

## Demystifying Sacrilege: The Mumtaz Qadri Case

*Mumtaz Qadri v The State*

PLD 2016 SC 17

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### Introduction

In a country where religious bigotry and extreme values find easy public expression without reproach, one can only imagine the precariousness of the position of the Supreme Court while hearing Mumtaz Qadri's case. He was a confessed murderer, laying proud claim to shooting Governor Salman Taseer down in broad daylight, and yet there was significant risk in finding him guilty and sentencing him appropriately. Swarms of people had come out in support of Qadri, lauding him as a *Ghazi*, a champion of Islam, and valorizing him for his bravery and conviction.<sup>1</sup> Even after his execution, devotees continue to make pilgrimages to his grave, and there have been efforts to convert it into a shrine in order to immortalize Qadri as a *Shaheed*. In this case note, I analyze the contents of the judgment in *Mumtaz Qadri v the State*,<sup>2</sup> and show that how the Supreme Court maneuvered the treacherous waters of the blasphemy law and the jurisprudence that surrounds it to deliver a skillfully crafted guilty verdict that left little question as to Qadri's defense of grave and sudden provocation, and also undermined his claim to religious righteousness.

The structure of this note is as follows: first I lay out the procedural history, facts of the case and the ruling of the Supreme Court, followed by a discussion of relevant prior case law. I then critically engage with the judgment of the Supreme Court, making comments on the arguments employed by the court. I conclude by reflecting on the impact this judgment may have on the trajectory of discourse on blasphemy in Pakistan.

### Facts and Holding

On the 4<sup>th</sup> of January 2011, the Governor of Punjab, Salman Taseer, was shot by his official guard, Malik Mumtaz Qadri, in Islamabad. The attack left Mr. Taseer gravely injured, and he died soon afterwards. Immediately after firing upon the Governor, Mr. Qadri laid down his weapon and surrendered himself to the other guards deputed to Mr. Taseer's security. Upon the completion of the investigation against Mumtaz Qadri, a challan was submitted before the Anti Terrorism Court II, Rawalpindi Division, which framed charges against the accused under Section 7(a) of the Anti Terrorism Act ('ATA') 1997,<sup>3</sup> read with Section 302<sup>4</sup> and 109<sup>5</sup> of the Pakistan Penal Code ('PPC') 1860.<sup>6</sup>

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<sup>1</sup> AFP, 'Hero's Welcome for Accused Killer of Pakistani Governor Salman Taseer' *The Australian* (6 January 2011) <<http://www.theaustralian.com.au/news/world/heros-welcome-for-accused-killer-of-pakistani-governor-salman-taseer/story-e6frg6so-1225982804390>> accessed September 13, 2016.

<sup>2</sup> PLD 2016 SC 17.

<sup>3</sup> Section 7(a) of the Anti Terrorism Act states, 'whoever commits an act of terrorism under Section 6, whereby (a) death of any person is caused, shall be punishable, on conviction, with death or with imprisonment for life, and with fine.' Section 6 provides for the definition of terrorism.

<sup>4</sup> Section 302 of the PPC provides punishment for *Qatl-e-Amd* which is the intentional causing of death or the intentional causing of bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability

In the trial court, Mumtaz Qadri did not deny that he had fired the shots that killed Salman Taseer. However, he stated that he was not guilty because he had committed the murder of an apostate.<sup>7</sup> Qadri argued that the victim had exposed himself as a sympathizer of a condemned prisoner, Aasia Bibi, a woman who had been charged and convicted of blasphemy.<sup>8</sup> Furthermore, he presented news clippings and interviews of the deceased Taseer in which he had criticized the current blasphemy law; actions that Qadri alleged were a violation of Section 295-C of the PPC, itself a capital offense.<sup>9</sup> Thus, Qadri argued that his actions were justified in light of these circumstances.

In its judgment dated 1 October 2011, the Anti Terrorism Court found Qadri guilty of an offense under Section 302(b) of the PPC and sentenced him to death and to pay a sum of Rs. 1,00,000 to the heirs of the deceased as compensation. Through the same judgment, the trial court also convicted the accused of an offence under Section 7(a) of the ATA and sentenced him to death and to pay a fine of Rs. 1,00,000.

Qadri challenged his convictions and sentences before the Islamabad High Court. The court dismissed the appeal to the extent of his conviction and sentence under Section 302(b), but partially allowed the appeal to the extent of the conviction under Section 7(a) of the ATA, and his conviction and sentence on that count was set aside.<sup>10</sup>

The case made its way to the Supreme Court when Mumtaz Qadri filed an appeal, challenging the upholding of his conviction under Section 302(b) by the Islamabad High Court, while the State sought leave to appeal against the same judgment, challenging the acquittals of the accused from the charge under Section 7(a) of the ATA.

The court framed a number of issues in deciding the appeal. It sought to discuss two questions that were of paramount importance in cases of murder. Firstly, did the accused actually commit the act in question and secondly, was there a legal or factual justification for carrying out the murder. With regard to the first question, the court pointed to the fact that Mr. Qadri had never denied shooting Mr. Taseer. He had accepted as such in his statement before the trial court. The court therefore felt that this question had already been sufficiently answered. With regard to the second question, the court decided to deal with the factual and legal justifications separately.

In its judgment, the court discussed two primary factual justifications provided by Qadri. The first was that during the course of defending Aasia Bibi, a convicted blasphemer,

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cause death, causes the death of such person. The punishment under 302(b) is death or imprisonment for life as *tazir* punishments depending upon the circumstances of each case.

