarantees human rights.

In Pakistan, there has been much talk about judicial independence, particularly since a public movement helped reinstate former Chief Justice Iftikhar Chaudhry. The Supreme Court has frequently emphasized the importance of an independent judiciary and its link with protecting human rights. In a 2012 judgment, the Court held

*...there could be no democracy without basic human rights and fundamental freedoms as its foundation, and there could be no protection and enforcement of human rights and fundamental freedoms without the existence of an independent judiciary.*¹¹¹

5.3.1. Trial before an independent court

The right of a trial before an independent and impartial judiciary is reduced to mere rhetoric in many cases involving offences against religion, especially in trial court proceedings where the accused is alleged to have committed blasphemy against the Prophet Muhammad. In such cases, not only are there serious doubts about the independence of courts, but the impartiality of individual judges also, at times, appears compromised.

In Pakistan, independence of the judiciary is often understood narrowly to only mean absence of political interference in the judiciary's affairs. But international standards, including the International Covenant on Civil and Political Rights (ICCPR), provide a much broader meaning: judicial independence also encompasses protection of judges, in law and in practice, from threats, harassment, reprisals or attacks, both from state and non-state actors.

Judges who hear blasphemy cases have reported being harassed, intimidated, and threatened to convict individuals accused of committing blasphemy. Some judges have reported receiving letters and phone calls warning them of attacks against themselves and their families if defendants in blasphemy cases are acquitted.¹¹²

Where hearings are public, courtrooms are often packed with hostile crowds, chanting slogans against the accused. Often, these crowds belong to, or are affiliated with, organized extremist Islamist groups.

Such conduct impedes on the fairness of proceedings, which requires "the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive." The UN Human Rights Committee has noted, for example, that the hearing is not fair if "the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court..."¹¹³

Following her country visit to Pakistan in 2012, the UN Special Rapporteur on the independence of the judiciary also expressed concern that judicial independence was under threat in cases of blasphemy as judges were "coerced or pressured to decide against the accused, even without supporting evidence", and that

*The judiciary too has grown very afraid of public sentiment regarding blasphemy cases. Such sentiment, coupled with intimidation and violence, as well as the lack of protection measures from authorities, seriously encroaches on the independence of the judiciary and results in a biased delivery of justice.*¹¹⁴

Recently, Judge Pervez Ali Shah was forced to leave the country after getting death threats. The threats came in conjunction with his presiding over the trial in which Mumtaz Qadri was convicted for the murder of former Governor of Punjab, Salman Taseer. Mumtaz Qadri confessed that he killed Salman Taseer as he believed the Governor had committed blasphemy.

¹¹¹ PLD 2012 SC 923, para 6.

¹¹² Consultation of lawyers and judges on offences related to religion, September 2014, Lahore.

¹¹³ Human Rights Committee, General Comment 32, supra fn. 48, para 25.

¹¹⁴ Report of the Special Rapporteur on the independence of judges and lawyers, supra fn. 96, page 13.

Earlier in 1997, death threats against a judge of the Lahore High Court were realized: he was killed, two years after he had presided over the trial which resulted in the acquittal of two accused persons in a blasphemy case. Reportedly, the judge's family claimed that he had been receiving threatening and abusive calls from some activists of an extremist religious organization since he had acquitted the two men accused of blasphemy.¹¹⁵

All these factors impede on the independence of judges hearing blasphemy-related cases. In accordance with international law, judges must decide matters before them "impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason". States are obligated to take measures protecting judges from any form of external influence in their decision-making and reprisals; these are among the safeguards of the guarantee of the independence of the judiciary. The independence and impartiality of the judges presiding over the case is fundamental fair trial guarantee; it is a pre-requisite to a fair trial and the violation of this right renders a trial unfair. (See section 4.5.2).

5.3.2. Trial before an impartial court

Another fundamental aspect of the right to a fair trial that is often ignored in Pakistan, but is particularly relevant in proceedings involving blasphemy allegations, is the right to trial before an impartial tribunal or judge.

The impartiality of a judge can be defined as the absence of bias, animosity or sympathy towards either of the parties. Under international standards, courts must be impartial, and also appear to be impartial. Thus, judges have a duty to step down from cases in which there are sufficient grounds to question their impartiality.

The vague and overbroad wording of section 295-C of the Pakistan Penal Code, which criminalizes words, representations, imputations, innuendos, or insinuations, which directly or indirectly, defile "the sacred name of the Holy Prophet", has allowed prejudices, religious leanings and personal predilections of judges to shadow their judgments, calling into question their impartiality. This bias is apparent in the conduct of judges during blasphemy proceedings, and also their judgments.

These concerns are magnified further by the requirement under Pakistani law that judges presiding over first instance trials in 295-C cases be Muslim. The provision, when coupled with the vagueness of the law, all but invites the types of partiality noted above in the judgments of first instance court, and is inconsistent with the rights to trial before an independent and impartial court.

A lawyer told the ICJ that judges treat blasphemy trials as "matters as exercises in theological interpretation", and that "the religious identity of the judge often dominates the proceedings", and in many cases, also the judgment. In one case, for example, the Lahore High Court appeared to base its reasoning more on the "faith of the court" than the law

*It is the **absolute faith of the court** that none in this world can undermine the respect, honour, sanctity, inviolability and piety of the Holy Prophet...whosoever...has any doubt regarding His supremacy as the last Prophet...is none but an infidel (emphasis added)*¹¹⁶

Defense lawyers in blasphemy cases have reported that judges, particularly in trial courts, often make partisan comments against the accused persons during proceedings, and act more like aggrieved parties instead of neutral arbiters. They claim that judges do not attempt to conceal their sympathy towards the complainant and their disapproval of the defendant, frequently expressing their horror at the alleged blasphemous comments made by the accused.

Such cases continue to exist even though courts have frequently held that judges must only decide cases before them on the basis of proven facts and the law, as opposed to extraneous considerations, including their faith. Most recently, in its judgment upholding Mumtaz Qadri's conviction, the Supreme Court clarified that courts, "in terms of our calling and vocation and in

¹¹⁵ Unholy Speech, Holy Laws, *supra* fn.18, p. 335.

¹¹⁶ *Manzar-ul-Haq Shah Jahan v. the State*, Criminal Appeal No. 608 of 2012, Lahore High Court, 10 June 2015, (unreported), para 12.

accord with the oath of our office, are obligated to decide this case in accordance with the law of the land as it exists and not in accordance with what the law should be." The Court also held that under the Pakistani law, interpretations of Islam were only the domain of the Federal Shariat Court, the Shariat Appellate Bench of the SC and the Council of Islamic ideology.¹¹⁷

The bias of judges during trial, at times, is also manifested in the way proceedings are conducted, statements made during the proceedings, and not only in the outcome but also the substance of their judgments.

A lawyer currently representing a blasphemy accused in a trial court stated that the trial judge appeared to be in "fear and awe of the prosecutor and complainants". Throughout the proceedings, the judge was conscious of not offending the complainants and repeatedly stated that blasphemy is an intolerable offence and perpetrators should and will be dealt with strictly.¹¹⁸

In one case, for example, the presiding judge of the Lahore High Court refused to include the alleged blasphemous remarks in his appellate judgment, claiming that doing so would offend the honor of the Prophet Muhammad

*The words uttered and filthy language allegedly used by the applicant/accused as appears in the statements under section 161, Cr.P.C. of P.Ws. is highly insulting and intolerable (sic), one cannot dare to reproduce the same in this order, as the honour of Hazrat Muhammad (PBUH), being so much sacred (sic), rents my breast even to go through the statements of witnesses before police (sic).*¹¹⁹

In other judgments, judges personal views about Islam that informs their reasoning, is evident

*There is no denial to the proposition that the Holy Quran enjoins the Muslims to hold the last Prophet of Allah (peace be upon Him) dearer than themselves and their kith and kin, and this is also strengthened by Ahadiths this is why the law of the land has suggested the death penalty in such cases.*¹²⁰

In the same judgment, the Lahore High Court refused to accept the appellant's testimony that he was a Muslim and stated that the "remarks contained in the letter cannot be expected to be made by a true Muslim and such remarks are only expected from an Ahmadi as they consider Mirza Ghulam Ahmad as their Prophet."¹²¹

The Court upheld the conviction under section 295-C and confirmed the death sentence. Another strand of reasoning followed by the Court was that the complainant was a man of great credibility as he was Islamic scholar who had played an instrumental role in drafting the blasphemy law and ensuring that the offence carried the death penalty.

In a 1993 case, the Supreme Court upheld the validity of various laws that prohibited members of the Ahmadiyya community from expressing their religious beliefs. The Supreme Court's judgment also appeared to condone violence against those alleged to blaspheme against the Prophet Muhammad

*It is the cardinal faith of every Muslim to believe in every Prophet and praise him. Therefore, if anything is said against the Prophet, it will injure the feelings of a Muslim and may even incite him to the breach of peace, depending on the intensity of the attack...*¹²²

After reproducing some of the teachings of Mirza Ghulam Ahmad, the Court added

*Can then anyone blame a Muslim if he loses control of himself on hearing, reading or seeing such blasphemous material as has been produced by Mirza Sahib?*¹²³

¹¹⁷ *Malik Muhammad Mumtaz Qadri v. the State*, Criminal Appeals No. 210 and 211 of 2015, para. 2.

¹¹⁸ ICJ interview, March 2015.

¹¹⁹ 2014 MLD 617 Sindh, para 8.

¹²⁰ *Wajih-ul-Hassan v. Ismail Qureshi*, Criminal Appeal No. 1356 of 2002, 29 September 2010, Lahore High Court (unreported).

¹²¹ *Ibid.*

¹²² *Zaheeruddin v. the State*, 1993 SCMR 1718, para 83.

¹²³ *Ibid.*, para 84.

