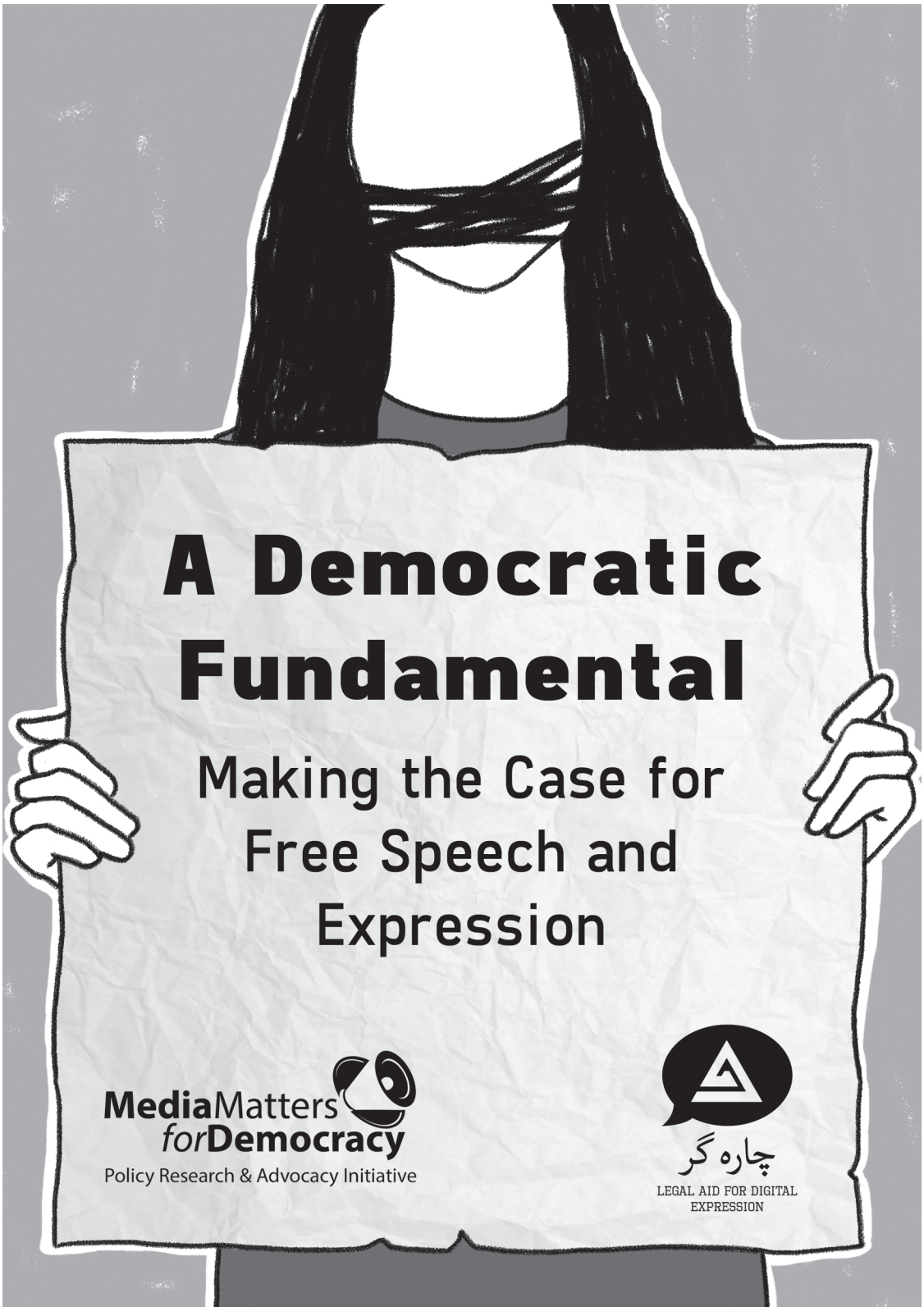

# A Democratic Fundamental

## Making the Case for Free Speech and Expression

MediaMatters forDemocracy
Policy Research & Advocacy Initiative

چارہ گر
LEGAL AID FOR DIGITAL EXPRESSION

# A Democratic Fundamental

## Making the Case for Free Speech and Expression

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# Foreword

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# Introduction

The ability of humans to communicate complex ideas, thoughts and narratives through language, is considered by many to be the defining characteristic which sets us apart from the rest of the animal kingdom and has allowed human beings to evolve into the civilizations that we are today.

Thus, from the earliest conceptions of the ideology of human rights, it was identified that the ability to speak openly and freely; to discuss, debate and criticize, is an innate human right which belongs to all humans and it cannot be arbitrarily snatched away. However, words and speech also have power, which if abused, can be catastrophic for the safety of the public or the rights of the individual. Thus, the operationalisation of freedom of speech in a state, is an act of careful balance - Some restriction of the right to freedom of speech may be important so as to ensure that speech which may promote violence is restricted and the rest remains protected.

However, dangerous speech is a complex concept to define and regulate. Thus, states often grapple with finding the right balance between restricted and protected speech.

In Pakistan, unfortunately, we can see the balance tipping on the side of restrictions and regulations. According to the World Press Freedom Index, 2020, Pakistan is now ranked 145 of 180 countries in terms of protection and freedom available to journalists[1].

A historic cause for such dismal performance is Pakistan's colonial past and the prominent influences of colonial era security jurisprudence on Pakistan's public law jurisprudence. For the colonial state, there was nothing more dangerous than free speech and dissent, as it could cause the local population to revolt and seek independence. Thus, criminalization of dissent and restraining publications deemed to be critical or controversial, was a part of the defensive strategy of the Colonial powers, allowing them to squash out voices and opinions that might have threatened their power. Unfortunately, the underlying philosophy of the colonists, the idea that citizen's individual freedoms can be conveniently sacrificed for the sake of the security of the state, has continued to infect the jurisprudence around speech in Pakistan's public law.

In this report, we present an overview of all the laws in Pakistan which are made to either restrict or criminalize free speech and expression. From colonial era laws which criminalized dissent to modern day enactments meant to regulate online speech - this report explores and analyzes all laws restricting free speech in Pakistan. The report also explores the enforcement and interpretation of these laws, by presenting the case law by the Superior Courts of Pakistan.

01 Pakistan : Under the military establishment's thumb | Reporters without borders. (2020). Retrieved 1 May 2020, from https://rsf.org/en/pakistan

Section 1

# Constitutional Rights

# Chapter 1
# ARTICLE 19 OF THE CONSTITUTION OF PAKISTAN

***Article 19 Freedom of speech, etc.***

*Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam[2] or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence.*

## INTRODUCTION

The freedom of speech and expression in Pakistan as it stands today recognizes two different stakeholders, i.e. citizens and the press. The exercise of free speech and expression by both is subject to seven restrictions which must be reasonably imposed by law. These restrictions will vary for each medium through which this right is practiced.

In either case, authorities cannot not travel beyond the scope of the following restraints, imposed by legislation, in regulating the freedom of the press and citizens' right to speech and expression:

i. Glory of Islam
ii. Integrity, Security or Defence of Pakistan
iii. Friendly relations with foreign states
iv. Public Order
v. Decency or morality
vi. In relation to contempt of court
vii. Commission of or incitement to an offence

Yet, it must be noted that there has been little to no legislative attempt by the legislature to define the ingredients of the above-mentioned restrictions and the powers and limitations of executive agencies in applying the same. The yardstick of each reasonable restriction has been left to the subjective interpretations of the regulators or the courts tasked with the authority to hear such cases. Therefore, the exercise of speech and expression under the unbridled control of the Regulator or the Court, becomes subject to a variety of arbitrary and unreasonable restraints.

02 It was for the first time under the 1973 Constitution that the term "Glory of Islam" was recognized as a restriction to speech and expression in Pakistan. This was not present in variations of the right contained in the 1956 or 1962 Constitutions. Furthermore, the term "commission of" replaced the term "defamation" via a constitutional amendment in 1975

# FREEDOM OF SPEECH AND EXPRESSION

Due to a lack of clear definitions as to what constitutes the freedom of speech and expression, it fell upon courts to determine its meaning. As discussed later, the right has been defined in the context of several laws and doctrines. However, it is important to note that the regulation of the medium through which such a right is practiced is the starting point for its curtailment.

In **Hamid Mir and another vs. The Federation of Pakistan** (PLD 2013 Supreme Court 244), a two-member Commission established by the Supreme Court of Pakistan identified four different mediums for which freedom of speech and expression must be interpreted separately and distinctly:

**a.** Print Media i.e. newspapers and magazines etc.;

**b.** Electronic Media i.e. broadcasting and distribution licenses which include but are not limited to Cable TV, FM radios, TV channels, DTH etc.;

**c.** Social Media i.e. Facebook, YouTube, Twitter or other online media engagement platforms;

**d.** Classical Media i.e. the theatre, books, cinema.

However, the freedom of speech and expression, although a continually defined term, has been interpreted in the same manner across the board for all mediums. There cannot be a "one-fit all" approach to the interpretation of reasonable restrictions in the context of the mediums outlined above. This in effect, lays down an inconsistent and ill-fitting approach to how the right is and ought to be exercised in Pakistan. Each medium must be identified separately, with different yardsticks for restraints clearly identified.

## i. Modern Day Approaches

With increasing digitization, there has been a vast introduction of modern mediums such as social media, electronic media and other digital mediums to which this right now extends. In view of this, courts have now begun to acknowledge that the wide dissemination of information, attributable to these digital platforms, has led to an evolved interpretation of the freedom of speech and expression.

In some ways, one can argue that the state of speech and expression in Pakistan has improved due to this evolution. In **Shahid Masood vs the Federation of Pakistan** (2010 SCMR 1849), the Supreme Court of Pakistan affirmed that the weight attached to electronic media was inherently attached to Articles 19 and 19A of the Constitution. This was perhaps a case where, for the first time, electronic media was identified as a means for exercising the freedom of speech and expression.

In cases relating to film and theatre, Courts have also acknowledged that the freedom of speech and expression is not linear. In art, for example, different standards ought to be

established. In **Abdullah Malik v. Ministry of Information Broadcasting (PLD 2017 Lahore 273)**, the Lahore High Court defined the meaning of artistic expression in relation to films stating:

> *"It is often said that art pleases and illuminates our lives by stimulating emotions as well as it upsets, prods and pokes and that art in all its shades should be available to audiences. The principle underlying a free, democratic society is that every individual has a right to decide what art he or she wants or does not want. A similar freedom to create art must also be made available to the artists. The choice, however, remains with the society for rejection of certain expressions of art forms that is controversial."*

Similarly, courts recognized later that the broadcast of Indian films was also a form of expression and curtailment of this expression had to be reasonably justified through the permissible restraints contained in parliamentary statutes or the constitutional right itself. In **M/S Leo Communications (Pvt.) Ltd. etc. vs The Federation of Pakistan etc.** (PLD 2017 Lahore 709), the Lahore High Court noted that the spread of technology required restrictions on fundamental rights to be construed accordingly:

> *"In this digital age of connectivity, the planet is now but a global village and we cannot shut ourselves to ideas, thoughts, art, culture and literature that is all around us and just a click away. With this perspective, reasonable restrictions under the Constitution and the prohibitions under the law, are to be examined."*

The Bench further distinguished between the terms "speech" and "expression" as follows:

> *""Speech" means the expression or communication of thoughts or opinions in spoken words. An expression of or the ability to express thoughts and feelings by articulate sounds or a sequence of lines written for one character in a play."*
>
> *""Expression" means the action of making known one's thoughts or feelings; the conveying of feeling in a work of art or in the performance of a piece of music; writings, speech, or actions that show a person's ideas, thoughts, emotions or opinions. Any dramatic work is, therefore, a symbol of speech and expression."*
>
> *The court held that both of these rights were integral to the practice of free speech and expression under Article 19 of the Constitution.*
>
> *"The right to communicate and receive ideas, facts, knowledge, information, beliefs, theories, creative and emotive impulses by speech or by written word, theatre, dance, music, film, through a newspaper, magazine drama or book is an essential component of the protected right of freedom of speech and expression. The broadcast of ideas, culture, history, literature, opinions, thoughts, emotions and art through the medium of plays and dramas signifies freedom of speech and expression in a country."*

It seems that Courts are now acknowledging the importance of plurality and diversity in the media in advancing the freedom of speech and expression. Furthermore, it seems that courts have now acknowledged that different standards are applicable to different mediums, and that restrictions imposed upon them must be construed accordingly. Even otherwise, the

standard for reasonable restrictions under each medium must vary on the basis of the content it produces. For example, a ban on a presumably anti-state film was uplifted by the Lahore High Court in Abdullah Malik's case stating that such depictions were artistic expression. However, this may not be the case for a news report which has been dubbed anti-state because of the terms or language it uses which may compromise its voracity.

### ii. The Flipside on the Evolving Right to Speech and Expression

One can argue that with the advancement of mediums for the practice of speech and expression, some courts have also been cautious in allowing the practice of this right to go unfettered. Recently, courts have taken issue with the regulation of content on social media, stating that freedom of speech and expression was subject to reasonable restrictions on all platforms. This was, for example, recognized in **Salman Shahid vs The State and others** (PLD 2017 Isl. 218). There has however, been little case law recognizing the parameters of applicable reasonable restrictions on Article 19 on social media. The only two situations where such a right is subject to regulation is under the Prevention of Electronic Crimes Act, 2016 and the judgments reproduced below. Thus perhaps restraints on the freedom of speech and expression have also increased in other ways.

In **Muhammad Ayoub vs. The Federation of Pakistan through Secretary, Ministry of Interior, Islamabad and 6 others** (2018 PCrLJ 1133), the Lahore High Court held that *"the right of expression could be allowed to thwart feelings of any religion on earth, because as a matter fact distortion of any religion on the pretext of right of speech / expression or information amounted to another form of terrorism and such was a fact that international community must concede".* It held:

> *"Having observed that, this court is well aware of the fact that despite all above pointed benefits, comparatively a few of the internet users, for any reason whatsoever, have resorted to use it for destructive purposes. In this context we are aware that the internet or for that matter other social forums like Facebook, Twitter, etc. unfortunately are being used, by some of the elements, negatively, and by their such nefarious activities, the laws of the countries are being violated, religious feelings of all kinds of communities are being hurt, let it be said that all this is being done under the cover of "freedom of expression" and "freedom of speech"."*

In cases like these, judges have often discussed social media and the need to perceive fundamental rights in Pakistan, especially Article 19 from a religious perspective, perceiving free speech on the internet as a western agenda. Therefore, while some judges may take a liberal approach to exercise of the right, others may not. For example, let us take the case of Indian content. The Lahore High Court believed that airing Indian dramas was also a form of expression and banning the same on the basis of reciprocity, i.e. Indian channels banning Pakistani content, was not a reasonable restriction. However, the Supreme Court of Pakistan took a different view. It continued to ban Indian content on the basis that it was not only infringing upon the commercial interests of Pakistani content-makers, but that it aimed to uproot the social fabric. The two different approaches taken to plurality and diversity in the media are emblematic of a single problem: there are no limits to judicial opinions on reasonable restraints. Therefore, Courts and regulators alike will choose to apply their own interpretations of the right and restrictions contained therein. This more so merits an

exhaustive definition of restrictions under Article 19.

## FREEDOM OF PRESS

### i. What is the Freedom of the Press?

The seminal judgment on the freedom of the press is **Masroor Ahsan v. Ardeshir Cowasjee** (PLD 1998 SC 823). In this case, a balance between the duties of the press and the freedoms afforded to it were discussed. The Supreme Court noted in relation to the press reporting *sub judice* matters:

> *"The press is expected to recognize its duties and responsibilities towards the society and in discharging their functions/duties they should not compromise on public order, decency and morality. If they exceed the reasonable limit or limit of fair criticism they become liable to be prosecuted for contempt. An irresponsible conduct and attitude on the part of an Editor, Reporter, Columnist and Publisher cannot be said to have been adopted in good faith. At the same time one cannot overlook the fact that it is an inalienable right of every citizen to comment fairly on any matter of public importance in accordance with law.*
>
> *This right is one of the pillars of individual liberty, freedom of speech which the Courts have always faithfully upheld in terms of the Constitutional mandate. Function/duty of a free press is to act as a watchdog and to disseminate correct and fair accounts of the various public events and of other matters in which the public may be vitally interested. In the discharge of the above function/duty there may be some occasional lapses on their part which are to be condoned, provided the same do not fall within the ambit of reckless or irresponsible conduct or prompted by malice or any other ulterior motive."*

Previously, the freedom of the press was presumably limited to print media. Today, the right invariably extends to all platforms used for reporting. Therefore, what was previously considered "freedom of the press" has evolved to "freedom of the media" as a whole. This was recognized in **Pakistan Broadcasters Association and others vs. PEMRA and others** (PLD 2016 SC 692):

> *"The concept of freedom of media is based on the premise that the widest possible dissemination of information from diverse and antagonistic sources is sine qua non to the welfare of the people. Such freedom is the foundation of a free government of a free people."*

Later, the **Suo Moto Case NO.28 OF 2018 (Regarding Discussion in TV Talk Show with regard to a Sub-judice Matter)** (PLD 2019 SC 1) applied the same principles from **Masroor Ahsan's** case to journalists reporting *sub judice* matters on television:

> *"The law in Pakistan by virtue of the Code of Conduct in fact places greater trust in its media and journalist community by trusting that they will provide objective information about pending proceedings while taking precautions that they do not pass subjective or prejudicial comments in such regard."*

However, this is not to imply that restrictions on print media and electronic media are the

same. They are governed under separate statutes with differing standards of regulation. Yet, the principles governing "reporting" have been considerably the same. In *State vs. Mati Ullah* Jan (2018 PCrLJ 889), the Islamabad High Court conflated both terms to state:

> *"The Print and Electronic Media are in no way vested with unfettered liberty and impunity to publish and telecast any material which is prejudicial to the interest of any person or institute or harm or cause damage to reputation, honour and prestige of a person or an institution. Any broadcasting Agency is not free to telecast anything for promotion of the company or corporation or on the instruction of some quarter or according to its desire, but its freedom is subject to a moral code of conduct and such reasonable restrictions as may be legitimately imposed under the law in public interest and glory of Islam."*

**ii. Threats to the Press**

It is not to be forgotten that the freedom of the press has also been impacted by grave security risks and external influences. The same risk was recognized in **High Court Bar Association and others vs. The Government of Balochistan and others** (PLD 2013 Balochistan 75) wherein journalists had emphasized before the Balochistan High Court that they were under risk if they did not report matters relating to proscribed terrorist organizations. The Balochistan High Court observed that this was not an acceptable justification; if the press started reporting out of fear, it would only become a mouthpiece for propaganda.

However, it is to be remembered that judicial pronouncements like these may be easy to make but impossible to actually observe, especially since there is no state-level protection for journalists. They are often threatened, maimed and or harassed for reporting news and therefore automatically practice prior restraint. According to the Committee to Protect Journalists, over 61 journalists have been killed since 1992[3]. This in effect directly hampers journalistic impartiality.

Furthermore, journalists have also been the target of mass censorship by the State itself. It was held only recently in **Suo Motu Case No. 7 of 2017** (PLD 2019 SC 318):

> *"Overt and covert censorship is unconstitutional and illegal. Nebulous tactics, such as issuing advice to self-censor, to suppress independent viewpoints, to project prescribed ones, to direct who should be hired or fired by media organisations is also illegal. This Court has castigated those who had resorted to such tactics in the past. It had directed that there should be "no hindrance or obstruction" of television broadcasts and the Provincial Police Officers were directed to take action against the perpetrators. No one, including any government, department or intelligence agency can curtail the fundamental right of freedom of speech, expression and press beyond the parameters mentioned in Article 19 of the Constitution. Those who resort to such tactics under the mistaken belief that they serve some higher goal delude themselves."*

03 Committee to Protect Journalists, 'Pakistan' < https://cpj.org/asia/pakistan/> accessed 28th April 2020.

It is often the Regulator itself that exercises such powers arbitrarily. Although its powers are limited by Article 19, the Regulator has often come under the pressure of external agencies while permitting content to be aired. A recent example of this is where the Pakistan Electronic Media Regulatory Authority cut distribution of a TV channel called "Geo News" after the arrest of its CEO[4]. This action was taken without affording any reasons to the TV channel. Presumably, there is nothing in law which permits such an action. Yet, the Regulator, which is so intrinsically tied to the Federal Government, exercises little independence on its own. Thus, any promises of free speech and expression by the judiciary are rendered illusory and impracticable.

It is ultimately to escape from this mis-regulation that there has been a glaring shift of news reporting from conventional means (electronic or print media) to social media which was until recently unregulated territory. However, as we have discussed above, today even social media has become the subject of excessive and unfettered regulation through inconsistent laws and judicial pronouncements. For example, in April, 2019, Shahzeb Jillani, an investigative reporter, was accused of "cyberterrorism" and making "defamatory remarks against the respected institutions of Pakistan."[5] Thus, indirect and/or excessive censorship has seeped across all media platforms in Pakistan, causing significant damage to freedom of the press.

One of the key cases in determining reasonable restrictions was **Pakistan Broadcasters Association and others vs. PEMRA and others** (PLD 2016 SC 692) wherein the Supreme Court of Pakistan considered the scope of reasonable restrictions that could be imposed on the practice of Article 19. It observed that it was not entirely possible to precisely define reasonableness. However, some factors that could be considered in determining whether the restriction on a fundamental right were reasonable were held to be as follows:

1. *The nature of the right infringed;*
2. *Duration and extent of the restriction;*
3. *The causes and circumstances prompting the restriction;*
4. *The manner as well as the purpose for which the restrictions are imposed are to be considered;*
5. *The extent of the malice sought to be prevented and/or remedied;*
6. *The disproportion of the restriction may also be examined in the context of reasonableness or otherwise of the imposition.*

In particular relation to speech and expression, reasonable restrictions were defined as follows:

04 Committee to Protect Journalists, 'Pakistan broadcast regulator cuts distribution of Geo News after CEO's arrest' < https://cpj.org/2020/03/pakistan-broadcast-regulator-cuts-distribution-of-.php> accessed 28th April 2020.

05 RadioFreeEurope/RadioLiberty, 'Tightening The Noose': Pakistani Journalists Turn To Social Networks As Mainstream Media Gagged' < https://www.rferl.org/a/tightening-the-noose-pakistani-journalists-turn-to-social-networks-as-mainstream-media-gagged/29934638.html> accessed 28th April 2020.

*1. Whether in purporting to exercise freedom of expression one is infringing upon the aforesaid right of others, and also violating their right to live a nuisance free life;*
*2. Whether one's right to time and space is being violated. It should also be kept in mind that none can be forced to listen or watch that he may not like to, and that one cannot be invaded with unsolicited interruptions while eagerly watching or listening to something of his interest;*
*3. Freedom of expression being a natural fundamental right cannot be suppressed unless the same is being exploited and/or is causing danger to, or in it lies the imminent potential of hurting public interest, or putting it at stake directly, and also that the anticipated danger should not be thremote, conjectural or far-fetched. It should rather have proximate and direct nexus with the expression;*
*4. Government should therefore strike a just and reasonable balance between the need for ensuring the right of people of freedom of speech and expression on the one hand and the need to impose social control on the business of publication and broadcasting.*

Today, one can argue that a single test of reasonableness can no longer apply to all mediums. These broad terms still give unlimited authority to the executive and judiciary to impose restrictions as they please to protect "public interest". But what is public interest?

This term was defined in **M/S Leo Communications (Pvt.) Ltd. etc. vs The Federation of Pakistan etc.,** (PLD 2017 Lahore 709) as:

*"Even otherwise, there is a thin line between in the public interest and against the public interest. The right balance and equilibrium has to be maintained between the two. What might appear to many to be against the public interest can also be in the public interest, if looked at differently. For effective evaluation of the existence of public interest, we must filter the subject matter through our preambular constitutional values of democracy, freedom, equality, tolerance, social, political and economic justice, freedom of thought, expression, belief, faith, worship and association."*

Therefore, what may be seen as against the public interest by external authorities may not in fact, be against the public interest. This is exactly why a Regulator must act independently from any subjective views in imposing restrictions on the practice of a right under Article 19.

