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Pakistan Ordinance XX Of 1984: International Implications On Human Rights

*The right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of the religion or belief that he professes, regardless of his status, and regardless of his condition in life. The desire to enjoy this right has already proved itself to be one of the most potent and contagious political forces the world has ever known.*¹

I. INTRODUCTION

On April 26, 1984, under the Martial Law Regime of President Zia-ul-Haq, Pakistan added Ordinance XX² to the Pakistan Penal Code. Ordinance XX is a law which prohibits Ahmadiyya Muslims³ from publicly practicing their religion.⁴ Violations of Ordinance XX

1. Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, U.N. ESCOR Supp. (No. 8) at vii, U.N. Doc. E/3335 (1960).

2. The complete title of this ordinance is the Anti-Islamic Activities of the Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984, *reprinted in The Gazette of Pakistan, Extraordinary, Apr. 26, 1984, § I, at 73* [hereinafter Ordinance XX].

3. Ahmadiyyas, also known as Quadianis, are followers of Mirza Ghulam Ahmad, who founded the sect in Quadian, India, in 1901. Hirza Ghulam Ahmad claimed to have received a revelation from God; hence, those who believe Mirza Ghulam Ahmad do not believe that Mohammed is the last Prophet, as do the Sunni and Shiite Muslims. PAKISTAN: A COUNTRY STUDY 124 (R. Nyrop ed. 1984) [hereinafter COUNTRY STUDY].

4. The body of Ordinance XX reads as follows:

Part I. - PRELIMINARY

1. Short title and commencement - (1) This Ordinance may be called the Anti-Islamic Activities of the Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984.

(2) It shall come into force at once.

2. Ordinance to override orders or decisions of courts. The provisions of this Ordinance shall have effect notwithstanding any order or decision of any court.

Part II. AMENDMENT OF THE PAKISTAN PENAL CODE

(Act XLV of 1860)

3. Addition of new sections 298B and 298C, Act XLV of 1860. In the Pakistan Penal Code (Act XLV of 1860) in Chapter XV, after section 298A, the following new sections shall be added, namely: 298B. Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places. (1) Any person of the Quadiani group or of 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

are defined as anti-Islamic activities and criminal offenses,⁵ punishable by imprisonment for up to three years, in addition to a fine.⁶ Ordinance XX also provides that "[t]he provisions of this Ordinance shall have effect notwithstanding any order or decision of any court."⁷

In August of 1984, the United Nations Human Rights Subcommittee on the Prevention of Discrimination and Protection of Minorities (Subcommission)⁸ began an investigation⁹ to determine whether

of the Holy Prophet Muhammed (peace be upon him), as "*Ameer-ul-Mumineen*," "*Khalifa-tul-Mumineen*," "*Khalifa-tul-Mustimeen*," "*Sahaabi*" or "*Razi Allah Anho*";

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

(c) refers to, or addresses, any person, other than a member of the family (Ahle-bait) 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 Quadiani 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.

298C. Person of Quadiani group, etc. calling himself a Muslim or preaching or propagating his faith. — Any person of the Quadiani group or the Lahori group (who call themselves "Ahmadis" or by any other name), who, directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, 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.

Part IV. AMENDMENT OF THE WEST PAKISTAN PRESS AND PUBLICATIONS ORDINANCE, 1963 (W.P. ORDINANCE NO. XXX OF 1963)

6. Amendment of section 24, West Pakistan Ordinance No. XXX of 1963. — In the West Pakistan Press and Publications Ordinance, 1963 (W.P. Ordinance No. XXX of 1963), in section 24, in subsection (1), after clause (j), the following new clause shall be inserted, namely:

"(jj) are of the nature referred to in section 298A, section 298B of section 298C of the Pakistan Penal Code (Act XLV of 1860)."

See *supra* note 2.

5. *Id.*

6. *Id.*

7. *Id.* at 74, pt. I, para. 2.

8. The Subcommission is a subordinate investigatory body to the United Nations Commission on Human Rights (U.N. Commission). The U.N. Commission is supervised by the United Nations Economic and Social Council. For a discussion of the operations of the Subcommission, see generally Haver, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 21 COLUM. J. TRANSNAT'L L. 103 (1982); *Review of the Work of the Sub-Commission, Note by the Secretary General*, 37 U.N. Subcommission on Prevention of Discrimination and Protection of Minorities (Agenda Item 3), U.N. Doc. E/CN.4/Sub.2/2 (1984).

or not enforcement of Ordinance XX was resulting in gross violations of human rights in Pakistan.¹⁰ In August of 1985, the Subcommission passed Resolution 1985/21,¹¹ which declared Ordinance XX *prima facie* violative of international human rights standards.¹² The Subcommission resolved that Ordinance XX "violates the right to liberty and security of persons, the right to freedom from arbitrary arrest or detention, the right to freedom of thought, conscience and religion, the right of religious minorities to profess and practice their own religion, and the right to an effective legal remedy."¹³ The Subcommission, through the United Nations Commission on Human Rights, has called upon Pakistan to repeal Ordinance XX.¹⁴ Despite Resolution 1985/21 and, notwithstanding the cessation of martial law in Pakistan in December of 1985, Ordinance XX remains in effect.¹⁵

Violations of human rights occur when states limit or suspend protection of human rights, contrary to the standards of derogation established by customary or conventional principles of international law.¹⁶ There are currently two derogation standards: 1) emergency

9. Two nongovernmental human rights organizations brought Ordinance XX to the attention of the Subcommission in 1984. One group was the Minority Rights group. See *Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities: Summary Record of the 24th Meeting*, 37 U.N. Subcommission on Prevention of Discrimination and Protection of Minorities (24th mtg.) at 6-7, U.N. Doc. E/CN.4/Sub.2/SR.24 (1984). The second group was the Anti-Slavery Society. See *Commission on Human Rights, Sub-Commission On Prevention of Discrimination and Protection of Minorities: Summary Record of the 23rd Meeting*, 37 U.N. Subcommission on Prevention of Discrimination and Protection of Minorities (23rd mtg.) at 6, U.N. Doc. E/CN.4/Sub.2/SR.23 (1984).

10. The Subcommission derives its authority to make investigations with respect to human rights violations from ECOSOC Resolutions 1235 (XXLII) and 1503 (XLVIII). The latter specifically governs investigations of gross violations of human rights. See Haver, *supra* note 8, at 119.

11. *Question of the Violation of Human Rights and Fundamental Freedoms, Including Policies of Racial Discrimination and Segregation and of Apartheid, in all Countries, with Particular Reference to Colonial and Other Dependent Countries and Territories: Report of the Subcommission Under Commission on Human Rights Resolution 8 (XXIII), The Situation in Pakistan*, 38 U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (Agenda Item 6), U.N. Doc. E/CR.4/Sub.2/4.42 (1985) [hereinafter *Res. 1985/21*].

12. *Id.* at 2, para. 1.

13. *Id.*

14. *Id.* at 2, para. 3.

15. *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories: Written Statement Submitted by Human Rights Advocates, Inc., A Non-Governmental Organization in Consultative Status (category II)*, 42 U.N. Sub-Commission on Human Rights (Agenda Item 12), U.N. Doc. E/CN.4/NGO/30 (1986).

16. Conventional international law is that law which is articulated in treaties, whereas customary international law is customs established as general rules of law as a result of contin-

clause provisions,¹⁷ which relate to situations of war or public emergency, and 2) limitation clause provisions,¹⁸ which relate to situations which affect public health, safety, order, morals, or the fundamental rights and freedoms of others.¹⁹

Case decisions from regional and United Nations human rights bodies,²⁰ as well as studies by the Subcommission and various international organizations of jurists, have developed concise rules of law with respect to emergency clause derogation standards.²¹ The standards with respect to the limitation clause provisions are not as yet developed, although the recently formulated Siracusa Principles²² have added guidelines that help clarify what constitutes a permissible human rights derogation under non-emergency situations.

Freedom of religion is recognized as an inalienable, core right which must be protected at all times.²³ The inherent definition of freedom of religion also makes it a qualified right, subject to state-imposed restrictions.²⁴ In other words, its definition includes a limitation clause. To date, freedom of religion is the only human right which is considered both a core and a qualified right. For this reason,

ued usage over time by states who recognize the customs as obligatory. W. FRIEDMANN, A. LISSITZYN & R. PUGH, *INTERNATIONAL LAW CASES & MATERIALS*, 35-36 (1969).

17. See International Covenant on Civil and Political Rights, art. 4, G.A. Res. 2200, 21 U.N. GAOR (Agenda Item 62), U.N. Doc. A/6546 (1966) [hereinafter *Int'l Pol. Covenant*], reprinted in *HUMAN RIGHTS, A COMPILATION OF INTERNATIONAL INSTRUMENTS*, 1983, at 8-9, U.N. Doc. ST/HR/7/Rev.2, U.N. Sales No. E.83.XIV.1 (1983) [hereinafter *HUM. RTS. COMPILATION*].