In other cases, judges have asked accused persons to pledge that they are "good Muslims" and placed great significance on their religiosity,¹²⁴ and in cases where the accused is a non-Muslim, courts have asked defendants to show their respect for the Prophet Muhammad.¹²⁵

A lawyer who defended a person accused of committing blasphemy against the Prophet Muhammad in the trial court stated in an interview with the ICJ that when his client, a Christian man accused of blaspheming against the Prophet Muhammad, testified that he had great love and respect for the Prophet Muhammad and would never say anything against him, the trial judge remarked that if the defendant had so much love and respect for the Prophet Muhammad, why did he not convert to Islam?¹²⁶

This reasoning can also be found in the trial court's judgment. Rejecting the credibility of the defendant's testimony as "not believable", the judge wrote in the judgment that if the accused believes "in the honour of the Holy Prophet PBUH...why (has) he up till now (not) embraced Islam?" Consequently, the trial court convicted the accused and sentenced him to death.¹²⁷

Judges have also expressed similar sentiments outside of the courtroom. According to news reports, in August 2000, Justice Nazir Akhtar of the Lahore High Court stated in a public lecture that "we shall slit every tongue that is guilty of insolence against the Holy Prophet".¹²⁸ While judges, like all others, have the right to freedom of expression, because of their duties, it must be exercised in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary. Thus international standards safeguarding the independence and impartiality of the judiciary prohibit judges from making any comment that might affect the fairness of the trial of any person on any issue.¹²⁹

Under international standards as well as Pakistan's code of conduct for judges,¹³⁰ judges are obligated to recuse themselves from a case if they are unable to decide it independently or impartially. For example, Principle 2.5 of the Bangalore Principles of Judicial Conduct states that "a judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable that the judge is unable to decide the matter impartially".¹³¹ Failure to do so may amount to judicial misconduct, as well as impugning the right to a trial before an independent and impartial court.¹³²

Statements of judges made in court and in judgments highlighted above are illustrative of judicial partiality in blasphemy cases that is inconsistent with the right of the accused to fair proceedings before independent and impartial courts. Convictions resulting from proceedings in which the tribunal was not independent and impartial are inherently unfair.

¹²⁴ *Manzar-ul-Haq Shah Jahan v. the State*, Criminal Appeal No. 608 of 2012, Lahore High Court, 10 June 2015 (unreported), para 17.

¹²⁵ 2006 MLD 1504 Lahore, para 5.

¹²⁶ ICJ interview, September 2015.

¹²⁷ *The State v. Younis Masih*, 2007, pp. 83-84.

¹²⁸ The Daily Din, 28 August 2000.

¹²⁹ See, for example, Principles 4.6, 4.2, and 2.4 of the Bangalore Principles of Judicial Conduct

¹³⁰ <http://www.supremecourt.gov.pk/web/page.asp?id=435>

¹³¹ Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002, accessed at:

http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

¹³² The ICJ is not aware of any disciplinary proceedings brought against any judge in Pakistan for his or her failure to maintain independence and impartiality in cases related to blasphemy.

5.4. Right to defend oneself and the effective assistance of counsel

Under Pakistani and international law, the right to a fair trial includes, among other guarantees, a number of safeguards of the right of accused persons to defend themselves against the charges.

The right of all accused persons to the assistance of an independent lawyer to defend their rights and interests, and with their assistance to challenge the evidence against them and present a defense to the charges, is a fundamental fair trial guarantee.

The Supreme Court of Pakistan too has observed that "a competent, diligent and ethical Bar is an indispensable component of our judicial system" and "the Bar exists for the purpose of ensuring access to and delivery of justice" and to "stand up for upholding the rule of law."¹³³

In view of the right to equality and the prohibition of discrimination, international standards and Pakistani case law clarify that the right to counsel includes the right to be appointed suitably experienced and qualified independent counsel for people who do not have counsel of choice where required in the interests of justice, and to the appointment of counsel free of charge where the accused lacks sufficient resources to pay for counsel.¹³⁴ Respect for this right aims to safeguard, among others, equality of arms without discrimination, a fundamental principle of a fair trial without which an accused would always be at an unfair disadvantage and could not hope to mount an adequate defense.

In addition, in cases where the death penalty may be given on conviction, the State and the court have a particular obligation to ensure that appointed counsel is competent and has the requisite skills and experience commensurate with the gravity of the offence.¹³⁵

To defend oneself against the charges, including with the assistance of a lawyer, is typically violated to such an extent in Pakistan that it makes a mockery justice and the very purpose of a trial.

First, those accused of blasphemy experience difficulty to find lawyers to represent them. This has meant that some blasphemy accused have had to request that lawyers be appointed to assist them.

One of the reasons for this is that many lawyers support the blasphemy laws in their current form, including a mandatory death penalty for those who defame the Prophet Muhammad. Indeed, in Pakistan lawyers constitute one of the strongest pressure groups in this regard.

For example, Mumtaz Qadri, who killed the former Governor of Punjab, Salman Taseer, because of the Governor's opposition to the blasphemy laws, was hailed as a martyr by large segments of the lawyers' community. Reportedly, dozens of lawyers attended his hearings, chanting slogans condemning Salman Taseer and demanding Mumtaz Qadri's release. Mumtaz Qadri's support in the legal profession included, reportedly, a team of at least 60 defense lawyers: their line of defense was that Mumtaz Qadri had fulfilled his religious obligations by killing Salman Taseer, as the latter had committed blasphemy against the Prophet.

According to media reports, one of Mumtaz Qadri's lawyers, former Justice Mian Nazir Akhtar, went on to declare at a conference against proposed amendments to the blasphemy law

*When it comes to the sanctity of the Prophet, the implementation of all manmade laws become different. Those who insult Him have no rights, including no right to live. There is no need for trial or hearings...*¹³⁶

In addition to pressure felt from, amongst others, their professional peers, the pool of lawyers willing to take cases is small owing to fact that allegations of blasphemy evoke a strong

¹³³ CrI. Misc. Application No. 86 of 2014, accessed at: <http://www.supremecourt.gov.pk/web/page.asp?id=1785>

¹³⁴ Article 14(3)(d) of the ICCPR; See section 340, Code of Criminal Procedure, 1898 and *Sher Muhammad v. the State*, 1999 MLD 1758.

¹³⁵ See *Muhammad Sharif v. the State*, PLD 1973 Lahore 365, and Amnesty International, Fair Trial Manual, *supra* fn.76, para 28.6.1.

¹³⁶ "Islamic clerics back blasphemy laws: those who insult Mohammed have no right to live", *Asia News*, 16 June 2015, <http://www.asianews.it/news-en/Islamic-clerics-back-blasphemy-laws:-those-who-insult-Mohammed-have-no-right-to-live-34522.html>

personal religious response, and because individuals accused of committing blasphemy are presumed to be guilty, lawyers who act in their defense also become tainted by association.

Some lawyers who defend blasphemy accused have reported receiving hostility from within the legal profession,¹³⁷ as well as from others and a range of forms of reprisals, some of which are described below.

5.4.1. Risks and challenges faced by lawyers

As eluded to above, another reason why accused persons in blasphemy cases are often unable to engage a lawyer of their choice to represent them is the often well-founded fear of lawyers of intimidation and attacks by complainants or other "interested" parties (who are at times members of, or supported by, armed Islamist groups). A recent illustration of this is the unlawful killing of lawyer Rashid Rehman Khan, who was killed after multiple warnings to withdraw from a blasphemy case. But even before Rashid Rehman's unlawful killing, attacks against defense lawyers in blasphemy cases were commonplace -Rashid Rehman had himself stated in an interview that defending a blasphemy accused in Pakistan was like "walking into the jaws of death".¹³⁸

Because charges in blasphemy cases are often framed in vague language, lawyers diligently representing their clients also run the risk of themselves being accused of "blasphemy". In one case, for example, a lawyer defending a 14-year-old Christian accused of "defiling the Quran" by writing blasphemous remarks on five pieces of paper told the ICJ that during trial, he requested the Court to allow him access to the pieces of paper so he could see what his client had been accused of writing. The trial judge allowed his request. As he was reading the first piece of paper and taking notes in his diary, dozens of people, ostensibly belonging to extremist Islamist groups, started chanting slogans against him, saying he too was a blasphemer for reproducing blasphemous words. The presiding judge immediately directed that the box containing the allegedly blasphemous pieces of paper be re-sealed.¹³⁹

The fear of reproducing the alleged blasphemous conduct appears more prevalent in section 295-C proceedings. In cases involving allegations under section 295-A, for example, courts have engaged in detailed discussion on the interpretation of blasphemy.¹⁴⁰

The failure of the authorities to protect and guarantee the safety of lawyers who have provided legal assistance to individuals charged of blasphemy has reportedly had a chilling effect upon other lawyers: many say they have been discouraged from representing persons in blasphemy cases out of fear of reprisals against themselves and their families. This has further impeded the right to fair trial of those accused of blasphemy-related offences in the country.

The ICJ considers that the failure of the authorities to protect lawyers who represent those accused of blasphemy from reprisals including threats, assaults and other violence notwithstanding the demonstrable pattern of such reprisals of which they are well aware, breaches the obligation of the State to act with due diligence to protect lawyers and prevent violations of the human rights of those whom they knew or ought to have known were at such risk. Furthermore, the lack of investigation into these serious and well documented attacks violates the State's obligation under international human rights law, including Article 2 of the ICCPR, to ensure prompt, thorough and independent investigation of such crimes, capable of leading to the identification and prosecution of the perpetrators.¹⁴¹

¹³⁷ ICJ interview, September 2015.

¹³⁸ Ali Sethi, "Pakistan's Tyranny of Blasphemy", *New York Times*, 20 May 2014, accessed at: http://www.nytimes.com/2014/05/21/opinion/pakistans-tyranny-of-blasphemy.html?_r=0

¹³⁹ ICJ interview, September 2015.