<sup>5</sup> Section 109 of the PPC provides punishment for abatement where no express provision is made by the Code.

<sup>6</sup> PLD 2016 SC 17, 4.

<sup>7</sup> Qadri's statement in court read, in part, 'I have not committed murder of an apostate like Salman Taseer (the then Governor Punjab) contrary to dictums of the Holy Qur'an and Sunnah.'

<sup>8</sup> Mohammad Zubair Khan, 'Asia Bibi Death Sentence Suspended by Pakistan Court' *The Telegraph* (22 July 2015) <<http://www.telegraph.co.uk/news/worldnews/asia/pakistan/11756143/asia-bibi-death-sentence-suspended-by-pakistan-court.html>> accessed September 13, 2016.

<sup>9</sup> Section 295-C states, 'Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.'

<sup>10</sup> (n 2) [6].

Mr. Taseer had called the blasphemy law a ‘black law’. Mr. Qadri had contended that the expression of this view amounted to blasphemy itself. The second part of the factual justification advanced by him was that immediately before the murder, the appellant had said to Mr. Salman Taseer that it was unbecoming of him as a Governor to have called the blasphemy law a black law, upon which Mr. Salman Taseer had responded by using obscene words to describe the law. In a criminal case, whenever an accused seeks to demonstrate his actions as justifiable under a peculiar set of circumstances, Article 121 of the Qanoon-e-Shahadat Order, 1984 comes into play.<sup>11</sup> The Article places the burden of proving that the actions fall within the general exceptions provided by the PPC on the accused. Upon failure to fulfill this burden, the court presumes the absence of such circumstances. The court argued that while grave and sudden provocation could be a valid exception, the burden of proof was on the defendant to show that such provocation had indeed occurred. Going through the record, the court ruled that Mr. Qadri had failed to fulfill this burden. The news clippings and interviews that he had produced in the court made no mention of the dates and timings of when the alleged blasphemy by Mr. Taseer had occurred. Furthermore, in the alleged utterances, Mr. Salman Taseer had never, directly or indirectly, made any observation about the Holy Prophet Muhammad (peace be upon him) so as to attract the definition of blasphemy contained in Section 295-C, PPC.<sup>12</sup> With regard to the alleged utterances by Mr. Taseer to Mr. Qadri, when the latter confronted him about his remarks, the court ruled that no evidence of that interaction ever happening had been provided. Thus the court ruled that no factual justification existed for the actions of Mumtaz Qadri.

Moving to possible legal justifications available to the defendant, the court observed that all such justifications forwarded by the accused relied upon the belief that Mr Taseer had in fact committed blasphemy through his utterances. As the evidence on record had not proved this, the court called upon the counsel representing the accused to forward another defense. Subsequently, the counsel referred to Section 79 of the PPC.<sup>13</sup> By relying upon the provisions of this Section, the learned counsel for the appellant maintained that even if Mr. Salman Taseer had not committed the offence of blasphemy within the meanings of Section 295-C of the PPC, the appellant still mistakenly believed that Mr. Salman Taseer had committed the said offence and, therefore, the appellant had committed no offence by murdering him. The court proceeded to analyze Section 79, coming to the conclusion that the interpretation forwarded by Qadri’s counsel was ‘misconceived and unacceptable’.<sup>14</sup> It argued that Qadri’s actions were a mistake of the law and not a mistake of fact.<sup>15</sup> He had also

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<sup>11</sup> Article 121 of the Qanun-e-Shahadat Order 1984 states, ‘When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code (Act XLV of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.’

<sup>12</sup> (n 2) [12].

<sup>13</sup> Section 79 reads, ‘Act done by a person justified, or by mistake of fact believing himself justified, by law. - Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.’

<sup>14</sup> (n 2) [15].

<sup>15</sup> The court argued that even if due to a mistake of fact the appellant entertained an impression that Mr. Salman Taseer had committed the offence of blasphemy still there was no valid basis available with the appellant to believe that his act of killing Mr. Salman Taseer was justified by the law of the land. It is also obvious that if the appellant believed that his act was justified by law then such belief was based upon a mistake of law and, therefore, the provisions of Section 79 of the PPC were inapplicable to the case. See Ibid [15].

not acted in good faith, as he did nothing to verify the statements he believed Salman Taseer had made and instead acted on hearsay.

Once it became clear that the court would not hold any legal justification for the actions of Mumtaz Qadri, his counsel proceeded to turn to Islam to find a justification for the actions of the accused. The counsel produced a number of verses from the Qur'an, the opinions of some renowned scholars and two decisions delivered by the Caliph Umar (R.A). These sources dealt with the Islamic position on blasphemy and the prescribed punishment for a blasphemer. In response to this line of argument, the court, delivered what is perhaps the most important ruling of the judgment. It first pointed to Article 203-G and Article 175(2) of the Constitution, arguing that the interpretation of the Islamic law on blasphemy was not within the jurisdiction of the court.<sup>16</sup> Not wanting to dwell on the issue, it stated that in all the relevant historical incidents during the early days of Islam, the person accused had been adjudicated guilty of blasphemy. It was not so in the present case as Salman Taseer had not been declared a blasphemer by any competent authority. At this junction, the judgment went into the discussion of the issue of whether criticizing the blasphemy law constitutes blasphemy itself. Holding unequivocally that it does not, the court stated, 'It goes without saying that seeking improvement of a manmade law in respect of a religious matter for better or proper enforcement of such law does not *ipso facto* amount to criticizing the religious aspect of such law'.<sup>17</sup> It also made reference to the case of *Muhammad Mahboob v The State*<sup>18</sup> to show that, in the past, the courts themselves had been critical of the application of the blasphemy law in Pakistan.<sup>19</sup>

The last issue that the court ruled upon was whether the actions of Mumtaz Qadri constituted terrorism. He had originally been charged under the ATA but the Islamabad High Court had acquitted him of the charge. Terrorism is defined in Section 6 of the ATA. The Supreme Court bifurcated terrorism as defined under the section into two parts; the *mens rea* and the *actus reus* of the offense.

