

## **Draft for PYLC 2011—Legal Affairs Committee**

The Legal Affairs Committee PYLC 2011 intends to seek solutions and adopt resolutions in connection with three current and controversial matters of public interest in Pakistan. Each of the issues listed below will be addressed in turn.

1. **Blasphemy Law.** Is this a tool to victimise the minority community and settle scores or does it serve an important religious and social purpose? Should we consider repealing or amending it? If so, how can this be done?
2. **Candidacy Laws.** How can these be defined so as to achieve sound electoral reform? How can these laws be invoked so as to ensure that the quality of the parliamentarians improves?
3. **Judicial Reform.** In what ways can we enhance rule of law? How can the Courts be improved? Has the historic judicial movement of 2007-2009 achieved all it set out to achieve?

### **Blasphemy Law**

In order to debate the blasphemy law, it is important to understand what the law says, how it has been implemented over the years, and what amendments have been suggested thus far. The blasphemy law in Pakistan dates back to 1860, when it was written into the British Penal Code. It then contained clauses to protect the interests of diverse religious groups in undivided India. Following is a section-by-section explanation (also detailing the year each particular clause was added) of the blasphemy law as it stands today.

#### What relevant sections of the law say:

- **295:** Injuring or defiling a place of worship of any religion punishable by 2 years imprisonment (1860).
- **295A:** Deliberate and malicious acts intended to outrage the religious feelings of any group punishable by 10 years (1927).
- **295B:** Wilful defiling, damaging or desecrating a copy of the Holy Quran or of an extract there from punishable by life imprisonment (1982).
- **295C:** Defiling the sacred name of the Prophet (pbuh) punishable with death, or imprisonment for life (1986 Act). Life imprisonment dropped in 1990. (295B & C are also non-bail able offenses. In addition, in a charge filed under 295C, the trial must be presided over by a Muslim judge).
- **298:** Wounding the religious feelings of any person punishable by one year imprisonment (1860).
- **298A:** Defiling the sacred name of any wife or family member of the Prophet, the righteous Caliphs or his companions (Sahaba) punishable by 3 years (1980).
- **298B:** Ahmedis barred from reciting Azan (as Muslims do) or naming their call for prayers as Azan or employing nomenclature and appellations associated with Islam--punishable by 3 years imprisonment (1984).
- **298C:** Ahmadis posing as Muslims and preaching their faith declared equivalent to outraging the feelings of the Muslims--punishable by 3 years imprisonment (1984).

#### How the law is implemented:

According to Mansoor Raza's report for the Justice and Peace Commission, entitled "Blasphemy Law, The Context, Issues and Causes," between 1927 and 1984, there were only 9 registered cases of blasphemy. However, after the introduction of the amendments suggested in 1982 and 1986, the rate of reported blasphemy cases increased exponentially. Mr. Ijaz ul Haq, while serving as Federal Minister for Religious Affairs, noted that from 1984 to 2004, 5000 cases of blasphemy were registered and a total of 964 people were charged on the accusation of blasphemy, of which 479 were Muslims, 340 Ahmedis, 119 Christians, 14 Hindus and 10 others.

Moreover, a total of 104 blasphemy cases have reached the higher courts. In as many as 41 cases, Section 295C was invoked. In 11 out of the 12 cases that involved a decision on the merits of the case, the accused was acquitted because the judgment pointed out weaknesses and inconsistencies in the prosecution's case. In 8 of the 11 acquittals, the court noted *mala fide* intent in the implication of the accused. In no blasphemy case has a death penalty been carried out. However, between 1986 and 2007, at least 23 people were murdered after they were accused of committing blasphemy. Some were killed before a case could be registered against them, some in police custody, and others while serving a prison sentence.