¹⁴⁰ In a 1960 judgment, for example, the Lahore High Court found that the alleged blasphemous passages in the book "Mizan-ul-Haq", written by a Christian author on the comparison between Islam and Christianity "will outrage feelings of the Muslims". However, it did not prove the offence under section 295-A of the Pakistan Penal Code as the requisite intention to "deliberately and maliciously" offend was absent. The Court ruled: *I am clear in my mind that the laws of Pakistan do not forbid comments on acts of founders and leaders of religions provided the comments are not of such a character as to make an unbiased person believe that they could have no other object but to deride or are so caustic in their tone as to merit the appellation of unjustified and unfair comments.* (PLD 1960 (W. P.) Lahore 629, para 11.)

¹⁴¹ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 15.

In addition to protecting the personal safety of lawyers at risk of reprisal for carrying out their professional duties, such protection is necessary to preserve the integrity and effectiveness of the administration of justice. Independent lawyers form a foundational pillar of the justice system within States that respect the rule of law. Without lawyers able and willing to provide services as defense counsel, fair trials are not possible.

Thus international standards require States to protect lawyers from being identified with their clients or their clients' causes and the Human Rights Committee and the UN *Basic Principles on the Role of Lawyers* underscore that States must ensure that lawyers are able to "perform all of their professional functions, including advising and representing and defending the rights of persons charged with criminal offences, without restrictions, influence, pressure, intimidation, hindrance, harassment or improper interference."¹⁴² The *Basic Principles* further provide that lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.¹⁴³

The State's failure to provide any real protection to lawyers who represent people accused of blasphemy in Pakistan and facing threats as a result is also a breach of the State's obligation to ensure and respect the right of the accused to a fair trial, and in particular the right to assistance of counsel.

5.4.2. Effective assistance of counsel

Another equally important guarantee to safeguard the effective exercise of the right of accused persons to defend themselves, including with the assistance of counsel, are the duties of lawyers to, at all times act freely and diligently, in accordance with the law and recognized standards and ethics of the legal profession and to uphold human rights and fundamental freedoms.

In blasphemy trials, however, lawyers' conduct in some cases has fallen far short of the required standard to ensure a fair trial.

5.4.2.1. Reports of unethical conduct by lawyers

In some cases, families of individuals accused of blasphemy have leveled serious allegations of mismanagement of funds and fraud against counsel who agreed to represent blasphemy accused. In at least three cases, they told the ICJ that even after charging exorbitant fees to provide legal assistance in blasphemy cases, lawyers left the proceedings midway or deliberately tried to damage the defendant's case during trial to secure higher fees for the cases on appeal. The families said that they felt helpless in the face of such unethical practices, as according to them, the fact that so few lawyers agree to defend blasphemy accused, left them with little choice to engage other counsel.

Commenting on reports of fraudulent practices within the legal community and NGOs working on blasphemy cases, a senior lawyer said to the ICJ

In the 1980s and 1990s, lawyers collaborated and worked together as a team to defend those accused of blasphemy. Much of this work was pro bono and lawyers were only driven by their desire to see justice be done. Now, some notable exceptions aside, quite a few lawyers and NGOs see the suffering of blasphemy accused as an opportunity to extort money from their families, or at times, international charities and organizations, with fees going up to 50,000 US Dollars in high-profile cases¹⁴⁴

According to the information available to the ICJ, no disciplinary action has been taken by Bar Councils against lawyers who have openly advocated for unlawful killing those accused of blasphemy, nor investigations initiated into allegations of the professional misconduct of lawyers who carried out their representation of people accused of blasphemy in a manner inconsistent with standards on the role of lawyers.

¹⁴² UN Human Rights Committee, General Comment 32, *supra* fn. 48; and Principle 16 UN Basic Principles on the Role of Lawyers, *supra* fn. 60.

¹⁴³ Principle 18, *ibid*.

¹⁴⁴ ICJ interview, September 2015.

5.4.2.2. Reports of ineffective assistance of counsel

As discussed above (see sections 5.1 and 5.1.1), in most blasphemy cases, before convicting a person courts have not required the prosecution to prove the alleged blasphemous statements were insulting to the Prophet Muhammad by any objective standard, but only that the defendant was involved in the alleged blasphemous conduct. Since the law against blasphemy is loosely and vaguely defined and applied arbitrarily, the fear of inadvertently committing blasphemy by reproducing the blasphemous comments or by questioning whether the alleged conduct amounted to blasphemy is so high that lawyers, and even judges, hesitate to venture into this territory.

As a result, defense counsel regularly rest their entire defense of a blasphemy accused on grounds that either that the blasphemy allegation was made maliciously, or that the accused lacked the capacity to commit blasphemy because of mental disability or juvenility. Some have told the ICJ that they have not dared to exercise the defense rights and their duties on behalf of their clients to argue that the alleged conduct did not amount to blasphemy— thus *de facto*, waiving an important component of the right of defense. In addition to fair trial violations that result from a law that does not meet the principle of legality and conviction where all elements of the offence, including intent, are not proven, the result is also that defendant is denied the benefit of effective assistance of counsel.

In Asia Bibi's case, for example, prosecution witnesses claimed the defendant had made three specific statements about the Prophet Mohammed. During the entire course of the proceedings, there is nothing to indicate that the defense raised the issue about whether these statements were blasphemous, or referred to the need to apply the "reasonable person" standard in the interpretation of section 295-C to prove meet the threshold of blasphemy.

5.4.2.3. Counsel appointed by the state

As mentioned above, under Pakistani law and international standards, the State is obligated to appoint counsel to represent an accused who does not have counsel of choice to represent him or her in cases in which the interest of justice require it. The State must assume the cost of the defense in cases where the accused is unable to engage counsel due to financial constraints.

The duties of lawyers, whether engaged by the defendant him or herself, or where appointed by the State, (and whether or not they are acting free of charge to the accused), remain the same: lawyers have a duty to raise issues which impact on an accused's right to be tried by an independent and impartial tribunal in the course of fair proceedings, and to take such other measures with a view to ensure that the defendant's rights are respected in the course of the proceedings. (See section 4.5.3).

Lawyers interviewed by the ICJ reported that State-appointed counsel in blasphemy cases frequently failed to discharge their duties effectively and diligently. In some cases, unnecessary adjournments requested by the State-appointed defense counsel resulted in the trial continuing for many years. In such cases, defendants have been also unable to obtain release on bail on statutory grounds as courts hold the defense, and not the prosecution, responsible for the delay in proceedings. (See section 5.5 and 5.5.1).

In one case, the Lahore High Court acknowledged in its appellate judgment that the appellant's counsel, who had been appointed by the State, was not present for at least three hearings, and the Court had appointed another counsel to defend the appellant. Curiously, rather than continuing the proceedings so as to allow the newly appointed lawyer to adequately prepare to present the accused's case, the Lahore High Court went on to consider and decide the appeal on the very day the new lawyer was assigned and upheld the appellant's conviction and imprisonment for life.¹⁴⁵

Under Article 14(3)(b) States must respect the right of accused persons to adequate time and facilities to prepare (and present) a defense, and to consult with their counsel.¹⁴⁶ Pakistani courts have clarified that the law requires that counsel be appointed in time for him or her to "study the documents" of the case, and particularly where the accused may face capital

¹⁴⁵ 2001 MLD 1203, para 2.

¹⁴⁶ *UN Basic Principles on the Role of Lawyers*, Principle 21. This Principle also stipulates that "such access should be provided at the earliest appropriate time".

punishment, the right of an accused person to effective legal representation is not fulfilled where the counsel is appointed a day or two before the trial.¹⁴⁷ The conduct of the Lahore High Court in this case appears to have flown in the face of these standards, violating the rights of the accused to counsel and adequate time and facilities to prepare the case and consult with newly appointed counsel.

MUHAMMAD RAHIM

In June 1996, Muhammad Rahim was accused of using "filthy and derogatory language" against the Prophet Muhammad, defaming holy personages of Islam, and "defiling a copy of the sacred Quran". Muhammad Raheem denied all charges. He argued that he was falsely implicated in this case because he was having a dispute with his landlord, who was one of the prosecution witnesses.

In September 1999, a trial court in Sargodha convicted him under sections 295-B, 295-C and 298-A of the Penal Code and sentenced him to life imprisonment.

In January 2001, the Lahore High Court heard Muhammad Raheem's appeal. The Court acknowledged that the defense counsel appointed by the State had failed to attend any hearing and the appellant's right to a defense had been compromised. On the day the appeal was heard, the Court appointed another counsel to defend the appellant.

Curiously, and in apparent violation of the rights of the accused, rather than adjourning the proceedings to allow the lawyer time and facilities to prepare the case and communicate with Muhammad Raheem, the Court delivered its judgment, upholding the conviction and sentence passed by the trial court of life imprisonment the very same day it appointed new counsel.

5.4.3. Jail trials and *in camera* proceedings

Under Article 14(1) of the ICCPR, holding oral hearings on the merits of a case determining a criminal charge, which the parties and members of the public, including the media, can attend, is the general rule. The Human Rights Committee has clarified that the publicity of hearings ensures transparency, and thus provides an important safeguard for the interest of the individual and of society at large. While Article 14 acknowledges that courts have the power to exclude all or part of the public from the proceedings, this must only be done in exceptional circumstances, specifically for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice.¹⁴⁸ However, closing part or all of the proceedings, or alternatives measures taken must nonetheless be compatible with the right of the accused to a fair trial in the context of adversarial proceedings.

Requests to hold the criminal proceedings in a jail (*jail trials*) may be made by the defendant or a *jail trial* may ordered by the trial court where there are grounds to believe that the proceedings in an open court would risk the lives of the defendant, the witnesses, judges, lawyers or other people associated with the case. If such threats exist, judges may also authorize a form of *distance trial*, where the defendant observes and participates in the proceedings from the jail through video link.