One can ultimately conclude that current day curtailments on the freedom of speech and expression are no longer restricted to the reasonable restrictions contained in Article 19 of the Constitution. While some judicial forums and regulators may give more weightage to the right itself, others have sought to curb its practice through maximum regulation.

Therefore, a balance must be ultimately struck between free speech and regulation, with restrictions always leaning in favour of the former. Hence, restraints must be minimal, justifiable and decided independently. Just like Courts have held not everything can be justified under the garb of freedom of speech and expression, it must be held that not every action of the State to curtail speech and expression can be legitimized under the garb of "reasonable restrictions". Today, although there may be a plethora of definitions of freedom of speech and expression, the most pertinent one from **Hussain Bakhsh Kausar v. The State** (PLD 1958 (W.P.) Peshawar 15) must be adopted:

*"Freedom of speech, subject to the restrictions mentioned above is essential, because without it the*

*society based on the ideas of peace, order, or justice, cannot take shape, nor can the people who wish to live in freedom can be assured of greater security guaranteed to them under the Constitution. The Constitution, as is clear from the wording of Article 8, has been very careful to secure to even most repellent of the citizens the common right of free expression so long as it does not transgress the limitations placed by law. The police and the people in authority must change their outlook now and stop the unnecessary harassment of the people by censoring the letters of the citizens of Pakistan, tapping their telephones, and keeping a watch on their activities except in the case of the known traitors and treason-mongers because that amounts to the negation of the fundamental right guaranteed to the people by the Constitution. Freedom of expression of one's views is a gift of the Constitution, and it cannot be abridged by the people in authority so long as it is not intended to create chaos in the country or disrupt or destroy it.*

*It is high time that the people in power realised that they have no absolute power over the lives and conduct of the persons who reside within their jurisdiction. A man is entitled to his opinion and is within his right to express it. The citizens of Pakistan are free and they must be allowed to live in freedom and the law of the land should conform to this freedom."*

## RECOMMENDATIONS

1. The seven restrictions contained in Article 19 of the Constitution must be clearly and exhaustively defined. It is for the Parliament to stipulate what the seven restrictions contained in Article 19 mean and constitute. Leaving the power to define such restrictions to the subjectivities of different regulators and courts which change over time, is an excessive delegation of power. This is not only ex facie discriminatory but has been held to be a violation of individuals' fundamental rights under the Constitution of Pakistan, 1973.

2. PEMRA or any other regulator for that matter, must independently apply its mind to determine whether censorship of certain content is reasonable or permissible under the law. Save for express legislation in this regard, the executive cannot act on the directives of the Federal Government or any other agency to impose restraints on the practice of a fundamental right.

3. Different mediums under the law through which citizens and the press exercise the freedom of speech and expression must be recognized through distinct enactments and codes of conduct. The first step however must be to allow all of these mediums to self-regulate with minimal governmental interference. This can only be facilitated once media and press laws in the country are reviewed and all contradictions and overlaps are removed. These enactments must expressly define the reasonable extents to which free speech under a particular medium can be curtailed. The standards for reasonable restrictions under the seven heads identified above will be separate for all.

4. The freedom of speech and expression must be evolved in line with current times. Each platform through which the freedom of speech and expression is practiced is different. Therefore, Courts, legislature and the executive must recognize such differences while laying down the permissible parameters for each medium.

5. The protection of journalists must be recognized as the foremost duty of the State in protecting the freedom of speech and expression. The state of news reporting in Pakistan will have a direct impact on the information provided to the citizenry. Journalists are often deterred from performing their duties as there is little to no protection afforded to them in high-risk areas. Therefore, the Protection of Journalists Act 2014 must be reintroduced in the Parliament and a Parliamentary Committee on the protection of journalists must be established. This committee must recommend a series of reforms for online spaces as well as field reporting where journalists are protected from undue attacks and harassment.

# Chapter 2
# Article 19A of the Constitution of Pakistan 1973

***Article 19A. Right to information:***

*Article 19 of the Constitution of Pakistan guarantees that every citizen shall have freedom expression, and there shall be freedom of the press subject to any reasonable restriction imposed by law.*

***#DigitalLawAsia***

## INTRODUCTION

The constitutional right of access to information was inserted into the Constitution of Pakistan 1973 through the 18th Amendment in 2010. Supplementing this law until recently was the Freedom of Information Ordinance 2002 and the Freedom of Information Rules 2004. However, these were repealed after the enactment of the Right of Access to Information Act that was enacted federally in 2017. Similarly, each province also adopted the law with Balochistan enacting its Freedom of Information Act in 2005, Sindh in 2016, Punjab and Khyber Pakhtunkhwa in 2013.

The ingredients for operationalisation of Article 19A are straightforward;

i. Every citizen shall have the right to have access to information in all matters of public importance,

ii. Subject to regulation and reasonable restrictions imposed by law.

It was to clearly define the ambit of regulations and reasonable restrictions on the freedom of information that the above-mentioned federal and provincial laws were enacted.

Apart from the law in Balochistan, each of the other laws mandates the creation of an Information Commission and lays down the criterion for which information may be disclosed and may be privileged. An Information Commission is not only tasked with making information public but can also hear complaints and appeals by citizens regarding their requests. Individuals, through this law, are allowed to make an application to the relevant Information Commission or to a designated official of the relevant ministry to request certain information. The timeline for responding to such queries is on average 10-15 days and varies in each province.

This is perhaps a step forward from how other reasonable restrictions in constitutional rights are perceived in Pakistan. For example, the restrictions in Article 19, i.e. speech and expression, are left at the behest of judicial interpretations and legislative enactments which often have the impact of being contradictory. This ultimately limits the freedoms that citizens can enjoy. Therefore, with regulations and restrictions now defined exhaustively in these laws, the contents and limits to Article 19A are clear. Moreover, an enforceable fundamental right to information also creates room for judicial decisions that can assist in ascertaining the contents and limitations to this right.

## JURISPRUDENCE ON ARTICLE 19A

The freedom of information has been deployed in several manners by superior courts in Pakistan. For example, it was used in **Hamid Mir and another vs. The Federation of Pakistan** (2013 SCMR 1880) to hold that any restriction on disclosure of expenses made from the exchequer, which the government imposes, or the legislature provides for, would be justiciable on the touchstone of Articles 19 and 19A of the Constitution. Such disclosure would only be limited by the restrictions contained in the above-mentioned constitutional provisions, and of course subject to reasonableness.

In another case titled **Jurists Foundation vs. Federal Government through Secretary, Ministry of Defence and others** (PLD 2020 SC 1), the Supreme Court of Pakistan, while hearing the validity of the Chief of Army Staff's extension held that the structure, command, governance, and organization of the Army are matters of public importance. Therefore, the manner in which the COAS is to be appointed inherently attracts Article 19A. Furthermore, the Court observed that the Pakistan Army Rules, 1954,, and the Army Regulations, 1998 had not been available earlier. It thus held that Acts of Parliament or subordinate legislation were public documents that must be made readily available to all citizens in Pakistan subject to the restrictions in Right of Access to Information Act, 2017. This was important for public functioning and could enable an important debate that could remedy many issues in the first instance.

Similarly in **Human Rights Case No. 17599 OF 2018** (Regarding alarming high population growth rate in the country) (2019 SCMR 247), the Supreme Court noted that it was a lack of providing information and awareness on family planning to citizens that had led to a surge in Pakistan's population. The Court held that, "*the right to freely and responsibly determine the number and spacing of children involves imparting sufficient information and means to the parents to control reproduction as well as providing them with adequate knowledge regarding the advantages and disadvantages of such determination.*" It, therefore, ordered Pakistan Electronic Media and Regulatory Authority (PEMRA) to allocate free airtime for family planning messages on all radio and television channels in prime time to ensure that parents were given adequate information and awareness to plan families.

In **Mian Najeeb-ud-Din Owaisi and Another vs. Amir Yar Waran and others** (2013 SCMR 862), the Supreme Court observed that under Article 19A, every citizen, who was also an elector or voter, would have the right to have access to information in all manners with reference to the credentials of a candidate the citizen was going to vote for. It was thus decided that nomination papers would be made available online in terms of Article 19A so that voters could also easily obtain information and file objections against candidates if they wish.

Similarly, in **Mansoor Sarwar Khan vs. Election Commission of Pakistan and others** (2015 CLC 1477), the Lahore High Court observed that the freedom of information was, in fact, an important component in any democratic country. It observed,

*"Cluster of freedoms (fundamental rights) under the Constitution embolden this constitutional promise. Freedoms of movement, speech, assembly, association and information enjoy a unique symbiotic relationship which nurtures democracy and strengthens political institution. Articles 15, 16 19 and 19A bolster political associations by allowing its members the right of movement across the country, the freedom of speech to express and disseminate their political views, the right to hold lawful assemblies to meet, debate and share their political ideas and by giving them access to*

*information."*

It can be seen from the above that courts have applied Article 19A to a vast variety of rights and issues. This only goes to assert that perhaps the right to information is much needed to effectively empower citizens against the centralized actions of the government.

## THE SCOPE OF ARTICLE 19A

In **Muhammad Masood Butt and 3 others v. S.M. Corporation (Pvt.) Ltd and 6 others** (2011 CLD 496), a Divisional Bench of the Sindh High Court held that non-framing of regulations relating to right to information (RTI) could not have the effect of rendering the right guaranteed by Article 19A nugatory. Essentially, the right would remain available to all citizens.

This judgment shows the effect of incorporating Article 19A into the Constitution as a fundamental right. The need for transparency in governance could no longer be left at the behest of parliamentary legislation. Secondly, the need for transparency in a matter of public importance was a right that could be justiciable in a court of law if denied to citizens. Even when the RTI laws mentioned above did not cover the scope of information sought by a citizen, remedies under Article 19A would still be available to them.

This was affirmed in the case titled **Watan Party and others vs. The Federation of Pakistan and others** (PLD 2012 SC 292). A nine-member bench decided what was popularly known as the "Memogate scandal". The Court heard the petition under its original jurisdiction read with Article 19A, holding that it was the justiciable right of every citizen to know the affairs of public functionaries.

However, it is Honourable Justice Jawwad S. Khawaja's concurring note that sheds further light on Article 19A and its importance. In holding that a petition under Article 184 (3) to enforce a fundamental right under Article 19A was maintainable and justiciable, he stressed upon the independence citizens now had from centralized institutions withholding information. He observed that citizens required information in a representative democracy to fairly evaluate available choices in electoral candidates and that citizens could now directly demand transparency from the government without resorting to "whistle-blowing". He observed that Article 19A was much broader and more assertive than a statutory right and that the constitutional provision could not be altered or abridged by a law enacted by Parliament. This judgment was eventually used by Courts in cases tasked with hearing the maintainability of cases brought under Article 19A directly without seeking remedies available in existing RTI laws.

A full bench of the Lahore High Court confirmed this proposition in the case titled **Province of Punjab vs. Qaisar Iqbal and others** (PLD 2018 Lah. 198). In 2014, members of the Pakistan Awami Tehreek (PAT) were attacked by the government during a procession. This was widely reported in the press and ultimately, the Provincial Government requested the establishment of a Judicial Commission to conduct an inquiry into the matter. Therefore, a One-Man Tribunal was established which submitted its report the same year. The crux of this case was that the report of the Tribunal be made public in terms of Article 19A of the Constitution. In considering this question, the Court stated that Article 19A was broader in its nature. If a law did not cover the

disclosure of certain information, citizens would still enjoy the benefit of demanding that information from courts under Article 19A of the Constitution.

Qaisar Iqbal's case is now integral to the discussion of Article 19A. The Court laid down a conclusive set of guidelines for the freedom of information, highlighting local as well as international jurisprudence. The Court observed:

*"Right to information and access to information in all matters of public importance is indisputably a fundamental right guaranteed under Articles 19 and 19A of the Constitution. The right of information stems from the requirement that members of a democratic society should be sufficiently informed so that they may influence intelligently the decision which may affect themselves. The people of Pakistan have a right to know every public act, everything that is done in public way, by their public functionaries and chosen representatives. People are entitled to know the particulars of every public transaction, acquire information in all matters of public importance and to disseminate it. It enables people to contribute to debate on social and moral issues and matters of public importance. Without information, a democratic electorate cannot make responsible judgments about its representatives. Freedom of information is the only vehicle of political discourse so essential to democracy and it is equally important in facilitating artistic and scholarly endeavors of all sorts. In sum, the fundamental principle involved here is the people's right to know and freedom of information and freedom of speech and expression should therefore receive generous support from all those who believe in democracy and the participation of people in the administration and matters of public importance."*

It then went on to analyze similar provisions from international jurisdictions, noting that the right to information was but an integral pillar of a democratic state. It held, *"A popular government without popular information or the means of obtaining it, is but a prologue to a farce or tragedy or perhaps both."*

Analysing Article 19A, the Court noted the meaning of "public importance":

*"[…] public importance according to dictionary meaning could be defined as a "question which affects and has its repercussions on the public at large and it also includes the purpose and aim in which the general interest of the community particularly interest of individual is directly or widely concerned"*

However, the Court noted that reasonable restrictions under Article 19A are not confined to matters specified in Article 19. In fact, the restrictions in RTI legislation would apply to Article 19A. Yet, since these exceptions were serious encroachments on the freedom of speech, expression, and information under Articles 19 and 19A, the harm or "likely harm" to public order in such cases had to be proved. The Court held:

*"It is not permissible to restrain right to information or freedom of expression merely on the basis of speculative possibility of harm or prejudice to public order but the information must be of such as would create real and substantial risk of prejudice and harm to public order."*

Ultimately, it would be upon Courts to perform a balance exercise between the right of the citizens to obtain disclosure of information that competes with the right of the State to protect such information on the basis of the exceptions contained in RTI legislation.

The Court also went on to analyze the implications of Article 19A on the right to a fair trial under Article 10-A of the Constitution:

*"[…] Three tests are satisfied before suspending the media publication of the report of proceedings or part of proceedings. The first question will be whether reporting would give rise to a substantial risk of prejudice to the administration of justice in the relevant proceedings and if not, that would be the end of the matter; that, if such a risk was perceived to exist, then the second question is whether a Sec 4(2) ibid order would eliminate the risk, and if not there could be no necessity to impose such a ban and again that would be the end of the matter; and that thirdly, value judgment might have to be made as to the priority between the competing interests by applying proportionate and balancing test."*

It can be seen that Qaisar Iqbal's case has adopted a very liberal approach to the interpretation of the right to information in relation to fair trial and free speech and expression. This case sets an important precedent for future interpretations of the right, especially on the question of balance between disclosure of information against citizen's constitutional right to demand transparency.

## ARTICLE 19A AND FREEDOM OF SPEECH AND EXPRESSION

As seen above, the superior courts have often intrinsically linked Article 19A to other fundamental rights. Most frequently, the freedom of speech and expression in Article 19 corresponds with the freedom of information in Article 19A. Thus, the right to disseminate information is an integral component of the right to be able to receive information.

In **Mian Muhammad Nawaz Sharif vs. The President of Pakistan and others** (PLD 1993 SC 473) an eleven-member bench of the Supreme Court held that the *"right of the citizenry to receive information can be spelt out from the "freedom of expression" guaranteed by Article19 subject to inhibitions specified therein and such right must be preserved."*

Similarly, with regards to press freedom, the Supreme Court in **Dr. Shahid Masood and others v. The Federation of Pakistan and others** (2010 SCMR 1849) held that it was crucial to give media houses the freedom to disseminate their content subject to the law. It observed that not only was this step crucial to protect their freedom of speech and expression in Article 19, but also that it afforded citizens access to information in all matters of public importance as guaranteed by Article 19A of the Constitution. This was amongst the first cases to recognize the complementary nature of both constitutional provisions after Article 19A's incorporation into the Constitution.

In **Suo Moto Action Regarding business deal between Malik Riaz Hussain and Dr. Arsalan Ifikhar attempting to influence the judicial process** (PLD 2012 SC 664), the Supreme Court of Pakistan took notice of media outlets inadvertently reporting that the judicial process was compromised. The Court observed that it strove to protect citizens' right to correct information in a matter of national importance in a transparent manner. It stated that journalists, while practicing their fundamental right under Article 19, also owed a duty to Pakistani citizens to provide verified information. Therefore, the Court observed that journalists had a duty to report fairly and objectively by conducting due diligence while compiling reports and to filter out rumors or insinuations from them in the process.

The most recent and pertinent judgment on the interrelation between freedom of speech and expression and the right to information is **Su0 Motu Case No 28 OF 2018 (Regarding Discussion in TV Talk Show with regard to a Sub-judice Matter)** (PLD 2019 SC 1). The case

concerned the discussion of a matter sub judice before the Supreme Court. The Court noted that there needed to be a balance between the freedom of expression and the administration of justice. Although Article 19 in Pakistan's Constitution varied significantly from that of other international jurisdictions, the manner of dealing with prejudicial comments was the same:

(1) imposing prior restraints on discussions/comments by the media or any other form of publication; and/or

(2) imposing sanctions in the form of sub judice contempt, for interference in the administration of justice.

The Court observed that although the freedom of press and information was an absolute right in some jurisdictions, it was qualified in Pakistan by reasonable restrictions contained in Article 19 and 19A. The Court held that under Pakistani law, prejudicial comments on sub judice matters are dealt with through prior restraint and/or contempt of Court proceedings. Supplementing these restrictions was Pakistan Electronic Media Regulatory Authority's (PEMRA) Code of Conduct which stated that the discussion of sub judice matters must be conducted in a manner which does not negatively affect another person's fundamental right to be dealt with in accordance with the law (Article 4 of the Constitution) and the right to fair trial and due process (Article 10A of the Constitution). Furthermore, it held that the Code of Conduct in fact takes a relatively more lenient approach by allowing the media to provide information about sub judice matters and only subjective and prejudicial commentary is prohibited.

The Court observed that "media trials" could not be allowed since the fate of sub judice matters would be determined on public forums and this would influence not only the minds of the public but also of the judges, lawyers and investigators involved. This would have the effect of prejudicing the matter, thereby violating Articles 4 and 10A of the Constitution. For this purpose, a balance had to be struck between the right to freedom of speech and information on one hand and the right to a fair trial and to be dealt with in accordance with the law. The Court noted:

*"While on one hand such programmes are allowed to be aired thereby protecting the freedom of speech and the right to information; the requirement that they ought to be aired in an informative and objective manner and that no content should be aired which tends to prejudice the determination by a court, tribunal or any other judicial or quasi-judicial forum, ensures that the right to fair trial, to be dealt with in accordance with law and of due process are duly safeguarded."*

Ultimately, the Court observed that the highest regard had to be given to a person's right to a fair trial and the freedom of speech and expression had to be guided in a manner which did not encroach a person's right to be dealt with in accordance with law. The Court observed:

*"At the heart of this sub judice rule lies the view that an essential element of fair trial is an impartial judiciary and one simply cannot turn a blind eye to the fact that comment on a sub judice matter in the media or any other widely circulated publication has at least the potential of having an indirect effect on the minds of the judges seized of a matter. Although judges have the ability to ignore any irrelevant considerations while adjudicating a matter, the mere risk or danger of causing prejudice to a pending matter is sufficient for the law to step in to protect the right of the*

*one being adversely affected. While public interest may at times require that information be provided regarding a certain case, strict guidelines with regards to such publication are necessary to be imposed so as to ensure that the fundamental rights of all persons are given equal weightage including the accused or those involved in such proceedings."*

This case ultimately ties the freedom of speech, expression, and information together to assert that neither can be enjoyed fully if it surpasses the reasonable restrictions contained therewith. The judgment is also an important insight into how the right to speech, expression, and information can prejudice the rights of parties. However, this judgment is in contrast to Qaisar Iqbal's case (see above) wherein the test for determining whether a publication would prejudice the rights of parties to a trial was different. Instead of prior restraint, which is seemingly advocated by the Supreme Court in this case, it would be more pertinent to assess the impact of each publication on a case-to-case basis to see which publication or speech would have the effect of harming a trial and why. In view of this, it is perhaps more favourable to look to the test in Qaiser Iqbal's case to consider when free speech and expression in relation to allegedly prejudicial comments can be curtailed to protect the right to a fair trial of another party.

While some cases interpret Articles 19 and 19A liberally within the bounds of reasonable restrictions entailed in the provisions, other courts have in fact added to the list of restrictions. In another case titled **Muhammad Ayoub vs. The Federation of Pakistan through Secretary, Ministry of Interior, Islamabad and 6 others** (2018 PCrLJ 1133), the Petitioner before the Lahore High Court contested that certain Facebook pages be blocked for posting blasphemous content and violating Articles 19 and 19A. The Court analyzed this argument by stating that freedom of speech, expression, and information could not be used to hurt the sentiments of any religion, going so far to say that this *"distortion of any religion on the pretext of right of speech/expression or information now amounts to another form of terrorism a fact that the international community must now concede."*

The Court observed that with the advancement of the internet, its users had resorted to relying on it for "destructive purposes" under the cover of freedom of speech and expression. It maintained that both Articles 19 and 19A were subject to reasonable restrictions and could not be unregulated or unfettered. Ultimately, while allowing the writ petition, the Court also ordered that the material appended to the petition be banned from access since it was against the country's faith and belief and could not be made public.

Muhammad Ayoub's case shows how often courts can go beyond the restrictions contained in Article 19A and accompanying RTI laws by reading in additional constraints. This is the point where often, undefined parameters of Article 19's restrictions also become cumbersome upon the free exercise of Article 19A.

## RECOMMENDATIONS

1. Instead of encouraging bans on speech, expression and the subsequent dissemination of information, Courts should lay down exhaustive guidelines for when disclosure of certain information is prejudicial to public order. These should first consider whether the content sought to be banned may actually be prejudicial. If it is prejudicial, attempts should first be made to

mitigate such risk by limiting the material to be disclosed.

2. Regulations under all RTI laws must be enacted immediately to ensure the smooth operation of Information Commissions and to provide guidelines to designated officials at ministries as to the form and manner in which information is provided.

3. All conflicts in provincial and federal RTI laws must be removed to ensure harmony between existing legislation and Article 19A.

4. All RTI applications must be made user-friendly and accessible for all citizens. Provincial and Federal Information Commissions must establish fully functional websites with a portal through which citizens can easily upload complaints.

5. The Right of Access to Information Act 2017 contains a bulk of state information that is privileged, and shifts the burden of disclosure upon citizen organizations and businesses. This is against the spirit of Article 19A and must be remedied.

Section 2

# Pakistan Penal Code

# Chapter 3
# BLASPHEMY

## INTRODUCTION

Offences relating to religion (today titled Part XV of the Pakistan Penal Code) were initially included in the Indian Penal Code in 1860 as Sections 295, 295-A, and 298 and applied to all religions. Pakistan adopted the Penal Code (**"PPC"**), along with these provisions in 1947. Cases of offences against religion in Pakistan in its early years were the result of the government's attempts to regulate the press. Therefore, initial cases from the 1950s and 60s related to appeals by authors or publishers of books against the government.