18. *INT'L POL. COVENANT*, art. 18, reprinted in *HUM. RTS. COMPILATION*, *supra* note 17, at 11.

19. *Id.*

20. For decisions of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, see generally *HUMAN RIGHTS COMMITTEE SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL (Second to sixteenth sessions)*, 1985, U.N. Doc. CCPR/OP/1, U.N. Sales No. E.84.XIV.2 (1985) [hereinafter *SELECTED DECISIONS*]. For decisions emanating from the European Court and Commission on Human Rights, see generally H. PETZOLD, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: CASES AND MATERIALS* (1984); EUROPEAN COMMISSION OF HUMAN RIGHTS: *STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1984) [hereinafter *STOCK-TAKING*]. For case decisions emanating from the Inter-American Court and Commission on Human Rights, see generally T. BUERGENTHAL, R. NORRIS & D. SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS* (1982).

21. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L. L. 1072, 1073 (1985).

22. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, reprinted in 7 *HUM. RTS. Q.* 3 (1985) [hereinafter *Siracusa Principles*].

23. See *infra* text accompanying note 42.

24. See *infra* text accompanying notes 94-95.

freedom of religion should more appropriately be called a quasi-core right.

As a result of its unique status as a quasi-core right, freedom of religion can be limited during periods of peace under limitation clause standards. Freedom of religion cannot, however, be limited in any way during periods of war or public emergency under the emergency clause provisions.²⁵

Consequently, while the original purposes for enacting Ordinance XX during a state of emergency may have violated international law, continued enforcement of Ordinance XX after the lifting of martial law for the same purposes may not be a violation of international law.²⁶ This result seems contrary to the policy behind elevating a particular human right to the level of a core right, namely, to accord it more, not less, protection.²⁷

Part I of this Comment focuses on the inherent weaknesses in the current definition of the right to freedom of religion. Part II traces the historical development of international human rights standards with respect to protection of the right to freedom of religion and principles of derogation. Part III analyzes Ordinance XX under the derogation standards outlined in both the emergency clause and the limitation clause. Finally, Part IV proposes changes to clarify the status of the right to freedom of religion. Part IV also recommends changes to reconcile the inconsistencies currently existing between the derogation standards of the emergency clause and the limitation clause.

II. HISTORICAL BACKGROUND

A. *Development of State Responsibility to Protect the Right to Freedom of Religion*

The right to freedom of religion is recognized as both a political and a religious duty.²⁸ As early as the seventh century, the Code of

25. See *infra* text accompanying note 69.

26. See *infra* text following note 209.

27. Lillich, *supra* note 21, at 1072.

28. For a historical discussion of the development of the concept of freedom of religion in international law, see generally Krishnaswami, *supra* note 1, at 1-23. For a summary of regional and United Nations declarations and treaties which address the problem of discrimination on the grounds of religion or belief, see generally *Elimination of All Forms of Religious Intolerance, Note by the Secretary-General Prepared in Accordance with Resolution 1982/28 of the Sub-Commission*, 36 U.N. Subcommission on Prevention of Discrimination and Protection of Minorities (Agenda Item 15), U.N. Doc. E/CN.4/Sub.2/29 (1983).

Conduct issued by the founder of Islam, the Prophet Mohammed, provided:

To the Christians of Najran and its neighbouring territories, the security of God and the pledge of Mohammed the Prophet, the Messenger of God, are extended for their lives, their religion, their land, their property The *status quo* shall be maintained; none of their rites (religious observances) and images shall be changed. No bishop shall be removed from his bishopric, nor a monk from his monastery, nor a sexton from his church.²⁹

1. Development of conventional international human rights law

Starting as early as the sixteenth century and continuing through World War II, states have guaranteed within multilateral treaties the rights of religious minorities — as individuals and as groups — to profess and practice their religion.³⁰ The Geneva Convention memorialized the rights of both civilians and prisoners during periods of war to profess and practice their religion.³¹ The Charter of the United Nations mandates its member states to “promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”³² Accordingly, in 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights (Universal Declaration), which identifies the various rights and freedoms protected under the United Nations Charter.³³

Subsequent to the adoption of the Universal Declaration, various United Nations treaties and declarations have specifically detailed particular rights enumerated in the Universal Declaration.³⁴ Thus, article 18 of the International Covenant on Civil and Political Rights (International Political Covenant)³⁵ provides the following definition

29. Krishnaswami, *supra* note 1, at 2.

30. *Id.* at 4.

31. In particular, see article 34 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3346, T.I.A.S. No. 3364, 75 U.N.T.S. 135, 164; *see also* articles 24, 27, 38, 58, 86 & 93 of the Geneva Convention Relative to the Protection of Civilian Persons in time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3535, 3536, 3542, 3555, 3372, 3577, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 304, 306, 312, 325, 342, 347.

32. U.N. CHARTER art. 55.

33. *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/811, at 1 (1948) [hereinafter *Universal Declaration*], *reprinted in* HUM. RTS. COMPILATION, *supra* note 17, at 1.

34. *See generally* HUM. RTS. COMPILATION, *supra* note 17, at iii. This source reprints human rights treaties and declarations.

35. Int'l Pol. Covenant, *reprinted in* HUM. RTS. COMPILATION, *supra* note 17, at 11.

of the right to freedom of religion:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.³⁶

The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (Declaration on Religion)³⁷ further expands the definition provided in the International Political Covenant by detailing the rights of individuals, the duties of states, and the composite rights included within the right to manifest one's religion or belief.³⁸

At the regional level, organizations of states have ratified human rights treaties which parallel the protections contained in the various United Nations conventions regarding freedom of religion.³⁹

At both the United Nations and regional levels, certain core rights are specified as inalienable.⁴⁰ That is, a state cannot in any way, either directly or indirectly, restrict or suspend core rights during periods of war or periods of peace.⁴¹ Freedom of religion has been uniformly recognized as one of the inalienable, core rights.⁴²

2. Development of Pakistani law

Pakistan also recognizes the principles of freedom of religious practice and belief in the preamble and in article 20 of the Pakistan

36. *Id.*

37. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief [hereinafter *Declaration on Religion*], G.A. Res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/51 (1982), *reprinted in* HUM. RTS. COMPILATION, *supra* note 17, at 48.

38. *Id.*

39. *See* Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter *European Convention*], *reprinted in* COUNCIL OF EUROPE, HUMAN RIGHTS IN INTERNATIONAL LAW, BASIC TEXTS 3 [hereinafter *BASIC TEXTS*]; American Convention on Human Rights [hereinafter *American Convention*], *reprinted in* BASIC TEXTS, *supra*, at 66; African Charter on Human and Peoples' Rights [hereinafter *African Charter*], *reprinted in* 24 INT'L COMM'N JUR. REV. 76 (1980).

40. American Convention, art. 13, *reprinted in* BASIC TEXTS, *supra* note 39, at 71; European Convention, art. 9, *reprinted in* BASIC TEXTS, *supra*, at 7; African Convention, art. 8, *reprinted in* 24 INT'L COMM'N JUR. REV. 76, 77 (1980); *see also* Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations known as State of Siege or Emergency*, 35 U.N. Commission on Human Rights (Agenda Item 10), U.N. Doc. E/CN.4/Sub.2/15 (1982).

41. Lillich, *supra* note 21, at 1074.

42. *Id.* at 1080.

Constitution.⁴³ Human rights in general, and freedom of religion in particular, are likewise protected by the Injunctions of Islam,⁴⁴ which are incorporated into the Pakistan Constitution⁴⁵ and which remained in effect during martial law.⁴⁶ Although the constitutional right to freedom of religion was suspended from July 1977 until December 1985,⁴⁷ President Zia nonetheless stated constantly that his government recognized and protected freedom of religion, as well as the rights of minorities.⁴⁸ Thus, at all times, freedom of religion has remained a recognized principle of domestic law within Pakistan.

Pakistan is also bound, under customary principles of international law, to protect the right to freedom of religion. Moreover, as a signatory state to the Geneva Conventions,⁴⁹ Pakistan is obligated to protect freedom of religion during periods of war. As a member of the United Nations, Pakistan is also bound to preserve and protect the right to freedom of religion, in accordance with articles 1.3, 55(c) and 56 of the United Nations Charter.⁵⁰

B. *Development of Principles of Derogation*

Principles of derogation address two questions. First, principles of derogation address which particular rights are inalienable, core rights; that is, rights which are not subject to any derogation by the state.⁵¹ Second, principles of derogation define under what circum-

43. AAEEN (Constitution), preamble, art. 20 (Pakistan) (1973, suspended 1977, reinstated 1985).

44. The Injunctions of Islam are embodied in the Shariat, which is the canonical law of the Islamic faith. The Shariat incorporates the Holy Quran, Mohammed's words coming directly from God, as well as the Sunnah, a code of model behavior derived from the traditions of Mohammed's sayings and deeds. The Shariat provisions thus encompass both religious as well as social duties. See Note, *Human Rights Practices in the Arab States: The Modern Impact of Sharia Values*, 12 GA. INT'L & COMP. L. 55 (1982).