A defendant who is being tried in jail for blasphemy under section 295-C said about the proceedings

When my case was in court, I was accompanied by dozens of policemen at all times. But I still did not feel safe. I could tell the hostile and charged crowds who attended each hearing were intimidating the judge and the lawyers. In that environment, I had no hope of a fair trial. In jail, while the trial facilities are far from adequate, at least there is some chance of an impartial verdict¹⁴⁹

¹⁴⁷ See, for example, PLD 1973 Lahore 365 and 1971 PCRLJ 1335.

¹⁴⁸ Human Rights Committee, General Comment 32, *supra* fn. paras 28 and 29.

¹⁴⁹ ICJ interview, September 2015.

His counsel agreed that the jail was a more secure facility than regular courts for defendants in blasphemy cases, but questioned the State's failure to provide adequate security for trial in courtrooms

*It is a misnomer that the Pakistani State is weak –it is, on the contrary, very powerful. The truth is that in blasphemy cases, from the parliament to the judiciary to the police, no one is serious about reforming the system that victimizes the accused from the day the blasphemy allegation is leveled against him or her.*¹⁵⁰

For reasons of security, access to the proceedings that take place in jails is usually only permitted to the accused; prosecution and defense lawyers; and witnesses. Members of the defendants' family or media are generally barred access to the proceedings. This impedes on the right to a public hearing, which generally requires oral hearings of the case, which the parties and members of the public, including the media, can attend.

These measures are not only incompatible with the right to a public hearing, at times, they also do not work: In one case, for example, the trial court had authorized *jail trial* after the accused and his lawyer received threats to their lives during proceedings in the Sessions Court. Even during proceedings in jail, however, individuals hostile to the accused falsely claimed to be lawyers and attended the hearings. The prison authorities, however, failed to prevent that from happening.

Additionally, in *jail trials*, the defendant and his or her lawyers cannot communicate confidentially as prison officials are at all times present during their meetings. This is inconsistent with the right of the accused to adequate time and facilities to prepare their defense and communicate with counsel, and contravenes the accused's right to counsel under international standards, which require governments to recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.¹⁵¹

Another alternative that has been used in place of a public trial in order to protect the security of the accused in a blasphemy-related trial has been holding the trial through video link. In this case, the trial proceedings took place in court, but the defendant participated in the proceedings through video link from the prison where she was being detained.

The accused in this case, who is being tried under section 295-B for allegedly defiling the Quran, shared serious reservations about the arrangements in such cases. According to her account, she was expected to participate in the proceedings from the jail through a weak and inconsistent video link on a fourteen-inch television screen. She could not communicate with her counsel and the counsel could not adequately consult with her. Additionally, the defendant and her counsel were not given any privacy to discuss the case and strategy during the proceedings.

This account highlights some glaring fair trial violations in proceedings conducted through video link, demonstrating that they are not adequate substitutions for regular trials in open court. The right to assistance of counsel, including to instruct and have confidential communication with counsel, for example, is violated as the defendant, who is in jail, does not have the opportunity to instruct counsel, who is present in court;¹⁵² and the right to be present at trial and an oral hearing.¹⁵³ (See section 4.5.3).

While the ICJ appreciates that the Pakistani authorities now at least recognize the risks faced by defendants, judges, witnesses and lawyers in blasphemy cases and have attempted to provide them more secure facilities for trial, such facilities must at all times meet Pakistani and international fair trial standards.

It is also of concern that courts have, at times, refused to transfer trials from locations where there is a greater risk of violence -usually where the alleged blasphemous incident took place- to more neutral locations. In one case, the Lahore High Court refused the defendant's request to transfer proceedings from Multan to Lahore even after the defendant's counsel, following

¹⁵⁰ ICJ interview, September 2015.

¹⁵¹ Article 14(3) (b) and (d) and Principle 22, *UN Basic Principles on the Role of Lawyers*, *supra* fn.60.

¹⁵² Amnesty International, *Fair Trial Manual*, *supra* fn. 76, pp. 152-153.

¹⁵³ *Ibid.*, p. 156.

repeated threats, had been killed in Multan for defending the accused. The judge hearing the transfer application remarked that there was no need to transfer the trial to Lahore as "there is no requirement for a visa to travel between cities" and the defendant and his lawyer would be at risk regardless of where the trial is held. Rejecting the application, the Lahore High Court held that there is "no material in support of the apprehension expressed on behalf of the petitioner".¹⁵⁴

Jail trials and trials through video link in blasphemy cases should be considered short-term and exceptional measures. If they are to continue, adjustments must be made to remove all but necessary impediments to public trials in jails and to ensure that the accused has the ability to communicate confidentially with counsel throughout the proceedings.

¹⁵⁴ *Junaid Hafeez v. the State*, CRL Misc. No. 175/T, 2014, 9 September 2014.

5.5. Bail and the presumption of innocence

As highlighted above (see section 3.2), many offences against religion, including sections 295-A, 295-B and 295-C of the Penal Code, are non-bailable offences. This means that bail may only be granted at the discretion of the court and is not the accused person's right.

Section 497 of the Code of Criminal Procedure provides that those accused of non-bailable offences "shall not be so released if there appears (*sic*) reasonable grounds for believing that he has been guilty of an offence punishable with death, imprisonment for life or imprisonment for ten years." This precludes those accused of blasphemy under sections 295-A and 295-B, which carry a penalty of ten years and life imprisonment respectively, and section 295-C, which carries a mandatory death penalty, from the benefit of bail if the court finds that there are reasonable grounds to establish guilt.

Section 497 of the Code of Criminal Procedure is incompatible with international standards for the right to liberty and fair trial, including notably Article 9(3) of the ICCPR. The UN Human Rights Committee has emphasized that the clarified that pre-trial detention should not be mandatory for all individuals charged with a particular crime without regard to individual circumstances.¹⁵⁵

In accordance with the right to liberty, under Article 9(3) as well as the presumption of innocence, there is a presumption that people charged with a criminal offence will not be detained while awaiting trial. Under international law, States may only detain individuals pending trial where there are substantial grounds for believing that it is necessary and proportionate in the circumstances of the particular case to ensure his or her presence at trial, the preservation of evidence, or to protect against the individual committing a serious offence.

Detention prior to trial is thus a preventative measure that is aimed at averting obstruction of justice or averting (further) harm, not as a punishment. It must not be used for improper purposes or last longer than is necessary. The Human Rights Committee has therefore clarified that the continuing lawfulness, necessity and reasonableness of detention in each case must be reviewed regularly, at reasonable intervals, including in the light of alternatives to detention.¹⁵⁶ In the light of the rights to trial within a reasonable time, under Article 9(3) of the ICCPR detention prior to trial must be limited in duration: the longer the detention, the more the need for careful scrutiny of the continued necessity and proportionality of such detention by the court.¹⁵⁷

Individuals accused of blasphemy are often rejected bail, particularly by trial courts, on the basis that reasonable grounds exist to establish guilt. They do not consider individual circumstances of the applicants, including whether their detention awaiting trial is necessary and proportionate in the circumstances.

ICJ's analysis shows that the reasoning of courts in determining whether bail is to be granted in blasphemy and non-blasphemy cases appears inconsistent, especially where the applicant is a woman. In a 2004 case not related to blasphemy, for example, the Lahore High Court granted post-arrest bail to the applicant, who was a woman accused of causing grievous injury and was in pre-trial detention for over one year. The Court reasoned that the law allowed for a more lenient position regarding bail "to protect the women from the rigorous of imprisonment before trial and also to save women-folk from the atmosphere of jail which is of course not congenial for women, children minors and old age persons."¹⁵⁸

In another case where the applicant, a woman accused of possessing over five kilograms of heroin, the Sindh High Court granted her bail reasoning that even though the grant of bail to a

¹⁵⁵ Human Rights Committee, General Comment 35, *supra* fn. 45, para 38.

¹⁵⁶ *Ibid.*

¹⁵⁷ Amnesty International, Fair Trial Manual, *supra* fn. 76, section 6.3.

¹⁵⁸ 2005 PCRLJ 164, Lahore High Court.

women was discretionary, "courts have leaned towards granting of bail even where the accused was found involved in a murder case inviting capital punishment."¹⁵⁹

This approach can be contrasted with how courts decide bail applications in cases involving alleged blasphemy.¹⁶⁰ (See section 5.1).

An analysis of reported judgments of the High Courts and the Supreme Court on the question of bail involving sections 295-A, 295-B and 295-C show that while judges are more likely to give the benefit of doubt to individuals accused for committing offences under sections 295-A and 295-B, judges are less inclined to allow bail where the accused is alleged to have blasphemed against the Prophet.

Table no. 4: Outcome of bail applications to the High Courts

Section	Number of cases	Bail Denied	Bail Granted
295-A	18	0	18
295-B	11	2	9
295-C	21	13	8

5.5.1. Statutory bail in cases of delay

Pakistani law provides that bail may be granted to accused persons who, due to no fault of their own or their counsel's, have been in detention pending trial:

- Where the offence carries a penalty that is less than death, for over one year and their trial has not concluded (six months for women)
- Where the offence carries the death penalty, for over one year and their trial has not concluded (one year for women)¹⁶¹

In a 2009 Sindh High Court case, where the applicant was accused of committing murder and theft, the Court held that

*The Constitution of Pakistan provides that no person should be deprived of his liberty unless in accordance with law. The law, however, should be effective. If a person is detained under the law then he should be tried and dealt with expeditiously. To detain someone for over six years, as in this case, is an abuse of process of law by the prosecution, whose obligation is to ensure that the trial is expeditious.*¹⁶²

The Court went on to rule that bail could be granted in cases where an inordinate delay in the conclusion of the trial even where the offences were of "serious nature", carrying the death penalty or sentence for life imprisonment.