For example, **In the matter of the Book "Jesus in Heaven on Earth" and in the matter of the Petition of the Woking Muslim Mission and Literary Trust, Lahore, and of the Civil & Military Gazette, Limited, Lahore vs the Crown (**PLD 1954 Lahore 724), the Government ordered for the forfeiture of a book that violated Section 295-A of the PPC. In particular, it was argued that the book insulted Christianity and hurt the sentiments of Christians. The author of the book challenged the decision before the Lahore High Court. Although the Court acknowledged that the author had published the book in the exercise of his right to free speech and expression, it upheld the order of forfeiture noting that this expression had still hurt the sentiments of Christians. This decision was later overturned by the Supreme Court on technical grounds[6]. Similar cases on governmental bans on publications included **Ahmad Abbasi vs. The Administrator of Karachi** (PLD 1961 Karachi 129), where the Court overturned a ban on a book on Islamic history, stating:

> *"The principles that emerge from the above discussion leave no doubt in my mind that every citizen in this country has a right to express himself freely on controversial religious and historical questions. But this right must not exceed the limit of fair criticism and should not be expressed in immoderate and in temperate language. Besides, for the purpose of appreciating whether or not a particular piece of writing falls within the mischief of any penal law, it is necessary that the writing should be read as a whole in fair and liberal spirit not concentrating on isolated passages or words but endeavouring to grasp the theme and intention of the writer from the words he has employed and attempting to estimate at the same time the effect of those words and the manner of their employment upon the mind of an average reader."*

However, these offences were subsequently altered during the rule of military dictator, Zia-ul-Haq's regime. Although Sections 295, 295-A and 298 in the PPC remained unchanged, what is today Section 298-A[7], was inserted in 1980, with Section 295-B following in 1982[8]

Subsequently, Sections 298-B and 298-C, which broadly aimed to criminalize Ahmadiyyas for

06 The Woking Muslim Mission And Literary Trust, Lahore And The Civil & Military Gazette Ltd., Lahore Vs The Crown (PLD 1956 Supreme Court 209).

07 Inserted through the Pakistan Penal Code (Second Amendment) Ordinance, XLIV of 1980.

08 Inserted through the Pakistan Penal Code (Amendment) Ordinance, 1982 dated 18th March, 1982.

practicing the Muslim faith, was introduced through the Anti-Islamic Activities of Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance in 1984.

The final offence relating to religion i.e. Section 295-C was included in the PPC in 1986[9]. Initially, Section 295-C included two alternate punishments i.e. life imprisonment or death. However, in Muhammad Ismail Qureshi vs. Pakistan (PLD 1991 Federal Shariat Court 10), the alternate punishment of life imprisonment under Section 295-C was removed by the Federal Shariat Court for being repugnant to Islamic injunctions. Today, the punishment for anyone guilty of an offence under Section 295-C is death alone. It is worthy to note that the Federal Shariat Court had also noted that Section 295-C be amended to include the same punishment for acts done or things said against other prophets as well.

## OFFENCES AGAINST RELIGION TODAY

**295-A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs:**

*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.*

**295-B. Defiling, etc., of Holy Qur'an:**

*Whoever willfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.*

**295-C. Use of derogatory remarks, etc., in respect of the Holy Prophet:**

*Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him), shall be punished with death, and shall also be liable to a fine.*

**298. Uttering words, etc., with deliberate intent to wound religious feelings:**

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

**298-B. Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places:**

09 Inserted through the Criminal Law (Amendment) Act No. III of 1986.

*(1) Any person of the Quadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name who by words, either spoken or written, or by visible representation-*

*(a) refers to or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (peace be upon him), as "Ameer-ul-Mumineen", "Khalifat-ul-Mumineen", Khalifa-tul-Muslimeen", "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 a "Masjid";*
*shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to a fine.*

*(2) Any person of the Qaudiani 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.*

298-C. 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.*

## NOTABLE CASES IN RELATION TO BLASPHEMY AND SPEECH AND EXPRESSION

### i. Application of Blasphemy Laws to Social Media

Today, religious offences have also been made applicable to other mediums such as social media. Directions in this regard were reported in the case of Salman Shahid Vs The State and others (PLD 2017 Isl. 218). In this case, the petitioner sought the blockage of blasphemous content on social media, particularly Facebook pages titled “Bhainsa”, “Mochi” and “Roshani” and directions for the government to initiate legal proceedings against the authors of such content under Section 295-C of the PPC and the Anti-Terrorism Act.

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In its 116-page judgment authored entirely in Urdu, the Bench extended the application of blasphemy laws to social media and empowered authorities such as the FIA and PTA to surveil and take prompt action against anyone posting blasphemous content online. It ordered for a complete ban on social media websites such as Facebook in the event that they did not conform to Pakistani laws and that immediate action be taken against the owners of the above-mentioned pages. It observed that such content posted online was the result of propaganda:

> *"It is a matter of concern that foreign funded NGOs and so-called experts, through a planned campaign and an anti-Islam agenda, are committing an absolutely prohibited act by making absurd, shameful and degrading remarks against the Holy Prophet (SAW), and are trying to commit or achieve an unachievable act of degrading the status of the Holy Prophet (SAW). On the other hand, Saint Valentine, notorious and the symbol of vulgarity, is shown as the hero for the young generation. It is sad that state institutions and media have also become part of this act. Demands for legal action against the blasphemers are given meagre coverage, while victims of any reaction are shown as the subjects of tyranny, by holding vigils for them. Courts can never encourage anyone to take law into their hands or committing an illegal act; however, such incidents can only be curtailed when prompt and honest investigations are conducted against the perpetrators of blasphemy. Whole of Pakistan becomes assessor of such abominable acts. Nation's absolute love for the Holy Prophet (SAW) is the foundation of faith, where no prudency or argument can work. This is so intoxicating on which no Muslim can compromise."*

The Bench in passing its judgment discussed the balance between rights and responsibilities, citing free speech jurisprudence and related restraints imposed through offences against religion in various countries. It ultimately held that although freedom of speech and expression was a fundamental right, it was not unfettered, and restrictions on it could be imposed vis a vis offences against religion. Therefore, in view of the restrictions in Part XV of the PPC, such a right was to be practiced carefully to not hurt the sentiments of Muslims in Pakistan. It further extended the application of blasphemy citing a case from Gilgit-Baltistan (5/2010):

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> *".....but propaganda of anti-Islamic thoughts with a view to cause injury to the feelings of a Muslim sect or any slander made in writing or in spoken words insulting the Holy Prophets or to be critical with use of derogatory language in respect of the religious thoughts or to speak in favor of blasphemy or against the law of blasphemy in insulting manner to the honour of last Holy Prophet Muhammad (PBUH) is prohibited by law and also by code of moral conduct. Therefore, publication of objectionable material on the above matters is certainly beyond the right of free expression and the person responsible for such publication directly or indirectly and also a person who in any manner acts in aid of such activity may be guilty of offence of Blasphemy and is equally liable for prosecution under the law of Blasphemy in addition to the prosecution for libel and defamation"*

Citing such jurisprudence, the Bench ordered the following:

> *"(i) That Inter ministerial committee constituted by the then Prime Minister in the year; 2000 would keep a vigilant eye on the websites and in the eventuality of any objectionable material concerning the religious faith of any group would take prompt action before it reaches to the public-at-large and in case of failure the concerned persons would be taken to task while initiating disciplinary action against them and the government would also include some members from amongst the private persons in the said committee;*
>
> *(ii) That the Crisis Cell working in the Services Division ICT Directorate and Enforcement Division shall be used as a tool to unearth such material and to block the relevant website/URL forthwith and in case of failure stern action be taken against the delinquents;*
>
> *(iii) That the government shall agitate the matter before the United Nations through its permanent delegate for legislation at international level against such acts and convey the reservations of the Muslims of the world in general and that of Pakistan in particular regarding the publication of such objectionable material;*
>
> *(iv) That the government shall bring matter before the Organization of Islamic Countries (OIC) in consultation with the other member countries and would adopt a clear-cut via media to halt repetition of such incidents;*
>
> *(v) That the government shall also see the viability of permanent blocking of the websites involved in unethical and illegal activities in the event that such material is again presented on internal;*
>
> *(vi) That the government shall strive for legislation in this regard on the lines already adopted by other Islamic countries in addition to China;*
>
> *(vii) That the government shall impart awareness amongst the public through different modes e.g. print and*

*electronic media regarding use and misuse of such websites; and*

*(viii) That in case of repetition the government shall sue concerned authorities before the appropriate forums."*

Interestingly, the Court also sought for a review of blasphemy laws to prevent its misuse. The Judge noted that the existing framework for false criminal accusations was inadequate and that false accusations of blasphemy were an equally punishable offence also punishable by death.

In another case titled **Muhammad Ayoub vs. The Federation of Pakistan through Secretary, Ministry of Interior, Islamabad and 6 others** (2018 PCrLJ 1133), the Petitioner before the Lahore High Court contested that certain Facebook pages (the same identified in Salman Shahid's case) be blocked for being blasphemous. The Petitioner pleaded that this content was not only a violation of Articles 19 and 19A of the Constitution but also of Part XV of the PPC and the Prevention of Electronic Crimes Act 2016. The Lahore High Court held that freedom of speech, expression and information could not be used to hurt the sentiments of any religion, going so far to say that this "distortion of any religion on the pretext of right of speech/expression or information now amounts to another form of terrorism a fact that the international community must now concede." It observed:

*"As shall be seen from the preamble of our Constitution, the rights of every community have been delicately balanced, and freedom of speech/expression and information is also hallmark of our constitution, but the term "right of expression" cannot be stretched to such an extent that it be used as a tool to defy the religious thoughts or sacred personalities of one's religion. This court is of the clear view that under the umbrella of "freedom of speech and information" not only the Muslim community, in fact the followers of all the religions have been made to suffer immensely […]"*

The Bench discussed how the exercise of speech and expression in the digital age was being misused:

*"There can be no second opinion that advancement and use of technology has brought the whole of the universe into one global village and the internet is now considered to be the most productive element in spreading, sharing and developing knowledge and ideas, ultimately benefiting the public at large. Having observed that, this court is well aware of the fact that despite all above pointed benefits, comparatively a few of the internet users, for any reason whatsoever, have resorted to use it for destructive purposes. In this context we are aware that the internet or for that matter other social forums like facebook, twitter, etc. unfortunately are being used, by some of the elements, negatively, and by such nefarious activities, the laws of the countries are being violated, religious feelings of all kinds of communities are being hurt, let it be said that all this is being done under the cover of "freedom of expression" and "freedom of speech".*

The Judge mentioned that the rights under Articles 19 and 19-A were not unfettered and were subject to restrictions imposed by law.

*"The court is cognizant that freedom of expression, universally acknowledged as both fundamental and foundational human right, is not only a corner stone of democracy but also indispensable to thriving civil society. Indeed, the freedom of expression is considered to be a foundational human right of the greatest*

*importance. The right to freedom of expression is protected by a multitude of regional and international treaties and charters and frameworks, but internationally it is applied with some restrictions as no country could allow the rebellions by delivering speeches against the state, promoting hatred and seeds of terrorism in the country. If such situation is allowed to persist, certain disgruntled elements will start to recruit citizens as a force to wage a war against the State as is the case in Syria, Afghanistan, Iraq, etc. Hence, the restrictions imposed by the Constitution of Islamic Republic of Pakistan, 1973 could not be bypassed. In short freedom of speech and information and restrictions imposed there-against, could be explained in one sentence "liberty of one ends where the nose of other starts". [..] One must not forget that the right of "freedom of speech or freedom of expression" which is now being portrayed as innovation of recent times had in fact been introduced by Holy Prophet 1400 years ago."*

He, therefore, directed all stakeholders to review and immediately block all content on every social media outlet that came within the remit of blasphemy and to immediately proceed against the owners of Bhainsa, Roshani, and Mochi.

Similarly, in another case titled **"Bytes for All vs. Federation of Pakistan and others"** (Writ Petition No. 958/2013), the Lahore High Court directed PTA to block a film on YouTube called "Innocence of Muslims" for being anti-Islam.

**ii. In Relation to Ahmadiyyas**

Often, offences relating to Ahmadiyyas also invite the inclusion of Section 295-C in FIRs. In **Zaheeruddin vs. The State** (1993 SCMR 1718), the Appellant challenged Ordinance XX of 1984 which, by way of criminal sanction, debarred Ahmadiyyas from using Muslim epithets. The Appellant contended that this Ordinance was a violation of citizens' fundamental rights under Articles 19 (Freedom of Speech and Expression) and Article 20 (Freedom of Religion and Belief) of the Constitution. However, the Supreme Court of Pakistan in this case held that Muslim epithets were the sole intellectual property of Muslims, and Ahmadiyyas, who were non-Muslims under the Constitution, could not use such terms as this was tantamount to deceptively pretending to be Muslim. The Court observed that the Ordinance was not a violation of Articles 19 and 20 of the Constitution since Ahmadiyyas, by using Muslim terms, were offending the sentiments of Muslims:

*"As regards clause (e) of section 298-C, the law cannot be said to be violative of Fundamental Right of religion or speech where it punishes acts outraging the religious feelings of a particular group or of the general public as such. Nobody has a Fundamental Right or can have one of outraging the religious feelings of others while propagating his own religion or faith. Therefore, clauses (a), (b) and (e) as found in section 298-C are consistent with the Constitutional provisions contained in Articles 19, 20 and 260(3)."*

In view of this, Ahmadiyyas have been banned from calling their places of worship "masjids"[10] or from publishing/printing religious material, particularly the Holy Quran, by using the names of books of the Muslims along with names of Muslim authors[11]. Similarly, in the case titled **Maulana**

10 Ata Ullah vs. The State (PLD 2000 Lahore 364).

11 Muhammad Hussain Muawiyah vs. Inspector General of Police, Punjab and others (PLD 2019 Lahore 448).

**Allah Wasaya and others vs. the Federation of Pakistan and others** (PLD 2019 Islamabad 62), the Islamabad High Court observed that the divide between Ahmadiyyas and Muslims was crucial. Therefore, the judgment concluded with a series of recommendations to create this divide. One such recommendation was that Qadianis could not be allowed to conceal their identities by having names similar to Muslims, therefore, they were to be either refrained from using ordinary Muslim names or the term Qadiani or Ghulam-e-Mirza should form part of their names and must be mentioned officially.

## DEFENCES AND ISSUES IN TRIAL

### i. Issues in Investigation

There have been very few defences to blasphemy and often cases are overturned in appeal. This is emblematic of a wider concern: trial courts are often intimidated by the severity of the offence and are quick to convict on that basis. For example in **Muhammad Mahboob alias Booba vs. The State** (PLD 2002 Lahore 587), the Lahore High Court granted bail to the Petitioner observing that the quality of evidence against the accused could not be relied on and that the Police had been inept in investigating the offence. This was additionally due to the fact that a sub-Inspector or Moharrir was not academically competent to a djudge whether an act constituted one of blasphemy. Therefore, the Judge directed the Inspector General of Police to compose a team of at least two (2) Gazetted Investigating Officers conversant with Islamic law. In the event they themselves were not familiar with Islamic law, a well-reputed scholar who may advise them should be added. The Court noted that the trial court had been overwhelmed by the nature of the accusations and the offence associated therewith in reaching its decision. Therefore, it had become oblivious to the fact that not only was the requisite standard of proof missing but that the trial court should not have been biased or prejudiced by a mere accusation.

In **Nasir Ahmed vs. The State** (1993 SCMR 153), the Supreme Court of Pakistan defined the ingredients of "defiling":

> *"…we find that serious question which requires examination is whether "defiling" takes place ex facie by the written or spoken words or the act of the person accused of the offences or that this is to be seen steeping in view the totality of the milieu, including necessarily the faith, the intention, the object, and the background of the person using them. […] It is only when the person reading or hearing them goes deep into the background of the person using them and brings his own special knowledge of the faith, beliefs and latent intentions of such an accused that the alleged results are likely to follow."*

### ii. Mental incapacity as a defence

In **The State vs. Muhammad Arshad Javed** (1995 MLD 667), the Lahore High Court acquitted the the accused and reversed his death sentence under Section 295-C on the grounds that he was mentally unfit and did not understand the offence committed by him in the course of his speech. It relied on Islamic jurisprudence on criminal law to outline the reasons for withholding responsibility in a criminal offence which were as follows; (1) Insanity, (2) Unconsciousness, (3) Coercion and necessity, (4) Infancy.

**iii. Insufficient Evidence**

In **Peer Zahoor Ahmad vs. The State** (2003 YLR 2000), the accused's conviction was quashed and he was acquitted due a lack of evidence establishing his connection to the crime alleged. A lack of evidence, it must be noted, has been the most relied on basis for acquitting individuals charged under the four offences under Section 295, 295-A, 295-B and 295-C[12].

**iv. Addition of Offences in the FIR**

Blasphemy laws have often been applied in criminal complaints even where they are not merited. For example, in **Altaf-ur-Rehman vs. The State** (2002 MLD 1389), the Petitioner was arrested under Section 295-A on the basis of objectionable and derogatory speeches against the present regime and the Pakistani Army.

**v. Mandatory Permission for Including Section 295A in an FIR**

Under Section 196 of the Code of Criminal Procedure ("CrPC"), no court is allowed to take cognizance of an offence under section 295A unless such complaint is made "by order of or under authority from, the Federal Government or the Provincial Government concerned, or some officer empowered in this behalf by either of the two Governments." This has been termed a mandatory requirement by courts, and failure thereof will render subsequent proceedings coram non judice[13].

## RECOMMENDATIONS

1. In light of Section 196 of the Criminal Procedure Code, no FIR can be registered under Section 295-A unless permission is obtained in this regard by the Federal or Provincial Governments. This must be extended to cases under Section 295-C.

2. As per **Malik Mumtaz Qadri vs. The State and others** (PLD 2016 SC 17), whenever a base of blasphemy is registered, it should be investigated by at least two (2) Gazetted Investigating Officers who are conversant with Islamic jurisprudence. In case they are not, a well-reputed scholar may be added to the team. The team should first collectively investigate whether such an offence has occurred before the police can proceed.

3. Most recently, the Supreme Court, in **Ms. Asia Bibi vs. The State and others** (PLD 2019 SC 64) observed, *"Blasphemy is a serious offence but the insult of the appellant's religion and religious sensibilities by the complainant party and then mixing truth with falsehood in the name of the Holy Prophet Muhammad (Peace Be Upon Him) was also not short of being blasphemous."*

In view of this dictum, Sections 295, 295A, 295B and particularly 295C must be amended to include:

12 Also see: Abdul Ahad vs. The State and another (PLD 2007 Peshawar 83).
13 Naheed Khan and ors. vs. The State and another (2012 PCrLJ 396).

*"If it is found from the investigation that a charge leveled under this section is false and frivolous, the person making such an allegation is also liable to be punished under the punishment prescribed under this Section"*

.

This provision is necessary to prevent abuse of law and to equally punish those who abuse it.

# Chapter 4
# CRIMINAL DEFAMATION

## INTRODUCTION

In Pakistan, along with a civil penalty under the Defamation Ordinance 2000 the act of defamation is also criminalized under Section 499 of the Pakistan Penal Code, 1860. This is a colonial era legislation that Pakistan inherited from the pre-independence British India.

Under Section 499, *Criminal Defamation is defined* as the intentional making of an imputation which harms the reputation of a person. However, there are 10 exceptions to this crime, listed out in the statute, which provide a full defence to the accused.

This law overlaps with the common law civil tort of defamation under which monetary damages are granted by the Court for any defamatory publication or statement made by the defamator (author of the defamatory publication or statement) against the plaintiff which leads to a loss in reputation of the plaintiff.

There is a difference between an act of civil and criminal defamation however. Where in civil defamation, the defamator is liable if the plaintiff is successful in proving the mere fact that harm to reputation has occurred due to the making of a false publication or statement by the defamatory. However, as held by the Sindh High Court in the case of Syed Mehmood Ali vs. Network Television Marketing (PLD 2005 Kar 399), under criminal defamation, the mala fide intention of the defamator to hurt reputation also has to be proved.

In the case of **Sir Edward Snelson vs. the Judges of the High Court of Pakistan** (PLD 1961 SC 237) the Supreme Court of Pakistan held that the words used in any defamatory publication or statement must be interpreted not only in their ordinary and natural meaning, but also in their secondary sense imported by the circumstances to see if they fall within the offense of defamation.

**499. Defamation:**

*Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said except in the cases hereinafter excepted, to defame that person.*

***First Exception*** *- Imputation of truth which public good requires to be made or published: It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.*

***Second Exception*** *- On Public conduct of public servants: It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.*

***Third Exception*** *- Conduct of any person touching any public question: It is not defamation to express in good*

*faith any opinion whatever respecting the conduct of any person touching any public question, and. respecting his character, so far as his character appears in that conduct, and no further*

***Fourth Exception*** *- Publication of reports of proceedings of Courts: It is not defamation to public a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.*

***Fifth Exception*** *- Merits of case decided in Court or conduct of witnesses and other concerned: It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and not further.*

***Sixth Exception*** *- Merits of public performance: It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.*

***Seventh Exception*** *- Censure passed in good faith by person having lawful authority over another: It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.*

***Eighth Exception*** *- Accusation preferred in good faith to authorised person: It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject matter of accusation.*

***Ninth Exception*** *- Imputation made in good faith by person for protection of his or other's interest: It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.*

***Tenth Exception*** *- Caution intended for good of person to whom conveyed or for public good: It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.*

**500. Punishment for defamation:**

*Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.*

**Essential Elements**

Since this is a criminal offense, it is the duty of the prosecution/complainant to fulfill the initial onus to prove that the essential elements required to establish a case of criminal defamation are fulfilled by the accused. The following elements were laid down in the case of **Khondhkar Abu Talib v. The State** (PLD 1967 SC 32):

i) The accused is responsible for the defamatory publication/statement;
ii) That there is an imputation in the defamatory publication/statement which is false;

iii) The imputation has been made by the author with the intention of harming or knowing that it would harm the reputation of a person against whom it was made;

The Sindh High Court in **Aitbari Ali v. the State** [PLD 1982 Kar 302] also held that the information should be disseminated to the public or published by the accused and in **Abdul Karim v. Abu Zafar Qureshi** [PLD 2001 Kar 115] it was held that the false imputation must lower the reputation and standing of the person before his family, friends and the general public for the offense of criminal defamation to be established.

Additionally, in the case of **M.Anwar v. Saadat Khayali** (PLD 1963 (W.P) Lahore 323) the Lahore High Court held that even if the accused pleads to their guilt, the court must ensure that the facts the accused pleads to actually fulfill the elements of the offense of criminal defamation before the accused is convicted for the offense.

Lastly, in **Zahri Khan v. the State** (1980 PCrLJ 153), it was affirmed that a reasonable person standard is employed by the courts to judge if any imputation is defamatory, i.e. if the publication/statement can said to have reasonably lowered the reputation and standing of a person in society.

**Defences**

Any act of making an imputation through publication/statement which harms the reputation of a person will not amount to criminal defamation if it falls within any of the 10 exceptions mentioned in the text of the statute. Most of these defences are similar to the defences a defendant can take to avoid liability in a common law tort action for defamation.

The defence of simple truth, a powerful defence in civil defamation, is not a valid defence in criminal defamation however. As per the First Exception, the publication must both be truthful as well as be made for the public good so that it is not actionable as an offense of criminal defamation. The courts in Pakistan have also read in a good faith defence within the First Exception as well, which allows the accused to be protected by the First Exception if the accused in good faith believes whatever was imputed, even if it turns out to be false, to be the truth at the time of publication. However, to employ this defence, the Court in the case of **Mushtaq Ahmad Gurmani v. Z.A Suleri** (PLD 1958 Lahore 747) stated that the author of the defamatory imputation must prove that adequate care and precautions were taken to check if the information was true before the publication.

In **Mukhtiar Ali Shah v. Ahmad Shah** [2017 YLR 2247] whistle blowing by public officers which relates to the conduct of other public officers or of illegalities committed by governmental organizations or to report any other matter for the public good were also deemed protected expression under the Second Exception by the court.

In a recent landmark case, the Supreme Court of Pakistan has also protected all allegations made to the police or to courts by any person for the purpose of prosecution or any other legal process from the offense of defamation. The Supreme Court in **Ayesha Bibi v. Additional District**

**Judge** [(2018 SCMR 791) reasoned that a person aggrieved of these statements can avail the remedy of malicious prosecution against the person who has made them in pursuance of a legal action but no action of criminal defamation would lie since all statements made to public authorities, even if false, for the purposes of a prosecution or legal process, are immune.