As far as the case in hand is concerned, the actions of Mumtaz Qadri involved firing at Mr. Salman Taseer and thereby causing his death and, thus, his *actus reus* fell within the ambit of Section 6(2)(a) of the Anti-Terrorism Act, 1997.<sup>20</sup> Regarding the appellant's *mens rea*, the court ruled that he had himself said in his statement recorded by the trial court that the murder of Mr. Salman Taseer committed by him was 'a lesson for all the apostates, as finally they have to meet the same fate'.<sup>21</sup> That statement of the appellant clearly established that not only he wanted to punish Mr. Salman Taseer privately for the perceived or imagined blasphemy committed by him, but he also wanted to send a message to all others in the society at large who dared to follow in Mr. Salman Taseer's footsteps. The matter of murdering Mr. Salman Taseer was, 'surely designed to intimidate or overawe the public or a

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<sup>16</sup> Article 203-G ousts the jurisdiction of the Supreme Court with respect to any matter within the jurisdiction of the Federal Shariat Court while Article 175(2) provides that no Court shall have jurisdiction save for it being conferred on it by the Constitution or any other law.

<sup>17</sup> (n 2) [17].

<sup>18</sup> PLD 2002 Lah 587.

<sup>19</sup> *Ibid.* In this case, the Lahore High Court traced the history of the law of blasphemy in the sub-continent and took judicial notice of the rampant misuse of that law by unscrupulous people trying to settle their personal scores but had also pointed out the hazards of investigation of such cases by untrained and poorly advised investigating officers.

<sup>20</sup> Section 6(2)(a) covers action that involves the doing of anything that causes death.

<sup>21</sup> (n 2) [20].

section of the public or to create a sense of fear or insecurity in the society so as to attract the requisite *mens rea* contemplated by Section 6(1)(b) of the Anti-Terrorism Act, 1997.’<sup>22</sup>

In light of these considerations, the Supreme Court upheld Mumtaz Qadri’s conviction and overturned the Islamabad High Courts decision to acquit him under Section 7(a) of the Anti Terrorism Act.

### **Prior Case Law**

For the Supreme Court to come to the unequivocal conclusion that the murder of Salman Taseer by Mumtaz Qadri constituted an act of terrorism which could not be justified on the basis of any alleged blasphemy on part of the victim, a number of important cases need to be looked into to discern the progression of Pakistani jurisprudence to the point where it could take such a stance.

In *Mohammed Mehmood v The State*,<sup>23</sup> the Lahore High Court discussed the history of the blasphemy law at length and analyzed the impact that Section 295-A and 295-C of the PPC had on the legal system of the country. The case concerned the conviction of Mohammed Mehmood under Section 295-C. The court pointed to the fact that the original, ‘blasphemy law’ was enacted under the colonial rule to protect minority Muslims from possible abuse of their religious sentiments by the majority Hindu community. After the creation of Pakistan, however, the laws were significantly amended even though Muslims were in the majority. Section 295-A of the PPC was added in 1980. Section 295-B was introduced two years later in 1982, while, in 1986, 295-C was enacted.<sup>24</sup> In 1991, the Federal Shariat Court ordered that life imprisonment should be removed from the possible punishments, thereby instituting a mandatory death penalty in case of conviction under 295-C.<sup>25</sup>

The judgment made two important advances in the approach that the judiciary in Pakistan has taken with regard to the blasphemy law. Firstly, the judgment, quoting from a newspaper report, highlighted the fact that, ‘the law was being abused more blatantly by the Muslims against the Muslims to settle their scores’.<sup>26</sup> Furthermore, the ruling reproduced remarks made in a Dawn news report. These remarks stated, in part, that

the trouble is that over the years bigotry and intolerance have made such deep inroads into our society that all three parties in the blasphemy cycle, the complainant, the police and the judge think that they are doing the right thing and also earning Divine favor into the bargain when they are pressing charges

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<sup>22</sup> (n 2) [20]. Section 6(1)(b) reads, ‘the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society.’

<sup>23</sup> PLD 2002 Lah 587.

<sup>24</sup> Section 295-A being a general clause applying to all religions reads, ‘Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of the citizens of Pakistan, by words, either spoken or written, or by visible representations insults the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both’. On the other hand, Sections 295-B and 295-C specifically provide for punishment for desecration or defiling the Qur’an or using derogatory language for the Holy Prophet respectively.

<sup>25</sup> *Ismail Qureshi v Pakistan* PLD 1991 FSC 10.

<sup>26</sup> (n 23) [16].

under this law. This is the zeal sanctioned by the law and clothed in self righteousness.<sup>27</sup>

That the High Court would include such extracts in a judgment on blasphemy by seeing them as relevant demonstrates a development in the judicial thinking of the court, which in earlier times would not be willing to make a representation that could be seen as provocative in certain circles.