Even where accused persons are entitled to statutory bail, judges often reject bail in blasphemy-related cases, particularly where the accused is charged under section 295-C of the Penal Code. In many instances, judges consider the accused persons and their counsel responsible for the delay in proceedings, and are unsympathetic towards the security risks or other hardships faced by the accused or his/her counsel that may have contributed partly to the delay.¹⁶³

The consequence of bail being refused, even after statutory period prescribed by law has been satisfied, appears to be a denial of the presumption of innocence and consequently the right to

¹⁵⁹ 1990 PCRLJ 326, para 6.

¹⁶⁰ See the case of *Saliha Shaheen*, Box no. 3

¹⁶¹ Section 497, Code of Criminal Procedure, 1898.

¹⁶² 2009 YLR 1777, Sindh High Court.

¹⁶³ See, for example, *Walaiha Irfat v. the State*, Criminal Miscellaneous (bails), 7530-B-15 and *Murad ur Rehman v. the State*, 2014, PCRLJ 61, Sindh High Court.

liberty of individuals accused of blasphemy, who are deprived of their liberty for many years even though in a large majority of cases, they are at a later stage found innocent and are acquitted on appeal.

SALIHA SHAHEEN

Saliha Shaheen, a 24-year old Muslim woman, was arrested in March 2012 on allegations of "defiling the Quran", which is an offence under section 295-B of the Penal Code and carries a mandatory sentence of life imprisonment.

According to section 497 of the Code of Criminal Procedure, women accused of offences that carry a sentence less than death are entitled to bail if they are in detention for a period of six months and their trial has not concluded.

In March 2015, Saliha Shaheen's counsel applied for statutory bail before the trial court, but the application was dismissed. Her counsel then approached the Lahore High Court requesting bail; the application was passed from one judge to the other for more than two months, before being rejected on the grounds that the trial was about to conclude and that the delay could partly be attributed to adjournments sought by the accused and her counsel. The Court failed to acknowledge that the defense had asked for adjournments in only a small minority of the more than 50 occasions when the proceedings were postponed. Much of the delay was caused by the prosecution's failure to produce witnesses; threats to the accused and her counsel; and strikes of lawyers and judges.

The Lahore High Court also did not consider the general presumption in favor of granting bail to women accused, which courts regularly apply in cases that are not related to blasphemy.

Finally, on 12 October 2015, the Supreme Court accepted Saliha Shaheen's appeal, and she was granted bail after spending nearly three and a half years in detention.

5.6. Trial without undue delay

A fundamental prerequisite of a fair trial, acknowledged in Pakistani law¹⁶⁴ as well as Articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights, is that trial must be held within a reasonable time.

The right to trial within a reasonable time encapsulates the globally recognized principle that "justice delayed is justice denied". In addition, the right is linked to other rights including the presumption of innocence, the right to liberty, and the right to a defense. Article 9(3) of the ICCPR and other standards that safeguard this right at the pre-trial phase aim, among other things, to ensure the accused is not in effect deprived of his or her liberty prior to trial as a form of punishment without trial. They also aim to limit the uncertainty faced by an accused person and reduce the likelihood of any stigma attached to the accusation itself.

The UN Human Rights Committee has clarified that the right to be tried without undue delay relates not only to the time by which a trial should commence, but also the time by which it ends and the final judgment is rendered; all stages, including appeals, must take place within a reasonable time.¹⁶⁵ What constitutes "reasonable time" may vary from case to case, taking into account the complexity of the facts, requirements of investigation, and other external factors such as the conduct of the accused person. If the accused is detained pending trial, the obligation on the State to expedite the trial is even more pressing, since less delay is considered reasonable.¹⁶⁶ However, in scheduling the proceedings the right of the accused to adequate time and facilities to prepare a defense, guaranteed under Article 14(3) (b) of the ICCPR must also be respected.

Delays in trial are common for a variety of offences across the criminal justice system in Pakistan. The effects of such delays are acutely felt by persons accused of blasphemy, who fear for their lives and the safety of their families from the time such allegations are made and even while they are held in custody.

Individuals accused of blasphemy are held in pre-trial detention for prolonged periods, and those who are sentenced to death following charges under section 295-C of the Penal Code, face long periods on death row awaiting the outcome of their –frequently successful- appeals.

Asia Bibi, for example, was arrested in June 2009 on charges of blasphemy. She was held in pre-trial detention for over sixteen months before a trial court found her guilty in November 2010 and sentenced her to death. She appealed to the Lahore High Court, and it took nearly another four years for her appeal to be decided. In November 2014, Asia Bibi appealed to the Supreme Court, and it took a further eight months for the Supreme Court just to admit her case for hearing. By any standard, this period of time- all of which was spent in custody- violates her right to be tried within a reasonable time.

Asia Bibi's case is not an exception. The average time between arrest and trial in blasphemy cases is between two to three years. In many cases, the accused persons are not granted bail, and thus is held in custody throughout this pretrial period, implicating their rights not only to trial within a reasonable time, but also the rights to liberty and the presumption of innocence. (See section 4.5.5).

In some blasphemy cases, the period of pre-trial detention is even longer. Muhammad Sharif, for example, was arrested in 2001, and was convicted for blasphemy by a Sessions Court in 2005. He was finally acquitted by the Lahore High Court in 2007, after spending over six years in custody for a crime he never committed. Another blasphemy accused, Muhammad Arshad, was arrested on charges of blasphemy in 1989 and was convicted by a Sessions Court in 1993. When the Lahore High Court set him free in 1994, an innocent man had already spent nearly six years deprived of his liberty.

The time taken by high courts to decide appeals is much longer, another four to five years on average. Again, the delay in proceedings has, in some cases, been even longer: Niaz Ahmed,

¹⁶⁴ See section 3.1.

¹⁶⁵ Human Rights Committee, General Comment 32, para. 35 *supra* fn. 45.

¹⁶⁶ See Amnesty International, Fair Trial Manual, *supra* fn. 76, pp. 143-146.

Maulvi Tahir Aasim, and Muhammad Idrees Rabbani, all waited for nearly six years on death row before their appeals were decided by Lahore High Court and they were acquitted.

There are some cases that tell an even more disturbing tale: Wajih-ul-Hassan was arrested in 1999 for committing blasphemy under section 295-C of the Penal Code. He was convicted by the trial court in 2002. He appealed to the Lahore High Court, and after a period of eight years his appeal was decided and his conviction and death sentence were upheld. He appealed to the Supreme Court, but even after five years his appeal has still not been heard. As of October 2015, Wajih-ul-Hassan has spent over 16 years in prison, a sentence nearly amounting to life imprisonment in the country.¹⁶⁷

Lawyers and judges interviewed by the ICJ were of the view that the security risks associated with blasphemy-related cases are the major cause of the unduly prolonged proceedings. Trial court judges are routinely transferred, in some cases multiple times, and the new judge must then peruse evidence all over again. In other cases, judges, who are reluctant to hear blasphemy-related cases, schedule long gaps between hearings, or the prosecution delays producing or examining witnesses.

However, in view of the rights to defend and to adequate time and facilities to prepare a defense under international law guaranteed under Article 14 of the ICCPR, delays occasioned by the good faith exercise of procedural rights by defense, must be discounted when determining whether the accused has caused delay in the proceedings.

Courts in Pakistan too have expressed concern about the long periods of detention in blasphemy cases

*The appellant had been arrested in connection with this case way back on 19-5-1998 and for the last about eight and a half years he is rotting and languishing behind the bars in a case which has been found by me to be replete with serious doubts and infirmities. An offence under section 295-C, P.P.C. is indeed a very grave offence but not grave enough to **brutalize justice in its name (emphasis added)**.*¹⁶⁸

Proponents of the blasphemy law argue that since the judicial process eventually acquits blasphemy accused in a large majority of cases, there is no need for amending the blasphemy law to introduce greater safeguards for accused persons. Such arguments, however, do not take into account the long periods of time blasphemy accused spend in detention, in some cases with the threat of execution hanging over their heads, and the impact this has on their lives, their families, their professions, and their mental and physical well-being.

¹⁶⁷ The delay in deciding appeals may also be incompatible with section 426 of the Code of Criminal Procedure that specify that if the appellant is sentenced to three years or less imprisonment by the trial court, the appeal must be decided within six months; if the appellant is sentenced to three to seven years imprisonment, the appeal must be decided within one year; and if the appellant is sentenced to seven years and above, appeal must be decided within two years.

¹⁶⁸ 2007 YLR 336 Lahore, para 10.

AFAQ MASIH

Afaq Masih, a Christian man, was arrested in September 2005 on charges of expressing derogatory remarks against the Prophet Muhammad. Afaq Masih denied all charges, and stated that he had gotten into an argument with some Muslim men during a festival, prompting them to lodge a false case of blasphemy against him.

In May 2007, the trial court convicted Afaq Masih and sentenced him to death based on indirect and circumstantial evidence. Five years later, on appeal, the Lahore High Court acquitted him of all charges, ruling that there was no evidence against him.

According to Afaq Masih, the eight years he spent in detention changed his life. Following his arrest he was reportedly tortured for eighteen hours in police custody and was coerced into signing an extra-judicial confession. The police officers then reportedly threatened him that his wife and children would be harmed if he spoke about being tortured in front of the magistrate and asked for a medical check-up. After being convicted, he suffered a heart attack in prison, the effect of which he has still not fully recovered from.

Now he is ostensibly a free man, but he can no longer perform manual labor; his wife and four children left their home while he was in prison and have not come back, and he lives in an impoverished state in a town away from his home. He is still fearful that if he is found, he would be killed.