**Prosecution**

It is essential to note that the offense of defamation is not a cognizable offense in the Pakistan Penal Code, this means that it cannot be prosecuted by the police through their own motive or through the filing of an FIR.

For someone to be prosecuted for criminal defamation, it necessarily requires a private complaint to be made by the complainant (the complainant must be an aggrieved person) to the Magistrate, after which, the Magistrate, if satisfied that prima facie a case of defamation is made out against the accused, shall issue notices against the accused and direct police to take a required action. In the case of **Hafiz Muhammad Siddique Anwar v. the State** (1997 PCr.LJ 1228) the Court explained that the Magistrate cannot take cognizance of an offense or even a police challan charging someone of criminal defamation – such a procedural defect in any action of prosecution of criminal defamation would be incurable and vitiate the entire proceeding.

Jurisdiction of the offense can also only be taken by the Court where the defamatory piece was published, not where it had consequence, as concluded by the Sindh High Court in **Chowdhry Riaz Ahmed v. The State** (PLD 1979 Kar 119), i.e. if a defamatory piece was published in City A, it must be prosecuted in City A, even if it was distributed in City C or the complainant, whose reputation was damaged, lives in City B.

Lastly, delay in the prosecution of the complaint was held to be fatal – unless good reasons can be shown by the complainant to justify the delay in **Ghulam Murtaza v. the State** [PLD 1966 (W.P) Karachi 337] and **Agha Hussain Naqvi v. Manzoor Hussain Shah Sabzwari** [1983 PCrLJ 2235]

**Aggrieved person**

Normally the aggrieved person should be someone who is the most affected by the defamatory publication or statement and must make the complaint on their own behalf
However, in certain cases, other persons, not directly defamed by the defamatory material, may file a complaint of criminal defamation against the author if:

(i) As per **Hasan Razaqi v. Mehrunisa Mehr** [PLD 1971 Kar 266] and **Shabana Mustafa v. Dr. Muhammad Khalid** [PLD 2001 Lahore 98] their reputation has also been harmed as consequence by the false imputations;

(ii) As per **Mir Mubarak Ali v Abu Mohiyuddin Abdul Wahab** [1987 PCr,LJ 1603] the imputation was of a general nature on a group of persons and one person from the group files the complaint; and

(iii) As per **Mir Shakeel Ur Rehman v. Yahya Bakhtiar** [PLD 2010 SC 612] the defamatory statement or publication was hurtful to family members or force or institution of the complainant and the complainant has died.

Lastly, in the case of **Habib-ul-Wahab Al Kheiri v. Ch. Saeed Ahmed** (1979 SCMR 545), the Supreme Court held that defamation against public servants and governmental offices is actionable by the government itself through a complaint filed by the public prosecutor or as a private action through a complaint filed by an officer defamed.

**Punishment**

Under Section 500 the courts have been given discretion to choose an appropriate sentence on a case to case basis. The courts can choose to have the accused only pay a fine or can choose to only incarcerate the accused for any term up to 2 years or choose both. The incarceration will only be simple imprisonment in contrast to rigorous imprisonment and if the convict fails to pay the fine, they will have to go through a further period of incarceration as is judged fit by the court.

**Liability of Media**

As per **Mushtaq Ahmad Gurmani v. Z.A Suleri** (PLD 1958 Lahore 747) newspaper editors are required to be extra careful under the law of criminal defamation. They are expected to verify the information they publish carefully to take advantage of the defence of good faith belief in the information being true and being published for public good.

And as per **M.Anwar v. Saadat Khayali** (PLD 1963 (W.P) Lahore 323) a newspaper editor is always assumed to be liable for any defamatory publication made in the newspaper he/she retains control over, unless it can be proven through evidence that the editor was not in control of the newspaper and had given temporary editorial control to another person.

## ANALYSIS

In every civilized society, a person's reputation is very valuable – from personal relationships to business dealings, a reputation can make all the difference. Therefore to maintain public order, any attempt by someone to defile someone's reputation with falsities must be discouraged – this is the basis of the law of defamation. However, while defamation is a serious social ill which needs to be curtailed, laws criminalizing defamation also have serious consequences for the right to freedom of speech as they cause a serious freezing effect on the exercise of free speech due to the threat of abuse of the police powers of the state to stifle dissent through wrongful prosecutions, arrests and convictions.

While the courts of Pakistan have attempted to provide various protections to citizens from the criminal offense of defamation – in fact the statute itself also provides numerous amounts of exceptions from the offense - it is still unfortunately very widely abused in Pakistan to stifle free expression, bury investigative reporting in the media, harass journalists and bully sexual assault survivors who are brave enough to call our their attackers back into silence.

This is because, as per the review of the case law, it is clear that the police in Pakistan continually file FIRs at the insistence of influential complainants against their opponents, especially journalists and women, even when this procedural irregularity vitiates the entire proceeding. That is because the aim of the complainant is to harass and coerce the accused into either silence or apology by dragging them through the criminal system.

Also the fact that truth simpliciter which is an absolute defence for civil defamation under the Defamation Ordinance, 2000 which is a civil liability – less harsh by its very nature – is not a defence for criminal defamation is very worrying. The added requirement to prove that the statement was not only true but made for the public good leaves too much discretion in the hands of the court to decide what is and what is not for the public good.

While both, freedom of speech and the protection of the reputation of a person, are important, a balancing of the two valuable rights would necessarily require the abolishment of criminal defamation. This is because the civil action under the tort of defamation is enough to deter would-be defamators and in protecting a person's reputation in society. And since civil defamation monetarily compensates a victim of defamation for any loss occasioned to their reputation while not completely scaring a citizen from expressing their thoughts freely due to the threat of criminal sanctions, it is the only reasonable that criminal defamation which is so often abused be done away with.

Article 19 of the Constitution of Pakistan, 1973 guarantees freedom of speech to all citizens subject to reasonable restrictions by law for six subjects. These subjects used to be seven before the Fourth Constitutional Amendment in 1975: defamation was removed via this constitutional amendment as a subject heading under which free speech can be restricted. This means that defamation is no longer even a constitutionally mandated restriction on free speech, raising the question if it is still reasonable and just to continue to threaten people with prison for making false statements under Section 499?

This question is pending before the Islamabad High Court in a recently filed petition which has challenged the constitutionality of Section 499 and 500 and has sought that criminal defamation may be struck down for being ultra vires the right to freedom of speech and expression found in Article 19 of the Constitution of Pakistan, 1973. Criminal Defamation is an obsolete criminal law which is no longer followed in the countries it arose from i.e. the United Kingdom abolished criminal defamation in 2010 and perhaps it is time for Pakistan to do the same.

## RECOMMENDATIONS

1. Parliament should repeal Chapter XXI of the Pakistan Penal Code, 1860 and all the provisions contained therein, including Section 499 and Section 500 relating to Criminal Defamation immediately.

2. The Superior Judiciary should strike down Chapter XXI of the Pakistan Penal Code 1860 and all the provisions contained therein, including Section 499 and Section 500 relating to Criminal Defamation, as unreasonable restriction on the right of freedom of speech

protected under Article 19 of the Constitution of Pakistan, 1973.

3. If it is not repealed or struck down, the Parliament should amend Section 499 of the Pakistan Penal Code, 1860 to allow truth simpliciter as a defence to criminal defamation or the Superior Judiciary should strike down the additional requirement that the imputation must also be for 'the public good'.

4. The Subordinate Judiciary must be trained to ensure that the fulfillment of all the essential elements of the offense are prima facie proved by Complainant in a complaint of criminal defamation before a notice is issued to the accused so as to nullify the use of this provision to harass people. The court must also take note if none of the exceptions apply to facts of the case and dismiss the same if they believe it does so as to avoid unnecessary litigation.

# Chapter 5
# SEDITION

## INTRODUCTION

Sedition, or "language or behaviour that is intended to persuade other people to oppose their government" was included as an offence into the then-Indian Penal Code through the Penal Code (Amendment) Act, 1870 (XXVII of 1870) as Section 124A. The law was initially introduced by the British colonial government in India to not only suppress rising independence movements but also to retain British power in the subcontinent through use of violence.

**124-A Sedition:**

*Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Federal or Provincial Government established by law shall be punished with imprisonment for life to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.*

*Explanation 1: The expression disaffection includes disloyalty and all feelings of enmity.*

*Explanation 2: Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*

*Explanation 3: Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*

## COLONIAL BEGINNINGS AND CURRENT-DAY ANALYSIS:

This provision made it easy to target pro-independence activists in the pre-independence era. For instance, prominent freedom fighters such as Mahatama Gandhi, Lokmanya Tilak and Annie Besant were all charged with the offence as a result of their campaigning[14]. However, of particular note are the Lokmanya Tilak trials where Muhammad Ali Jinnah acted as counsel for the accused and successfully got him bail[15].

A defence to this provision has always been rather difficult. For example, in **Beaumont Emperor versus Sadashiv Narayan Bhalerao** (PLD 1947 Privy Council 32), the Respondent was charged with sedition in 1943 after distributing printed copies of certain pro-independence material. The Privy Council's observations are note-worthy:

14 Chandan Gowda, 'Sedition: A Law Misused' (Bangalore Mirror, 2016) <https://bangaloremirror.indiatimes.com/opinion/views/sedition-a-law-misused/articleshow/53776685.cms> accessed 18 April 2020.

15 A.G. Noorani, Jinnah And Tilak: Comrades In The Freedom Struggle (Oxford University Press 2010).

*In England there is no statutory definition of sedition; its meaning and content have been laid down in many decisions, some of which are referred to by the Chief Justice, but these decisions are not relevant when you have a statutory definition of that which is termed sedition, as we have in the present case.*

This meant that the law was only enacted for the British Raj's governance in India. Furthermore, judges often applied a strict yardstick to convict accused individuals. For instance, in the present case the Court noted that there should have been a conviction simply on the basis that the person had intended to commit sedition.

In the Court's view, sedition did have to result in violent activity; the very intention to create disorder was enough to constitute an offence. This intention was left to the judge to adjudicate on the basis of the material before him. This leads to a significant problem. Any sort of speech or expression can be curtailed on the touchstone of being seditious subject to a judge's opinion.
However it is regrettable that the present day situation is not quite different. Even after Partition and independence from colonial rule, the provision continues to be deployed as a tool to curtail speech and expression in the subcontinent. For example, in November 2019, student activists in Lahore, Pakistan were arrested under charges of sedition for organizing a solidarity march demanding student unions[16]. India has meted out similar treatment to its activists, journalists and students who have organized against violent state practices[17].

## PENALTY AND PROCEDURAL INFORMATION:

1. The punishment for an offence of sedition is liable to be punished with imprisonment for life or three years along with a fine.

2. Sedition is a non-cognizable offence and therefore, so the police cannot arrest the accused without a warrant.

3. Under Section 196 of the Code of Criminal Procedure (**"CrPC"**), a charge of sedition against will not be cognizable or punishable, unless such charge is made on the basis of a complaint by the order of the Federal or Provincial Government (or any officer empowered in this behalf). [Guidelines for this were laid out in **Maulana Dost Muhammad** v. the State (1976 PCrLJ 184)]

4. Once arrested and as per the Second Schedule to the CrPC, a person must apply to the Additional Sessions Court for bail. This was confirmed in **Manzoor Ali Soomro vs. The State** (2001 YLR 964).

16 Imran Gabol, 'Sedition Cases Registered Against Organisers And Participants Of Student March' Dawn Newspaper (2020) <https://www.dawn.com/news/1519976> accessed 18 April 2020.

17 Amarnath K. Menon, 'How The Sedition Law Has Become A Weapon To Muzzle Dissent' India Today (2020) <https://www.indiatoday.in/india-today-insight/story/how-the-sedition-law-has-become-a-weapon-to-muzzle-dissent-1650030-2020-02-26> accessed 18 April 2020.

## DUE PROCESS AND SEDITION TRIALS:

In **Manzoor Ali Soomro vs. The State** (2001 YLR 964), the Court noted that even the trial court had to adjudicate upon the merits of a case as opposed to the severity of the offence. It was the fundamental right of citizens under the Constitution of Pakistan, 1973 to take part in processions and the Court could not deny them bail mechanically just because an offence was one of higher degree. The Court observed:

*"Under the Constitution of Islamic Republic of Pakistan, 1973 it is the fundamental right of every citizen to raise voice against anything which he feels to be unjustified or discriminatory with the condition that he has to remain within the precincts of law. Thus, in the absence of section 144, Cr.P.C. or any other law prohibiting gathering of persons or taking of procession it shall be within the lawful right of a citizen to do so. The learned trial Court has observed that the applicants were members of an unlawful assembly and the police attempted to prevent the unlawful assembly. But there is nothing on the record to show that there was any law making the gathering an unlawful assembly. Thus, if some persons have raised slogans against Pakistan it is to be determined, of course tentatively at the stage of bail, whether every person protesting against the shortage of water would be vicariously responsible for an irresponsible act on the part of few persons. A balance is to be struck in the liberty of citizens and the respect and integrity of the State, its sovereignty and maintenance of law and order."*

Further guidelines for registering a charge of sedition were laid down in **Naveed Ahmad Khan, Advocate and others vs. Station House Officer, Renala Khurd** (1994 PCr.LJ 2381). The Lahore High Court in quashing the FIR lodged against the petitioner under, inter alia, Section 124A stated that it was crucial that information relating to commission of a non-cognizable offence (an offence for which an arrest cannot be made without a warrant) be recorded in a Roznamcha (Station Diary). In view of this, a police officer can only conduct investigations in a complaint of sedition under s.124A once he has obtained an order from the Magistrate to this effect.

## MEANING OF SEDITION

One of the first cases to determine the meaning of sedition was **Abdur Rahman Malik vs. The Crown** (PLD 1950 Lah. 234) where pamphlets criticizing the creation of Pakistan were held to be seditious. The Court observed that any person reading the manifesto in the pamphlets would penultimately believe that Pakistan's creation led to violence against Muslims. The Judge observed that this was a serious and direct attack upon the concept which created Pakistan. He therefore laid down the meaning of sedition:

*"Sedition" as described by Fitzgerald, J […] "embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquility of the State and lead ignorant persons to subvert the Government. The objects of sedition generally are to induce discontent and insurrection, to stir up opposition to the Government and to bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance, or to lead to civil war, to bring into hatred or contempt the sovereign or Government, the laws or the constitution of the realm and generally all endeavours to promote public disorder."*

Guidelines to Courts for adjudicating sedition trials were first laid down in **Z.A. Sulleri and others**

**v. The Crown** (PLD 1954 Sind 80). These were:

1. The intention with which the language is used and such intention has to be judged primarily by the language used,

2. In arriving at its conclusions as to the intention of the accused the court must have regard to the occasion on which and the circumstances in which the writing was published or representation made,

3. Criticisms or condemnation of measures taken or policies pursued by the Government with a view to their withdrawal or alternation cannot per se be seditious,

4. It is not every kind of disaffection, hatred or contempt which would constitute sedition. […] it is that degree of disaffection, hatred or contempt which induces people to refuse to recognize the government at all and leads them to un-constitutional methods which is essential before a charge of sedition can be held to be established. Otherwise leads them to un-constitutional methods which is essential before a charge of sedition can be held to be established. Otherwise every criticism would come within the mischief of the words

However, the pivotal case on the definition of sedition is **Sardar Attaullah Khan Mangal vs. The State** (PLD 1967 SC 78) in which the Supreme Court of Pakistan laid down what kinds of speeches would constitute "disaffection" towards the government. Then-Chief Justice Cornelius' reasoning for the decision was relied on several subsequent judgments:

*"…the view that has been consistently held is that evidence as to the truth of the measures which formed the basis of criticism offered in the offending statement cannot be admitted in cases where the libels are alleged to be, as in this case, seditious. The principle upon which this rule is based is simple and salutary. It is that it can never be in the public interest that enquiry into the truth of such statements should be allowed in cases where the essential and indeed the only question for the Court to decide is whether the effect of the language used is such that it is calculated to create in the minds of those who see or hear it a feeling of revulsion towards the Government by law established, so strong as to amount to hatred or contempt, 'or in a still worse case, where the hatred or contempt is so strong as to have the effect of seriously taking away from the Government the allegiance of the public or a section thereof, in other words, producing "disaffection." It is of course not necessary that such feelings should have actually been caused: it is enough that the language used was calculated to produce this result or in the alternative that an attempt should have been to produce such a result."*

## DEFENCE TO SEDITION

Justice Hamoodur Rahman's judgment in Sardar Attaullah Khan Mangal vs. The State (PLD 1967 SC 78) extensively analysed whether truth could constitute an offence. He discarded the view that truth could be used as a mitigation of the offence, ultimately concluding that in fact, truth could not at all be used as a defence to sedition. His judgment, which is considered seminal today, notes:

*"[…]Will not the gravity of the offence depend upon the gravity of the harmful effect the speech or article is calculated to produce and will not this in its turn depend upon the nature of the language used, the time or occasion or place at which it is used, the type or class of persons to whom it is addressed or among whom it is circulated, the status and*

*position of the person using such language, the extent of the publicity given to it, the gravity of tale consequences that are likely to ensue or have actually ensued and the circumstances in which the offending speech came to be made or the article published? If so, then how is the truth or falsity of the facts referred to in the speech relevant?"*

## REQUIREMENTS OF SEDITION

Tofazzal Hussain vs. The Province of East Pakistan and others (PLD 1965 Dacca 478) held that the context in which speeches were made was essential and had to be taken into account while considering whether any speech or related material was seditious in nature[18].

Justice Rahman in Sardar Attaullah Khan Mangal vs. The State (PLD 1967 SC 78) considered that Courts should gather the speech-maker's intention from their words and deeds by stating, *"Where there are no deeds but only words the speaker's intention must be gathered from a plain reading of his words."*

Similarly in **Mian Tufail Muhammad vs. The State** (PLD 1973 Lahore 747), it was held that Courts could not take into account principles or policies of a political party to declare offences punishable under the Penal Code inapplicable to a group of persons simply because their conduct did not contravene the political party's policies.

It can ultimately be seen that **intention** to commit sedition and the context of a speech are an integral part of the offence and Courts must take this factor into account while deciding a case of sedition.

The Islamabad High Court in **Ali Raza v. Federation of Pakistan** (PLD 2017 Isl. 64), held that the following ingredients are necessary to constitute an offence of sedition:

(a) Offence must contain promotion of feeling of enmity, hatred or ill-will between different religious or racial or linguistic or regional groups or castes.

(b) Words, deeds or writing used to disturb the tranquility of the State or to subvert the government.

(c) Incite the people to incursion and rebellion.

(d) Complaint must be initiated by the Federal or Provincial Government and by an authorized person under the law after considering the relevant factors of the alleged incident with reasons.

(e) Private persons cannot agitate the matter regarding seditions of charge rather it should be initiated, inquired and investigated by the Government or at least on their direction.

(f) Criminal conspiracy can only be considered if the other principal offence comes on record on

18 Also see: Masihur Rehman v. The State (1971 DLC 750)

the basis of allegations referred to in the complaint in each case whereas, is not a sedition, therefore, criminal conspiracy is not available in the instant matter.

(g) Authorized officer shall state reason before issuing any sanction in terms of sections 196 and 196-A, Cr.P.C. with speaking order.

## SEDITION AND FREEDOM OF SPEECH AND EXPRESSION

One of the first cases to have shed light on the implications of sedition on free speech and expression was Z.A. Sulleri and others v. The Crown (PLD 1954 Sind 80). The Court noted:

*"[…] it should be difficult to find a charge of sedition upon the ideas, sentiments and expressions which have become a part and parcel of normal political life of the country. The concept of party Government implies criticism of the party in power with a view to bring about its fall and exist. No interpretation of section 124-A, P. P. C., can be made unmindful of the implications of this fundamental basis of our constitution."*

This question was again brought to the court for consideration in **Hussain Bakhsh Kausar v. The State** (PLD 1958 (W.P.) Peshawar 15). In this case, the accused had, at a meeting chanted, "Pakhtunistan Zindabad!" Factoring in his personal opinion, the Judge held that the demand to name a certain part of Pakistan Pakhtunistan was a calculated method to harm Pakistan. Through extensive textual gymnastics, the Court eventually held that such a demand was also un-Islamic and would divide the country, leading to a security threat. This has often been the reason for the large scale criticism of sedition laws. Sedition laws are often left to the subjective interpretation of a judge and what in their mind, at the time, constitutes "disaffection towards the government".

Although there have been successful attempts at minimizing subjectivity,[19] there continues to be much room for abuse with terms such as "disloyalty", "feelings of enmity", "disaffection" etc.
It is also interesting to consider the developments in the balance between sedition and free speech. It can be seen from the following that Courts have only expanded the remit of speech and expression against sedition by developing criticism of the Government as an essential clog in democratic functioning. Some noteworthy judgments on the subject are as follows:

The Court used a very broad interpretation of free speech against sedition in Hussain Bakhsh Kausar (see above) held in 1958:

*"Freedom of speech, subject to the restrictions mentioned above is essential, because without it the society based on the ideas of peace, order, or justice, cannot take shape, nor can the people who wish to live in freedom can be assured of greater security guaranteed to them under the Constitution. The Constitution, as is clear from the wording of Article 8, has been very careful to secure to even most repellent of the citizens the common right of free expression so long as it does not transgress the limitations placed by law. The police and the people in authority must change their outlook now and stop the unnecessary harassment of the people by censoring the letters of the citizens of Pakistan, tapping*

19 See Sardar Attaullah Khan Mangal vs. The State (PLD 1967 SC 78)

*their telephones, and keeping a watch on their activities except in the case of the known traitors and treason-mongers because that amounts to the negation of the fundamental right guaranteed to the people by the Constitution. Freedom of expression of one's views is a gift of the Constitution, and it cannot be abridged by the people in authority so long as it is not intended to create chaos in the country or disrupt or destroy it.*

*It is high time that the people in power realised that they have no absolute power over the lives and conduct of the persons who reside within their jurisdiction. A man is entitled to his opinion and is within his right to express it. The citizens of Pakistan are free and they must be allowed to live in freedom and the law of the land should conform to this freedom.*

*Hatred, contempt or disaffection towards the Government is usually created towards the Government by words imputing to the Government base, dishonourable, corrupt or, malicious motive in the discharge of its duties, which was not done in this case. To criticise a Minister is no offence. If the Ministers are held above criticism then it would amount to this that if a person by fair or foul means attains to that height then the people cannot make any effort to remove him nor can his own errors even if he repeats them twenty times or his corruption, undemocratic action or mal-administration dislodge him from that position. Public platform is the only place from where the misdeeds of those- who hold the reins of the Government can be exposed. If that is shut out, democracy will see its end in no time. If we wish to retain the fundamental liberties and remain a free and independent people walking in the democratic way of life, we must be swift to scotch at the outset tendencies which may easily encroach upon liberties. Ministers may form the Government but they are certainly not the Government within the meaning of the word used in section 124-A of the P. P. C."*

However, according to judicial trends today, one can see there has been a shift against the use of sedition laws to curtail free speech and expression. This is perhaps evident from **Ali Raza v. Federation of Pakistan** (PLD 2017 Isl. 64). The Islamabad High Court was tasked to hear an FIR lodged against the petitioner under s.124A for erecting banners in Islamabad of the then Chief of Army Staff, Raheel Sharif and inscriptions stating, 'Education, Health, Peace- Move on Pakistan'. The Court quashed the Petitioner's FIR on procedural grounds, but observed the importance of preserving the freedom of speech and expression under Article 19 of the Constitution. The Court noted that although the freedom of speech and expression was not absolute, the Petitioner's banners with General Raheel Sharif's photograph could not be considered seditious. The banners used by the Petitioner were in fact, an expression of the Petitioner's thoughts and were not prohibited under the restrictions in Article 19. It parted with the view that a charge for sedition clearly had to establish that the offenders had *"to do an illegal act under an agreement in a secret and superstitious manner".* However, the Judge concluded that the FIR or a visual representation of the banners in this case did not *"reflect disaffection nor even it has been considered a message to an institution to disrupt the government."* The Court thus allowed bail to the Petitioner.