45. AAEEN (Constitution), art. 2, 227 (Pakistan) (1973, suspended 1977, reinstated 1985).

46. In July 1977, President Zia suspended part II of the Constitution. However, article 227, which is in part IX of the Constitution, remained in effect. See Chief Martial Law Administrator's Order 1 of 1977, reprinted in 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 123 (A. Blaustein & G. Flanz eds. 1986).

47. *Id.*; see also L.A. Times, Dec. 30, 1985, at 2, col. 2.

48. For example, in 1980 the government announced that "[t]here would be no interference in the religious beliefs of individuals," and that "no one dogma would be imposed on any Muslim sect." Pakistan Affairs, July 16, 1980, at 1, col. 3. In 1984, in a speech before a Shiite convention a few weeks after issuing Ordinance XX, President Zia "insisted that religious minorities would be zealously protected." COUNTRY STUDY, *supra* note 3, at xxviii.

49. Marie, *International Instruments Relating to Human Rights: Classification and Chart showing ratifications as of 1 January 1985*, 5 HUM. RTS. L.J. 376 (1984).

50. U.N. CHARTER art. 1, paras. 3, 55(c), 56.

51. Lillich, *supra* note 21, at 1074; Siracusa Principles, *supra* note 22, at 12.

stances and to what extent states can limit or suspend protection of all other noncore human rights.⁵²

Core rights are defined as fundamental rights which cannot be violated under any circumstances.⁵³ A state cannot directly restrict or suspend core rights by law or state sanctioned conduct.⁵⁴ Nor can a state indirectly restrict or suspend core rights by enacting laws with respect to noncore rights which by their terms, or by their enforcement procedures, violate core rights.⁵⁵ Thus, core rights are nonderogable. International law currently recognizes twelve core rights,⁵⁶ including the right to freedom of religion, and the prohibition of discrimination on the basis of race, sex, color, language, religion, or social origin.⁵⁷

Noncore rights are those human rights which may be limited or suspended by a state.⁵⁸ A state may derogate from its obligation to protect noncore rights under two circumstances: 1) during war or public emergencies;⁵⁹ and 2) in order to protect national security, public health, safety, order, morals, or the rights and freedoms of others.⁶⁰

52. Siracusa Principles, *supra* note 22, at 1-8; Lillich, *supra* note 21, at 1073-75.

53. O'Donnell, *Commentary by the Rapporteur on Derogation*, 7 HUM. RTS. Q. 12 (1985).

54. Lillich, *supra* note 21, at 1074-75.

55. *Id.*

56. The number of core rights have recently expanded. Existing international conventions, including the Geneva Conventions, all acknowledge the following core rights: right to life, prohibition against torture, prohibition against cruel, inhuman or degrading treatment or punishment, prohibition against slavery; and prohibition of retroactive penal measures. These core rights are binding on all states, whether the states are signatories to a convention or not, as principles of customary international law. Questiaux, *supra* note 40, at 18-19; Siracusa Principles, *supra* note 22, at 12. The additional rights of freedom of thought, conscience, religion, and the right to recognition of legal personality are recognized in the above instruments with the exception of the European Convention. Questiaux, *supra* note 40, at 19. Recently, however, the international community has added the following core rights — which currently appear only in the American Convention — to the list of core rights accepted under customary international law: the right to a name; the rights of a child; the rights of a family; the right to a nationality; the right to participate in government; the right against discrimination solely on the basis of race, sex, color, language, religion, or social origin; and the right to a fair trial. Lillich, *supra* note 21, at 1075-81.

57. Lillich, *supra* note 21, at 1080.

58. Kiss, *Commentary by the Rapporteur on Limitation Provisions*, 7 HUM. RTS. Q. 15 (1985).

59. Siracusa Principles, *supra* note 22, at 7-9.

60. *Id.* at 9. Similar emergency clause provisions appear in regional human rights conventions. See European Convention, art. 15, reprinted in BASIC TEXTS, *supra* note 39, at 8; American Convention, art. 27, reprinted in BASIC TEXTS, *supra*, at 75.

1. Emergency clause provisions

Pursuant to article 4 of the International Political Covenant:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discriminations solely on the ground of race, colour, sex, language, religion or social origin.⁶¹

a. International law standards and decisions

Contemporary standards of customary international law have further clarified the emergency clause provisions as incorporating the following principles.⁶² First, a public emergency is defined as "an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population"⁶³ of the state or area to which the derogation measures apply.⁶⁴ Second, threats to the life of the nation must rise to the level of a "threat to the organized life of the community" affected.⁶⁵ Third, principles of strict necessity apply in an objective manner.⁶⁶ Thus, apprehensions or fears of potentially dangerous situations do not constitute a public emergency.⁶⁷ Fourth, ordinary measures permissible under the specific limitation clauses must be inadequate to deal with the situation.⁶⁸ Fifth, core rights remain nonderogable during periods of public emergency.⁶⁹ Finally, adequate remedies must be available to persons who claim derogation measures affecting them are not strictly required.⁷⁰ These should include, at a minimum, those guarantees necessary to ensure a fair trial which are mandated by the Geneva Conventions.⁷¹ Under article 3

61. Int'l Pol. Covenant, art. 4, reprinted in BASIC TEXTS, *supra* note 39, at 8.

62. See generally Siracusa Principles, *supra* note 22; Lillich, *supra* note 21.

63. Siracusa Principles, *supra* note 22, at 7; Greek Case, 12 Y.B. EUR. CONV. ON HUM. RTS. 71-72 (1969).

64. Siracusa Principles, *supra* note 22, at 7.

65. O'Donnell, *supra* note 53, at 25; see also Questiaux, *supra* note 40, at 8, 15.

66. Siracusa Principles, *supra* note 22, at 9.

67. *Id.*

68. *Id.*

69. *Id.*; see also Questiaux, *supra* note 40, at 12.

70. Siracusa Principles, *supra* note 22, at 9.

71. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 3117, T.I.A.S. No. 3362, 75

common to all four of the Geneva Conventions, fair trial rights include the right to be tried by a regularly constituted court and, as a part of the right to life and security of persons, a prohibition against arbitrary arrest and detention.⁷²

Under customary international law, an arrest is arbitrary⁷³ if it fails to adequately protect human rights because the right to arrest has been too broadly defined.⁷⁴ Similarly, if the law or the procedures for effectuating the law are unjust or unreasonable, the law itself is arbitrary.⁷⁵ By the same token, where laws or procedures are enacted or tolerated by a government in contradiction of prior national legislation or prosecuted by a body not normally competent to prosecute, the laws or procedures are illegal by international standards.⁷⁶

Case decisions of the European Court of Human Rights (European Commission) have added the following clarifications to the emergency clause provisions. In its examination of the *Lawless* case,⁷⁷ which involved Ireland's imposition of restrictions on Irish Republican Army activities, the European Court noted that derogation measures "must be based on existing facts only, and cannot take account of subjective predictions as to future developments or unilateral fears that (a) situation may degenerate and the threat (of a public emergency) increase."⁷⁸

In the *Greek* case,⁷⁹ an investigation of the Greek Government's

U.N.T.S. 31, 32; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 3221, T.I.A.S. No. 3363, 75 U.N.T.S. 85, 86; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3319, T.I.A.S. No. 3364, 75 U.N.T.S. 135, 136; Geneva Convention Relative to the Protections of Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3519, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 289.

72. *Id.*

73. Prohibitions against arbitrary arrest and detention appear in Article 9 of the Universal Declaration, Universal Declaration, art. 9, *reprinted in* HUM. RTS. COMPILATION, *supra* note 17, at 1; article 10 of the International Covenant on Civil and Political Rights, Int'l Pol. Covenant, art. 10, *reprinted in* BASIC TEXTS, *supra* note 39, at 103; article 7 of the American Convention, American Convention, art. 7, *reprinted in* BASIC TEXTS, *supra*, at 69; articles 5-7 of the European Convention, European Convention, arts. 5-7, *reprinted in* BASIC TEXTS, *supra*, at 6-7; and article 6 of the African Charter, African Charter, art. 6, *reprinted in* 24 INT'L COMM'N JUR. REV. 76-77 (1980).

74. Marcoux, *Protection from Arbitrary Arrest and Detention Under International Law*, 5 B.C. INT'L & COMP. L. REV. 345, 367 n.155 (1982).

75. *Id.* at 368.

76. *Id.*; Siracusa Principles, *supra* note 22, at 10.

77. *Lawless v. Republic of Ireland*, Eur. Ct. H.R. (ser. B)(1960-61).

78. *Id.* at 94.