The second important point in the *Mohammed Mehmood* judgment was the fact that the ruling, relying upon the sayings of the Holy Prophet (peace be upon him) and examples of how he lived his life, argued that blasphemy, historically, was a forgivable offense in Islam. It does this by using the authority of Imam Ibn Taymiyah who himself quotes from Abdullah bin Abbas (R.A), that an apostate may be exempted from punishment if he repents. Ibn Abbas (R.A) further narrated that the Holy Prophet had forgiven a man who used to abuse and insult him after an apology was tendered.<sup>28</sup> By making the argument that blasphemy may be a pardonable offense under some circumstances, the judgment helped to point towards a more conciliatory approach to issue of blasphemy.

This evolution can be seen in, for example, the fact that the Supreme Court took *suo moto* notice of the violence against Christians in Badami Bagh, Lahore in 2013 after allegations that blasphemy had been committed.<sup>29</sup> The court ruled that in such a situation where the police themselves had taken shelter from a violent mob and failed to protect the life and property of the inhabitants of the colony, *prima facie*, ‘the fundamental rights of the citizens of the colony were not protected as enshrined under Articles 9 and 14 of the Constitution.’<sup>30</sup>

With regard to the second issue of what constitutes terrorism, a number of prior cases are helpful. As discussed earlier, Mumtaz Qadri was convicted under Section 7 of the ATA. The conviction was overturned by the Islamabad High Court but was reinstated in the final ruling of the Supreme Court. In *Basharat Ali v Special Judge Anti Terrorism Court II Gujranwala*, terrorism was described as ‘denoting the commission of a crime with the object and purpose of destabilizing the society or the government with a view to achieve objectives which are political in the extended sense of the word’.<sup>31</sup> The judgment in this case delved into a detailed discussion regarding the distinction between terror and terrorism, arguing that the critical difference between the two is the design and purpose; *mens rea* in jurisprudence. This is the intention behind the crime, in this case to spread fear and insecurity. While every crime creates a sense of terror or fear in the victim, that is not the primary goal of the offender. As against this, an act of terror is, by its nature, designed to create fear and insecurity in society. Ultimately, the court held that in order to qualify as terrorism, an act must be designed to create fear and insecurity and to ‘achieve a political and larger objective’.<sup>32</sup>

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<sup>27</sup> Ibid [17].

<sup>28</sup> Ibid [27].

<sup>29</sup> 2013 SCMR 918.

<sup>30</sup> Ibid.

<sup>31</sup> PLD 2004 1999.

<sup>32</sup> Ibid [7].

The next case to note is *Bashir Ahmed v Muhammed Siddique*.<sup>33</sup> In this case, the Supreme Court held the determination as to the nature of a crime as an act of terrorism, ‘cannot be determined without examining the nature, gravity and heinousness of the alleged offense, the contents of the First Information Report (‘FIR’), its cumulative effect on the society or a group of person and the evidence which has come on record.’<sup>34</sup>

Most recently, in *Ahmed Jan v Nasrullah*,<sup>35</sup> where it was held that when it comes to discerning if a criminal act also qualifies as an act of terrorism under the ATA, the unique circumstances of the case and the motive behind the crime must be examined. The case held that a murder due to family enmity was not a terrorism offense as there was no intention to spread fear in the general public.

### Analysis

There are a number of important facets of the Mumtaz Qadri judgment that may be analyzed, because the judgment is arguably the clearest pronouncement of the superior Judiciary of Pakistan on issues revolving around the blasphemy laws.

Firstly, it is interesting to note that the judgment begins by quoting from the Qur’an and the Sunnah of the Prophet (peace be upon him). It uses verses to make the point that no action should be taken against a suspected criminal without properly ascertaining the facts of the situation. The use of scripture by the court appears to be a move to give religious legitimacy to its argument; a much-needed commodity when dealing with provocative and divisive issues like blasphemy. In a subsequent section, however, the judgment clarifies that this employment of religion cannot form a legal basis in deciding the case. It points to Article 203-G of the Constitution of Pakistan that categorically ousts the jurisdiction of the court in matters of interpretation of the injunctions of Islam that fall within the exclusive domain of the Federal Shariat Court.<sup>36</sup> The judgment follows this by pointing out how the Supreme Court is, ‘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.’<sup>37</sup> This expression of explicit limitation on its own jurisdiction by the Supreme Court demonstrates a continued march towards a less activist Supreme Court in Pakistan. A clear shift in approach is plainly visible as compared to the Chaudhry court, an era during which the Judiciary was willing to take a far more proactive role in changing the law.

Secondly, in making the point that abuse of the blasphemy laws is rampant in Pakistan, the judgment quotes relevant sections from an earlier case, *Muhammed Mahboob v The State*.<sup>38</sup> In that judgment, as discussed earlier, the Lahore High Court somewhat hesitantly referred to a newspaper report to highlight the abuse of the blasphemy laws. The fact that the Supreme Court was now willing to refer to the judgment unequivocally, without attributing findings of abuse and calls for reform to third parties, demonstrates a change in

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<sup>33</sup> PLD 2009 SC 11.

<sup>34</sup> Ibid [10].

<sup>35</sup> 2012 SCMR 59.

<sup>36</sup> Article 203G of the Constitution states, ‘save as provided in Article 203F, no court or tribunal, including the Supreme Court and a High Court, shall entertain any proceeding or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court’.

<sup>37</sup> (n 2) [2].