This is not to say that all Courts have changed their yardsticks of applying s.124A to encourage speech and expression. In Muhammad Qayum Khan and others vs. The State (2019 MLD 570), the Gilgit-Baltistan Chief Court decided a case relating to the distribution of books that were considered 'anti-State'. The Court, observing that this offence was 'Fitna' and a disturbance of public peace, both of which under Islamic injunctions, were subject to higher punishments than murder. The Court held that it could not close its eyes to adverse impact of such publications, especially in the wake of the China-Pakistan Economic Corridor which offered a promising future for the people of Gilgit-Baltistan.

To conclude, it can be seen that Courts have strived to balance use of speech and expression and sedition. Yet, certain judicial interpretations have also departed from established principles and this is exactly the lacuna that is used as a means to abuse sedition laws and to curtail the freedom of speech and expression in Pakistan.

## SEDITION AND FREEDOM OF PRESS AND INFORMATION:

One of the first cases to have addressed sedition in light of press freedom was **Z.A. Sulleri and others v. The Crown** (PLD 1954 Sind 80) wherein the Sindh High Court considered whether a cartoon published in a newspaper could be considered seditious. In quashing the charges, the Court observed:

*"The writing or representation has to be read as a whole and in a fair, free and liberal spirit. This approach is all the more important when dealing with the press which has a duty of its own to discharge. It has to create, mould and educate public opinion on all matters of policy and measures which may affect the well-being of the people.*

*In Islamic democracy, where 'lima' is the determinant factor, it is essential that masses should know the pros and cons of every measure, good, bad or indifferent."*

Another case titled **Ali Hussain Jamali vs. The Government of Sindh through its Deputy Secretary, Home Department and another** (PLD 1974 Karachi 283), was filed against certain newspapers for disseminating ostensibly seditious content. However, the Court noted that statutes of a penal nature should be construed, in a democratic society, so as to preserve and not to undermine the functioning of democracy. It observed that the requirements under Section 24 (1) West Pakistan Press and Publications Ordinance (XXX of 1963) which required Governments to take notice of any offensive material are separate from those in s.124A observing that:

*"There is a difference between a speech and an article or an editorial in a newspaper. The readers of a newspaper are scattered and they cannot rally to an appeal in an article as a mob can to the speech of a demagogue."*

Therefore, s.124A would not automatically apply in cases which related to the press. This judgment provides an extensive analysis of press freedoms and seditious content and an extensive analysis of what constitutes *"fair criticism"*. It also provided a useful guideline for the use of sedition laws in relation to the press. However, s.124A is still used as a means of censorship today to curtail the freedom of the press.

## ANALYSIS

One of the restrictions to speech and expression in Article 19 of the Constitution is "incitement to an offence". Furthermore, case law suggests that the mere intention to incite violence is also seditious. This adjudication of this intention is left to the subjectivities of a judge. This problematic situation opens up many avenues for abuse. However, courts have often noted this. For example, the Supreme Court of Pakistan in **Suo Motu Case No. 7 of 2017** (PLD 2019 SC 318) on the Faizabad Dharna by the Tehreek-e-Labaik Party in Islamabad had held:

*"Overt and covert censorship is unconstitutional and illegal. Nebulous tactics, such as issuing advice to self-censor, to*

*suppress independent viewpoints, to project prescribed ones, to direct who should be hired or fired by media organisations is also illegal". It had also held that no, "government, department or intelligence agency can curtail the fundamental right of freedom of speech, expression and press beyond the parameters mentioned in Article 19 of the Constitution".*

This perhaps alludes to the idea that forced censorship under the garb of sedition laws was also to be criminalized if it went beyond the remit of Article 19 of the Constitution. Such guidelines continue to be ignored. Therefore, even before cases may reach judges, police officials may use this law to detain or commit violence against citizens. And even otherwise, if cases do reach judges, many citizens may be denied a fair trial at the very outset due to the punishment associated with this offence, or due to subjective judicial interpretations as can be seen above. It can be argued ultimately that in one way Pakistani courts have discarded the rigid colonial lens with which sedition was judged. Yet, the State continues to retain the power to charge individuals with the offence by keeping the provision in its statute books.

It can ultimately be concluded that sedition is a colonial import that only serves to clamp down on the fundamental rights of Pakistani citizens and it no longer serves any purpose in a democratic society governed by its Constitution.

## RECOMMENDATION

Section 124A must be repealed with immediate effect and struck off the statute books recognizing that sedition laws are outdated and undemocratic colonial relics.

Section 3

# General and Criminal Laws

# Chapter 6
# CONTEMPT OF COURT ORDINANCE 2003

## INTRODUCTION

The Contempt of Court Ordinance 2003 arises out of Article 204 of the Constitution of Pakistan 1973 which states that the Supreme Court and High Court of Pakistan have the power to punish any person for abusing, interfering with or obstructing the process of the Court in any way or disobeying any order of the Court; scandalizing the Court or otherwise doing anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt; doing anything which tends to prejudice the determination of a matter pending before the Court; or doing any other thing which, by law, constitutes contempt of the Court.

As per Article 204(3) the exercise of the power conferred on a Court of law under this Article can be regulated by law and the rules made by the Courts.

**2. Definitions:**

*In this Ordinance, unless there is anything repugnant in subject or context:*

*(b) "Criminal contempt" means the doing of any act with intent to, or having the effect of, obstructing the administration of justice;*

*(c) "Judicial contempt" means the scandalization of a Court and includes personalized criticism of a judge while holding of office;*

*(f) "Personalized criticism" means a criticism of a judge or a judgment in which improper motives are imputed; and*

**3. Contempt of Court:**

*Whoever disobeys or disregards any order, direction or process of a Court, which he is legally bound to obey; or commits a willful breach of a valid undertaking given to a Court; or does anything which is intended to or tends to bring the authority of a Court or the administration of law into disrespect or disrepute, or to interfere with or obstruct or interrupt or prejudice the process of law or the due course of any judicial proceedings, or to lower the authority of a Court or scandalize a judge in relation to his office, or to disturb the order or decorum of a Court is said to commit "contempt of Court" the Contempt is of three types, namely; the "Civil contempt" "criminal contempt" and "judicial contempt".*

**4. Jurisdiction:**

*(1) Every superior Court shall have the power to punish a contempt committed in relation to it.*

*(2) Subject to sub-section (3) every High Court shall have the power to punish a contempt committed in relation to any Court subordinate to it.*

*(3) No High Court shall proceed in cases in which an alleged contempt is punishable by a subordinate Court under the Pakistan Penal Code (Act No. XLV of 1860)*

**5. Punishment:**

*(1) Subject to sub-section (2) any person who commits contempt of Court shall be punished with imprisonment which may extend to six months simple imprisonment, or with fine which may extend to Rs. 100, 000, or with both.*

*(2) A person accused of having committed contempt of Court may, at any stage, submit an apology and the Court, if satisfied that it is bonafide, may discharge him or remit his sentence.*
*Explanation: The fact that an accused person genuinely believes that he has not committed contempt and enters a defence shall not detract from the bona fides of an apology.*

*(3) In case of a contempt having been committed, or alleged to have been committed, by a company, the responsibility therefore shall extend to the persons in the company, directly or indirectly, responsible for the same, who shall also be liable to be punished accordingly.*

*(4) Notwithstanding anything contained in any judgment, no Court shall have the power to pass any order of punishment for or in relation to any act of contempt save and except in accordance with sub-section (1).*

**6. Criminal contempt when committed:**

*(1) A criminal contempt shall be deemed to have been committed if a person*
*(c) Commits any other act with intent to divert the course of justice.*

**7. Fair reporting:**

*(1) Subject to sub-section (2), the publication of a substantially accurate account of what has transpired in a Court, or of legal proceedings, shall not constitute contempt of Court.*

*(2)The Court may, for reasons to be recorded in writing, in the interest of justice, prohibit the publication of information pertaining to legal proceedings.*

**8. Personalized criticism:**

*(1) Subject to the provisions of this Ordinance, personalized criticism of a specific judge, or judges, may constitute judicial contempt save and except true averment if made in good faith and in temperate language in a complaint made,*

*(a) to the administrative superior of a judge of a subordinate Court;*
*(b) to a provincial government,*
*(c) to the Chief justice of a High Court;*
*(d) to the Supreme Court;*
*(e) to the supreme judicial Council; or*
*(f) to the Federal Government for examination and being forwarded to the supreme judicial Council;*

*(2) Nothing contained in sub-section (1) is intended to deprive a judge of the right to file a suit for defamation.*

**9. Fair comments:**

*The fair and healthy comments on a judgment involving question of public importance in a case which has finally been decided and is no longer pending shall not constitute contempt;*

*Provided that it is phrased in temperate language and the integrity and impartiality of a judge is not impugned.*

**10. Judicial contempt:**

*(1) A superior Court may take action in a case of judicial contempt on its own initiative or on information laid before it by any person.*

*(2) Any person laying false information relating to the commission of an alleged judicial contempt shall himself be liable to be proceeded against for contempt of Court.*

*(3) Judicial contempt proceedings initiated by a judge, or relating to a judge, shall not be heard by the said judge, but shall (Unless he is himself the Chief justice) be referred to the Chief justice, who may hear the same personally or refer it to some other judge, and in a case in which the judge himself is the Chief justice, it shall be referred to the senior most judge available for disposal similarly.*

*(4) No proceedings for judicial contempt shall be initiated after the expiry of one year.*

**11. Innocent publication:**

*No person shall be guilty of contempt of Court for making any statement, or publishing any material, pertaining to any matter which forms the subject of pending proceedings, if he was not aware of the pendency thereof.*

**12. Protected statements:**

*No proceedings for contempt of Court shall lie in relation to the following:*

*(i) observations made by a higher or appellate Court in a judicial order or judgment;*
*(ii) remarks made in an administrative capacity by any authority in the course of official business, including those in connection with a disciplinary inquiry or in an inspection note or a character roll or confidential report; and*
*(iii) a true statement without intent to scandalize a judge regarding his conduct in a matter not connected with the performance of his judicial functions.*

**13. Substantial detriment:**

*(1) No person shall be found guilty of contempt of Court, or punished accordingly, unless the Court is satisfied that the contempt is one which is substantially detrimental to the administration of justice or scandalizes the Court or otherwise tends to bring the Court or judge into hatred or ridicule.*

*(2) In the event of a person being found not guilty of contempt by reason of sub-section (1) the Court may pass an*

*order deprecating the conduct, or actions, or the person accused of having committed contempt.*

*(3) Subject to the provisions of this Ordinance, truth shall be a valid defence in cases of contempt of Court.*

**14. Appeal:**

*(1) Notwithstanding anything contained in any other law or the rules for the time being in force, order passed by a superior Court in contempt cases shall be appealable in the following manner;*

*(i) in the case of an order passed by a single judge of a High Court an intra-Court appeal shall lie to a bench of two or more judges;*
*(ii) in a case in which the original order has been passed by a division or larger bench of a High Court an appeal shall lie to the Supreme Court, and*
*(iii) in the case of an original order passed by a single judge or a bench of two judges of the Supreme Court an intra-Court appeal shall lie to a bench of three judges and in case the original order was passed by a bench of three or more judges an intra-Court appeal shall lie to a bench of five or more judges.*

*(2) The appellate Court may suspend the impugned order pending disposal of the appeal.*

*(3) The limitation period of filing an appeal shall be 30 days.*

**Constitutional Validity of the Ordinance**

The text of Article 204 of the Constitution made subordinate legislation mandatory for regulation of the exercise of powers of the Court in contempt proceedings. Subsequently an act was promulgated as required by Article 204(3): The Contempt of Court Act 1976, which was eventually repealed by the present ordinance in 2003.

Ordinances are temporary emergency legislations under Pakistan's constitutional law, which lapse unless they are confirmed by the Parliament of Pakistan. The reason the Contempt of Court Ordinance 2003 has not lapsed to this day despite the fact that it has never gained parliamentary approval is that it is afforded the protection of Article 270AA which allows all laws made by the military government of the time to continue to be enforced as valid laws.

The Parliament of Pakistan, subsequently tried to attempt to repeal the Contempt of Court Ordinance 2003 by legislating a new law, the Contempt of Court Act, 2012 which curtailed the Superior Court's jurisdiction to hear cases of Contempt of Court. However in **Baz Muhammad Kakar v. Federation of Pakistan** [PLD 2012 SC 923] the Supreme Court of Pakistan struck down the Contempt of Court Act, 2012, holding that it was ultra vires the constitution as it attempted to restrict the scope and jurisdiction of contempt granted to the Superior Courts as per Article 204. As the entire act was declared unconstitutional by the Supreme Court, the repeal of the Ordinance under that law was also therefore declared void, reviving the Contempt of Court Ordinance 2003.

**Constitutional jurisdiction of Contempt of Court**

It is important to note that the requirement of promulgation of law by Parliament as per Article

204(3) of the Constitution is not seen as an express bar against Superior Courts exercising contempt powers under Article 204 directly.

The Supreme Court of Pakistan in State v. Khalid Masood [PLD 1996 SC 42] has held that the powers of the Superior Courts to initiate suo moto contempt proceedings under Article 204 are constitutional powers which can be exercised in a self-executing manner. The contempt jurisdiction under Article 204 is also considered to cover all forms of contempt mentioned in Section 3 of the Contempt of Court Ordinance 2003 i.e Civil Contempt, Criminal Contempt and Judicial Contempt.

**Civil Contempt**

This form of contempt is defined in Section 2(a) of the Contempt of Court Ordinance 2003 and is actionable when a party flouts/violates the order of a Court or any undertaking it has given to the Court.

In **Sikander Hameed v. Muhammad Aslam Kamboh** [PLD 2020 Lahore 38] a Division Bench of the Lahore High Court held that contempt jurisdiction of Courts must be exercised in order to enforce the law but since it infringes the personal liberty and right to freedom of expression of citizens, Courts must exercise it carefully. Court orders must be clear and precise and not ambiguous. In a contempt case, the accessed must clearly and deliberately violate Court orders, if the Court sees that the orders are of an imprecise nature where two views on their implementation could be reasonably taken, the Court must refuse to exercise contempt jurisdiction.

**Criminal Contempt**

Defined in Section 2(b) as any act which intends to or has the effect of 'obstructing the administration of justice'. This form of contempt arises if a party does any action which interferes with the legal proceedings happening before the Court or threatens the fair adjudication of the cases.

Under Section 7 the Court can itself take cognizance of criminal contempt or upon any complaint filed by a party to the proceedings who has been threatened or coerced by the accused or upon an application of a learned law officer

**Judicial Contempt**

Scandalization of the Supreme Court or the High Court and the personal criticism of judges of the Court is criminalized under Section 2(c) of the Contempt of Court Ordinance 2003. As per Section 2(h), for personal criticism to be actionable under the law, it must be of such nature that improper motives are attributed to the judge criticized.

Under Section 11(2) any false information is put before the Court in relation to the alleged act of Judicial Contempt, the person who has put the false information before the Court shall be liable to be proceeded against for Judicial Contempt and under Section 11(4) all cases of Judical Contempt are limited by a period of 1 year, after which no action can be brought about.

In **Talal Ahmed Chaudhry v. the State** [2019 SCMR 542] the Supreme Court held that once the alleged contemptuous material and statement made by the accused is put on the record and the Court is prima facie satisfied that it is contemptuous in nature, the burden of proof shifts to the accused to prove his bona fides and show the contemptuous material was not meant to undermine or embarrass the Court in their judicial functions or that it was taken out of context.

**In the matter of Contempt Proceedings against Imran Khan, Chairman of Pakistan Tehreek-e-Insaf** [PLD 2014 SC 367] a 3 member bench of the Supreme Court held that in Judicial Contempt, the Court should be lenient and exercise judicial restraint and by looking at the overall conduct of the accused and the facts and context within which the alleged contemptuous statement was made, it was clear the accused did not wish to bring the Superior Judiciary into disrepute by making the alleged statement and therefore the benefit of the doubt should be extended to him.

**Jurisdiction**

Under Section 4 every Superior Court has the jurisdiction to try any case of contempt committed against it. Under Section 4(2) every High Court can also hear cases of contempt committed against any of their subordinate Courts, unless the contempt case is under the Pakistan Penal Code, 1860.

In **Suo Moto Case No. 4 of 2010 [PLD 2012 SC 533] the jurisdiction of the Court which fixes the charge of Civil Contempt** (and arguably also Criminal Contempt) against the accused, to conduct the subsequent trial of the accused was upheld. The Supreme Court held that in cases of Civil and Criminal Contempt the Courts which fix the charge cannot be considered to be 'interested parties to the case' (in contrast to a case of Judicial Contempt) and thus the concerned Courts which have the jurisdiction under the Contempt of Court Ordinance 2003 to fix the charge of Civil and Criminal Contempt are not disqualified to conduct the subsequent trial of the accused. The Supreme Court also observed that a prima facie determination of the guilt of the accused by the concerned Court when establishing the charge does not disqualify that Court from conducting the subsequent trial as a *prima facie* view can change on the basis of the evidence put forward by the accused in his defence.

In **Abid S. Zuberi v. Khawaja Shams-ul-Islam** [PLD 2016 Sindh 618] a 5 member bench of the Sindh High Court held that in cases of Judicial Contempt, even if the judge who was scandalized does not proceed to forward the complaint to the Chief Justice, the Chief Justice could receive the complaint through others who lay the information of the offense before the Court. The Chief Justice of the Court could then proceed to hear the case himself or fix it before an appropriate bench.

**Procedure**

In **Suo Moto Contempt Proceedings initiated against Talal Chaudhry, State Minister, on account of derogatory and contemptuous speeches/statements at public gathering in respect of this Hon'ble Court telecasted by different TV Channels** [PLD 2018 SC 773] a 3 member bench of the Supreme Court of Pakistan upheld the power of Superior Courts to take suo moto notice of all forms of contempt: Civil, Criminal and Judicial Contempt.

Under Section 17 of the Contempt of Court Ordinance 2003, contempt proceedings will be initiated by the Court through sending the accused a notice or a show cause notice. The accused may then appear personally before the Court or through an advocate.

If after providing an opportunity of hearing to the accused the Court is prima facie satisfied the accused committed contempt of Court, it may fix the charge in open Court and then proceed to prosecute the accused through the recording of evidence. However, if the act of contempt is established by the Court from the record, the Court may forego a trial and punish the accused for contempt.

**Punishment**

Under Section 5 the Court may punish an accused with a maximum punishment of simple imprisonment with a term up to 6 months or a fine which may go up to Rs. 100,000 or with both. And under Section 5(2) such a sentence of an accused can be remitted if the accused apologizes to the Court for the alleged act of contempt, regardless of his good faith belief that he has not committed contempt.

In **Contempt Proceedings Against Senator Nehal Hashmi** [2018 SCMR 556] the Supreme Court of Pakistan held that even in cases where contemptuous material was of a substantial detrimental nature, the Court could mitigate the sentence of the accused on the basis of factors such as age and the fact the accused submitted an apology to the Court.

**Defence of Genuine Apology**

Under Section 5(2) of the Contempt of Court Ordinance 2003, regardless of any other defences used by the accused or a good faith belief by the accused that contempt has not been committed, the Court may discharge or remit criminal liabilities and the charge of contempt of Court, if the contemnor makes a sincere apology to the Court.

In **Suo Moto Case No. 1 of 2007** [PLD 2007 SC 688] the Supreme Court of Pakistan established the following factors to be considered by a Court when an apology is submitted by the accused for an alleged act of contempt:

(a) The apology must be tendered at the earliest stage of the contempt proceedings and should not be postponed to the tail-end of the contempt proceedings to be considered genuine;

(b) The apology must be unqualified, unreserved and completely unconditional;

(c) Along with the apology, the accused must show sincere and genuine remorse for the contemptuous act through his conduct;

(d) The contemnor should not try to justify his conduct to the Court.

**Defence of Fair Reporting and Fair Comment**

Under Section 8(1) of the Contempt of Court Ordinance 2003 no contemnor is liable for contempt of Court for any substantially accurate reporting of legal proceedings made before a Court of law unless the Court has, for reasons to be recorded in writing, under Section 8(2) prohibited the publication of any of the proceedings. Similarly, Under Section 10 of the Contempt of Court Ordinance 2003 any criticism or comments made against a judgement in any proceeding which is no longer pending adjudication is protected as long as the comments do not impute the impartiality of the Court and are made in the public interest.

In Talal Ahmed Chaudhry v. the State [2019 SCMR 542] a 5 member bench of the Supreme Court of Pakistan held that abusive language used against the Court, in a calculated manner by the accused, cannot be excused under the protection provided by the right to freedom of speech under Article 19. The Court held that a perusal of the speech showed that the contemnor's speech had no valid or fair criticism of the judgement of the Court but only aimed to bring the reputation of the Court into disrepute without any factual backing, thus the speech was not protected under Article 19 and was liable for contempt.

**Defence of criticism before relevant authority**

Under Section 9(1) of the Contempt of Court Ordinance 2003 any personalized criticism of a judge by the accused made in a complaint to the concerned authorities as highlighted under Section 9(1)(a) to 9(1)(f), which include to the Federal Government, Provincial Government, Chief Justice of the concerned High Court or the superior judge of the concerned Court, is not punishable under Judicial Contempt, as long as the averments made in the complaint are truthful and made in temperate language. Under Section 9(2) the concerned judge has the right to seek relief through criminal or civil defamation laws.

**Defence of innocent publication**

Under Section 15 of the Contempt of Court Ordinance 2003, no person is liable for contempt of Court for publishing anything related to pending proceedings which prejudice the free and fair adjudication of the case, if the accused can show that he was not aware of the pendency of the proceedings at the time of publication.

**Defence of Protected Statements**

As per Section 16 of the Contempt of Court Ordinance 2003, statements made by an appellate Court in an order or as an observation in legal proceedings; or by an authority in their official capacity; or by an person against a judge in any matter not connected with his judicial functions, as long as the averment against the judge is true and not made with the intent to scandalize the Court, are liable for contempt under the law.

**Defence of alleged contempt not meeting threshold of substantial detriment**

As per Section 18(1) of the Contempt of Court Ordinance, 2003 all conduct and statements made

by an accused has to meet the threshold of having caused substantial detriment to the free and fair adjudication of disputes by Court and the reputation of the Court and judges to be actionable as contempt of Court under the law.

**Appeals**

Under Section 19(1) of the Contempt of Court Ordinance 2003, appeals under the law against original orders are arranged. Under Section 19(2) the Court may suspend the original order being challenged in appeal, provided all appeals must be filed within 30 days as per Section 19(3).

In **Shahid Orakzai v. Mian Muhammad Nawaz Sharif, the Prime Minister of Pakistan** [2016 PCrLJ 1017] the Peshawar High Court held that contempt proceedings are independent proceedings and fall within the discretion of the Court. Any person who brings forth information of contempt committed by the accused loses the locus standi to remain involved in the adjudication of the same unless he is proceeded against for furnishing false information to the Court on the alleged act of contempt. Thus, if the Court acquits the accused of contempt charges, the person who has brought the information to the Court cannot appeal the acquittal of the accused under Section 19.

## ANALYSIS

The jurisdiction of the Courts of law under Article 204 and the Contempt of Court Ordinance 2003 is one of the most significant restrictions on the freedom of speech to arise in Pakistan in recent years. As the role of the Courts increased after the Lawyers Movement against the a dictatorial regime, a new, more independent judiciary was born after the crisis, which quickly moved to cement itself as a powerful institution.

However, very quickly, in exercise of this new found independence, the Courts were found locking horns with under institutional players, especially the politicians and the media. As the clash came to a head, the political government began non-implementation of Court orders and making statements against the Courts on the national media.

This situation gave rise to the use of contempt jurisdiction of the Supreme Court and the High Courts of Pakistan, which is provided under the Constitution under Article 204, as a sword as well as a shield. Greatly utilizing suo moto notice, Courts in Pakistan greatly expanded contempt jurisdiction, especially Judicial Contempt which protects judges from scandalization of the Court and the judges, which was sparingly used before 2007, to not only begin implementation of their orders but also to convict government functionaries and politicians for non-compliance.