5.7. Capacity and competency

Section 84 of the Pakistan Penal Code provides that "nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

According to section 465 of the Code of Criminal Procedure, where the court has reason to believe that the accused person is of "unsound mind", it must "try the fact of such unsoundness and incapacity, and if the Court is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case".¹⁶⁹

Additionally, section 466 provides that whenever an accused person is found to of unsound mind and incapable of making his defense

*...the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.*¹⁷⁰

The Lahore High Court has held in one case that even if the accused person and his or her counsel do not raise the provisions related to safeguards for persons who lack the requisite capacity to understand the wrongfulness and illegality of a criminal act with the trial court, "it cannot serve as an excuse as the learned trial Magistrate was himself expected to be aware of the procedural law."¹⁷¹

People who should fall within the above-mentioned provisions, however have continued to be prosecuted and held in detention prior to trial for committing blasphemy, particularly for "willfully defiling the Quran" under section 295-B of the Pakistan Penal Code. Many have spent years in detention before they are released on appeal to the high courts.

5.7.1. Failure to apply the law

A 2006 judgment of the Peshawar High Court regarding the denial of bail by the Sessions Court to an individual accused of committing an offence under section 295-B of the Penal Code illustrates the glaring injustices that have been faced by blasphemy accused who are of "unsound mind" and the lack of impartiality of judges in such cases, particularly in the lower courts.¹⁷²

In March 2005, a shopkeeper alleged that Saifullah Khan had torn a copy of the Quran and thrown it into a dustbin. Saifullah Khan claimed he suffered from psychosis and severe mental delusions, which he had allegedly developed while in custody of American troops in Afghanistan. He requested release on bail under sections 466 and 497 of the Code of Criminal Procedure. A report of the Standing Medical Board supported his claim, and declared Saifullah Khan "unfit to plead". The Sessions Court, however, rejected his bail application, expressing apprehensions that "if the accused is released on bail that would not only cause disturbance to the public peace but would also endanger the life of the accused due to the mental attachment of the society with almighty Allah."¹⁷³

In April 2006, the Peshawar High Court heard Saifullah Khan's petition challenging the rejection of bail. In a scathing judgment, the Court denounced the rejection of bail because of external reasons as "destructive to the administration of justice" and held

The learned Additional Sessions Judge, it is shocking to note, has been carried sway by emotional/religious sentiments and has gone with the winds which she apprehended to be blown by the religious circles in case justice was done in the

¹⁶⁹ Section 465 of the Code of Criminal Procedure, 1898.

¹⁷⁰ Section 466, *ibid.*

¹⁷¹ 2003 PCRLJ 206.

¹⁷² PLD 2006 Peshawar 140.

¹⁷³ *Ibid.*, para 6.

*matter. This amounts to denial of justice under the fear of invisible threat. Such an approach is against the universal principle of justice. It is the rock bed principle of justice that "let the heaven fall but justice shall prevail".*¹⁷⁴

Emphasizing the need for judges to, at all times, remain independent and impartial, the Court further added

*It is the hallmark, distinctive as well as exclusive quality of a Judge to be firm and stern in the matter of doing justice and at no occasion shall permit exterior elements of whatever influence, menace and mischief to deter it from doing justice hence, the denial of relief to the petitioner by the learned Courts below on the above consideration is in disregard of the well-settled principles of law and justice.*¹⁷⁵

In another appeal before the Peshawar High Court, the Court found that the appellant, who had been convicted and sentenced to life imprisonment by the trial court, was denied safeguards under the law

*The convict had taken the plea of fits and mental disorder and unsound mind...but the learned trial Court did not referred (sic) the accused to Civil Surgeon of the District to checkup his mental condition. The trial Court also did not adopt the procedure prescribed under Section 465, Cr.P.C.*¹⁷⁶

Earlier in 2012, the Islamabad High Court quashed charges against Rimsha Masih, a 14-year old Christian girl with "limited mental capacity" accused of defiling the Quran. The Court held that "the most important factor for consideration of involving of any person of having committed the offence under section 295-B, P.P.C. is whether there existed any *mens rea* in committing such like offence", which a mentally disabled, minor girl could not be expected to possess.

Rimsha Masih's case is exceptional in the speediness with which it was handled, since she was arrested in August 2012, and in November 2012 the Islamabad High Court quashed all charges against her.

Many other mentally ill individuals have to suffer in detention for many years before being acquitted. In another case, the Lahore High Court acquitted a Christian man of defiling the Quran on the ground that "the defence has sufficiently proved on the record that at the time of the occurrence the appellant was an insane person and did not know the nature of the act done by him." When the High Court set him free, he had already spent over five years in detention.¹⁷⁷

The failure of prosecutors and investigators to ensure protection of human rights, due process and the correct administration of justice is particularly striking in blasphemy cases where the accused is mentally disabled. Zaibunnisa was arrested in 1996 on charges of blasphemy under section 295-B after a cleric from Lahore complained to the police that he had found torn pages of the Quran thrown in a drain. A medical board declared her mentally ill soon after her arrest, but she was kept in detention. It July 2010, 14 years after she was first arrested, the Lahore High Court ordered her release. After she was freed, the cleric reportedly told the media that he had not included her name in the complaint: a police official had reportedly implicated her in the case to defuse tension that had developed in the area over al alleged incident of the defiling of the Quran.¹⁷⁸

A prison officer in Lahore's Central Jail informed the ICJ that there are a number of women accused of blasphemy with mental disabilities detained in the jail awaiting trial. Prison authorities in another major prison of Punjab in Multan shared a similar story. One officer admitted that some of these women have been languishing in jail for many years, as their families are not interested in pursuing their case and have for all purposes disowned them following the blasphemy allegations.¹⁷⁹

¹⁷⁴ *Ibid.*, para 8.

¹⁷⁵ *Ibid.*

¹⁷⁶ PLD 2014 Peshawar 122.

¹⁷⁷ 2007 MLD 1040.

¹⁷⁸ Asad Jamal and Badar Alam, "Herald Exclusive: What the law says", *Herald*, 15 February 2011, accessed at: <http://www.dawn.com/news/606409/herald-exclusive-what-the-law-says>

¹⁷⁹ In April 2015, the provincial government of the Sindh province, noting the lack of the implementation of the above-mentioned provisions of law in blasphemy cases, amended the Sindh Mental Health Act, 2013. According to the

SARTAJ MASIH

In June 2001, an official at a mosque in Faisalabad accused a Christian man, Sartaj Masih, of tearing and trampling on pieces of the Quran. Sartaj Masih was arrested the same day and charged under section 295-B of the Pakistan Penal Code for "willfully defiling the Quran".

During trial, Sartaj Masih's lawyer argued he was mentally ill. He had been admitted to a psychiatric hospital in Lahore in August 2000, but had run away and since then had been "wandering in different places". A psychiatrist from the Punjab Institute of Mental Health supported his claim.

In September 2004, the trial court rejected Sartaj Masih's defense, convicted him under section 295-B of the Penal Code, and sentenced him to life imprisonment.

Sartaj Masih appealed to the Lahore High Court. In January 2007, the Lahore High Court held the trial court had erred in not considering his medical report and failed to apply section 84 of the Pakistan Penal Code.

The Court stated that Sartaj Masih was mentally incapable of committing the offence of "willfully defiling the Quran" and did not possess the requisite intention to prove the offence.

Sartaj Masih was finally acquitted in January 2007, after spending over five years in detention.

5.8. Conditions of detention and imprisonment

Article 10(1) of the ICCPR requires that States guarantee that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Overcrowded prisons, torture and other ill-treatment, and inadequate health and hygiene facilities generally plague detention and prison facilities for all crimes. The predicament of individuals accused of blasphemy, who are detained pending trial or appeal or serving sentences for blasphemy, is compounded by the security and safety risks they face as the offence with which they are accused or have been convicted also makes them also vulnerable to attacks.

Special measures taken by prison authorities, ostensibly for the protection and security of those awaiting trial or serving sentences for blasphemy, have further undermined individuals' right to humane treatment in detention or prisons.

5.8.1. Security of detainees

Under international law, States must ensure that all people deprived of their liberty are treated with respect for the inherent dignity of the human person, and are not subjected to torture or other cruel, inhuman or degrading treatment or punishment.¹⁸⁰ States' obligations to ensure the rights of people deprived of their liberty apply to all detainees and prisoners, without discrimination.¹⁸¹

International human rights law also requires that States exercise "due diligence" in securing the enjoyment of human rights against violations by non-state actors, and are required to prevent, punish, investigate or redress the harm caused by human rights abuses by private persons or entities. Authorities must pay special attention to ensure the safety or health and dignity of detainees or prisoners at particular risk, including because of their identity or status.

Prison officials acknowledged to the ICJ that blasphemy was a "highly sensitive" matter, and detainees accused of, or serving sentences for blasphemy, were at "high risk" of attacks by other detainees and even jail staff.

In some cases, threats against those detained awaiting trial or imprisoned following conviction for blasphemy have been actualized.

In September 2014, Muhammad Asghar, a 70-year old man convicted for blasphemy was shot in a jail in Islamabad, reportedly by a police constable. He was seriously injured, but survived the attack.¹⁸²

Ayub Masih, who was in prison following his conviction in 1998 for blasphemy, was stabbed by other inmates in prison. Other prisoners and jail staff witnessed the incident, but reportedly did nothing to prevent the attack.¹⁸³ The Lahore High Court acquitted Ayub Masih in 2001.

Another victim of the blasphemy law, Yousaf Ali, convicted for blasphemy and sentenced to death in 2000, was reportedly shot dead by another detainee while being moved from one barrack to another in Lahore's Kot Lakhpat Jail.¹⁸⁴

5.8.2. Solitary confinement/Isolation

Ostensibly as a measure to protect those awaiting trial on blasphemy charges and those serving sentences following conviction for blasphemy, individuals have been held in cells separate from other detainees. Usually, the block of cells in which they are held (referred to as "high security

¹⁸⁰ Rule 1, the Mandela Rules, *supra* fn. 79.

¹⁸¹ Rule 2, the Mandela Rules, *supra* fn. 79.