<sup>38</sup> (n 18).

the severe reluctance that existed in discussing these issues for fear of reprisals and backlash. The fact that the Supreme Court of is now willingly to openly critique the abuses of the enacted blasphemy law is an encouraging sign that the whole judicial system, particularly the lower courts might be more willing to take a critical view of the use of the law.

Thirdly, the Mumtaz Qadri ruling definitively closes the door to legally sanctioned vigilante justice. In a country like Pakistan where there have been numerous instances of people taking the law into their own hands by lynching suspected criminals, attacking alleged blasphemers and destroying their communities, the ruling, by emphatically stating that, ‘the law of the land does not permit an individual to arrogate unto himself the role of complainant, prosecutor, judge and executioner’,<sup>39</sup> helps in establishing the principle that regardless of the alleged offense, it is the responsibility of the State, not private individuals, to initiate criminal proceedings against an alleged offender.

Lastly and perhaps most importantly, the judgment, in deciding if Mumtaz Qadri was within his rights to shoot Salman Taseer for his alleged blasphemy, held that to question the application of blasphemy laws or to call for their reform in face of such rampant abuse did not constitute the commission of an offense. To further substantiate this point, the judgment draws an analogy with the Hudood Ordinances. According to the Supreme Court, even though that law too is based on divine scripture, it has faced serious criticism since its promulgation and calls have been made for reforms. These demands are fundamentally legal. The court goes a step further on this issue by explaining that, ‘in a democratic society, citizens have a right to contend, debate or maintain that a law has not been correctly framed by the state in terms of the mischief sought to be suppressed or that the law promulgated by the State ought to contain adequate safeguards against its misapplication or misuse by motivated persons.’<sup>40</sup> The judgment then traces the history of the blasphemy law in Pakistan as originally enacted under colonial rule in the British India. It points out that Section 295-C as it currently stands restricts blasphemy to defiling the name of the Holy Prophet (peace be upon him), and not to a criticism of the law itself. Even counsel for Mumtaz Qadri was of the view that the law should be ‘improved so that it should be brought in line with the true scope of the concept of blasphemy’.<sup>41</sup> By using the arguments of the perpetrator of the crime, the court successfully demonstrates the possibility of an evolution in the law, without which the law continues to be a tool for settling personal scores among the people.

## **Conclusion**

The Mumtaz Qadri case marks an important point in the legal history of Pakistan. The court should be lauded for delivering a judgment, which as was obvious, would stir up anger in certain parts of society. By holding that the criticism of any law, even the blasphemy law, is well within the rights of every citizen and does not constitute blasphemy, the judgment, helps in opening the door to a more broad-based and open discussion regarding the issue of blasphemy. Furthermore, by accepting that the law has been used to settle personal scores, the judgment provides credence and legitimacy to calls for amendments to make abuse less likely. The judgment may mark a turning point in the unfortunate history of blasphemy laws in Pakistan and may be the catalyst for a change in the current state of affairs.

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<sup>39</sup> (n 3) [27].

<sup>40</sup> Ibid [17].

<sup>41</sup> Ibid [18].

## **Gendered Justice: Constitutions, Trans-genders and Equality**

*Dr. Muhammad Aslam Khaki v S.S.P. (Operations) Rawalpindi*  
PLD 2013 SC 188

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### **Introduction**

The trans-gender community of South Asia has undoubtedly faced deplorable discrimination. However, recently the Supreme Courts of India and Pakistan have attempted to transcend the traditional gender binary by recognizing their distinct gender identity as the ‘third sex’. In 2012, the Chief Justice of the Supreme Court of Pakistan issued a landmark judgment in *Dr. Muhammad Aslam Khaki v S.S.P. (Operations) Rawalpindi* which gives legal recognition to the trans-gender<sup>1</sup> community in Pakistan as belonging to the ‘third sex’.<sup>2</sup> Such a definitive inclusion of a traditionally excluded community under the legal umbrella was expected to gradually debunk the gender stereotypes that have historically functioned to marginalize the trans-gender community in Pakistan. However, for all practical purposes, the judgment has changed little. Their bodies continue to be the chief site of contestation, problematized by family, society and the state apparatus, all of which reinforce the rigid gender binary. In contrast, a similar judgment issued by the Indian Supreme Court has had a comparatively positive influence on the social status of *hijras* in India.

This case note will endeavor to analyze the reasons behind the limited impact of the judgment in *Dr. Muhammad Aslam Khaki v S.S.P. (Operations) Rawalpindi* as compared to its Indian counterpart in redressing the grievances of the trans-gender community following decades of social exclusion. In doing so, this case note will compare the language of both the judgments, and argue that the discriminatory social attitude towards the trans-gender community cannot be transformed unless the Supreme Court of Pakistan employs a substantive approach towards the interpretation of the fundamental right to equality as enshrined in Article 25 of the Constitution of the Islamic Republic of Pakistan 1973 (‘the Constitution’).

### **Effects of Colonial Encounter on Trans-gender Identity**

The story of the suppression of trans-gender identity is deeply connected to the narrative of colonial displacement.<sup>3</sup> Particularly in the socio-political context of the subcontinent, the social exclusion of trans-genders can be attributed to the rigid dichotomous gender identities under the influence of patriarchal policies adopted by the colonial state.<sup>4</sup> The inconsistency of

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<sup>1</sup> The term ‘transgender’ has been used very broadly to refer to a spectrum of gender experiences and identities that do not fit into the traditional male-female gender binary. However, in this case note, the author uses the terms transgender, eunuchs and *hijras* interchangeably to refer to a particular group of people who are anatomically unidentifiable as male or female.