#### Current relevance of the law:

It is in this context, that one must look at the recent high-profile case of Aasia Bibi, a Christian farmhand from Punjab province, who, on November 8, 2010, became the first person in Pakistan to be sentenced to death for blasphemy. Punjab Governor Salman Taseer and minorities minister Shahbaz Bhatti spoke out in support of Aasia Bibi. President Zardari ordered a ministerial review that concluded the verdict was legally unsound and recommended a presidential pardon. The government announced its intention to amend the blasphemy law and former information minister, Sherry Rehman, proposed legislation for amendments. Governor Taseer visited Aasia in prison to show solidarity. However, on November 26, 2010, law minister, Babar Awan, ruled out any change to the blasphemy law under his watch. President Zardari dithered on pardoning Aasia Bibi. It should be noted that this dithering on the part of the President was in sharp contrast to his resolve in May when he used his constitutional authority within hours to pardon interior minister, Rehman Malik, convicted for non-appearance in two corruption trials. On November 29, 2010, the Lahore High Court passed an order barring President Zardari from pardoning Aasia. Finally, on December 30, the government publicly announced that it had "no intention" to repeal or amend the blasphemy law.

On the other hand, several groups acting under the umbrella of Tehreek Tahaffuz-e-Namoos-e-Risalat held rallies across the country in support of the blasphemy law and offered rewards to anyone who kills Aasia Bibi. Death threats were made to both Salman Taseer and Sherry Rehman. The federal and provincial governments did not act on the threats. On January 4, 2011, Governor Taseer was assassinated by his own security guard, who purportedly supported the blasphemy law. Threats continue to be made to Sherry Rehman, with the imam of Sultan Masjid in Karachi declaring her non-Muslim being a case in point, in response to which some civil society activists lodged a first information report (FIR) against him for incitement to violence, and he subsequently denied his earlier remarks.

#### Efforts to amend the law:

Over the years, several rights groups and civil society activists have called for the repeal of this law. The view of Human Rights Watch Pakistan is that Sections 295 and 298 should be repealed forthwith. In 2000, the Musharraf government also tried to address this issue but backtracked. Nevertheless, a 2004 criminal law amendment made it mandatory for investigation of any charge under 295C to be carried out by an SP rank police officer. Most rights activists currently feel that repeal may be unrealistic in this climate but do advocate amending the law so as to stop its abuse and discriminatory practice. The view of the political parties however remains guarded. With few exceptions, like Sherry Rehman (PPP), Ayaz Amir (PML-N) and Bushra Gohar (ANP), most legislators are reluctant to publicly call for amendments even if they privately agree to them. It may be noted that Afrasiab Khattak, speaking on Policy Matters on Dunya TV, did indicate that ANP would be open to amending, though not repealing the law (this statement however preceded Taseer's assassination). Babar Awan, Khursheed Shah, and Qamar Zaman Kaira, all PPP ministers, on the other hand, publicly took an opposite stand, a stand in direct contravention to PPP's manifesto promise of undoing discriminatory legislation. Sherry Rehman has nevertheless submitted a private member's bill proposing certain basic amendments. The salient features of this bill are as under:

- Remove the death penalty from 295C and reduce the sentences for blasphemy for 295A, B & C.
- Introduce element of intention and malice to the offenses under 295C, 298B & 298C. Currently, except for 295C, the other provisions of Section 295 mandate that an offense carry the requisite *mens rea* (mental state), as is customary in criminal law generally.

- Require all cases to be tried in High Courts, though Sessions Courts may take cognizance of offenses.
- Introduce two changes to Pakistan Penal Code (PPC) which (i) penalise anyone making false accusations under Sections 295A, B & C, and (ii) advocacy of religious hatred that constitutes incitement to discrimination or violence be made an offense punishable under the law.

#### What religious scholars say:

Interestingly, in addition to Sherry Rehman's bill, the Council of Islamic Ideology (CII) has also called for an amendment in the law (as reported in a December 19, 2010 Express Tribune report). "The government should not allow anyone to misuse the blasphemy law and it should take all appropriate measures, whether administrative, procedural or legislative to stop incidents of mishandling the blasphemy law," the CII wrote in its recommendations. CII also proposed that "the accused persons must be given the right of defence through a legal adviser and a First Class magistrate should supervise the police investigation prior to registration of the case." In addition, CII also suggested that blasphemy cases should be tried by the High Courts. As far back as 1994, Maulana Kausar Niazi, the then Chairman of CII, remarked that the law needed modification.