79. *Greek Case*, 12 Y.B. EUR. CONV. ON HUM. RTS. (1969).

declaration of a state of siege in 1967, the European Commission noted that in order to justify public emergency derogation measures, normal measures or less restrictive alternatives must be plainly inadequate or unavailable.⁸⁰

With respect to the right to a fair trial, the European Commission determined in the *Greek* case that the extraordinary courts martial were not independent tribunals because they exercised their jurisdiction under authority of the Minister of National Defense.⁸¹ Thus, the court concluded that the jurisdiction of courts martial should be limited to cases against members of the Armed Forces or acts committed against members of the Armed Forces, and that ordinary criminal courts alone should try civilian cases, including charges of offenses against public order or national security.⁸²

The United Nations Human Rights Committee⁸³ has likewise determined that military judges subordinated to the authority of the military hierarchy are not independent, and that military cases should therefore be subject to review by ordinary courts.⁸⁴

Additionally, with respect to the language of the law itself, the European Commission declared in the *Greek* case that a legislative decree is overbroad if it leaves the definition of the offense to a disciplinary council, making it impossible for an individual to know beforehand whether or not his acts are lawful.⁸⁵

Finally, case decisions on the issue of arbitrary arrest and detention have led to the following conclusions. First, the Inter-American Commission on Human Rights has suggested that a lapse of more

80. *Id.* at 71-72.

81. *Id.* at 164.

82. See *Weisz v. Uruguay*, Commun. No. 28/1978, reprinted in *SELECTED DECISIONS*, *supra* note 20, at 57, 60; *DeTouron v. Uruguay*, Commun. No. 32/1978, reprinted in *BASIC TEXTS*, *supra* note 39, at 61-63; see also Universal Declaration on the Independence of Justice, pt. II, art. 2.06, reprinted in *The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers; Final Report by the Special Rapporteur, Mr. L.M. Singhvi*, 38 U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, Annex IV (Agenda Item 9(c)) at 5, U.N. Doc. E/CN.4/Sub.2/18/Add.6 (1985).

83. The United Nations Human Rights Committee derives its investigatory authority from article 41 of the International Political Covenant and article 7 of the Optional Protocol to the International Covenant. See *Int'l Pol. Covenant*, reprinted in *BASIC TEXTS*, *supra* note 39, at 107; *Optional Protocol to the International Covenant*, reprinted in *BASIC TEXTS*, *supra*, at 110.

84. *Consuelo Salgar de Motenjo v. Colombia*, Commun. No. 64/1979, reprinted in *SELECTED DECISIONS*, *supra* note 20, at 127, 130.

85. *Greek Case*, 12 Y.B. EUR. CONV. ON HUM. RTS. 164 (1969).

than five days prior to being formally charged violates international law.⁸⁶ Second, the Human Rights Committee has held that a four-month delay prior to being brought before a judge violates the International Political Covenant.⁸⁷ Finally, the Human Rights Committee has also consistently held that denial of a *habeas corpus* hearing violates the International Political Covenant.⁸⁸

b. Derogation provisions under the Pakistan Constitution

The Pakistan Constitution distinguishes between derogable and nonderogable human rights.⁸⁹ Freedom of religion is classified as a derogable right.⁹⁰ Derogable rights may be suspended while a proclamation of emergency is in force, but only for a maximum period of four months without National Assembly approval.⁹¹ Additionally, any law enacted by Parliament which would not have been issued without a Proclamation of Emergency expires six months after the Proclamation of Emergency has ceased to be in force, unless measures are taken to continue the validity of the law.⁹²

The scope of derogation measures under the Pakistan Constitution appears to parallel the international standards articulated in the emergency clause provisions of international human rights treaties. For example, pursuant to article 232 of the Pakistan Constitution, an emergency exists when the security of Pakistan, in whole or in part, is threatened by war, external aggression, or by an internal disturbance "beyond the power" of the provincial or federal government to control.⁹³ Thus under the Pakistan Constitution, the emergency must be national in scope, and actually existing or imminent.

2. Limitation clause provisions

Limitation clause provisions provide that a particular right "may be subject only to such limitations as are prescribed by law and are necessary to protect national security, public safety, order, health or

86. See Report on the Situation of Human Rights in the Republic of Columbia, OAS Doc. OEA/Ser.L/V/II, 83-88, reprinted in T. BUERGENTHAL, R. MORRIS, & D. SHELTON, *supra* note 20, at 206, 210.

87. *Carballal v. Uruguay*, Commun. No. 33/1979, reprinted in SELECTED DECISIONS, *supra* note 20, at 63, 65.

88. *Id.* at 65.

89. AAEN (Constitution) art. 8(5) (Pakistan) (1973, suspended 1977, reinstated 1985).

90. *Id.* at art. 20.

91. *Id.* at art. 232(8).

92. *Id.* at art. 232(7)(b).

93. *Id.* at art. 232.

morals, or the fundamental rights and freedoms of others.”⁹⁴ Under the United Nations and regional treaties, the limitation clause is part of the definition of protection of the following rights: freedom of movement and choice of residence, freedom of expression, freedom of association, the right to privacy, the right to property, and the right to freedom of religion.⁹⁵ Accordingly, freedom of religion is a core right, and at the same time it is a derogable right.

a. international law standards and decisions

Although little scholarly work is available in this area,⁹⁶ the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) were recently formulated.⁹⁷ The Siracusa Principles clarify in general terms the scope and definition of many of the limitation clause provisions.

The Siracusa Principles have set forth the following standards. A limitation which is justifiably “necessary” is one that responds to a pressing public or social need, pursues a legitimate governmental aim, and is proportionate to the governmental aim.⁹⁸ A limitation “prescribed by law” cannot be applied so as to jeopardize the essence of the right limited.⁹⁹ Thus, by implication, and unlike the emergency clause provisions, a limitation clause derogation can only restrict the right to which it applies. A limitation clause derogation cannot totally eliminate or suspend that right. In addition, the law cannot be vague, arbitrary or unreasonable in content or application.¹⁰⁰ To guarantee the appropriateness of the law, adequate safeguards and effective legal remedies must be available against illegal or abusive application of the law.¹⁰¹ Impliedly, then, the same trial rights provided under the emergency clause also apply under the limitation clause.¹⁰² Limitations cannot discriminate on the basis of race, color, sex, lan-

94. Int'l Pol. Covenant, arts. 19, 21, 22, *reprinted in* HUM. RTS. COMPILATION, *supra* note 17, at 11.

95. Int'l Pol. Covenant, arts. 12, 19, 22, 18, *reprinted in* HUM. RTS. COMPILATION, *supra* note 17, at 10-11.

96. *But cf.* Kiss, *supra* note 58; O'Donnell, *supra* note 53.

97. Siracusa Principles, *supra* note 22, at 1.

98. *Id.* at 4.

99. *Id.*

100. *Id.*

101. Kiss, *supra* note 58, at 18.

102. *Id.* at 19.

guage, religion or social origin, or violate any other core right.¹⁰³ The limitations clauses are to be interpreted strictly and in favor of the right at issue.¹⁰⁴ Finally, the limitation cannot lower the protection for any human right to a greater extent than that which is permissible under international law.¹⁰⁵

The situations to which limitation clause provisions apply are broadly defined.¹⁰⁶ To date, the following definitions have emerged. "Public safety" means protection against danger to the safety of persons or their physical integrity, or serious damage to their property.¹⁰⁷ A limitation on public morals must be "essential to the maintenance of respect for fundamental values of the community."¹⁰⁸ It must also not be arbitrary,¹⁰⁹ and must allow for challenges and remedies against abuse. Similarly, "public order" is defined as "the sum of rules which ensure[s] the functioning of society or the set of fundamental principles on which society is founded."¹¹⁰ "Public health" is defined as a serious threat to the population or individual members of the population.¹¹¹

Case decisions of international human rights bodies to date have focused on the application of the limitation clause to the right to freedom of speech. In *Handyside v. United Kingdom*,¹¹² a 1974 obscenity case, the European Court stated that while state authorities are in a better position than international judges to decide the content and necessity of restrictions based on the concept of public morals,¹¹³ every restriction or penalty imposed must be proportionate to a legitimate goal based upon an assessment of the reality of a pressing social need.¹¹⁴ Thus, states are given wide latitude to define public morals consistent with the needs of their particular society.¹¹⁵ However, the pressing social need must be existing or imminent.¹¹⁶

103. Siracusa Principles, *supra* note 22, at 4.

104. *Id.*

105. *Id.* at 5.

106. *Id.* at 5-7.

107. *Id.* at 6.

108. *Id.*

109. Kiss, *supra* note 58, at 16.

110. Siracusa Principles, *supra* note 22, at 5.

111. *Id.* at 6.

112. *Handyside Case*, 24 Eur. Ct. H.R. (ser. A) (1976).

113. *Id.* at 22, para. 48.

114. *Id.*

115. *Id.* at 21, para. 47; *accord*, *Hertzberg v. Finland*, Commun. No. 61/1979, *reprinted in*

SELECTED DECISIONS, *supra* note 20, at 124, 125.

116. *Handyside Case*, 24 Eur. Ct. H.R. (ser. A) 22, para. 48 (1976).