<sup>2</sup> PLD 2013 SC 188.

<sup>3</sup> The author uses this term with reference to the same meaning as used by Dr. Osama Siddique in his book *Pakistan’s Experience with Formal Law: An Alien Justice* (Cambridge University Press 2013).

<sup>4</sup> Eleanor Newbiggin, ‘A Post-colonial Patriarchy? Representing Family in the Indian Nation-state’ (2010) 44 (1) *Modern Asian Studies* 121.

the social roles that *hijras* played in the pre-colonial India with the colonial ideas of a civilized society resulted in the criminalization of their activities, which gradually led to their systematic exclusion from the domain of active cultural participation.

This was in stark contrast to the vibrant and celebrated role and place of *hijras* in pre-colonial India. The eighteenth-century Maratha State bestowed certain rights and specifically catered to the needs of the *hijra* community. Special cash and land grants were made for their welfare and many were appointed at respectable positions in the royal courts.<sup>5</sup> However, according to Laurence W. Preston, ‘when the British district officers first encountered the *hijras*, their first and immediate supposition was that here was another of the “barbarous practices” of the Indian society’.<sup>6</sup> Preston claims that ‘the British were aghast at the notion that it was their inherited responsibility to support such “abominations” and “wretches”’.<sup>7</sup> After the conquest of the Maratha dynasty, since these activities of the pre-colonial Indian society were not in conformity with the colonial moral sentiments, the British attempted to transform their subjects by seeking to eliminate these ‘barbarous practices’ through coercive legal regimes. An insightful case in this regard is the promulgation of the Criminal Tribes Act 1871 (‘CTA’), which deemed the entire community of eunuchs as inherently criminal and ‘addicted to the systematic commission of non-bailable offences’.<sup>8</sup> This Act was eventually repealed by the national legislatures following Partition in 1947. However, in the colonial era, the police had sweeping powers to arrest, harass, extort and even kill people that belonged to these tribes. In fact, the Act was made part of the police syllabus so that every police officer in the colonial India was aware of the identity of the ‘criminal tribes’. In the subjugated land, the notified tribes became the most watched people, and their movement was recorded and strict controls were placed on their places of travel and residence.<sup>9</sup> Consequently, the state gradually deprived *hijras* of all the rights and liberties that they previously enjoyed under local dynasties, and this caused the destabilization of their social, political and legal identity.

In addition to the criminalization of eunuchs, the enactment of CTA is particularly instructive with regards to how an instrument of control resulted in the transformation of social attitudes towards certain identities. The *hijras* were labelled criminals, denied legitimate rights and forced into prostitution and begging for sustenance. The state deprived them of the agency to actively participate in social activities. This agency was essential for social and economic mobility. The exclusionary legal attitude of the colonial state inevitably led to the transformation of the trans-gender identity from being socially acceptable to becoming culturally abhorrent.

The displacement of the trans-gender identity was perhaps an inescapable consequence of the colonial imperative to effectively govern and control the colonized society. According to Michel Foucault, a key role of the colonial penal system as an instrument of control was to create antagonism among various segments of a particular class so that other identities could be conceived only as ‘marginal, dangerous, immoral, a menace

<sup>5</sup> Lawrence W. Preston, ‘A Right to Exist: Eunuchs and the State in Nineteenth-Century India’ (1987) 21 (2) *Modern Asian Studies* 371, 372.

<sup>6</sup> *Ibid* 377.

<sup>7</sup> *Ibid* 386.

<sup>8</sup> Section 2, the Criminal Tribes Act 1871.

<sup>9</sup> Louis A. Knafla, *Crime, Gender, and Sexuality in Criminal Prosecutions* (17 edn Greenwood Publishing Group 2002) 124.

to society as a whole.’<sup>10</sup> It served as a means to impose certain purportedly universal moral categories that functioned as an ideological barrier between social identities characterized by the binary of ‘us’ and ‘them’. As Foucault points out, the modern penal system first transforms and then solidifies the transformed identities by sanctioning certain social behaviors as ‘appropriate, decent and culturally acceptable’.<sup>11</sup> Foucault’s analysis of the ideals that the colonial penal system aspired to achieve seems justified if we analyze the social attitudes towards the *hijra* community in the post-colonial context of India and Pakistan. *Hijras* have historically been discriminated against, marginalized, denied property rights, sexually molested, tortured and ridiculed into oblivion.<sup>12</sup> Unable to reconcile their psychological experiences of gender with their sexual identity as ratified at the instance of birth, *hijras* have been suffering from an identity crisis. To date, they have been unable to find any place in the male-female gender binary that has characterized the post-colonial normative structures of the state institutions.

### **Comparative Analysis of Indian and Pakistani Judgments**

The displacement of the traditional trans-gender identity and the resulting identity crisis has had a drastic impact on the social, political and cultural status of trans-genders in the post-colonial states. They have gradually degenerated into non-entities and consequently have been denied rights that accrue to a person by virtue of being a citizen of the modern state. However, the Superior Courts in India and Pakistan have recently issued landmark judgments attempting to transcend the gender binary by recognizing the gender of eunuchs as the ‘third sex’. Intuitively, such an approach should have had a positive impact on the social status of eunuchs in both the countries, but the results so far seem surprisingly disparate. This case note will attempt to analyze the respective judgments issued by the Superior Courts of India and Pakistan in order to find the probable reasons for such disparate developments in both the countries.