Javed Ahmed Ghamdi, in his book, "The Penal Shariah of Islam," stated that capital punishment can only be given to a person who has either killed someone, or to someone who is guilty of spreading mayhem in society. Dr. Zaheer Khalid, in a speech in 2008 in PMA House, categorically mentioned that there are several mentions of blasphemy committed by the polytheists of Makkah and Jews of Medina against Islam and its Prophet (Pbuh), yet no worldly punishment for this was prescribed in the Quran. He also stressed that according to the Quran, capital punishment can only be given to murderers and those who take the law into their own hands (Quran, 5:32). Religious scholar Khalid Masood has also reportedly supported amendments to this law.

It is also noteworthy to look at blasphemy legislation in other Muslim countries. Looking at the most populous Muslim countries, in Indonesia, for example, the maximum penalty for a convict is five years imprisonment. In Malaysia, the maximum penalty is three years imprisonment and USD 1,000 in fine. In Bangladesh, the maximum penalty is five years imprisonment and a fine.

#### Questions to ponder in adopting resolutions:

- Is the blasphemy law, as it currently stands in Pakistan, in line with Islamic teachings?
- Would the Prophet have approved of such a law?
- Is the blasphemy law in line with the vision of Pakistan's founding father, Mohammed Ali Jinnah?
- Is opposition to the amendment based on true Islamic teachings or on considerations of political power?
- Is the difference between the respective stand of Sunni Tehreek, Jamaat Islami (JI), Jamaat Ulema Islam (JUI) (who support the law as it is) and scholars like Ghamdi, Zaheer Khalid and Khalid Masood (who support amendments) based on the fact that the former are also political actors?
- If the law is to be amended, how can this be accomplished?
- In light of Salman Taseer's brutal murder, how can there be an environment created such that debate on the blasphemy law is permissible?
- How can debate on this issue reach a Standing Committee in Parliament?
- How can debate on this issue be facilitated in the public realm?
- How should those who prevent this debate from taking place by threatening violent action be dealt with?
- How can the public be educated on the effects of this law and its proposed changes?
- In what ways can vigilante action and mob rule be challenged such that public awareness and freedom of expression are not curtailed?

- How can political parties be persuaded to take clear stands on this issue instead of generally speaking about the misuse of the law or privately agreeing to amendments but hesitating from taking any public stand?
- Did the Lahore High Court overstep its authority in barring President Zardari from pardoning Aasia Bibi (reference Article 45 of the Constitution)?

## **Candidacy Laws**

Candidacy laws, or Articles 62 and 63 of the Pakistani Constitution, in essence describe the conditions for qualification and disqualification to Parliament. There has been some controversy surrounding these articles since subsequent to Presidential Ordinance No. 14, passed in 1985 by General Zia ul Haq, the conditions are reliant upon subjective assessment and therefore may be prone to abuse. Although challenges to qualification to Parliament based on Articles 62 and 63 have not been invoked too often, whether they can be amended to provide more objectively quantifiable criteria merits debate.

### What the subjective Sections of the law say:

- 62(d) states the person must be “of good character and is not commonly known as one who violates Islamic injunctions”. [Not applicable to non-Muslims]
- 62(e) states the person should have “adequate knowledge of Islamic teachings and practice obligatory duties prescribed by Islam as well as abstain from major sins”. [Not applicable to non-Muslims]
- 62(f) states the person must be “sagacious, righteous and non-profligate and honest and amen”.
- 62(g) states the person “should not be convicted for a crime involving moral turpitude or for giving false evidence”.
- 62(h) states that the person “should not have, after the establishment of Pakistan, worked against the integrity of the country or opposed the ideology of Pakistan”.
- In the case of non-Muslims, (d) and (e) above are substituted by “the person should have good moral reputation”.
- 63(c) states as a condition for disqualification that the person “ceases to be a citizen of Pakistan, or acquires the citizenship of a foreign state”.

### Implementation and current relevance:

Articles 62 and 63 became the subject of recent discussion when MQM filed a reference against Imran Khan based on these articles of the Constitution, stating in effect that since Mr. Khan has had a daughter out of wedlock, he has committed a major sin under 62(e) and is thus not fit to qualify for Parliament. More recently, the Supreme Court was moved to seek a disqualification of Interior Minister Rehman Malik under Articles 62 and 63 over his incorrect recitation of Surah Ikhlas of the Holy Quran.