Three years later in *Sunday Times v. United Kingdom*,¹¹⁷ another free speech case, the European Court articulated a facts and circumstances test to balance governmental and public interests to determine whether a limitation was proportionate to a legitimate goal pursued by the government.¹¹⁸ The European Court concluded that the limitation must “correspond to a social need sufficiently pressing to outweigh the public interest in (the right limited).”¹¹⁹ The *Sunday Times* court also concluded that in order for limitations to be validly prescribed by law, the restrictions must give a citizen reasonable notice and specificity as to what conduct will result in a violation of law.¹²⁰

b. Pakistan Constitutional provisions

Article 20 of the Pakistan Constitution provides that the right to freedom of religion is “[s]ubject to law, public order and morality.”¹²¹ Although “public order” and “public morality” are not specifically defined in the constitution, other limitation clause provisions in the constitution require that restrictions be reasonable,¹²² imposed by law, and be in the public interest.¹²³ Restrictions must also be consistent with protection of other human rights provisions.¹²⁴

c. analytical comparison of the derogation clause standards

A comparison of the emergency clause and the limitation clause standards reveals three significant distinctions. First, a threat under the emergency clause provisions must be national in scope and impact before limitations will be justified. Conversely, no clear definition of the scope of a “pressing social need” has as yet been articulated under the limitation clause provisions. Second, the terms under the emergency clause are more precise, in definition and scope, than are the terms under the limitation clause. It would appear that the limitation clause terms need to be more narrowly defined.

Finally, and most importantly, the derogation measures under the emergency clause provisions are limited “to the extent strictly re-

117. *Sunday Times Case*, 30 Eur. Ct. H.R. (ser. A) 23, para. 49 (1979), involved an appeal from a court order preventing publication of an article concerning thalidomide children while litigation involving a thalidomide manufacturer was pending before the court. *Id.* at 9-10.

118. *Id.* at 40, para. 65.

119. *Id.* at 42, para. 67.

120. *Id.* at 31, para. 49.

121. AAEN (Constitution) art. 20 (Pakistan) (1973, suspended 1977, reinstated 1985).

122. *See, e.g., id.* at art. 15.

123. *Id.*

124. *Id.* at art. 8(2).

quired by the exigencies of the circumstances."¹²⁵ In other words, the test to determine the validity of the restriction under this provision is that the restriction must be proportionate to an existing dangerous situation.¹²⁶ This not only narrows the scope, but also the duration of the permissible derogation measures.

On the other hand, the test to determine the reasonableness of a limitation clause restriction is not whether it is proportionate to the disturbance at hand but, rather, whether it is proportionate to a legitimate governmental purpose. This test for the limitation clause stretches the relationship between the restriction and the underlying problem that it addresses, injecting between the two elements a purpose requirement. The resulting focus is on the governmental intent, rather than the proportionality of the limitation. Consequently, a state can impose a restriction on a human right under the limitation clause which is necessary and proportionate to a legitimate governmental aim, but which has only a minimal connection or tangential effect upon the actual public disturbance.

Overall, the emergency clause standards appear to be more stringent, objective, and narrowly tailored than are the limitation clause standards. Accordingly, it appears that the emergency clause standards are geared more toward effectively and efficiently resolving a threatening situation than are the limitation clause provisions. In fact, the limitation clause provisions appear to be so loosely defined that a state could potentially derogate from its obligation to protect human rights during a non-crisis period to a greater extent or over a longer period of time than it could during a crisis period.

d. application of the two standards to the right to freedom of religion.

The emergency clauses of United Nations and regional human rights treaties specifically provide that no derogation of the right to freedom of religion may be made during the time of war or public emergency.¹²⁷ However, the limitation clause is included within the definition of the right to freedom of religion.¹²⁸ Thus, application of

125. Siracusa Principles, *supra* note 22, at 3.

126. *Id.* at 9; *see also* Questiaux, *supra* note 40, at 15.

127. *See supra* text accompanying note 42.

128. *See* Int'l Pol. Covenant, art. 18(3), *reprinted in* HUM. RTS. COMPILATION, *supra* note 17, at 11; Declaration of Religion, art. 1(3), *reprinted in* HUM. RTS. COMPILATION, *supra*, at 49; American Convention, art. 13(2), *reprinted in* BASIC TEXTS, *supra* note 39, at 71; European Convention, art. 9, *reprinted in* BASIC TEXTS, *supra*, at 7.

the emergency clause to the right to freedom of religion can be interpreted two ways. One interpretation is that during periods of public emergency, existing limitations on the right to freedom of religion may continue but no new limitations may be imposed. This interpretation is supported by virtue of the fact that freedom of religion is the only right that does not include in its limitation clause a derogation for national security purposes. Hence, by implication, states cannot restrict this right during public emergencies, whereas they can during non-emergency periods.¹²⁹

The second interpretation is that a state can take derogation measures during public emergency periods, but only to the extent permissible under the limitation clause. This interpretation in effect cancels the core status of the right to freedom of religion, and guarantees only that a state must at a minimum secure the freedom of religion rights specified in the Geneva Conventions.¹³⁰ Those rights include the right to attend community services,¹³¹ the right of children to exercise their religion,¹³² the right to nondiscrimination based solely on race, sex, color, language or religion,¹³³ and the right to distribute books and articles.¹³⁴

If the second interpretation is adopted, however, then it is unclear which derogation standards apply to determine the appropriateness of a limitation on the right to freedom of religion during public emergencies. Arguably, the emergency clause standards should apply, since the limitation is imposed during an emergency period. On the other hand, imposing a stricter standard of protection upon a state during a period when its continued existence is at stake would seem to be unreasonable and tantamount to a penalty. Because of the uncertainty in the law with respect to this issue, this Comment will analyze Ordinance XX under both derogation standards.

III. ANALYSIS OF ORDINANCE XX

A. Provisions of Ordinance XX

Ordinance XX expressly bans the public manifestation of the Ahmadiyya faith. Part I of this law declares Ordinance XX to be a

129. See Kiss, *supra* note 58, at 21.

130. See *supra* note 71 (citing article 3 common to all four Geneva Conventions).

131. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 34, 6 U.S.T. 3316, 3364, T.I.A.S. No. 3364, 75 U.N.T.S. 135, 164.

132. *Id.* art. 24, at 163-64.

133. *Id.* art. 27, at 165.

134. *Id.* art. 58, at 175.

criminal statute that applies only to Ahmadiyyas;¹³⁵ Part II prohibits Ahmadiyyas from publically using Islamic religious terminology in connection with their religion.¹³⁶ Ahmadiyyas are also prohibited from using religious titles, descriptions or epithets of Muslim origin,¹³⁷ or from using the word "Masjid" in connection with their place of worship.¹³⁸ Ahmadiyyas cannot call or refer to their faith as Islam,¹³⁹ and they cannot recite or refer to the mode or form of the call to prayers as "Azan."¹⁴⁰

In addition, Ahmadiyyas cannot practice their religion in community with others. Article 298C of the ordinance prohibits an Ahmadiyya from preaching or propogating his faith, or inviting others to accept his faith by oral or written language or by visual representation.¹⁴¹ Similarly, Part IV of Ordinance XX prohibits newspapers and publishers from printing or distributing Ahmadiyya literature.¹⁴² Finally, Ordinance XX provides that any Ahmadiyya who violates any of the above-described conduct, or "who, directly or indirectly poses himself as a Muslim . . . or by visual representations or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment . . . for a term which may extend to three years and shall also be liable to a fine."¹⁴³

Pakistan has stated to the United Nations Subcommission that the purpose of Ordinance XX is "to restrain certain Ahmadiyya practices which offend Orthodox Muslims"¹⁴⁴ and which "could hurt the sentiments of society in general and could lead to creating tension between various sections of society."¹⁴⁵ In other words, Pakistan ap-

135. See *supra* note 4 and accompanying text.

136. Ordinance XX, *supra* note 2, at 74, pt. II, art. 298B(1)(d).

137. *Id.*

138. *Id.*

139. *Id.* pt. II, at art. 298C.

140. *Id.* pt. II, at art. 298B(2).

141. *Id.* pt. II, at art. 298C.

142. *Id.* pt. IV (6). In December of 1984, the government of Pakistan closed the Ahmadiyya printing press located in Rabwah. The government also temporarily suspended several of the publications of the Ahmadiyya community, including several periodicals and a daily newspaper. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1985 at 1366 (1986).

143. Ordinance XX, *supra* note 2, at 74, pt. II, art. 298C.

144. *Summary of Arbitrary Executions, Report by Special Rapporteur, Mr. S. Amos Wako, Appointed Pursuant to Resolution 1984/35 of 24 May 1984 of the Economic and Social Council*, 41 U.N. Commission on Human Rights (Agenda Item 12) at 20, U.N. Doc. E/CN.421 (1986).

145. *Id.*

parently issued Ordinance XX in order to protect public morals and public order.