¹⁸² "Policeman wounds British man jailed for blasphemy in Rawalpindi", *Dawn News*, 26 September 2014, accessed at: <http://www.dawn.com/news/1134272>

¹⁸³ "Timeline: Accused under the blasphemy law", *Dawn News*, 18 August 2013, accessed at: <http://www.dawn.com/news/750512/timeline-accused-under-the-blasphemy-law>

¹⁸⁴ "Timeline: Accused under the blasphemy law", *Dawn News*, 18 August 2013, accessed at: <http://www.dawn.com/news/750512/timeline-accused-under-the-blasphemy-law>

barracks") is at a distance from other prison cells, and they are barred from speaking or interacting with other detainees. In many cases, they also have been prohibited from leaving their cells for exercise or fresh air, recreation or exercise.

In cases that are "high-profile", cells of such individuals have been monitored at all times by CCTV cameras. In addition, facilities such as the provision to cook their own food, which are available to other detainees,¹⁸⁵ are denied to many blasphemy accused, purportedly for their own security. In some cases, detainees accused of blasphemy are discouraged from keeping their own books, especially their respective holy books.

Individuals accused of blasphemy kept in solitary confinement recounted to the ICJ some elements of their daily struggle to maintain their sanity.

A 28-year old man, charged under section 295-C, in pre-trial detention for over two years spoke to the ICJ about the suffering faced by him and others

There are terrorists, serial killers and rapists in the same prison who have more rights than us –they have friends, they can chat over a game of cards or a cup of tea, they can feel the sun and breathe fresh air. Is a mere allegation of blasphemy so much worse than we have been stripped of all our rights? I don't know how long before our minds start rotting in this environment¹⁸⁶

The practice of prison authorities to detain individuals accused of, or convicted for, blasphemy-related offences for extended periods of time in solitary confinement is in violation of Pakistani law as well as international standards.

Section 29 of the Pakistan Prison Act, 1894, for example, provides that every prisoner held in solitary confinement for more than twenty-four hours, whether as a punishment or otherwise, "shall be visited at least once a day by the Medical Officer or Medical Subordinate."

This provision recognizes the serious mental health risks posed by solitary confinement and attempts to provide safeguards to ensure early detection of any psychological harm. This safeguard, however, is routinely disregarded by prison authorities.

Furthermore, Rule 623 of the Pakistan Prison Rules, 1978, requires that "each cell for solitary confinement shall have a yard attached to it, where the occupant have the benefit of fresh air without the means of communicating with other prisoners."

In at least one prison visited by the ICJ, individuals accused of blasphemy were kept in detention cells that did not have attached yards. Detainees were confined in their cells at all times, and did not have any facilities to get fresh air or any exercise.

Moreover, Rule 639 of the Pakistan Prison Rules provides that

...in executing a [judicial] sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods and when the imprisonment awarded shall exceed three months the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

However, even though individuals accused of blasphemy are kept in solitary confinement as a form of "protective custody" as opposed to punishment, the period of their isolation can continue for as long as the period of detention or imprisonment, thus, in some cases for many years.

The newly revised Standard Minimum Rules for the Treatment of Prisoners (known as the "Mandela Rules") define solitary confinement as the confinement of prisoners for 22 hours or more a day without meaningful human contact, and prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days.

¹⁸⁵ Rule 259, Pakistan Prison Rules.

¹⁸⁶ ICJ interview, September 2015.

Prolonged solitary confinement (in excess of 15 days) is prohibited by the Mandela Rules.¹⁸⁷ The UN Special Rapporteur on Torture too has concluded that 15 days is the limit between "solitary confinement" and "prolonged solitary confinement" because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible,¹⁸⁸ and a significant number of individuals will experience serious health problems regardless of the specific conditions, time and place, and pre-existing personal factors.¹⁸⁹

In addition, the Special Rapporteur has expressed concern that the practice of solitary confinement during pretrial detention "creates a de facto situation of psychological pressure which can influence detainees to make confessions or statements against others and undermines the integrity of the investigation".¹⁹⁰

Moreover, the UN Special Rapporteur on Torture and the UN Human Rights Committee¹⁹¹ have stated that when used during pre-trial detention or for indefinite or prolonged periods of time, solitary confinement can amount to cruel, inhuman or degrading treatment or punishment and even torture.

Under international standards, solitary confinement including for the purposes of security and protection of vulnerable detainees, must be used only in exceptional cases, as a measure of last resort and for as short as time as possible, pursuant to the authorization of a competent authority and subject to independent review.¹⁹² Under the Mandela Rules, indefinite and/or prolonged solitary confinement is prohibited.¹⁹³ The practice of detaining blasphemy those accused of blasphemy falls short on both these conditions.

Holding those accused of blasphemy for years in solitary confinement "for their own safety" has a perverse logic: while it is commendable that prison authorities recognize the risk faced by detainees from other inmates and police staff, their response only serves as a continuation of the persecution faced by individuals accused of blasphemy, resulting frequently in the further violation of their human rights.

5.8.3. Right to private and family life

Prison authorities in jails across the Punjab province informed the ICJ that they only allow "blood relatives" or counsel-of-record access to detainees accused of, or convicted for, blasphemy-related offences. Friends, distant family members, fiancés, NGO representatives and other people with *bona fide* interest in their case are routinely denied visits. Where the case is considered "high profile", restrictions on visitation may be even stricter.

Expressing his frustration at the situation, a man accused of blasphemy awaiting trial for over two years stated

*Dozens of people overtly hostile to me came to observe my trial in the sessions court. They intimidated the judge and threatened my lawyer. Yet no action was taken against them. Here, in prison, I am not even allowed to meet my well-wishers! And they (prison authorities) say it is for my own safety. How is spending days locked up in a prison cell without speaking to anyone for my own safety? I have not even been convicted of any offence, but have been condemned to a slow death...*¹⁹⁴

In most cases, family members are only permitted to meet detainees once a week, for a period of 15 to 30 minutes. This limitation, imposed on all detainees awaiting trial, affects blasphemy accused particularly because often, on the pretext of security, they are held in jails and prisons

¹⁸⁷ Rule 43 (b), the Mandela Rules, *supra* fn. 79.

¹⁸⁸ Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, para 26, accessed at: <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>

¹⁸⁹ *Ibid.*, para 63.

¹⁹⁰ *Ibid.*, para 73.

¹⁹¹ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

¹⁹² Rule 45, the Mandela Rules, *supra* fn. 76.

¹⁹³ 43 (1) (a) and (b), *ibid.*

¹⁹⁴ ICJ interview, September 2015.

located outside of their hometown, which means that their family members often have to travel for many hours, and most often at great expense, for a brief meeting.

In some cases, even family members have had to struggle to get access to their relatives in detention. Soran Masih, Asia Bibi's father, for example, was denied access to his daughter for many years before finally in August 2015, the Lahore High Court directed the prison authorities to allow him visitation rights.¹⁹⁵

The fiancé of a blasphemy accused in Lahore told the ICJ that prison authorities have barred him from meeting his fiancée in jail because they have no blood relation.

I have been pursuing her case, engaging lawyers on her behalf, and attending hearings of her case. The jail authorities know this, but still they have refused to allow me visitation rights. I cannot even protest against their behavior because I am fearful that they will retaliate by punishing my fiancée in detention

Under international standards as well as Pakistani law, all detainees have a right to communicate with the outside world. This is subject only to reasonable conditions and restrictions that are proportionate to a legitimate aim.¹⁹⁶ Denying detained individuals regular visits, including with family members and friends, or creating undue obstacles for visits, further adds to the suffering of individuals accused of or serving sentences for blasphemy, and in some cases, may violate their rights to family and private life.

¹⁹⁵ "Asia Bibi father allowed to Visit her in jail by LHC", *Pakistan Christian Post*, accessed at: <http://www.pakistanchristianpost.com/detail.php?hnewsid=5565#sthash.n56RC9IJ.dpuf>

¹⁹⁶ Amnesty International, *Fair Trial Manual*, *supra* fn. 76, pp. 51-54.

6. CONCLUSION AND RECOMMENDATIONS

Pakistan's blasphemy laws contravene its international legal obligations in relation to the respect and protection for freedom of thought, conscience, religion or belief; freedom of opinion and expression; equality before the law; the prohibition of discrimination; and, as described above, a range of fair trial rights. The operation of blasphemy laws continues to have a detrimental impact on pluralism in the country, and feeds into the atmosphere of religious intolerance and extremism. As Pakistan continues its efforts to counter terrorism and religious extremism, it must, as a matter of urgency, reconsider the existence of the blasphemy laws in their current form and either repeal or significantly amend all offences related to religion in compliance with its national and international human rights obligations.

As a matter of urgency, at the very least, all branches of the Pakistani State must address the defects in the framing of the blasphemy laws as well as of the shortcomings at the investigative, prosecutorial, procedural, administrative and judicial levels highlighted in this report to minimize the misuse of the blasphemy laws and ensure that those accused of blasphemy receive a fair trial. To this effect, a range of measures is needed to strengthen the independence, impartiality, and competence of judges, lawyers, investigators and prosecutors.

Moreover, additional extraordinary and special measures are also required to redress the particular injustices highlighted in this report in the implementation of Pakistan's blasphemy laws: vague and overbroad provisions of the law which are inconsistent with human rights guarantees; religious beliefs and ideological biases that influence the conduct of all key agents of the administration of justice; false and malicious complaints; and risks of violence and reprisals against the accused, their families, their communities, their lawyers, and judges, among others.