The 18<sup>th</sup> Amendment to the Constitution, passed under the current government’s tenure, sought to minimally amend 62(f), by adding at the end, the phrase: “, there being no declaration to the contrary by a court of law,” essentially adding a presumption of honesty. The 18<sup>th</sup> Amendment has also deleted 62(g) (which deals with moral turpitude and giving of false evidence) entirely. The Supreme Court had earlier expressed the concern, in its NRO judgment, that the NRO had made Articles 63(h) and (i) ineffective. Although the 18<sup>th</sup> Amendment amended 63(h) (which relates to corrupt practices and misuse of power or authority), it did not touch 63(i) (deals with dismissal from government service based on moral turpitude).

### Questions to ponder in adopting resolutions:

- How does one define “good character”?
- Is adequate Islamic knowledge the most relevant qualification for a legislator?

- Would it not be better to have criteria that can be easily assessed, such as whether the person in question has adequately filed taxes, declared assets, paid off loans borrowed?
- Isn't "reputation" or what people say about someone essentially the same as relying on hearsay?
- Are the changes to Articles 62 and 63 made by the 18<sup>th</sup> Amendment sufficient?
- Would 63(c) apply only to those who acquire citizenship after becoming members of Parliament or also prior to this? Should dual nationality be permissible for members of Parliament in an increasingly global world? Further, if this indeed is policy, then why aren't citizens of a foreign state who acquire Pakistani nationality subsequently also disqualified?

## **Judicial Reform**

The historic two-year lawyers' movement for the restoration of Chief Justice Iftikhar Chaudhry signified a landmark event in Pakistan's judicial and political history. Under the leadership of leading Pakistani constitutional lawyers, a civil society movement comprising of political and social activists, supported by the media, stood up to protest the wrongful removal of a Chief Justice by a military dictator. The movement, which began as one that stood for the supremacy of rule of law and the Constitution, morphed into a demand for the restoration of democracy. As a result, it led to the end of a decade-long dictatorship and the return of civilian rule to Pakistan. But just as the movement settled many pressing issues, the newly-emboldened judiciary has also raised some interesting questions for Pakistan's future.

### Background

On March 9, 2007, Chief Justice Iftikhar Chaudhry was suddenly removed from office by General Musharraf, allegedly on charges of corruption. However, many suspected that the removal was a result of the Supreme Court's suo moto actions on the "missing persons case", allegedly abducted by intelligence agencies in the name of fighting the war on terror, and the Court deciding against government interests in the privatisation of a steel mill, thought to be damaging to then Prime Minister, Shaukat Aziz. Unlike previous attacks on the judiciary by the executive, Iftikhar Chaudhry refused to bow down and retained leading lawyer, Aitzaz Ahsan, as his chief counsel to contest the wrongful removal. A team of lawyers, comprising of Munir Malik, Tariq Mahmood, Ali Kurd and other leading legal luminaries agreed to agitate legally and politically, through the various bar councils. Lawyers took to the streets and as many as 60 judges of the superior judiciary resigned in protest to support Iftikhar Chaudhry. Not only was such support and willingness to take on the executive on the part of the bar and bench unprecedented in Pakistan's history, but a relatively free media, also threw in its weight behind the lawyers' movement. The government's response was severe, culminating in the infamous May 12 incident in Karachi, where 40 people died and hundreds were injured as a result of the provincial government's actions. However, widespread support for the lawyers' movement and mass rallies continued unabated. Opposition political parties united against the Musharraf government on this issue and Musharraf's hold on power continued to erode, even as western governments chose to remain silent on the human rights' abuses, and provided Musharraf tacit support. The indigenous movement marched forth however, culminating in the restoration of the Chief Justice on July 20, 2007.