This expansive exercise of contempt jurisdiction began with Suo Moto Case No. 1 of 2007 [PLD 2007 SC 688] in which a sitting Prime Minister of Pakistan was convicted for contempt for refusing to implement Court orders, leading to his disqualification from the National Assembly and culminated in many sitting Ministers of the government being convicted and disqualified, in **Suo Moto Contempt Proceeding initiated against Mr. Daniyal Aziz, Federal Minister, on account of derogatory and contemptuous speeches/statements in respect of this Hon'ble Court telecast by different TV channels** [PLD 2018 SC 738] **and Suo Moto Contempt**

**Proceedings initiated against Talal Chaudhry, State Minister, on account of derogatory and contemptuous speeches/statements at public gathering in respect of this Hon'ble Court telecasted by different TV Channels** [PLD 2018 SC 773], for making scandalous attacks and threats to the judiciary following a judgement of the Supreme Court which disqualified another sitting Prime Minister for allegations of corruption and lying.

However, this expanded and aggressive use of contempt jurisdiction by the Superior Courts of Pakistan has faced much criticism for its discretionary and inconsistent use especially in the cases of contempt before the Supreme Court of Pakistan. Many terms in Article 204 and Contempt of Court Ordinance 2003 are ambiguous, vague and completely left for the Courts to apply and define as per the whims of the judges sitting on the bench.

Examples of this include the use of the Defence of Apology, where in some cases the Supreme Court relies on judicial restraint to forgive contemnors for contempt and in others, despite receiving an apology, the Court continues to punish the accused. The standards set for the defence of apology set by the Supreme Court of Pakistan in **Suo Moto Case No. 4 of 2010** [PLD 2012 SC 533] are regularly flouted by the Court itself when it accepts an apology or rejects it.

Another example, is the defence of substantial detriment caused by the contemptuous act. A mandatory requirement which needs to be fulfilled, under the defence of substantial detriment the accused must be acquitted from the charge of contempt unless it is proven that the contemptuous act had a severe detrimental effect on the free and fair administration of justice by the Courts.

However in **Suo Moto Case No. 4 of 2010** [PLD 2012 SC 533] the Supreme Court of Pakistan has watered down this defence by holding that the substantial detriment caused by a contemptuous act is purely within the discretion of the Court against whom the contempt is committed and no evidence needs to be recorded or can be relied upon by the accused to prove that the alleged contemptuous act has not been substantially detrimental to the free and fair administration of justice by the Superior Courts.

Given that contempt is a criminal charge and is a very extreme restriction on the right of freedom of speech and expression - as contemptuous statements are usually arising from commentary made upon the administration of justice by the Courts of law or the impartiality of judges on the bench which is a highly protected form of free speech since it is made in the public interest - the elements of contempt, the defences available and the discretion available to Superior Courts when establishing contempt has been committed, accepting a defence and punishing an accused all needs to be clearly and well defined within the law so the restriction is 'a reasonable restriction' on free speech and not an overbroad one, as is required by Article 19 of the Constitution.

## RECOMMENDATIONS

1. Parliament should introduce amendments to the Contempt of Court Ordinance 2003, not to restrict the contempt jurisdiction of Superior Courts as was attempted by the Contempt of Court Act 2012, which was struck down, but by regulating it by providing clear definitions and elements of the offense so the subjective discretion of judges hearing contempt cases is lessened.

2. The Parliament of Pakistan must also pass amendments to the Contempt of Court Ordinance 2003 by providing a greater degree of protection to political speech and the media from contempt jurisdiction. While the Parliament may not reduce or finish the jurisdiction of the Courts to hear contempt cases arising out of political speeches and media stories, it can provide greater safeguards and checks and balances to ensure the freezing effect of Contempt jurisdiction is reduced.

3. The Supreme Court of Pakistan should pass judgements clearly delineating rules, tests and other forms of oversight so as to ensure that the jurisprudence on the offense of Contempt of Court in Pakistan is made clear and unambiguous. The Apex Court should focus greatly on reducing open ended discretion of Courts when hearing contempt cases and structure that discretion in a transparent and clear manner so that it can be utilized evenly and fairly.

4. The Supreme Court of Pakistan should pass judgements on the Right to Free Speech under Article 19 in relation to the offense of Contempt of Court, in an attempt to balance the two rights and provide adequate safeguards to protected speech such as political speech and media reporting so that Contempt jurisdiction is not an overbroad restriction which freezes free speech beyond what is required for the free and fair administration of justice.

# Chapter 7
# PREVENTION OF ELECTRONIC CRIMES ACT, 2016

## INTRODUCTION

The Prevention of Electronic Crimes Act, 2016 (PECA) is a recent law promulgated by the Parliament of Pakistan to curb online criminal activities, which were reportedly not being countered effectively by the police services due to the novelty of the internet and legislative gaps in the existing criminal laws.

Made amid severe criticism by civil rights activists, NGOs, and some opposition parties, PECA was considered by many to be a tool that would be used by the government to control the internet in Pakistan. While the complaints and criticisms succeeded in watering down the scope and extent of PECA from the initial draft, it still passed as a severely problematic law that leaves too much power in the hands of the executive, threatening online free speech in Pakistan.

The law is very extensive: it criminalizes a very wide range of online behaviors, ranging from hacking and electronic fraud to child pornography and spoofing, while also providing for the novel procedural rules to investigate and prosecute these offenses. In relation to the right to freedom of speech the most important offenses are contained in Section 9, Section 10, Section 11, Section 20, Section 21, Section 22 and Section 26 as they criminalize certain forms of online speech and expression directly. Under Section 20(2), 21(2), and 22(2) any aggrieved person or any guardian of a minor can also request for the removal, destruction, or blocking of the defamatory and humiliating online content.

Finally, Section 37 is also of massive importance which allows an agency of the Federal Government, the statutory regulator of internet service providers in Pakistan - the Pakistan Telecommunication Authority (PTA) created under Pakistan Telecommunication (Re-Organization) Act, 1996 - the power to block any content it deems to be unlawful or restricted.

**9. Glorification of an offense**

*(1) Whoever prepares or disseminates information, through any information system or device, with the intent to glorify an offence relating to terrorism, or any person convicted of a crime relating to terrorism, or activities of proscribed organizations or individuals or groups shall be punished with imprisonment for a term which may extend to seven years or with fine which may extend to ten million rupees or with both.*

**Explanation -** For the purposes of this section "glorification" includes the depiction of any form of praise or celebration in a desirable manner.

**10. Cyber-terrorism**

*Whoever commits or threatens to commit any of the offences under sections 6, 7, 8 or 9, where the commission or threat is with the intent to,*

*(a) coerce, intimidate, create a sense of fear, panic or insecurity in 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; or*

*(b) advance inter-faith, sectarian or ethnic hatred; or*

*(c) advance the objectives of organizations or individuals or groups proscribed under the law, shall be punished with imprisonment of either description for a term which may extend to fourteen years or with fine which may extend to fifty million rupees or with both.*

In **Muhammad Azam Davi v. the State** [2017 PCrLJ 1715] the Balochistan High Court held that the dissemination of sensitive information relating to the Balochistan Provincial Assembly by the accused would not fall within the ambit of Cyber-terrorism as per Section 10 of PECA unless it could be proven the accused released the data with the intent to 'coerce, intimidate, create a sense of fear, panic or insecurity in the government or public' and not out of personal animus.

**11. Hate Speech**

*Whoever prepares or disseminates information, through any information system or device, that advances or is likely to advance interfaith, sectarian or racial hatred, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.*

In **Suo Moto action regarding Islamabad Rawalpindi Sit-in/Dharna (Suo Moto Case No. 7 of 2017)** [PLD 2019 SC 318] the Supreme Court of Pakistan expanded the definition of offense of hate speech under Section 11 to include fatwas (religious edicts) made online which may put any person in harm's way and the spreading of messages using online means which incite or advocate the commission of any offense under the law.

**20. Offences against dignity of a natural person.**

*(1) Whoever intentionally and publicly exhibits or displays or transmits any information through any information system, which he knows to be false, and intimidates or harms the reputation or privacy of a natural person, shall be punished with imprisonment for a term which may extend to three years or with fine which may extend to one million rupees or with both:*

*Provided that nothing under this subsection shall apply to anything aired by a broadcast media or distribution service licensed under the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (XIII of 2002).*

*(2) Any aggrieved person or his guardian, where such person is a minor, may apply to the Authority for removal, destruction of or blocking access to such information referred to in sub-section (1) and the Authority on receipt of such application, shall forthwith pass such orders as deemed reasonable in the circumstances including an order for removal, destruction, preventing transmission of or blocking access to such information and the Authority may also direct any of its licensees to secure such information including traffic data.*

In **Muhammad Azam Davi v. the State** [2017 PCrLJ 1715], a case involving the dissemination of sensitive information which imputed the reputation of the Balochistan Provincial Assembly, the Balochistan High Court held that no question in relation to the harm of dignity of a natural person was raised and thus the offense was not attracted.

**21. Offences against modesty of a natural person and minor.**

*(1) Whoever intentionally and publicly exhibits or displays or transmits any information which,---*

*(a) superimposes a photograph of the face of a natural person over any sexually explicit image or video; or*

*(b) includes a photograph or a video of a natural person in sexually explicit conduct; or*

*(c) intimidates a natural person with any sexual act, or any sexually explicit image or video of a natural person; or*

*(d) cultivates, entices or induces a natural person to engage in a sexually explicit act, through an information system to harm a natural person or his reputation, or to take revenge, or to create hatred or to blackmail, shall be punished with imprisonment for a term which may extend to five years or with fine which may extend to five million rupees or with both.*

*(2) Whoever commits an offence under subsection (1) with respect to a minor shall be punished with imprisonment for a term which may extend to seven years and with fine which may extend to five million rupees:---*
*Provided that in case of a person who has been previously convicted of an offence under sub-section (1) with respect to a minor shall be punished with imprisonment for a term of ten years and with fine.*

*(3) Any aggrieved person or his guardian, where such person is a minor, may apply to the Authority for removal, destruction of or blocking access to such information referred to in sub-section (1) and the Authority, on receipt of such application, shall forthwith pass such orders as deemed reasonable in the circumstances including an order for removal, destruction, preventing transmission of or blocking access to such information and the Authority may also direct any of its licensees to secure such information including traffic data.*

In **Farhan Kamrani v. the State** [2018 YLR 329], the High Court of Sindh delineated the difference between offenses under Section 20 and Section 21 of PECA; highlighting the use of sexually explicit material to humiliate and defame a natural person to fall within the ambit of the offense defined in Section 21.

In **Junaid Arshad v. the State** [2018 PCrLJ 739] in a case involving a husband creating a fake profile of the complainant, his wife, on Facebook to share her sexually explicit photographs with another co-accused, the Lahore High Court held that, in cases under the PECA, digital forensic evidence would be given greater credence unless it can be rebutted by the accused with reasonable counter-evidence.

In **Muhammad Ashraf v. the State** [2018 PCrLJ 1667] in a case involving the release of sexually explicit images of the complainant by the accused through a fake Facebook account which was traced back to him, the Lahore High Court held that a complainant's consensual intimate or sexual relationship with the accused in the past cannot be argued as a valid defense to the offense.

It should also be noted that if the complainant is a minor, the punishment would be imprisonment for up to a term of 7 years or a fine up to Rs. 5 million or both.

22. Child pornography.
*(1) Whoever intentionally produces, offers or makes available, distributes or transmits through an information system or procures for himself or for another person or without lawful justification possesses material in an information system, that visually depicts,---*

*(a) a minor engaged in sexually explicit conduct;*

*(b) a person appearing to be a minor engaged in sexually explicit conduct; or*

*(c) realistic images representing a minor engaged in sexually explicit conduct; or*

*(d) discloses the identity of the minor,*
*shall be punished with imprisonment for a term which may extend to seven years, or with fine which may extend to five million rupees or with both.*

**Spoofing**
*(1) Whoever with dishonest intention establishes a website or sends any information with a counterfeit source intended to be believed by the recipient or visitor of the website, to be an authentic source commits spoofing.*

*(2) Whoever commits spoofing shall be punished with imprisonment for a term which may extend to three years or with fine which may extend to five hundred thousand rupees or with both.*
*Section 37. Unlawful on-line content.*

*(1) The Authority shall have the power to remove or block or issue directions for removal or blocking of access to an information through any information system if it considers it necessary in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, public order, decency or morality, or in relation to contempt of court or commission of or incitement to an offence under this Act.*

*(2) The Authority shall, with the approval of the Federal Government, prescribe rules providing for, among other matters, safeguards, transparent process and effective oversight mechanism for exercise of powers under subsection (1).*

*(3) Until such rules are prescribed under sub-section (2), the Authority shall exercise its powers under this Act or any other law for the time being in force in accordance with the directions issued by the Federal Government not inconsistent with the provisions of this Act.*

*(4) Any person aggrieved from any order passed by the Authority under sub-section (1), may file an application with the Authority for review of the order within thirty days from the date of passing of the order.*

*(5) An appeal against the decision of the Authority in review shall lie before the High Court within thirty days of the order of the Authority in review.*
*In two unreported but very important cases of the Islamabad High Court, the powers of PTA under Section 37 have been clarified.*

Firstly in Bolo Bhi v. Federation of Pakistan [W.P No. 4994/2014] decided on 25-05-2018 the Islamabad High Court held that the directions by the Federal Government under Section 37(3) to PTA for the exercise of their powers under Section 37 are a transitory arrangement and these directions cannot be considered to be binding in such a manner that they undermine the autonomy of the PTA and their regulatory power to independently decide and block online content under Section 37(1).

Secondly in **Awami Workers Party v. Federation of Pakistan** [W.P No. 634/2019] decided on

12-09-2019, the Islamabad High Court, while hearing a case on the illegal blocking of a political party's website by the PTA under Section 37 of PECA, held that PTA must provide parties a notice and an opportunity of hearing before blocking their online content under their regulatory powers. Additionally the court also held that the Federal Government was bound to promulgate the rules mentioned in Section 37(2) of PECA and provided them a 3 months' time period within which the rules must have been promulgated. Unfortunately the Federal Government and PTA have still not complied with the judgment and notified the rules, thus they are now facing contempt of court charges for their failure to do so.

**Investigation Agency**

It is important to note that as per Section 29 the Federal Government must create or designate a law enforcement agency for the investigation and prosecution of offenses under this act. Currently a law enforcement agency made prior to the promulgation of this act, the Federal Investigation Agency (FIA) which was created by Federal Investigation Agency Act, 1974 has been empowered by the Federal Government to undertake this charge. Under Section 30, joint investigation teams with officers of other law enforcement agencies can be constituted by the Federal Government to investigate and prosecute offenses under this act.

**Prior restraint**

Under Section 48 of PECA, the Federal Government through the PTA can issue binding directions to internet service providers and owners of designated information systems for the prevention of any offense found within the law.

Any unlicensed internet service provider or owner of a designated information system found not to be following these directions will be liable to a fine of up to Rs. 10 million for the first time and an imprisonment of up to six months with or without fine upon any subsequent conviction. Any licensed provider shall be liable to penalties for violating the terms and conditions of the license provided by the PTA.

**Trial and Appellate Courts**

Under Section 44, the Federal Government shall designate judicial officers with the binding consultation of the Chief Justice of a High Court of the province to try offenses under the PECA. These judges will also be trained in computer sciences, electronic forensics, and other topics that are necessary to assist them in trying these cases competently.

Under Section 47 the appellate court which shall hear appeals against final judgments and orders of the court shall be the High Court if the trial court was the Sessions Court or the Sessions Court if the trial court was the Magistrate's court.

**Bail and Cognizance of offenses**

As per Section 43, all offenses apart from Section 10 (cyber-terrorism), Section 21 (offenses against modesty of natural or minor) and Section 22 are non-cognizable (the investigation agency cannot

by itself take notice of the offense and start the investigation as a complaint is required to be filed for the investigation to commence), bailable (bail is to granted by the court as of right) and compoundable (the offender can be forgiven by the complainant/victim and the investigation/prosecution will be dropped).

In **Muhammad Hayat Khan v. the State** [2019 PCrLJ 472] the Islamabad High Court while hearing a case of a person charged with the glorification of an offense under Section 9 and cyberterrorism under Section 10 of PECA, granted bail to the accused. The court held that if a person is accused of committing the offense of cyber-terrorism under Section 10 of PECA for the act of glorifying an offense which is criminalised under Section 9, then for the purposes of bail the non-bailability of Section 10 shall not disentitle the accused from bail. This is because the courts in bail cases will refer to the lowest possible punishment under the law and grant bail accordingly.
This is an important case since all of the offenses which make the actus rea element of Section 10, i.e such as Section 9 are lesser offenses and are therefore bailable. Thus, notwithstanding the non-bailability of Section 10, the courts will grant bail to any person accused of committing cyber-terrorism under Section 10 of PECA.

Offenses under Section 10, Section 21 and Section 22 or their abetment are cognizable, non-bailable and non-compoundable offenses.

Non-bailable offenses are those offenses in which the accused does not have a right to bail but bail is generally granted as a concession. However, if the maximum punishment of the offense is imprisonment of 10 years or above, then the offense would be hit with the prohibitory clause of Section 497 of the Code of Criminal of Procedure, 1898 which bars the court from granting bail.

In **Usman Bin Mehmood v. the State** [2018 PCrLJ 408] and **Bahlool Khan v. the State** [2019 PCrLJ 769] both the Lahore High Court and Balochistan High Court have held that regardless of the fact that Section 21 of PECA is not hit by the bar contained in the prohibitory clause, even then, bail will be refused by the Court because of heinous nature of the offense.

**Oversight mechanisms**

As per Section 40, the Federal Government is also bound to create an autonomous forensic laboratory for independent analysis of electronic evidence collected by the investigation agency for the prosecution of offenses under this act, either in assistance to the investigation agency or to provide its expert opinion to the court during the prosecution of the offense. Such an agency has not been created as of yet.

Another oversight mechanism within the law can be found in Section 53 which binds the investigation agency created or designated under Section 29 to provide half-yearly reports to both houses of Pakistan's Parliament with reports of their activities under this law. Unfortunately this is poorly enforced with many instances of the FIA failing to provide such reports to Parliament in a timely manner.

## ANALYSIS

PECA is a thoroughly problematic law. While promulgated for the noble intentions of addressing online crimes, it is sadly more greatly geared towards the control of citizen's freedom of online speech and is constantly abused by the State to censor online content and to persecute journalists and dissenters.

The law is imprecise and there seems to be an almost deliberate vagueness within its criminal provisions. Glorification of an offense under Section 9 is an excellent example, which criminalizes any online speech which celebrates terrorists or terrorism, however, an honest assessment, whether academic and journalistic, on a terrorist or how an act of terrorism would count as glorification is not defined. People might even agree with the political goals of certain terrorist organizations but not with the terror tactics used; would this still make them liable for punishment under the offense?

Another problem is the offense of Spoofing under Section 26 of PECA which criminalizes any attempt by a person which involves setting up counterfeit websites or sending emails while pretending to be the authentic source. However, the mens rea element of the offense has not been clearly defined, would innocent online pranks also be charged under this offense or is it reserved only when someone spoofs another with the intent to defraud them in a monetary manner.

The second problem of PECA is its potential to be used as a tool to silence criticism by the State. In May 2019 the National Assembly of Pakistan's Standing Committee on Human Rights, after recognizing this problem, asked the National Commission of Human Rights (NCHR), an independent statutory national human rights institution in Pakistan, to recommend amendments in PECA to address the abuse of the law against journalists and citizens.

However, rather than look towards diluting the law or ensuring safeguards against its abuse, the Federal Government notified stringent rules recently titled Citizens Protection (Against Online Harm) Rules[20] in early 2020 for the expedited blocking of online content hosted on social media websites. These rules even further ahead of PECA and created a government-controlled entity called the National Coordinator and forced all social media companies operating in Pakistan to register with the PTA, compulsorily remove content deemed illegal by Pakistani authorities and move their servers to Pakistan and provide unrestricted access to their user information data to the Pakistani state. After much hue and cry by civil activists, the notification of these rules was withdrawn and they are currently under review.

This problem is compounded by a lack of reasonability and proportionality when blocking online content or criminalizing online speech, little or no regard is given to the freezing effect such regressive moves have and how it harms the net neutrality of the country. The Honourable Courts are also guilty of this, as in **Mohammad Ayoub v. Federation of Pakistan** [2018 PCrLJ 1133] the Lahore High Court, in a public interest petition filed against the Federal Government for failing to

20 http://digitalrightsmonitor.pk/wp-content/uploads/2020/02/citizens-protection-rules-00.pdf

take action against online blasphemous material, ordered the legislature to consider amendments within PECA which allow PTA to block the entire information system (a social media site, online portal etc.) if the illegal online content uploaded on it cannot be directly blocked by PTA due to technical reasons and the information system does not comply with the PTA's request.

The last major problem found within the PECA is that it embodies many characteristics that make it a law ripe for a constitutional challenge.

First, the PECA criminalizes certain online conduct, and then it provides special procedures for the prosecution and trial of these offences before a specific forum and prescribes special sentences for these offences. However, many of the criminal offences provided by PECA are unconstitutional and liable to be struck down because they criminalize conduct which is already criminalized by other special criminal statutes.

Examples of this are the provisions on cyber-terrorism under Section 10 and online hate speech under Section 11 - these offences are already criminalized under the Anti-Terrorism Act, 1997, which provides its own specialized procedures, sentences, and forum for trial and conviction. Another example is the offense against dignity of natural persons under Section 20 which is basically the offense of criminal defamation found in Section 499 in the Pakistan Penal Code, 1860 – again the offense of criminal defamation in the Pakistan Penal Code, 1860 is also actionable by the procedure and forum provided for criminal defamation.

In **Syed Mushahid Shah v. Federal Investment Agency** [2017 SCMR 1218] the Supreme Court of Pakistan unanimously held that where two criminal statutes enjoy concurrent jurisdiction over the accused for criminalizing the same conduct and provide different forums, procedures, and punishments for the criminal act, then the new law is liable to be struck down as this is discriminatory and in violation of the accused person's right to be treated equally under the law as per Article 4 of the Constitution.

Secondly, as per Section 37 of PECA, the Pakistan Telecommunication Authority (PTA) has been empowered to receive complaints and independently determine if online content being complained about is liable to be removed, if *"it is necessary in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, public order, decency or morality, or in relation to contempt of court or commission of or incitement to an offence"*.

The subject headings under which PTA can block the content are copied directly from the reasonable restrictions to free speech allowed in Article 19 of the Constitution. However, Article 19 specifically says that these restrictions should be made by law as these restrictions are not self-executing. Thus, subsequent legislation is needed to give effect to the restrictions contained in Article 19 and it is Parliament which is empowered to make law and while Parliament may allow other authorities to create sub-delegated legislation, it cannot excessively delegate its functions to the executive.

In **Pakistan Tobacco Company v. Government of NWFP** [PLD 2002 SC 460] the Supreme Court of Pakistan unanimously held that the legislature cannot delegate essential legislative functions to the executive, especially without providing guiding principles. Thus under the scheme

of the Constitution of Pakistan, 1973 the PTA, an unelected executive agency, cannot decide what content can be restricted 'in the interest of the glory of Islam' or 'for public order, decency and morality'- only Parliament can by making a law which provides for reasonable restrictions.

On the basis of these arguments, it is clear that most of PECA, especially Sections 10, 11, 20, and 37 are facially unconstitutional and should be struck down as so.

## RECOMMENDATIONS

1. Parliament should immediately bring about amendments in the offenses contained in Sections 9, 21, and 26 to insert more certainty in their language and introduce exceptions. Parliament should also repeal Section 10, 11, and 20 due to their overlap with other criminal laws. Finally, Parliament should repeal Section 37 or replace it with a new clause which clearly defines the criteria under which content can be blocked, makes considerations of proportionality and balancing mandatory upon the decision making authority before the decision and establish a transparent system through which such blocking of online content takes place.