B. Does Ordinance XX Violate Emergency Clause Derogation Standards?

To be considered a permissible limitation on the Ahmadiyyas' right to freedom of religion, there must have existed a serious nationwide threat to public morals or public order which threatened the organized life of the nation at the time Ordinance XX was enacted in April of 1984.¹⁴⁶ In addition, the limitation measures set forth in Ordinance XX must have been strictly required by the exigencies of the crisis, must not have infringed on any other core rights, and must not have involved discrimination based solely on religion.¹⁴⁷ Finally, the limitation, at a minimum, must not remove those trial rights granted under the Geneva Conventions.¹⁴⁸

In 1977, President Zia proclaimed a state of emergency and established martial law.¹⁴⁹ Martial law continued in effect until December 30, 1985.¹⁵⁰ Hence, when Ordinance XX was enacted in April of 1984, a state of public emergency in Pakistan actually existed. However, enactment of Ordinance XX was not strictly required by the exigencies of the situation in Pakistan in 1984.

Nationwide political and religious strikes, demonstrations, and riots occurred in Pakistan from 1979 through 1984.¹⁵¹ Students, union employees, and lawyers were among those involved in civil disobedience campaigns to protest the continued suspension of the 1973 constitution,¹⁵² the imposition of martial law, and courts martial.¹⁵³ However, these political disturbances did not involve Ahmadiyyas,

146. Each derogation must be assessed independently in time and space. See Questiaux, *supra* note 40, at 17.

147. *Id.*; see also *supra* text accompanying note 69.

148. Siracusa Principles, *supra* note 22, at 11.

149. COUNTRY STUDY, *supra* note 3, at xxii.

150. See *supra* text accompanying note 47.

151. In February of 1981, the Movement for Restoration of Democracy (MRD) held demonstrations. In June, student demonstrations followed. Finally, in August of 1981, there was a civil disobedience movement against local taxes, which resulted in the arrests of political workers, students, and trade union employees. AMNESTY INTERNATIONAL REPORT 1982 at 223-24 (1982).

152. In 1983, nationwide demonstrations erupted in protest of the continued suspension of the 1973 constitution. 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD XIX-XX (A. Blaustein & G. Flanz eds. 1986).

153. Sayeed, *Pakistan in 1983: Internal Stress More Serious Than External Problems*, 24 ASIAN SURV. 219, 222 (1984).

and there is no evidence that the normal police measures were inadequate to quell the demonstrations. Thus, under article 232 of the Pakistan Constitution and under the *Greek* case, these disturbances do not rise to the level of a national public threat which justifies restrictions upon the Ahmadiyyas right to practice their religion.¹⁵⁴ Clashes between Sunni¹⁵⁵ and Shiite¹⁵⁶ Muslims also occurred during this period.¹⁵⁷ However, restrictions on Ahmadiyya religious activities were not the least restrictive or most effective means of settling disputes between the Sunni and Shiite Muslims. Hence, Ordinance XX was not a derogation measure strictly required to diminish the religious unrest that existed in 1984.

From a historical perspective, the Zia government might reasonably have feared future sectarian strife involving Ahmadiyyas, since in 1953, anti-Ahmadiyya attacks by Sunni Muslims necessitated the imposition of martial law in order to restore public order.¹⁵⁸ Moreover, serious anti-Ahmadiyya riots again occurred in 1974.¹⁵⁹ Nevertheless, predictions as to future clashes between Ahmadiyya and anti-Ahmadiyya factions, absent existing facts demonstrating an imminent crisis, are insufficient reasons to justify derogation measures.¹⁶⁰ Any public manifestations of the Ahmadiyya religion between 1982 and 1984 had not resulted in serious nationwide strife or necessitated the

154. See *supra* text accompanying note 80.

155. Sunni Muslims, who comprise the Muslim majority in Pakistan, believe Mohammed is the last of the Prophets from God. See COUNTRY STUDY, *supra* note 3, at 116, 125.

156. Shiite Muslims, some fifteen to twenty-five percent of the population, are concentrated in the Northwest Frontier Province, Punjab. One of the major doctrinal differences between Shiites and Sunnis is the line of succession of the caliphate; the Shiites support the Ali line, while the Sunnis support the Umayyah line. COUNTRY STUDY, *supra* note 3, at 124.

157. In October 1982, there were Shiite-Sunni riots in Karachi and in Lahore, resulting in five dead and over two hundred wounded. Richter, *Pakistan In 1984: Digging In*, 25 ASIAN SURV. 145, 150 (1984).

In February 1983, Sunni-Shiite street battles erupted in Karachi after a Shiite mosque was set on fire. One week later, thousands of Shiites staged a sit-in, blocking one of the major highways in the area. Haeri, *Proxy War in Karachi: Sectarian Riots Fomented by Iran Adds to Pakistan's Domestic Troubles*, 30 SOUTH 28 (Apr. 1983).

Finally, in June of 1983, Sunni-Shiite clashes resulted in 40 deaths. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1983 at 40.

158. In 1953 Sunni mob attacks against Ahmadiyyas led to riots that resulted in the imposition of martial law. COUNTRY STUDY, *supra* note 3, at 40, 124.

159. Following anti-Ahmadiyya riots in 1974, Ahmadiyyas were constitutionally defined as non-Muslims. Article 260(3) of the 1973 Constitution and Chief Martial Law Order No. 2 of 1981 both exclude Ahmadiyyas from the definition of a Muslim in Pakistan. 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD ix (A. Blaustein & G. Flanz eds. 1982).

160. See *supra* text accompanying note 78.

use of national armed forces.¹⁶¹ In the *Lawless* case, the European court stated that an "emergency, being only *potential*, having persisted in virtually unchanged form for years and not having led to serious disturbance of general public order or of external relations, cannot be regarded as of exceptional gravity, but only as a *latent emergency* of a minor degree."¹⁶² Thus, Ordinance XX cannot be justified as a preventative measure.

Since 1984, the potential unrest has been transformed into actual strife. Ordinance XX has, in fact, provoked defiance on the part of Ahmadiyyas,¹⁶³ and clashes have regularly occurred since enactment of Ordinance XX between Ahmadiyya and anti-Ahmadiyya factions.¹⁶⁴ However, these clashes have not yet been beyond the ability of local police authorities to handle, hence no public emergency exists which justifies continued enforcement of Ordinance XX during post-martial law.¹⁶⁵

Moreover, Ordinance XX is being enforced by the government of Pakistan in an arbitrary manner. The language of Ordinance XX is arbitrary in that it fails to give reasonable notice and specificity as to what conduct will result in a violation and what form or amount of punishment will be imposed. Ordinance XX broadly defines the right to arrest an Ahmadiyya based on any conduct which "outrages" the religious feelings of a Muslim.¹⁶⁶ Since the term "outrage" is not defined within Ordinance XX, Ahmadiyyas have no way of knowing what conduct rises to the level of an "outrage" prior to being arrested and tried. Ordinance XX also states that Ahmadiyyas will be subjected to "a fine", but no amount is set.¹⁶⁷ Thus Ahmadiyyas have no way of knowing how much of a fine will be imposed prior to sentencing. Additionally, Part I of Ordinance XX states that "[t]he provisions of this Ordinance shall have effect notwithstanding any order or

161. See AMNESTY INTERNATIONAL REPORT 1982, at 222-26 (1982); AMNESTY INTERNATIONAL REPORT 1985, at 232-37 (1985).

162. *Lawless v. Republic of Ireland*, Eur. Ct. H.R. (ser. B) 98 (1960-61). Similarly, the Human Rights Committee has determined that "latent subversion" did not justify any derogation by the Chilean Government. See Questiaux, *supra* note 40, at 16.

163. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984 at 1358 (1984).

164. *Id.*; see also AMNESTY INTERNATIONAL REPORT 1986 at 247 (1986).

165. See *supra* text accompanying note 68.

166. Ordinance XX, *supra* note 2, at pt. II, art. 298C.

167. *Id.* at pt. II, arts. 298B, 298C.

decision of any court.”¹⁶⁸ Thus, by implication, Ordinance XX can be enforced without a judicial hearing. Hence, Ahmadiyyas have no way of knowing before arrest whether they will be given a fair trial before ordinary courts or summarily sentenced by a martial court.

As a result of the arbitrary language of Ordinance XX, Ahmadiyyas have been subjected to arbitrary arrests, detentions, trials and punishments. Ahmadiyyas have been arrested for defending their mosques against anti-Ahmadiyya attacks.¹⁶⁹ Once arrested, Ahmadiyyas have been held in detention without bail for up to six months pending trial.¹⁷⁰ Thus Ordinance XX has resulted in the imposition of detention periods which exceeded international law standards.¹⁷¹ Some Ahmadiyyas have been tried by military courts which are bodies not competent to prosecute civilians under the Pakistan Constitution,¹⁷² the Geneva Conventions,¹⁷³ and general principles of international law.¹⁷⁴ The decisions of untrained military judges¹⁷⁵ have not been reviewed by ordinary courts,¹⁷⁶ even though harsh sentences have been imposed. For example, when heavy fines have been imposed, Ahmadiyya's personal property has been confiscated.¹⁷⁷ In addition, at least four people have been sentenced to 25 years imprisonment, and two people have been sentenced to death.¹⁷⁸ Therefore, enforcement of Ordinance XX has resulted in a denial of the minimum rights to a fair trial which are guaranteed by the Geneva Conventions.¹⁷⁹

Consequently, the stated purposes of protecting public morals and public order does not justify derogation measures under the emer-

168. *Id.* at pt. II, art. 2. This provision appears to be an attempt to prospectively reverse contrary court decisions.