On 22 March 2013, the Supreme Court of Pakistan in *Dr. Muhammad Aslam Khaki v S.S.P. (Operations) Rawalpindi*<sup>13</sup> held that ‘eunuchs should be treated equally as other citizens in this country enjoying the same rights under the Constitution of Islamic Republic of Pakistan 1973’.<sup>14</sup> The Court stated that the fundamental rights of eunuchs are fully protected under the Constitution and ‘it is the duty of Government Functionaries to protect their inherited property rights, right to get education, right of the franchise and to ensure their participation in all spheres of life’.<sup>15</sup> In order to ensure that eunuchs get their due share in inheritance and employment opportunities, the Court directed the chairperson of the National Database and Registration Authority (NADRA) to ensure that a new gender category is created for eunuchs and that they are provided National Identity Cards (NICs) so that their respective fundamental rights may be enforced ‘as they are more vulnerable among humans’.<sup>16</sup> The Court ultimately held that the Federal and Provincial Governments were

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<sup>10</sup> Michael Foucault, ‘On Popular Justice: A Dialogue Discussion with Maoists’ in Colin Gordon (ed) Power/Knowledge: Selected Interviews and Other Writings 1972-1977 (Pantheon Books 1980) 15.

<sup>11</sup> Ibid.

<sup>12</sup> Sheher Bano Khan, ‘Trans-gendered Identity: Shame, Honour and Sexuality’ (*Aawaz*, 2015) 1-17 <<http://aawaz.org.pk/cms/lib/downloadfiles/>> accessed 4 June 2016.

<sup>13</sup> (n 2).

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

equally responsible for recognizing the rights of eunuchs and were ‘bound to provide them protection of life and property and secure their dignity’.<sup>17</sup>

The creation of the third gender category and the issuance of NICs to eunuchs is a positive step towards gender equality. However, while seeking to enforce the fundamental rights of eunuchs, the Court seems to address the issue from a very strict, formalistic lens, which contemplates that ‘all persons similarly situated should be treated the same’.<sup>18</sup> Stating that ‘eunuchs should be treated equally as other citizens’<sup>19</sup> underscores the conflict between eunuchs’ psychological experience about gender and their sexual identity, either male or female. The Court, by stating that it ‘is only interested... that in terms of Article 184(3) of the Constitution the fundamental rights of the eunuchs are to be fully protected’,<sup>20</sup> glosses over perhaps the most significant question as to why the social status of the said community has not been improved despite recognition of their fundamental rights by the Constitution. Such a formal approach towards gender equality is problematic because it does not consider that the historical disempowerment of eunuchs is a result of various social, economic and political factors. Saying that the gulf between the State machinery and the trans-gender community is only present due to the lack of ‘representation as they do not have a focal person’<sup>21</sup> understates the point that their disempowerment is deeply linked to the patriarchal norms that are blatantly manifested in the functioning of our inherited formal legal system. By not acknowledging the structural reasons for the exclusion of eunuchs from social life, the Court reinforces the colonial stereotypes about gender identities that it is attempting to shatter by recognizing eunuchs as respectable citizens of the State.

In contrast with the *Aslam Khaki* judgment, the Supreme Court of India seems to have taken a more holistic approach towards the issue of gender identity of eunuchs. In *National Legal Services Authority v Union of India*,<sup>22</sup> the Court read the distinct identity of the *hijra* community into the fundamental rights framework as recognized by the Constitution of India. Justice K. S. Radhakrishnan noted that ‘gender identity is one of the most fundamental aspects of life which refers to a person’s intrinsic sense of being male, female, trans-gender or trans-sexual person’.<sup>23</sup> Delving deeper into the history of the subcontinent, the Court analyzed various historical texts and the pre-colonial socio-political milieu to conclude that ‘*hijras* played a prominent role in Indian society, especially in the Ottoman empire and the Mughal rule in the Medieval India’.<sup>24</sup> It then traced the displacement of the traditional identity of eunuchs in colonial times particularly to the promulgation of CTA and other relevant legal provisions. The Court extensively discussed the relevant international treaties to which India is a signatory, particularly the Yogyakarta Principles, holding that adherence to international norms is essential for the development of democracy in India. Referring to the distinct gender identity of *hijras* in Article 19(1)(a) of the Indian Constitution,<sup>25</sup> the Court

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<sup>17</sup> 2013 SCMR 187, [2].

<sup>18</sup> Eileen Kaufman, ‘Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts’ Equality Jurisprudence’ (2006) 34 (3) GJICL 557, 559.

<sup>19</sup> (n 2).

<sup>20</sup> (n 17) [8].

<sup>21</sup> Ibid [6].

<sup>22</sup> 2014 Indlaw SC 250.

<sup>23</sup> Ibid [19].

<sup>24</sup> Ibid [15].

<sup>25</sup> Article 19(1)(a) of the Indian Constitution guarantees the fundamental right to freedom of speech and expression to all citizens of the Republic of India.

held that ‘gender identity lies at the core of one’s personal identity, gender expression and presentation’,<sup>26</sup> and should be respected by the State.