But it was not to last long. On November 3, 2007, Musharraf imposed an "emergency" to avoid a potentially unfavourable verdict in the "dual office case" (which was to consider his dual office of President and Army Chief), and once again deposed the Chief Justice as well as other members of the bench. The civil society and lawyers' movement gained even more strength in spite of Musharraf's brutal crackdown, and political parties, viewing Musharraf as weak and insecure, threw their weight heavily behind the movement. As a result of acute pressure, Musharraf stepped down from the office of Chief of Army Staff and appointed General Ashfaq Pervez Kiyani in that role on November 29, 2007. Benazir Bhutto returned to Pakistan and tragically lost her life in a terrorist action on December 27, 2007. Many blamed the government for the lapse in security. Nawaz Sharif, who had returned to Pakistan a month earlier, actively supported the lawyers' movement. In February 2008, elections were called. PPP emerged as the largest vote-taking party, followed by PML-N. Musharraf's party, PML-Q, was routed at the polls. PPP and PML-N, historic rivals, formed an alliance and decided to govern the country together. However, due to the PPP's dithering on the promise of restoring the deposed judiciary, PML-N left the coalition in August 2008. The same month, Musharraf stepped down as President. The PPP's reluctance to reinstate

the judiciary appeared to many as reminiscent of the Musharraf government. Finally, on March 16, 2009, after the lawyers' movement, with Nawaz Sharif's support, threatened a "long march," President Zardari acquiesced.

### Impact and current relevance

The lawyers' movement has undoubtedly emboldened the judiciary and made the general Pakistani public aware of constitutional matters. Subsequent to the Order passed by the judiciary in protest of the November 3, 2007 Emergency imposed by Musharraf, it has also become far more difficult for future martial laws by military dictators to be validated by the Courts and far less likely for members of the judiciary to take oaths under Provisional Constitutional Orders (PCOs) initiated by military dictators. Since its restoration, the judiciary has summoned, perhaps for the first time in Pakistan's history, intelligence officers and asked for explanations on "missing people". It has also questioned the corruption of politicians and struck down controversial and unconstitutional legislation such as the National Reconstruction Ordinance (NRO). In addition, it has ruled for the downtrodden in cases between landlords and peasants as well as protected the rights of young underage girls traded to settle family feuds as a result of illegal *jirga/panchayat* decisions.

However, just as the judiciary has used its new-found independence to take on the unconstitutional actions of powerful groups, it has also at times overstepped its authority and encroached upon the domain of the legislature and executive. It has sought to fix the prices of commodities that should be determined by free market forces, it has sought to strike down legislation that has been unanimously approved by all parties in Parliament, and it has most recently, sought to prevent President Zardari from exercising his constitutional authority in pardoning blasphemy victim, Aasia Bibi.

More troublingly, though the judiciary is independent of pressure from the executive, it may not be free of bias. Supporters of PPP claim that the judiciary is quick to take on cases exposing the corruption of PPP but continue to dilly-dally on older petitions, such as the one submitted by Asghar Khan, which questions the use of taxpayer funds by military officers in order to form Islami Jamhoori Ittehad (IJI) in the late eighties, comprising of Mr. Nawaz Sharif and other politicians opposed to the PPP. Moreover, those accused of violence against the state, such as the Lal Masjid cleric Abdul Aziz, have been allowed to go free. Equally worrying is the politicisation of the legal community following the lawyers' movement. Lawyers have become accustomed to taking to the streets, and at times threatening illegal action. This was seen in the case of Shazia Masih, a teenaged Christian domestic worker, who was allegedly abused by her employer, a member of the legal community. In response, a few members of the Bar vowed to "burn alive" any lawyer who takes on Shazia Masih's case. More recently, some lawyers have gone so far as to garland Mumtaz Qadri, the murderer of Governor Salman Taseer, and pressured the Court to free him.

### Questions to ponder in adopting resolutions

- Has the emergence of an independent judiciary resulted in the judiciary emerging as an alternative power centre?
- Is the judiciary biased against the PPP and too lenient towards PML-N and other parties to the right of the political spectrum?
- Is the judiciary enjoying a newly-enhanced reputation equally, in all provinces?
- Does Sindh feel let down by the judiciary's post-restoration actions?
- How can a healthy check and balance and division of powers be ensured among the executive, legislature and judiciary?
- Has judicial action against those responsible for violence against the state been hampered due to the unwillingness of witnesses to come forward? How can witnesses be assured the protection of the state in such cases?
- Is the media doing a good job of keeping a check on judicial function or is its focus skewed against politicians?
- Shouldn't the legal licenses of those lawyers who resort to extra-legal means be cancelled?

- Should the judiciary be required to call in experts in matters of economics, technology, etc and heed their advice when deciding cases pertaining to these issues?

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