169. See Amnesty International, *Death Penalty and Legal Concern: Members of the Ahmadiyya Community in Pakistan*, AI Index: ASA 33/04/86 (Feb. 20, 1986).

170. *Id.*; see also Amnesty International, *Pakistan: Imposition of Death Sentences on Nasir Ahmad Qureshi and Rafi Ahmad Qureshi, Members of the Ahmadiyya Community*, AI Index: ASA 33/06/86 (Mar. 1985).

171. See *supra* text accompanying note 87.

172. AAEEN (Constitution) art. 175 (Pakistan) (1973, suspended 1977, reinstated 1985).

173. See *supra* text accompanying notes 71-72.

174. See *supra* text accompanying notes 76, 80-84.

175. See Amnesty International, *supra* note 170, at 3.

176. *Id.*

177. See *Gross Violations of Human Rights: Written Statement Submitted by Human Rights Advocates, a Non-Governmental Organization in Consultative Status (category II)*, 38 U.N. Subcommission on Prevention of Discrimination and Protection of Minorities (Agenda Item 6) at 1, U.N. Doc. E/CN.4/Sub.2/NGO/23 (1985).

178. See Amnesty International, *supra* note 169, at 2.

179. See *supra* text accompanying notes 71-72.

gency clause, because the disturbances relating to public morals and public order did not create a situation of nationwide crisis in Pakistan in 1984 beyond the control of the local officials. Ordinance XX was not strictly required to alleviate the political or social unrest in Pakistan in 1984. Moreover, both the language and the enforcement procedures of Ordinance XX have exacerbated rather than ameliorated the social tensions in Pakistan since 1984. Additionally, Ordinance XX violates the core rights guaranteed by the Geneva Conventions. Accordingly, the initial enactment, as well as the continued enforcement of Ordinance XX, violates the emergency clause standards.

C. Does Ordinance XX Violate Limitation Clause Derogation Standards?

The following limitation clause principles apply to Ordinance XX. First, there must be a pressing social need which initially necessitated enactment of Ordinance XX, as well as a pressing social need justifying its continued enforcement.¹⁸⁰ Second, the government of Pakistan must have had a legitimate aim for enacting and enforcing Ordinance XX, and Ordinance XX must be proportionate to that aim.¹⁸¹ Third, Ordinance XX must not jeopardize the essence of the right to freedom of religion,¹⁸² nor provide for lesser protection of the right to freedom of religion than would be provided during a time of war under the Geneva Conventions.¹⁸³ Fourth, Ordinance XX must not discriminate solely on the basis of religion.¹⁸⁴ Finally, because the Government of Pakistan has justified Ordinance XX on grounds of public morality and public order, Ordinance XX must be essential to the maintenance of respect for the fundamental values of society.¹⁸⁵

The fundamental values of the people of Pakistan are embodied in the Principles of Islam.¹⁸⁶ Ahmadiyyas believe in every fundamental tenet of Islam except one;¹⁸⁷ they deny that Mohammed was the

180. See *supra* text accompanying note 98.

181. *Id.*

182. See *supra* text accompanying note 99.

183. See *supra* text accompanying note 105.

184. See *supra* text accompanying note 103.

185. See *supra* text accompanying note 108.

186. Islam is the state religion of Pakistan. AAEEN (Constitution) art. 2 (Pakistan) (1973, suspended 1977, reinstated 1985). In addition, all laws in Pakistan must conform to the Injunctions of Islam. *Id.* at art. 227.

187. See *Commission on Human Rights, Subcommittee on Prevention of Discrimination and Protection of Minorities, Summary Record of the 24th Meeting*, 37 U.N. Subcommittee on

final prophet.¹⁸⁸ Instead, the Ahmadiyyas believe that the Mirza Ghulam Ahmad was the final prophet to have received a revelation from God.¹⁸⁹ This denial of the finality of Mohammed has led Orthodox Muslims to consider Ahmadiyyas apostates.¹⁹⁰ Thus, use of religious terms to refer to anyone other than Mohammed implicitly outrages Orthodox Muslims and presumably might offend some members of the Muslim majority. It is unclear, by the existing definitions of the limitation clause, whether protection of the "sentiments" of Orthodox Muslims or of society in general¹⁹¹ is a sufficiently pressing need to outweigh the public interest in freedom of religious expression.

In *Handyside*,¹⁹² the European Court determined that the right to freedom of expression applied "not only to 'information' or 'ideas' that are favourably [sic] received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population."¹⁹³ Thus, the mere fact that Ahmadiyya religious ideas are offensive to Orthodox Muslims is an insufficient reason to prohibit Ahmadiyyas from exercising their right to preach and propagate their religion, at least within their own community.

The question of whether Ahmadiyyas should be permitted to proselytize polarizes two important Islamic tenets — the principle of religious tolerance,¹⁹⁴ and the finality of the Holy Prophet.¹⁹⁵ Since international human rights bodies generally defer to the decision of state authorities as to what constitutes public morals, Ordinance XX can be interpreted as a reasonable public policy decision to protect the concept of the finality of Mohammed as the more fundamental of the two moral values of Pakistan. Arguably, then, there was in 1984, and there continues to be, a pressing social need — and a corresponding legitimate governmental goal — for Ordinance XX; namely, mainte-

Prevention of Discrimination and Prevention of Minorities (24th mtg.) at 6-7, U.N. Doc. E/CN.4/Sub.2/SR.24 (1984).

188. See COUNTRY STUDY, *supra* note 3, at 124.

189. *Id.*

190. *Id.*

191. See *supra* text accompanying notes 144-45.

192. *Handyside Case*, 24 Eur. Ct. H.R. (ser. A) (1979).

193. *Id.* at 22, para. 48.

194. The Quran states that "[e]ven with unbelievers, unless they are rampant and out to destroy us and our Faith, we should deal kindly and equitably as is shown by our holy Prophet's own example." THE HOLY QURAN 1544 (A. Ali ed. 1946).

195. COUNTRY STUDY, *supra* note 3, at 124.

nance of respect for the concept of the finality of Mohammed as a fundamental element of public morals in Pakistan.

Accordingly, those sections of Ordinance XX which prohibit Ahmadiyyas from using terms which signify the Holy Prophet in reference to someone other than Mohammed would be appropriately tailored limitations, except for the fact that they are discriminatory. Presumably, Orthodox Muslims would be equally offended if other religious groups who do not believe in Mohammed improperly used the same proscribed terms. Yet Ordinance XX does not prohibit the use or misuse of these terms by non-Orthodox Muslims or by non-Muslims. Thus, Ordinance XX amounts to a discriminatory limitation based solely on religion. For these same reasons, prohibiting only Ahmadiyyas from using other Islamic words which do not reference the Holy Prophet also amounts to discrimination.

In addition, Ordinance XX appears to be disproportionate to the goal of preserving the public acknowledgement of the finality of Mohammed because it not only prohibits the Ahmadiyya proselytizing, but it also prohibits all Ahmadiyya community religious practices.

In *X v. the United Kingdom*,¹⁹⁶ the European Court noted that "the right to manifest one's religion in community with 'others' has always been regarded as an essential part of the freedom of religion."¹⁹⁷ The court held that "the two alternatives, 'either alone or in community with others'. . . cannot be considered as mutually exclusive or as leaving a choice to the authorities, but only as recognising [sic] that the right may be practiced in either form."¹⁹⁸ The Geneva Conventions also implicitly recognize the right to religious practice in community with others as an essential component to freedom of religion by protecting that practice during periods of war.¹⁹⁹

Although the right to manifest one's religion in community with others is an "essential" component of the right to freedom of religion,²⁰⁰ international standards have not yet defined the community right as the very "essence" of the right to freedom of religion.²⁰¹ In other words, if the individual right to have or to adopt a particular religion is so dependent upon the community manifestation of that religion so that suspending the community rights is tantamount to

196. *X v. United Kingdom*, 22 Eur. Comm'n H.R. 27 (1981).

197. *Id.* at 34, para. 5.

198. *Id.*

199. See *supra* text accompanying notes 130-34.

200. *X v. United Kingdom*, 22 Eur. Comm'n H.R. 27 (1981).

201. See *supra* text accompanying note 99.

eliminating the individual rights,²⁰² then Ordinance XX jeopardizes the essence of the Ahmadiyya right to freedom of religion and is therefore an impermissible restriction under the limitations clause.