While recognizing the fundamental rights of the *hijra* community, the Indian Supreme Court did not limit its treatment of the gender identity issue to the Indian Constitution. Discussing the social attitudes towards *hijras* in India, the Court observed that ‘trans-gender people, as a whole, face multiple forms of oppression in this country. Discrimination is terribly large and pronounced especially in the field of health, employment, education, leave aside social exclusion’.<sup>27</sup> While acknowledging that *hijras* have equal rights to all other citizens of the State, the Court noted that ‘despite constitutional guarantee of equality, *hijras* have been facing extreme discrimination in all spheres of life’.<sup>28</sup> In order to address the problem of historical discrimination, the Court held that Articles 15 and 16 of the Indian Constitution emphasize the fundamental right against discrimination on the basis of sex to prevent any direct or indirect attitude towards treating people differently merely due to not being in conformity with the traditional gender binary. The Court specifically asked the State to take affirmative actions ‘so that the injustice done to [the trans-gender community] for decades could be remedied’.<sup>29</sup> Aiming at substantive equality, Justice A. K. Sikri observed:

Equality not only implies preventing discrimination..., but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.<sup>30</sup>

Nowhere in the *Aslam Khaki* judgment do we find such a comprehensive approach towards redressing the historical discrimination suffered by the trans-gender community. The Supreme Court of Pakistan has apparently construed fundamental rights as negatives rights i.e. the protection of individuals against unfavorable treatment by introducing anti-discrimination laws. Such an approach, as discussed earlier, does not address the issue of inability to access these fundamental rights on account of social, political and cultural factors. Acknowledging the harsh reality, Justice A. K. Sikri notes:

The Constitution has fulfilled its duty of providing rights to trans-genders. Now it is time for us to recognize this and to extend and interpret the Constitution in such a manner that ensures a dignified life of trans-gender people.<sup>31</sup>

By recognizing trans-genders as belonging to the ‘third sex’, the Court is not only ensuring the rule of law, but also advancing justice to the marginalized section of the society that has so far been deprived of its natural and constitutional rights. Justice A. K. Sikri observed that ‘the rule of law is not merely social order. The rule of law is social justice based on public order’,<sup>32</sup> which can only be achieved if all segments of the society are provided equal opportunities to live a dignified life. The Court ultimately held that ‘the trans-gender people

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<sup>26</sup> (n 22) [66].

<sup>27</sup> Ibid [45].

<sup>28</sup> Ibid [55].

<sup>29</sup> Ibid [60].

<sup>30</sup> Ibid [88].

<sup>31</sup> Ibid [114].

<sup>32</sup> Ibid [125].

must be treated as “third gender” and the State should take measures so that *hijras* may regain their respect and place in the society which once they enjoyed in our cultural and social life’.<sup>33</sup> By directing the State to consider *hijras* a ‘socially and educationally backward class’,<sup>34</sup> the Court essentially reinforced the colonial stereotypes about their gender identity. However, the affirmative treatment of a historically marginalized community seems to be a necessary evil for bringing them at par with other segments of the society. In doing so, the Court imagined gender as a spectrum of identities and experiences—thus transcending the gender binary that characterized the post-colonial socio-political milieu.

### **Disparate Implications**

The different treatment by the Supreme Courts of India and Pakistan of the issue concerning the trans-gender identity and equal protection has produced starkly different consequences for the social status of the trans-gender community. Not much seems to be happening in Pakistan; no social safety nets have been devised to bring eunuchs at par with the other segments of the society; and, therefore, the judgment of the Court seems to be ineffective in bringing about any change in the social status of the said community.<sup>35</sup> However, the reforms that followed *National Legal Services Authority* include: a comprehensive policy report on the Issues Relating to Trans-gender Persons by the Ministry of Social Justice and Empowerment, a private member bill on the Rights of Trans-gender Persons (2014), admission of some trans-genders in state universities, more judgments upholding the rights of eunuchs, and institution of various commissions with representatives of eunuchs to oversee the formation of safety nets to ensure their active participation in social life.<sup>36</sup>

Such disparate results can be attributed to the difference in treatment of the constitutional guarantee of equality by the Superior Courts. Although both the countries declare equality a core value and prohibit the State from denying equal protection of law, Indian jurisprudence construes the guarantee of equality as a positive right that grants additional power to the State to take affirmative action to actually eliminate inequality. The Court seems to be acknowledging that a rigid formal equality regime will hamper the dispensation of gender-based justice and therefore the State should acknowledge and compensate for disadvantage. Even though labelling a community as ‘vulnerable’ and ‘socially backward’ reinforces, and at times causes expansion of oversimplified stereotypes, yet these affirmative actions seem to be significant for providing redress following decades of social exclusion.

### **Conclusion**

The preceding analysis shows that as long as the society remains riddled with disparity in power relations among various genders, and as long as the gender binary continues to influence the functioning of legal institutions, a formal approach to the principle of equality and liberty will most probably not be very effective in achieving the ideal of gender-based justice. The ultimate ideal of an egalitarian society in a democratic setting can only be achieved if the courts employ a result-oriented methodology while adjudicating on matters

<sup>33</sup> Ibid [129].

<sup>34</sup> Ibid [7].

<sup>35</sup> (n 12) [11], [16]-[17].

<sup>36</sup> Orinam, ‘NALSA and Beyond: Presentation on Trans-gender People and Indian Laws’ *Orinam* (31 August 2015) <<http://orinam.net/trans-gender-laws-siddharth-narrain-nazariya/>> accessed 4 May 2016.

pertaining to the constitutional guarantee of equality. The Supreme Court should acknowledge that ‘the equality imperative does not merely enjoin discriminatory state conduct but also requires positive protection and corrective action by the state in the form of affirmative action, effective minority protection regimes and social safety’.<sup>37</sup> The road leading towards gender-based justice can be traversed more effectively if the courts substantively interpret the equality clauses, and the relevant state institutions play their role in devising policies to ensure effective social and cultural participation of the trans-gender community.

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<sup>37</sup> (n 18) 618.