2. Citizens & civil society should appeal to the Superior Courts of Pakistan to strike down Sections 9, 21, and 26 for being void due to vagueness and Sections 10, 11, and 20 due to their overlap with other criminal laws. The Superior Courts should also strike down Section 37 due to it being excessive delegated legislation which goes against the express provisions of Article 19 of the Constitution of Pakistan.

3. The Federal Government should notify rules under Section 37 which provide safeguards, oversight, and transparency to the exercise of PTA's powers under Section 37. A special focus should be given towards the necessity, reasonability, and proportionality in the blocking and restriction of content. Every order for blocking should be reasoned and based on competent criteria. PTA should also ensure that owners of websites and authors of online content are served notices before the blocking and a proper hearing is conducted.

# Chapter 8
# HATE SPEECH AND ANTI TERRORISM ACT, 1997

## INTRODUCTION

The Anti-Terrorism Act ("**ATA**") was promulgated on 17th August 1997. It not only defined the term "terrorism" but also created special anti-terrorism courts to try those charged with offences under the Act. However, a majority of the initial ATA was declared unconstitutional by the Supreme Court in **Mehram Ali and others vs. The Federation of Pakistan and others** (PLD 1998 SC 1445). This chapter reviews the law's implications on free speech and expression in Pakistan.

**Provisions relating to speech and expression in ATA:**

ATA not only gives a broad definition of terrorism, but also includes within its remit, restrictions to speech and expression. Section 11W of the Act states:

***11W. Printing, publishing, or disseminating any material to incite hatred or giving projection to any person convicted for a terrorist act or any proscribed organization or an organization placed under observation or anyone concerned in terrorism.***

*(1) A person commits an offence if he prints, publishes or disseminates any material, whether by audio or videocassettes or any form of data, storage devise, FM radio station or by any visible sign or by written photographic, electronic, digital, wall chalking or any other method or means of communication which glorifies terrorists or terrorist activities or incites religious, sectarian or ethnic hatred or gives projection to any person convicted for a terrorist act, or any person or organization concerned in terrorism or proscribed organization or an organization placed under observation:*

*Provided that a factual news report, made in good faith, shall not be construed to mean "projection" for the purposes of this section.*

*(2) Any person guilty of an offence under subsection (1) shall be punishable on conviction with imprisonment which may extend to five years and with fine.*

The terms, *"or any form of data, storage device, FM radio station or by any visible sign", "or means of communication", "glorifies terrorists or terrorist activities or"* were added through an Amendment Act in 2013. The punishment for this offence was also reviewed in 2005.

The ingredients of an offence under Section 11W essentially are:

- A person prints, publishes or disseminates any

- Whether by audio, video cassettes, any form of data, storage device, FM radio station or by any visible sign or by written photographic, electronic, digital, wall chalking or any other method or means of communication

It is often the Regulator itself that exercises such powers arbitrarily. Although its powers are limited by Article 19, the Regulator has often come under the pressure of external agencies while permitting content to be aired. A recent example of this is where the Pakistan Electronic Media Regulatory Authority cut distribution of a TV channel called "Geo News" after the arrest of its CEO[4]. This action was taken without affording any reasons to the TV channel. Presumably, there is nothing in law which permits such an action. Yet, the Regulator, which is so intrinsically tied to the Federal Government, exercises little independence on its own. Thus, any promises of free speech and expression by the judiciary are rendered illusory and impracticable.

It is ultimately to escape from this mis-regulation that there has been a glaring shift of news reporting from conventional means (electronic or print media) to social media which was until recently unregulated territory. However, as we have discussed above, today even social media has become the subject of excessive and unfettered regulation through inconsistent laws and judicial pronouncements. For example, in April, 2019, Shahzeb Jillani, an investigative reporter, was accused of "cyberterrorism" and making "defamatory remarks against the respected institutions of Pakistan."[5] Thus, indirect and/or excessive censorship has seeped across all media platforms in Pakistan, causing significant damage to freedom of the press.

One of the key cases in determining reasonable restrictions was **Pakistan Broadcasters Association and others vs. PEMRA and others** (PLD 2016 SC 692) wherein the Supreme Court of Pakistan considered the scope of reasonable restrictions that could be imposed on the practice of Article 19. It observed that it was not entirely possible to precisely define reasonableness. However, some factors that could be considered in determining whether the restriction on a fundamental right were reasonable were held to be as follows:

1. *The nature of the right infringed;*
2. *Duration and extent of the restriction;*
3. *The causes and circumstances prompting the restriction;*
4. *The manner as well as the purpose for which the restrictions are imposed are to be considered;*
5. *The extent of the malice sought to be prevented and/or remedied;*
6. *The disproportion of the restriction may also be examined in the context of reasonableness or otherwise of the imposition.*

In particular relation to speech and expression, reasonable restrictions were defined as follows:

04 Committee to Protect Journalists, 'Pakistan broadcast regulator cuts distribution of Geo News after CEO's arrest' < https://cpj.org/2020/03/pakistan-broadcast-regulator-cuts-distribution-of-.php> accessed 28th April 2020.

05 RadioFreeEurope/RadioLiberty, 'Tightening The Noose': Pakistani Journalists Turn To Social Networks As Mainstream Media Gagged' < https://www.rferl.org/a/tightening-the-noose-pakistani-journalists-turn-to-social-networks-as-mainstream-media-gagged/29934638.html> accessed 28th April 2020.

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practicing the Muslim faith, was introduced through the Anti-Islamic Activities of Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance in 1984.

The final offence relating to religion i.e. Section 295-C was included in the PPC in 1986[9]. Initially, Section 295-C included two alternate punishments i.e. life imprisonment or death. However, in Muhammad Ismail Qureshi vs. Pakistan (PLD 1991 Federal Shariat Court 10), the alternate punishment of life imprisonment under Section 295-C was removed by the Federal Shariat Court for being repugnant to Islamic injunctions. Today, the punishment for anyone guilty of an offence under Section 295-C is death alone. It is worthy to note that the Federal Shariat Court had also noted that Section 295-C be amended to include the same punishment for acts done or things said against other prophets as well.

## OFFENCES AGAINST RELIGION TODAY

**295-A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs:**

*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.*

**295-B. Defiling, etc., of Holy Qur'an:**

*Whoever willfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.*

**295-C. Use of derogatory remarks, etc., in respect of the Holy Prophet:**

*Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him), shall be punished with death, and shall also be liable to a fine.*

**298. Uttering words, etc., with deliberate intent to wound religious feelings:**

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

**298-B. Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places:**

09 Inserted through the Criminal Law (Amendment) Act No. III of 1986.

- Which glorifies terrorists or terrorist activities or

- Incites religious, sectarian or ethnic hatred

- Or gives projection to any person convicted for a terrorist act

- Or projects any person or organization concerned in terrorism or proscribed organization or an organization placed under observation

The proviso is that a factual news report, made in good faith, shall not be construed to mean "projection" for the purposes of this section.

**ATA: Legal Issues**

This provision is perhaps impossible to analyse without considering the use of the term "terrorism" and "terrorist acts".

A parliamentary debate from 13th August 1997 i.e. the date of the law's introduction, suggests that many parliamentarians were surprised by its contents. Former parliamentarian Mr. Syed Naveed Qamar observed that he became aware of the law once he entered the House. Yet, his observations form the basis of the general critique of ATA today:

*"This law is opened to such abuse. This law, it does not give any safeguard to the innocents. This law does not put any check on the corrupt policemen. This law does not keep a check on the corrupt administrator. Because, now he is almighty. Now he is all powerful or immediately action or immediately action to try and stifle crime and stifle terrorism."*

In 2020 in a judgment titled **Ghulam Hussain and others vs. The State and others**, a 7 member bench of the Supreme Court set out to clarify that perhaps the term "terrorism" was being used far too widely and was prone to abuse. It held:

*"Before parting with this judgment we may observe that the definition of 'terrorism' contained in section 6 of the Anti-Terrorism Act, 1997 as it stands at present is too wide and the same includes so many actions, designs and purposes which have no nexus with the generally recognized concept of what terrorism is."*

In light of the above, it can be seen that the definition of terrorism and terrorist activities, due to a broad definition, can include a plethora of activities that may not come within the definition as per the ATA. Thus it seems that Section 11W will also open up room for much abuse. For example, Person A publishes a blog relating to human rights violations by Punjabis against Pathans in a certain province. This can very well come within the definition of inciting ethnic hatred in the wake of an unregulated mechanism to decide what terrorist activities mean.

**Freedom of the Press**

The provision in Section 11W states that a factual news report, made in good faith, shall not be construed to mean projection of terrorism. However, despite this provision, Section 11W has been

used as a tool to curtail press freedom and reporting in the country. The **High Court Bar Association and others vs. The Government of Balochistan and others** (PLD 2013 Balochistan 75) is a testament to this.

Some of the High Court's interim orders curtailing press freedom through the use of Section 11W are noteworthy:

*"It is noted that some newspapers and electronic media in reporting the matter not only identifies the organization which claims responsibility for such attacks but also proceeds to propagate the views of such organizations. […] Section 11-W of the Anti-Terrorism Act, 1997 states that the printing, publishing or disseminating any material which instigates hatred or gives projection to any proscribed organization or an organization placed under observation or anyone concerned with terrorism is in itself an offense."*

*"We have been informed that the organization which claimed responsibility for carrying out the attack was the 'Lashkar-e-Jhangvi', which is a banned organization. Accordingly, the press and the media should not have printed any propaganda material of such organization as the same may constitute an offence under section 11-W of the Anti-Terrorism Act, 1997 as well as running foul of Article 19 of the Constitution of Pakistan. The press and the media are directed not to print or publish any propaganda of an organization that has been banned or in respect whereof an observation order has been passed, respectively under sections 11-B and 11-D of the Act."*

## ANALYSIS

The judgment in the High Court Bar Association discussed above seems to curtail the media's power to report terrorist activities as a whole or to censor it heavily while being aired. If there is any material that is often a part of a factual news report such as the statement of the banned outfit which inevitably also propagates its views, will that also be caught within Section 11W? If the media does not deploy language which itself incites violence or endorses the views of an organization, it must not be debarred under Section 11W or Article 19 from disseminating such information.

It is evident that the ATA itself is quite problematic. However, still, ATA is protected under Article 8 (3) (b) of the Constitution of Pakistan, 1973:

*8 (3) The provisions of this Article shall not apply to:-*

*(b) any of the (ii) other laws specified in Part I of the First Schedule;*

*and no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.*

Article 8 predominantly states that laws inconsistent with or in derogation of fundamental rights are to be considered void. However, it also saves the legislation protected under Part I of the First Schedule to the Constitution. Therefore, legislation contained in Part 1 will not be struck down by courts on the touchstone of fundamental rights.

Hence, individuals charged with offences under Section 11W of the Act will not presumably have the constitutional guarantee of free speech as a defence. One can argue that perhaps Article 19 of

the Constitution very much permits the restriction sought by this provision. After all, one of the restrictions imposed by law that Article 19 is subject to, is the commission of, or incitement to an offence.

However, as Mr. Naveed Qamar pointed out, the law itself is open to misuse, and often, courts find themselves with criminal cases where Section 11W has been included as an offence in the FIR, but there is little evidence about the commission of such an offence. In **Maulvi Ali Muhammad Hadi and another vs The State** (2014 PCrLJ 1349), the Gilgit Baltistan Chief Court was tasked to hear the case of the Petitioners who were convicted under Section 11EE ATA for distributing allegedly controversial booklets in Skardu and were additionally disturbing public tranquility and peace through their speeches. The Court, while quashing the Order and acquitting the accused, observed that these powers were vast in nature, but were exclusively vested with the Superintendent/DPO and that, *"provisions of law do not vest any power to a SDM (Sub-Divisional Magistrate) to bind down any person on the basis of simple allegations levelled by a low level police officer".*

Hence, the constitutional guarantee of free speech cannot be taken away from citizens through arbitrary applications of the law which wrongfully activate the restraints in Article 19. The restraints and the definitions upon which such restraints are based must be clarified as much as possible.

However, this is not to say that those outfits that incite hatred and violence against others on the basis of their religion, ethnicity or sect should be allowed this constitutional guarantee of speech. In the case of **Haris Bashir and others vs. The State** (2016 PCrLJ 746), a Divisional Bench of the Lahore High Court was tasked to hear the bail of a group of persons involved in the murder of a Christian couple burnt alive. The Court held that the speeches, which from the facts, showed that they incite violence against vulnerable individuals or groups, must be strictly regulated.

Another instance of this is the Balochistan **High Court's decision in the High Court Bar Association and others vs. The Government of Balochistan and others** (PLD 2013 Balochistan 75). In this case, the Balochistan High Court took suo motu notice of an incident where a terrorist outfit proscribed under the ATA, the Lashkar-e-Jhangvi had murdered several people belonging to the Hazara community. This matter was widely reported across the country along with the outfit's statements claiming responsibility for the attack. The High Court in its judgment observed the mediums for propagation of the outfit's ideologies which included media channels as well as wall-chalking: both of which come under 11W. In specific relation to the question of terrorists pressurizing the media to propagate their views, the Court observed:

*"Some media representatives are present today and state that they simply report the matter and it is for the news editor, chief editor and or the owners of their organization to print or publish any story. […] they are threatened on the phone that if the propaganda of such an organization is not printed they will come under attack themselves and as such out of fear they will publish such a report. We however do not consider the same to be a justification for violating the law and the Constitution of Pakistan and if anyone does so he will have to face the consequences provided in the law. It is also not expected that the media, which is stated to be the fourth pillar of the State, would undermine or weaken the integrity and the cohesion of the State and the people residing within it."*

*"We do not accept fear to justify propagating the views of banned organizations. If any threat is extended to media personnel they should immediately report the matter to the police, but under no circumstances a threat can be justified*

*to propagate the views of banned organizations."*

However, there is a distinction between factual news reports made in good faith and propaganda disseminated out of fear. It is not a novel fact that journalists are constantly at risk while reporting and without any adequate safeguards provided for their safety, it is inevitable that they may be pressurized to report certain views. Therefore, while the latter can presumably be caught under Section 11W, it must also be noted that journalists or media organizations must only be charged if they have violated this provision following adequate protections given to them by the State.

## RECOMMENDATIONS

**1.** The Parliament must repeal provisions relating to electronic crimes under Section 11W ATA since it creates a conflict with Sections 9, 10, and 12 of the Prevention of Electronic Crimes Act, 2016. Both provisions prohibit similar acts but provide different penalties. This conflict affects the rights of those being tried under either law and malpractices may result in the denial of a fair trial.

**2.** Define the terms "terrorist" and "terror activities" in light of the Supreme Court's judgment (*Ghulam Hussain*) so that parties are not vexed through Section 11W unless there is a clear violation which is discernible from the facts of each case.

**3.** Persons who commit hate speech wrongfully in the name of religion to glorify persons charged and convicted of terrorism under the law must also face criminal charges and liabilities.

**4.** Define the term "projection" to establish clear guidelines for permissible content. Distribute copies to PEMRA, Censor Boards and all other authorities regulating mediums for speech and expression. This allows organizations to practice prior restraint and will give them reasonable guidelines for content production. Any news reporting in relation to proscribed organizations must not be prohibited if it is not caught by the exhaustively defined term, 'projection'.

Section 4

# Sectoral & Other Laws

# Chapter 9
# THE MOTION PICTURES ORDINANCE, 1979

## INTRODUCTION

Promulgated in September 1979, the Motion Pictures Ordinance, 1979 (**"The Ordinance"**) regulates censorship of films publicly or privately exhibited at cinemas or through any other cinematographs. It repealed its predecessors i.e. the Cinematograph Act, 1918 and the Censorship of Films Act, 1963 but saved all actions taken under them. Furthermore, it was accompanied by the Censorship of Films Rules 1980. However, the Ordinance was later devolved to the provinces pursuant to the 18th Amendment to the Constitution. Each province now has its own laws and accompanying rules.

### The Censorship Board

No person can publicly or privately exhibit a film by a cinematograph unless it has been certified by a Censorship Board established under the Ordinance. Initially, a Central Board of Film Censors (**"CBFC"**) was created for reviewing films for certifications. However, pursuant to the 18th Amendment, this responsibility was devolved to provincial Censor Boards which were established in Sindh, Khyber Pakhtunkhwa and Punjab.

Yet the CBFC, under auspices of the Ministry of Information & Broadcasting, continues to play an influential role in film censorship in Pakistan. In early 2020 the government announced its decision to create a Federal Censor Board which would coordinate with provincial boards to create a "uniform film policy to propagate Islamic values and ideology" to revive the cinematic industry in Pakistan. To this effect, the Motion Pictures Ordinance (Amendment) Bill 2020 was introduced in the National Assembly which remains pending at the time of writing of this chapter.

It is evident that the Federal Censor Board is not novel. It can be argued that perhaps the government is only seeking to strengthen the existing CBFC i.e. by centralizing film censorship powers and essentially undoing the effects of the 18th Amendment.

**Punjab:**
Enacted through the Punjab Motion Pictures (Amendment) Act 2012, the Punjab Motion Pictures Ordinance 1979 mostly replicates the initial Ordinance and creates a Punjab Film Censor Board, constituted by the Provincial Government. Its supplementing Rules, the Punjab Censorship of Films Rules 2013 regulate the procedure of the Board and the manner in which films are certified. For example, it obligates members of the Censorship Board to provide a report to the Board on his views on the nature of exhibition the film is suitable for public exhibition. It also categorizes certificates of films in Rule 16 by affixing a particular mark to each nature of certification.

**Khyber Pakhtunkhwa:**
Enacted in March 2018, the Khyber Pakhtunkhwa Censorship of Motion Pictures (Films, CDs, Videos, Stage Dramas, and Shows) Act, 2018 also largely replicates the 1979 Ordinance. Yet the scope of the 2018 Act is much wider. It regulates a non-exhaustive list of mediums including CDs,

videos, stage dramas and shows, and their dissemination through cinematography, cable networks, electronic media, etc. None of these terms are defined and there is no clarity as to which other mediums and apparatuses fall within the domain of the 2018 Act.

This also evidently creates an overlap between the functions of the Pakistan Electronic Media Regulatory Authority (PEMRA) and the KP Censor Board. The content and mediums sought to be regulated under the Act are exclusively in PEMRA's domain. Therefore, it is unclear whether one body has overriding jurisdiction over the other, or whether this will give rise to parallel powers. This will also result in duplicity of censorship processes. For example, a film may be certified for public exhibition through electronic media by the KP Censor Board and provincial Government, but at a later stage may be censored by PEMRA. Although there is no case law on the 2018 Act, there is room for much confusion which can result in a mass curtailment of speech and expression in the KP province.

**Sindh**

The Sindh Motion Pictures Ordinance 2012, promulgated in February 2012 repealed the Sindh Motion Pictures Act 2011. It is broadly a replication of the 1979 Ordinance and is supplemented by the Sindh Censorship of Films Rules 2014.

**Powers of the Board**

The Board in censoring films is guided by Section 6 of the Ordinance which replicates the constraints contained in Article 19 of the Constitution. Therefore, those films or portions of films will not be certified which are prejudicial to, or violate, in the opinion of the Board;

- The Glory of Islam,
- Integrity, security or defense of Pakistan or any part thereof,
- Friendly relations with foreign States,
- Public order, decency or morality,
- The commission of, or incitement to an offence,

One restriction was applied by the Federal Shariat Court in **Islamuddin Asad vs. The Islamic Republic of Pakistan** (PLD 1983 FSC 140). It held that any form of "obscenity, nudity, dancing or wearing sexually attractive clothes" during Friday at *Jummah* time or late at night would be repugnant to Islamic injunctions. The decision was not challenged.

It is to be noted that Section 6 gives vast powers to the Board by allowing it to censor films as per its subjective opinions. Therefore, film censorship is often guided by arbitrariness.

In **Abdullah Malik v. Ministry of Information Broadcasting** (PLD 2017 Lahore 273), the Lahore High Court struck down a notification issued by the Ministry of Information, Broadcasting, and Heritage (the Ministry of Information) whereby the Urdu feature film "Maalik" was declared an uncertified film in Pakistan. The film was initially granted a censorship certificate on the basis of recommendations by the CBFC but was subsequently decertified by the Ministry of Information in the exercise of its powers under the Ordinance for containing a series of controversial dialogues which offended the country's image.

Recognizing artistic freedom of expression as a fundamental right, the Court noted that the film was a work of fiction, and the Ministry's reasons for decertifying it were not legally justified. It held that censorship was a delicate matter and had to be exercised by balancing the restraints in the Ordinance and the freedom of speech and expression afforded to Pakistani citizens. The court observed:

*"The principle underlying a free, democratic society is that every individual has a right to decide what art he or she wants or does not want.* ***A similar freedom to create art must also be made available to the artists. The choice, however, remains with the society for rejection of certain expressions of art forms that is controversial."***

The Court relied on the UN Special Rapporteur for Cultural Rights' report to ground the view that freedom of expression would also apply to situations where artists presented shocking or controversial views. It further observed that it was to be left to the audience to decide whether a form of artistic expression was controversial. Ultimately, the Court concluded that the Ministry's decision to decertify Maalik was untenable in law. It parted with the view that the Authority's reasoning for censoring films had to be proportionate to, and justifiable under the permissible restraints contained in the Ordinance and Article 19 of the Constitution.

**Certification by the Board**

Individuals ("Applicants") must apply to the Board for a certificate in respect of the medium in question and submit along with such application the medium's rerecording, print soundtracks of speech, songs, music and effect, and any other material as the Board may require.

Under Section 11, the Board, the Provincial Government or Federal Government, as the case may be, also has the broad power to examine any film at any point and review it for certification as and when they deem fit.

The Board may then, after examining a film or having it examined, can;

i. Sanction such medium for unrestricted public exhibition;

ii. Sanction for restricted public exhibition, the terms of which will be defined by the Board;

iii. If required, direct the applicant to carry out excisions in the film as the Board considers necessary before sanctioning such medium for unrestricted or restricted public exhibitions;

iv. Refuse to sanction the film for public exhibition.

In scenarios (i), (ii) and (iii), the Board will grant a certificate to the applicant of the appropriate category.

However, the Board's power to excise films has also been restricted by the Lahore High Court in **Messrs. Bahoo Films Corporation (Regd.) vs. The Islamic Republic of Pakistan and 2**

**others** (PLD 1981 Lahore 512) wherein the Lahore High Court held:

*"(...) by making a lengthy film, the producer takes more exhibition time and thus less number of shows. Consequently, the producer would not do that unless he sees some benefit in it. The contention by the learned Deputy Attorney-General .that the film is imported and that the exchequer would suffer cannot be convincing. The petitioner is not willingly or desiringly acting against the national interest. In fact it is his own interest which may be equally important to him. In this view of the matter, the respondents have no authority to limit the length of the film only on the question of propriety without a proper support of law."*

**Appeals**

If a person is dissatisfied with scenarios (ii), (iii) and (iv), they can appeal the Board's decision to the Provincial Government or Federal Government in terms of Section 7 of the Ordinance as the case may be. The respective Government's decision in this case will be final.

**Powers of the Government**

The Government has concurrent powers under Section 9 to call for the record of proceedings pending before or decided by the Board and it can then certify a film for public exhibition, un-certify it, or limit its exhibition whenever it considers necessary. This can be done without notice to the Applicant, or anyone who has been granted a certification for public exhibition.

Often, the Board's powers are trumped by the Government through the exercise of its powers under Section 6 read with Section 9. Films are certified by the Board but decertified or prohibited for public exhibition by the Government at a later stage. This results in a loss of legitimate expectations of filmmakers who extensively invest resources into the dissemination of their films before they are arbitrarily banned by the Government.