Theoretically, community practices may not be important in some religions. Arguably, these practices do constitute the essence of the Ahmadiyya religion. The religious practices of the Ahmadiyya faith emphasizes group activities to care for their brethren.²⁰³ The Ahmadiyya community characteristically cares for its poor and finds employment for its members.²⁰⁴ The Ahmadiyya community also runs its own schools and welfare institutions.²⁰⁵ Therefore, suspension of all community practices of the Ahmadiyyas impacts the Ahmadiyyas as a collective group and as individuals. Suspension of community practices eliminates the characteristics which distinguish Ahmadiyyas, as a religious minority group, from other religious groups. Suspension of community practices also deprives Ahmadiyyas of their individual right to manifest their religious beliefs through participation in Ahmadiyya community charity services. Additionally, suspension of the right to worship with others and the right to distribute religious literature violates the minimum community religious rights guaranteed by the Geneva Conventions.²⁰⁶ Thus, suspension of community practices deprives individual Ahmadiyyas of the essence of their religion, which is the belief in and practice of community charity.

Consequently, Ordinance XX can be justified under the limitation clause as a law which is necessary to protect public morals. However, it is discriminatory solely on the basis of religion, it is disproportionate to its stated goal, and it jeopardizes the essence of the Ahmadiyya right to freedom of religion. In addition, enforcement of Ordinance XX violates the core rights to a fair trial for the reasons as stated under the emergency clause analysis.²⁰⁷ Therefore, the initial enactment as well as the continued enforcement of Ordinance XX violates the limitation clause standards.

202. See Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 103 (1976).

203. COUNTRY STUDY, *supra* note 3, at 124.

204. *Id.*

205. *Id.*

206. See *supra* text accompanying notes 131-34.

207. See *supra* text accompanying notes 166-79.

D. Analytical Comparison of the Analysis of Ordinance XX Under the Provisions of the Emergency Clause and the Limitation Clause

A comparison of the analyses of Ordinance XX under the provisions of the emergency clause and the limitation clause leads to the following conclusions. The language and enforcement procedures of Ordinance XX violate general principles of law under both derogation standards. The terms of Ordinance XX are undefined, overbroad and discriminatory solely on the basis of religion. As a result, Ordinance XX has been enforced against the Ahmadiyyas in an arbitrary manner. Ahmadiyyas have been subjected to long periods of detention, and denied the right to trial or judicial review by the ordinary courts in Pakistan.

However, the purposes for enacting Ordinance XX violate only the emergency clause standards. Under the limitation clause, the government of Pakistan is given the discretion to determine at what point there is a "pressing social need" to enact restrictive legislation in order to reduce sectarian strife. On the other hand, under the emergency clause, the government cannot enact legislation until the sectarian strife becomes a crisis affecting the entire population and organized life of Pakistan. Furthermore, under the limitation clause, the legislative response to the sectarian strife need only be proportionate to the legitimate governmental goal of protecting public morals with respect to the concept of the finality of Mohammed, whereas under the emergency clause, the legislation must make it possible to abate or bring to an end the sectarian strife causing the national crisis.²⁰⁸ Finally, under the limitation clause, derogation measures may continue in force indefinitely so long as it proportionately pursues the goal of protecting public religious morals, whereas under the emergency clause, the derogation measures are provisional in nature and must be rescinded once the national crisis is over.²⁰⁹ Thus, Pakistan can indefinitely restrict the community manifestation of the Ahmadiyya religion as a matter of public policy for the purpose of protecting public religious morals under the limitation clause, but not under the emergency clause.

Assuming, arguendo, that Ordinance XX was amended so that the language and enforcement procedures complied with the mini-

208. See Questiaux, *supra* note 40, at 17.

209. See *id.* at 24.

mum standards under international law,²¹⁰ Ordinance XX would still be discriminatory on the basis of religion. If, however, Ordinance XX was further amended to prohibit all community religious activities except those activities guaranteed under the Geneva Conventions for all religions other than the dominant Muslim majority,²¹¹ Ordinance XX would no longer be discriminatory or disproportionate to the legitimate governmental goal of reducing sectarian strife by protecting public religious morals.

The remaining question is whether prohibiting, in Pakistan, the community religious activities of all religions except one jeopardizes the essence of the general right to freedom of religion. There are currently no clear international legal guidelines to answer this question. If the essence of freedom of religion in general is not the manifestation of community religious activities, then Ordinance XX, as amended, could continue in force post martial law for an indefinite period under the limitation clause. Accordingly, Ordinance XX as amended, could restrict the right to freedom of religion to a greater extent and over a longer period of time under the limitation clause than under the emergency clause.

This result negates the protections guaranteed to the right of freedom of religion as an inalienable, core right and demonstrates a need to clarify the definition of freedom of religion with respect to community religious activities. This result also demonstrates the need to resolve the inconsistencies between the derogation standards under the emergency clause and the limitation clause so that states cannot under ordinary circumstances restrict the right to freedom of religion to a greater extent than they could under situations which threaten the life of the nation.

IV. PROPOSED CHANGES

A. *Protection of the Right to Freedom of Religion*

1. Ordinance XX of 1985 should be rescinded

Analysis of Ordinance XX under both the emergency clause and the limitation clause standards demonstrates that enactment of Ordinance XX violates international law and Pakistani law, as does its continued enforcement. International law places an affirmative duty

210. This would include setting a maximum for the fine amount, defining what constitutes an "outrage to the religious feelings of Muslims," and providing fair trial rights accorded under the Geneva Conventions. See *supra* text accompanying notes 166-73.

211. This would include Shiite and Sunni Muslims in Pakistan. See *supra* notes 155-56.

on states to correct legislation which violates human rights.²¹² Accordingly, Resolution 1985/21 "requests the Commission on Human Rights to call on the Government of Pakistan to repeal Ordinance XX and to restore the human rights and fundamental freedoms of all persons in its jurisdiction."²¹³ Therefore, Ordinance XX of 1985 should be rescinded immediately.

2. Proposed Clarifications of the Definition of Freedom of Religion under International Law

Freedom of religion is an essential human right which is appropriately considered a core right.²¹⁴ To ensure minimal state derogation of this right, this Comment proposes the following changes.

First, the right to freedom of religion should be recognized as an essential community right. Accordingly, the current wording of the definition of the right to freedom of religion in international conventions should be changed from practice "alone *or* in community with others"²¹⁵ to practice alone *and* in community with others.

Secondly, international human rights conventions should amend the limitation clause in either one of two ways to clarify its status as a core right. To guarantee the greatest possible protection of the right to freedom of religion, all limitation language should be completely eliminated. Alternatively, the current limitation clause language should be amended to specifically detail the exact scope and circumstances under which a state may permissively restrict the right to freedom of religion. Conversely, the limitation clause should state exactly what cannot be restricted, which at a minimum are those protections contained in the Geneva Conventions.²¹⁶ This alternative would pro-

212. Int'l Pol. Covenant, art. 2, provides:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Int'l Pol. Covenant, art. 2, reprinted in HUM. RTS. COMPILATION, *supra* note 17, at 8.

See also *Declaration on Religion*, art. 4, which provides that "[a]ll states shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter." *Declaration on Religion*, art. 4, reprinted in HUM. RTS. COMPILATION, *supra* note 17, at 49.

213. *Res. 1985/21*, *supra* note 11, at 2.

214. See *supra* text accompanying note 40.

215. HUM. RTS. COMPILATION, *supra* note 17, at 11.

216. See *supra* text accompanying note 128.

vide clearer guidelines to enable states to conform their national legislation to international law standards. This alternative should also reduce the possibility of abusive application of inconsistent or imprecise principles of derogation.

B. Clarification of the Principles of Derogation

Limitation clause provisions need to be more clearly defined. Ideally, derogation measures under the limitation clause provisions should be consistent with derogation measures under the emergency clause. Toward that end, more objective definitions of the terms "public order", "public morals", and "public safety" should be adopted. In addition, the scope and the level of urgency of the "pressing social need" requirement should be clarified. For example, a pressing social need might be defined as an existing or imminent dangerous situation that is incapable of resolution by the state or local officials, and which affects the culture, lives, economy, property, or functioning of vital social services of a geographically cohesive community or of the nation as a whole.

The definition "as necessary" should be amended to add a requirement which provides that derogation measures must be strictly required for the exigencies of the circumstances. In addition, the scope of the "as necessary" clause should be limited by an express provision — as is currently a part of the emergency clause standards — that core rights are nonderogable.

Finally, a requirement should be incorporated into both the emergency clause and the limitation clause standards which provides that states are under a positive duty — semi-annually or annually — to amend or rescind prior legislation which is no longer required under present circumstances.

V. CONCLUSION

This Comment has focused on the need for additional clarification of the international human rights standards which protect the right to freedom of religion. As highlighted by an analysis of Pakistan Ordinance XX of 1984, current inconsistencies in the principles of derogation permit states to accord less protection to the right of freedom of religion during ordinary circumstances than during periods of war or emergency. This Comment has also proposed changes designed to reduce abusive application of the principles of derogation. Those changes include defining with more specificity the limitation

clause provisions of international human rights instruments as well as conforming the limitation clause provisions to the emergency clause provisions.

In particular, the limitation clause provision pertaining to the right to freedom of religion should be amended to ensure greater protection of freedom of religion as an inalienable community right.

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