The ICJ, therefore, makes the following recommendations:

Parliament

- Repeal all blasphemy laws, particularly sections 295-A, 295-B, 295-C, 298-A, 298-B and 298-C, or amend them substantially so that they are consistent with international standards including on freedom of expression; freedom of thought, conscience or religion; and equal protection of the law as guaranteed under the ICCPR.
- Abolish mandatory death penalty, including for section 295-C cases.
- Expressly include the requirement of proof of deliberate and malicious intent in all offences related to religion that are retained in the short or long term, particularly section 295-C of the Pakistan Penal Code.
- As a short-term, temporary measure, until wider reform of the blasphemy laws and measures to address the flaws in their implementation is accomplished, amend section 196 of the Code of Criminal Procedure to ensure no court can take cognizance of any blasphemy-related offence, particularly under sections 295-B and 295-C of the Penal Code, without intervention from the provincial or federal governments, preferably from officials of the Ministry of Law, Justice and Human Rights. While the ICJ remains generally opposed to the requirement of sanction for the commencement of legal proceedings, given the specific issues raised in the report about the flaws in the prosecution and investigation in blasphemy cases, this additional temporary safeguard may act as an effective deterrent against malicious or frivolous prosecution.
- Amend Schedule II of the Code of Criminal Procedure, 1898, to make all blasphemy-related offences (sections 295 to 298-C) bailable, and ensure bail is only denied where there is substantial risk of flight, harm to others, or interference with the investigation that cannot be allayed by other means.

- Amend Schedule II of the Code of Criminal Procedure, 1898, to make all blasphemy-related offences (sections 295 to 298-C) non-cognizable, to ensure judicial warrants are a prerequisite for launching investigation and making arrests.
- Amend the Code of Criminal Procedure to remove the requirement that Muslim judges preside over section 295-C trials.
- Remove section 295-A from the list of scheduled offences under the Anti-Terrorism Act, 1997.

Federal and Provincial Governments

- Ensure the immediate and unconditional release of all persons deprived of liberty (whether awaiting trial or following conviction) solely for peacefully exercising their rights to freedom of expression and freedom of thought, conscience, religion or belief.
- Ensure respect for the right of individuals accused of blasphemy, whether detained in police custody, pending trial or following conviction, to visits and communication with their lawyers, families, friends and human rights groups. Any restrictions on visits with family members, friends or others must be prescribed by law, and both necessary and proportionate to a legitimate aim, and subject to review and challenge, including before an independent and impartial body.
- End the practice of holding individuals accused of, or convicted for, blasphemy-related offences in solitary confinement. Where used, ensure that solitary confinement is a measure of last resort and is under judicial supervision; is for the shortest possible time; and the individuals held in solitary confinement are examined by duly qualified and competent psychiatrists at regular intervals.
- Ensure all persons deprived of their liberty, including those awaiting-trial or convicted of blasphemy-related offences, are at all times treated humanely and with dignity. Authorities should also ensure that measures taken to protect the security of such individuals should not worsen their conditions, marginalize them more than is necessary to ensure their protection, and do not result in their being subject to conditions or a regime that is worse than of other detainees or prisoners.
- Establish a robust and multi-faceted witness protection programme; ensure adequate resources for the effective functioning of such a programme; and make the protection of the defendants, witnesses, investigators, lawyers and judges in blasphemy-related cases a priority.
- Take all necessary measures to guarantee protection for the lives and physical integrity of judges and lawyers. Any allegations of attacks, threats, or harassment must be promptly and thoroughly investigated by an independent and impartial authority and those responsible brought to justice in the course of fair proceedings.
- In collaboration with the Bar, establish and ensure adequate resources to ensure the availability of legal aid throughout the country. Such a legal aid system must, at a minimum, ensure the availability and provision, without discrimination, of quality legal assistance and representation by relevantly experienced and qualified independent lawyers for people suspected of or charged with a criminal offence, including blasphemy cases. Such legal aid must be available without charge to those who do not have the ability to pay.
- Ensure improvement of legal education, including education of judges. Human rights law courses and departments should be introduced in all law schools. The education system, as well as the criteria and procedures for the appointment of judges and prosecutors, should be designed to ensure that appointees to judicial and prosecutorial positions should have extensive knowledge of national and international

human rights law, including in particular the International Covenant on Civil and Political Rights (ICCPR).

- In consultation with judges and the Bar, ensure adequate resources and take other measures necessary to support continuing legal education for judges, lawyers and prosecutors on substantive legal developments, constitutional and judicial procedure, judicial ethics, gender sensitivity, discrimination and protection of human rights under both Pakistani and international law.
- Ensure that in blasphemy cases *jail trials* or trials through video link are exceptions rather than the rule. These exceptional measures must be used as a last resort and only to the extent necessary to protect the security of the accused and others associated with the case. Adjustments to such proceedings must be taken to remove all but necessary impediments to public hearings and to ensure their compatibility with the rights of the accused, including to communicate confidentially with counsel and participate fully throughout the proceedings.
- Ensure that each police station, court, detention facility and prison has resources and facilities that ensure respect for the right to the confidentiality of communications between individuals and their lawyers, including in *jail trials*. When necessary to ensure security of the lawyers, law enforcement officials, investigators, prison authorities or prosecutors may only be within sight —but not within hearing during such communications.
- In order to ensure the right of the accused to adequate time and facilities to prepare his or her defense, the duration and number of meetings between a lawyer and a detainee should not be limited by State agents under any pretext.
- Ensure the effective implementation of section 156-A of the Code of Criminal Procedure, which provides that for complaints under section 295-C, no officer below the rank of a Superintendent of Police shall investigate the complaint.
- Amend section 156-A to include all blasphemy-related offences, including in particular sections 295-B, 298-A, 298-B and 298-C of the Penal Code, with a view to decreasing prosecutions based on false and malicious complaints.
- Ensure that prosecuting and investigating agencies discharge their functions independently and impartially, in a manner that respects and protects human rights without discrimination, and that prosecutorial discretion be exercised to ensure that only *bona fide* complaints of recognizable criminal conduct are registered and pursued.
- Register criminal cases where courts have concluded or there are reasonable grounds to believe that complainants and/or the witnesses in blasphemy cases have committed perjury.

Supreme Court and Provincial High Courts

- Take appropriate steps to ensure that judicial codes of conduct are widely disseminated amongst judges, along with guidance on how judges should address the problems typically associated with blasphemy cases such as lack of independence and impartiality caused by religious beliefs, political ideology or interference from State or non-state actors.
- Ensure the code of conduct for all judges is in line with regional and international standards, including the Bangalore Principles on Judicial Conduct, with a view to strengthening the integrity of the judiciary and improving the accountability of judges.
- Ensure that allegations of professional misconduct based on violations of the judicial code of conduct (including that the judge has not acted impartially in a case

concerning an alleged offence against religion) are promptly, independently and impartially investigated. Where there is reliable evidence of such misconduct, disciplinary proceedings that meet fair trial and due process guarantees should be initiated before the Supreme Judicial Council.

- The Chief Justices of the Supreme Court and the provincial high courts should remind judges of their obligation to recuse themselves from participating in any proceedings where they are unable or it may appear to a reasonable observer that they would likely be unable to decide the matter independently or impartially, particularly because of religious beliefs, political views, or external influences.
- In the short-term, before independent and impartial proceedings before trial courts can be guaranteed, given the prevalence of violations to the right to a fair trial in sessions courts, high courts, in the interest of justice, should consider using their discretionary powers under section 526 of the Code of Criminal Procedure to hold the trials for all blasphemy-related offences, particularly under sections 295-A, 295-B, 295-C, 298-A, 298-B and 298-C, at the high court level.

Judges

- Ensure that the proceedings in blasphemy cases are conducted in a manner that respects the fair trial rights of the accused.
- Ensure that provisions of section 84 of Penal Code and sections 465-466 of the Code of Criminal Procedure related to mental capacity and competency are implemented in law and in spirit. The right of the accused to be examined by an independent and impartial relevantly qualified and experienced expert must be respected and protected.
- Ensure that decisions to detain a person pending trial are, as required by article 9(3) of the ICCPR, an exception rather than a rule. In view of the right to liberty and the presumption of innocence, judges must ensure that no person is detained unless there are substantial reasons in the particular case for believing that, if released, the individual would: abscond, commit a serious offence, interfere with the investigation or the course of justice, or pose a serious threat to public order; and there are substantial reasons for believing that there is no possibility that alternative measures would address these concerns.
- Ensure that any conditions imposed on release are necessary and proportionate to achieving the above-described ends (ensuring the individual's appearance at trial, the safety of others and the fair administration of justice).
- Ensure periodic review of the necessity and proportionality of continuing pre-trial detention of each individual detained for blasphemy-related offences at regular intervals, and ensure that an individual is released when the detention is no longer necessary or proportionate, and in circumstances where the individual has not been brought to trial within a reasonable time.
- Ensure that no one is convicted of blasphemy under section 295-C in the absence of proof beyond a reasonable doubt of every element of the crime, including the individual's intention to commit blasphemy.
- Implement provisions in the Code of Criminal Procedure that give courts discretion to transfer the venue of trials in the interest of justice, including applications on behalf of an individual accused of blasphemy to transfer the trial from the location of the alleged blasphemous incident to other safer localities that are adequately equipped and can ensure the respect for the rights of the accused, including trial by an independent court that is free from external influences.

The Bar

- The Pakistan Bar Council, in consultation with provincial bar councils and bar associations, should elaborate on lawyers' code of ethics to ensure it is consistent with human rights and with widely accepted and international standards on the role of lawyers.
- The Pakistan Bar Council and provincial bar councils should take appropriate steps to ensure the wide dissemination of the code of ethics for lawyers within the country through all the available means.
- Bar councils should ensure that allegations of professional misconduct, based on the Code of Conduct (including that the lawyer has not acted in a manner to actively pursue and defend his or her client's human rights in a case related to an alleged offence against religion) are promptly, independently and impartially investigated. Where there is reliable evidence of such misconduct, the lawyer must be given the opportunity to challenge the allegations and defend him or herself in the course of fair proceedings before an independent and impartial body composed of lawyers in which his or her rights and due process are respected.
- Bar Councils must ensure that the sole purpose of disciplinary measures is maintaining the independence and integrity of the legal profession. Measures must be taken to ensure that under no circumstances may disciplinary proceedings be used as a means of intimidation, harassment, and retaliation against lawyers for exercising their functions independently and diligently in accordance with internationally recognized professional standards.

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