In **Messrs Baho Film Corporation vs. Islamic Republic of Pakistan and another** (PLD 1981 Lahore 295), the then Central Government decertified the film "Maula Jatt" after it had been initially certified. The Lahore High Court struck down the Notification as illegal and arbitrary stating that the Government's revisional powers for film censorship in Section 9 were not unfettered and did not empower it to lay down new terms for decertification of films.

**In case of violations**

As per Section 8, if the Board or District Coordination Officer have reason to believe that a film's exhibition is in violation of the law, they may either suspend the exhibition of such a film or forward a written report to a police officer who may seize the equipment projecting this film. The Board or the District Coordination Officer's orders can be forwarded to the respective Government which can either discharge the Order, or un-certify a film by publishing a notification in the official Gazette.

Furthermore, as per Section 18 (1), any person who;

- Exhibits an uncertified film
- Tampers with the certification granted to such film by altering the prescribed mark
- Alter a film after it has been certified in a particular manner
- Or in general violates any provision of the Ordinance

can be punished by imprisonment for up to three years or a fine up to Rs. 100,000/-, or both. In the event that a person continues to violate the law, the fine may be extended by Rs.10,000 for each day the offence continues. However, no court can take notice of the offences mentioned above except upon a complaint in writing made by the Board or the licensing authority or persons authorised by any of them.

Police officials have often used this provision to conduct raids to regulate the content people watch at home. In **Allah Bachaya vs. The State** (PLD 1990 Lahore 499) the Court held that while the exhibition of an objectionable film may be in contravention of the Ordinance, watching it was not. In another case titled **Shakil Asghar and another vs. SHO Naushera, District Khushab and 2 others** (2000 YLR 3016) an FIR was registered against the Petitioners after a raiding party caught them watching a blue film at a Baithak in their village. The Lahore High Court quashed the FIR noting:

*"Thus, the raid in issue was conducted clearly in violation of the mandatory provisions of […] section 8 of the Motion Pictures Ordinance, 1979. Although the Fundamental Right guaranteed by Article 14 of the Constitution subjects the right of privacy to law but the law contained in the Motion Pictures Ordinance, 1979 clearly bridles the exercise of jurisdiction by the police in many ways. Any transgression of the limits prescribed by the law regarding a raid in this regard would surely be illegal in itself and, therefore, the eclipsing part of the Fundamental Right of privacy, guaranteed by Article 14 of the Constitution would in such a situation become inoperative. In some of the precedent cases mentioned above it has been categorically held that under the Islamic dispensation the activity of peeping toms or intruders of privacy of home are not to be encouraged. In some of the cases mentioned above peeping toms who had seen an alleged activity of commission of Zina had not been relied upon in support of such an allegation because their conduct was found to be offensive to Islamic social morality. If witnessing commission of Zina through such a method was not encouraged in such precedent cases then as alleged, witnessing an activity of watching a film about sexual intercourse through such a clandestine method is surely twice removed from permissibility or acceptability."*

## ANALYSIS

The present situation on film censorship has great implications on the freedom of speech and creative expression in Pakistan. This is triggered by an overlap between the powers of the multiple authorities established under the Ordinance i.e. between the Censor Boards and respective Governments and the provincial Boards and the CBFC. For KPK, there is an overlap between the Board, the provincial Government and PEMRA.

This invariably results in the misuse of power. An example of this is the case of **Ashir Azeem vs. The Federation of Pakistan and 8 others** (PLD 2017 Kar. 1). The Sindh High Court struck down the Federal Government's notification decertifying a film titled "Maalik" after it had been certified by the CBFC. It held that the Federal Government could no longer decertify a film in

respect of a province after the 18th Amendment, especially once certified by a Censorship Board for public exhibition. However, this creates a new set of problems. The Applicant, after his film was decertified by the Federal Government, had to approach different courts to seek relief in each province. This also led to differing approaches taken by the Lahore High Court and Sindh High Court to the question of censorship and the restraints on speech and expression.

Similarly, the CBFC's overriding powers will not only make provincial boards redundant but will also add to the varying standards of film censorship. For example, films certified by the Punjab Censor Board may be censored according to one standard, whereas the CBFC may have different criteria. Thus there is no clear view on how, and to what extent, film censorship and speech and expression are to be reconciled.

## RECOMMENDATIONS

1. Clearly delineate the powers of the respective governments to avoid any loss of legitimate expectations of filmmakers whose films have been certified once. The Government must practice restraint in un-certifying a film once it has been certified by a Provincial Board. In view of the Lahore High Court's judgment (**Abdullah Malik vs. Ministry of Information Broadcasting**), the Government must only review a film if there are complaints by the audience relating to it. In such an event, the Government must give a fair opportunity of hearing to the filmmaker during such review and its orders to excise portions of a film or un-certify it, must be accompanied by detailed reasons in writing.

2. Repeal the 2018 Khyber Pakhtunkhwa Act to avoid any conflicts between authorities or make a PEMRA official an ex-officio member of the Provincial Censor Board to smoothen coordination between the bodies.

3. If censorship as per Section 6 is left to the subjective opinions of respective Boards, there will be varying degrees of censorship in each province. Therefore, the subjective interpretations of Section 6 of the Ordinance must be minimized as much as possible to avoid conflicts in interpretation. This can be done by introducing a centralized Code that must be drafted keeping artistic expression as a fundamental right as per Article 19 of the Constitution and restraints contained therein must be minimal and reasonable.

4. Define the terms public and private exhibition and accordingly amend Sections 8 and 18 of the Ordinance to clarify that films watched at homes, in view of Article 14 of the Constitution, do not come within the scope of the Ordinance. Furthermore, criminal complaints under Section 18 must be quashed by courts if they are not accompanied by a report in writing by the Board, the Licensing Authority or any person authorized by them.

# Chapter 10
# PEMRA ORDINANCE

## INTRODUCTION

The Pakistan Electronic Media Regulatory Authority Ordinance ("2002 Ordinance") was promulgated on 1st March 2002 and subsequently amended in 2007. Interestingly, this law also extends to Azad Kashmir by way of the Azad Jammu and Kashmir Council Electronic Media Regulatory Authority (Adaptation and Extension of Functions to Azad Kashmir) Act, 2005. According to its Preamble, the law was enacted with the view to:

i. Improve the standards of information, education and entertainment

ii. Enlarge the choice available to the people of Pakistan in the media for news, current affairs, religious knowledge, art, culture, science, technology, economic development, social sector concerns, music, sports, drama and other subjects of public and national interest

iii. Improving access of the people to mass media

iv. To ensure accountability, transparency and good governance by optimizing the free flow of information.

Its regulatory regime exclusively covers electronic media comprising not only distributors of content but also broadcasters. Therefore, it is able to extend its jurisdiction to TV channels, radio stations, and a host of other means through which content is disseminated. However, as we will see later, PEMRA, the regulatory authority established under it has been instrumental in curtailing free speech and expression in Pakistan. The regime has not only affected journalists and media personnel, but also broadcasters and distributors of content.

With regards to subordinate legislation, PEMRA's Rules were first enacted in 2002, but were later replaced by another set of Rules in 2009. Additionally supplementing the Ordinance are a host of rules and regulations which define the scope of this law:

i. PEMRA (Television Broadcast Station Operations) Regulations, 2012
ii. PEMRA (Radio Broadcast Station Operations) Regulations 2012
iii. PEMRA (Distribution Service Operations) Regulations 2011
iv. PEMRA (Council of Complaints) Rules 2010
v. PEMRA Television Audience Measurement/Rating Service Regulations 2018

## REGULATORY REGIME

### i. The Authority

PEMRA's duties have been clarified time and again and most recently, the Lahore High Court in the case of **Munir Ahmad vs. The Federation of Pakistan and others** (2018 CLC 530) held:

*"PEMRA as a public authority has overarching statutory duties and Ordinance, 2002 creates duties regarding the enforcement of fundamental rights conferred by the Constitution, socio-economic policies, freedom of expression and grant of licenses of various nature. These are all public sector duties and it would be unlawful for PEMRA to act in a way which is incompatible with the duties cast upon it under the Ordinance, 2002."*

Sections 3 and 4 establish an Authority (PEMRA) which is responsible for regulating the operation and establishment of all broadcast media and distribution services in Pakistan which are set up for international, national, provincial, district, local or special target audiences. PEMRA comprises a Chairman and twelve (12) members who are appointed by the President. One member shall be appointed by the Federal Government with five being citizens from different professional fields and the remaining five from the general public, with two members being women.

Of particular note is Section 8 (5) of the Ordinance. All orders, determinations, and decisions of the Authority will be taken in writing and shall identify the determination of the Chairman and each member separately. Actual practice has been quite different. Essentially, PEMRA often issues notices suspending licenses, issuing warnings or fines, and even revoking them, without issuing such individual determinations. Additionally, another requirement is the fulfillment of one-third quorum for a meeting requiring the Authority to make a decision. It was due to a failure to meet this quorum that the Supreme Court in **Hamid Mir and another vs. The Federation of Pakistan** (PLD 2013 Supreme Court 244) struck down the PEMRA (Content) Regulations 2012.

### ii. Bodies that PEMRA regulates

Therefore, PEMRA regulates both local and foreign media enterprises such as cable operators, TV channels, radio channels by providing licenses to these stations to operate. This power and the types of licenses to be issued are further elaborated in Sections 18 and 19. Therefore, no person is allowed to engage in broadcast media or distribution service except after obtaining a license from PEMRA, which will first hold public hearings in all provincial capitals of the provinces before granting or refusing a license for five, ten or fifteen years. PEMRA may also add to its list distribution or cable network services through different regulations. The Lahore High Court in **Independent Newspapers Corporation (Pvt.) Ltd. and others vs. The Federation of Pakistan and others** (PLD 2017 Lahore 289) while striking down a set of DTH Regulations issued by PEMRA, held that a wide choice of mediums was in fact, conducive and integral to not only PEMRA's objectives, but also to the freedom of speech and expression in Pakistan. Although this decision was overturned by the Supreme Court later in **Mag Entertainment (Pvt.) Ltd. and others vs. Independent Newspaper Corporation** (Pvt.) Ltd and others (2018 SCMR 1809), some portions of the judgment are noteworthy. The Bench observed:

*"The emphasis on choice and free flow of information is to encourage divergent viewpoints in the content so that the electronic media is representative of all segments of society, be it demographic, ethnic, gender or otherwise. At the same time the electronic media is required to present a variety of viewpoints and ideas maintaining plurality in its content. Hence the purpose of the Ordinance is to ensure diversity and plurality in content and information which is an integral part of the right to freedom of speech and expression."*

In addition to allowing media enterprise licenses to operate, PEMRA also oversees competition control. In essence, it disallows media enterprises from owning or operating more than one medium to prevent undue concentration of media ownership and views. It also reserves the right to outrightly deny licenses to individuals who are not citizens of Pakistan, or media houses that belong to foreign jurisdictions, etc. Additionally, it must be mentioned that it is not only PEMRA that often bans content by media enterprises. Recently, distributors have also been held liable for refusing to air content.

In **Suo Motu Case No. 7 of 2017** (PLD 2019 SC 318), the Supreme Court in, what is popularly called the Faizabad Dharna case observed PEMRA's duties and responsibilities in this respect further. It stated that the 2002 Ordinance replicated Article 19 of the Constitution and therefore broadcasts which encourage in essence hate speech could not be permitted. In view of this, the Tehreek-e-Labbaik Pakistan created hatred amongst people by abusing, threatening, and advocating violence. The Bench observed that channels that had in fact supported the TLP in its pursuits were not taken action against by PEMRA for violating the terms and conditions of their licenses. Therefore, PEMRA had abdicated its statutory duty, which was required under the law to fulfill. The Court also observed that PEMRA had failed to protect the legitimate rights and interests of its licensed broadcasters which were stopped/interrupted by local cable network owners for not supporting the TLP. In essence, PEMRA's duties are not restricted to regulation, but also extend to the protection of media enterprises' business interests.

In another case titled **Pakistan Broadcasters Association and others vs. PEMRA and others** (PLD 2016 SC 692), the Supreme Court considered the extent of media regulation afforded to PEMRA and the balance between the business interests of media enterprises and the freedom of speech and expression. In this case, the question before the Court was to what extent could media enterprises air advertisements to advance their business interests. In holding that use of airwaves and frequencies which were public property was subject to regulation and was not covered by Article 19 of the Constitution, the Bench observed that:

*"The concept of freedom of media is based on the premise that the widest possible dissemination of information from diverse and antagonistic sources is sine quo non to the welfare of the people.*

*However even the core free speech, which propagates social, political or economic ideas, promotes literature or human thought, though fully protected, is subject to reasonable restrictions contemplated under Article 19 of the Constitution. Whereas the advertisements/ commercial speech; where the object and purpose is restricted to mere promotion of sales of goods and services, or stimulation of purchase thereof, and where the acquisition of the article to be sold constitutes the only inducement to its viewer, does not receive the same protection as social or political speeches and is subject to higher degree of regulations than noncommercial speech."*

### iii. Prohibitions

In the event that licensees violate any terms and conditions of their licenses, the Ordinance or the Rules made therein, PEMRA has the following powers:

1. **Prohibiting** broadcast media or distribution service, by giving reasons in writing, from

broadcasting or rebroadcasting or distributing any programme or advertisement if PEMRA is of the opinion that such content is against the general restrictions laid down against speech and expression, or if it feels that such a practice is an abuse of media power harming the interests of others;

**2.** **Inspect and investigate** the premises of a broadcast media or distribution service;

**3.** **Impose a fine** on the licensee after showing reasonable opportunity to showcase for imposing fines up to one million rupees on a licensee who contravenes the provisions of the Ordinance;

**4.** **Vary conditions of a license** if it feels they are in the public interest (the question of which variation of license terms would be reasonable and in the public interest was considered in In **M/S Leo Communications (Pvt.) Ltd. etc. vs The Federation of Pakistan etc.,** (PLD 2017 Lahore 709))

**5.** **Suspend or revoke a license** by an order in writing if the licensee, inter alia;

- Fails to pay the license fee, annual renewal fee, or any other charges including fines

- The licensee has contravened provisions of the Ordinance. However, in case of revocation of a broadcast media's license, an opinion shall also be obtained from the Council of Complaints;

- The licensee has failed to comply with the conditions of the license;

A license cannot, except for in cases of public interest, be varied, suspended, or revoked unless reasonable notice to show cause and a personal hearing are afforded to the licensee.

Orders passed by the Authority may be appealed to the High Court by the licensee within thirty (30) days of the receipt of such decision. Equally, PEMRA has a duty to make such a decision public within twenty-four (24) hours of passing it. In addition, Sections 33 to 36 lay down offences punishable under the Ordinance and the penalties connected thereto. Often, many decisions of suspension against licensees are taken by the Authority without issuing them show-cause notices, or some channels are often simply harassed through the shifting of their channels in cable bouquets. The right of suspension gives unfettered and unbridled rights to PEMRA. It does not have to consult the Council of Complaints, which is presumably the only competent authority to determine whether aired content is offensive or against public sentiment. Furthermore, it allows PEMRA to adopt a linear approach by completely sidestepping the Council of Complaints. Not only does this result in an extensive abuse of power, but it also creates uncertainty for licensees operating under the law for not knowing which content PEMRA will deem lawful or not.

## ANALYSIS

PEMRA has been widely regarded as the "guardian" of the fundamental right of speech and expression under the Constitution. In **Shahid Masood vs the Federation of Pakistan** (2010

SCMR 1849), several channels were being blocked or being placed at the end of channel bouquets. In response to this, the Supreme Court of Pakistan affirmed that the weight attached to electronic media was inherently attached to Articles 19 and 19A of the Constitution and that it was PEMRA's foremost duty to protect it.

Section 20 lays down the terms and conditions of obtaining a license. These terms often coincide with the stipulations contained in the PEMRA Code of Conduct, and the Regulations mentioned above. However, it can be argued that some terms and conditions in subordinate legislation go beyond the conditions contained in the Ordinance. The Ordinance itself prescribes limits such as preserving the sovereignty, security, and integrity of Pakistan, protecting social, national and cultural values, prohibiting content that encourages violence, abiding by the Code of Conduct approved by the Authority and broadcasting programmes in the public interest, etc.

PEMRA has often used its vast powers to regulate speech and expression on the pretext of public importance. One such case was In **M/S Leo Communications (Pvt.) Ltd. etc. vs The Federation of Pakistan etc.,** (PLD 2017 Lahore 709) wherein PEMRA banned broadcasters from airing Indian content. It argued that this ban was imposed on the basis of reciprocity since India had also banned Pakistani content in the wake of the 2016 Uri attack. The Lahore High Court struck this notification down and asserted the parameters of public importance, the importance of free speech and expression, and the balance. It observed that airing Indian content was in fact, also the exercise of speech and expression:

*" "Expression" means the action of making known one's thoughts or feelings; the conveying of feeling in a work of art or in the performance of a piece of music; writings, speech, or actions that show a person's ideas, thoughts, emotions or opinions. Any dramatic work is, therefore, a symbol of speech and expression. The right to communicate and receive ideas, facts, knowledge, information, beliefs, theories, creative and emotive impulses by speech or by written word, theatre, dance, music, film, through a newspaper, magazine drama or book is an essential component of the protected right of freedom of speech and expression. The broadcast of ideas, culture, history, literature, opinions, thoughts, emotions and art through the medium of plays and dramas signifies freedom of speech and expression in a country. The arrangement and choice of dramas and plays to be broadcast by the petitioner company under the License, including Indian dramas, is a mark of freedom of speech and expression of the petitioner company."*

It held that the principle of reciprocity did not find mention as a restriction in the Constitution, PEMRA's own laws, or in the terms and conditions of the license issued to broadcasters; therefore it was not a restriction in the public interest. The Bench observed the importance of free speech and expression in the modern-day context and departed with the following directions to PEMRA:

*"Principle of reciprocity might be a consideration for the State in formulating its foreign policy but is not available to PEMRA which is to function strictly within the ambit of the law. PEMRA must neither be piqued by misplaced emotions nor swayed by extra-legal considerations. It matters less, how other countries or foreign private channels interpret their freedom of expression. PEMRA has to set its goals independently and define the freedom of speech and expression in light of the progressive ideals enshrined in our Constitution."*

Courts have often also made directions of their own to PEMRA, above and beyond the terms and conditions of licenses and the provisions of the Ordinance mandate.

In the **State vs. Mati Ullah Jan** (2018 PCrLJ 899), the Respondent, a journalist, rendered an unconditional apology for remarks he made on television. While accepting the apology, the Court expounded on the media's right to free speech and what restraints were applicable:

*"The Article [19] ibid does not provide license to any person to make personal attempts on an individual or an institution to disgrace his dignity and reputation. The Print and Electronic Media are in no way vested with unfettered liberty and impunity to publish and telecast any material which is prejudicial to the interest of any person or institute or harm or cause damage to reputation, honour and prestige of a person or an institution. Any broadcasting Agency is not free to telecast anything for promotion of the company or corporation or on the instruction of some quarter or according to its desire, but its freedom is subject to a moral code of conduct and such reasonable restrictions as may be legitimately imposed under the law in public interest and glory of Islam. […] Even in case of fair comments, the TV channels must make sure that the comments are based upon facts, true and certified."*

In another case titled **Independent Media Corporation (Pvt.) Ltd. vs. PEMRA** (PLD 2017 Sindh 209), the Appellant was fined for airing "vulgar and obscene" content. The Appellant argued that PEMRA could not have penalized it in any way since the Ordinance did not define the meaning of 'obscene' or 'vulgar'. The Bench however clarified this:

*"To me, while the standard of mental acceptability (or rejection) of society's widespread views regarding obscenity, vulgarity and indecency change with the passage of time, however laws always provide means to arrest such violations. Look at, for example Section 292 of the Penal Code where dissemination of obscene material is held a penal offence. Also of relevance is Section 2(b) of the Indecent Advertisements Prohibition Act, 1963 where the term 'indecent' is defined to include whatsoever may amount to any incentive to sensuality and excitement of impure thoughts in the mind of an ordinary man of normal temperament, and has the tendency to deprave and corrupt those whose minds are open to such immoral influence, and which is deemed to be detrimental to public morals and calculated to produce pernicious effect, in depraving and debauching the minds of persons.[…]."*

However, the Court determined that whether or not the content aired on television was vulgar or obscene was not one for the Court to decide but for the Council of Complaints.

In contrast, the Islamabad High Court in **ARY Media Communications vs. The Government of Pakistan and ors.** (PLD 2018 Islamabad 285) determined that it was PEMRA's duty to ensure that an Islamic way of life and "maintenance of moral standards" was encouraged through electronic media. Failure by broadcasters to promote such culture and values ought to be severely punished by PEMRA.

Similarly, in the case of **High Court Bar Association and others vs. The Government of Balochistan and others** (PLD 2013 Balochistan 75), the Balochistan High Court banned print and media broadcasters from airing content relating to terrorist organizations. It stated that the same would be tantamount to projecting and propagating their terrorist ideologies and was punishable under Section 11W of the Anti-Terrorism Act. It stated that all such material must be immediately banned from publication or airing. To this, interested parties such as journalists and media broadcasters responded that their life was under serious risk from these terrorists if they did not air such content. With regards to this, the Balochistan High Court held that where they faced such threats, they ought to report immediately to the Police and;

*"If the electronic media and the press publish propaganda reports out of fear and propagate the views of banned organizations they are not acting as good and responsible journalists, but as mouthpieces for malicious and vile propaganda."*

It is pertinent to mention that the same view, i.e. interviewing terrorists is tantamount to a violation of Section 11W of the Anti-Terrorism Act (as discussed in this guide) was taken in the case of **Independent Media Corporation (Pvt.) Ltd. vs. PEMRA** (2019 PCrLJ 262).

However, it is respectfully submitted that courts do not have, and should not exercise the power to morally regulate content. This not only places several bars on the media's right to speech and expression, but also gives PEMRA vast powers to decide cases beyond its authority under the statute. It naturally follows that citizens' freedom of speech and expression under Article 19 of the Constitution is not fettered by the arbitrary decisions of executive bodies or their conceptions of reasonable restrictions. Both bodies are duty-bound under the Constitution to curtail the freedom of speech expressly within the bounds of the seven restrictions placed under Article 19 itself. Any restraint beyond the ones mentioned therein are liable to be declared ultra vires.

## RECOMMENDATIONS

1. PEMRA's exercise of proceeding against media enterprises should be exclusively limited to when the Authority receives such complaints from the general public.

2. The right to suspend licenses without consulting the Council of Complaints must be revoked and no action may be taken by PEMRA against media enterprises unless recommendations to this effect are sought by the Council of Complaints.

3. In the attempt to protect free speech and expression, particularly plurality and divert of the press, PEMRA should refrain from adopting a strict censorship policy. It should empower In-House Monitoring Committees to review content, which should in the event of failure to comply with the terms and conditions of licenses, consult with PEMRA or the Council of Complaints before any action under Section 30 is taken.

4. In view of Section 8(5) of the Ordinance, no determination or decision can be issued by PEMRA without each member's individual determination appended to such determination. Courts should strike down all determinations which do not follow this requirement or where media enterprises have not been given a show-cause notice or personal hearing before adverse action is taken against them.

5. All media-related legislation must be immediately and comprehensively reviewed to remove existing contradictions and defects in the laws, and to update them according to contemporary needs. This will not only protect media enterprises' legitimate interests under the law, but will also protect them from the risk of being adversely acted against in view of contradictory legislation.

# Chapter 11
# WEST PAKISTAN PUBLIC MAINTENANCE ORDER, 1960

## INTRODUCTION

In December 1960, the Governor of West Pakistan, upon instructions of the President of Pakistan General Ayub Khan, who was also the Chief Martial Law Administrator at the time and the country's first military dictator, promulgated the West Pakistan Maintenance of Public Order Ordinance, 1960 (MPO). Inspired by colonial era security jurisprudence, The MPO was designed to override standard legal procedures and due process of law so as to allow the Martial Government to immediately restrict political protests, public speeches or publications which were deemed to pose a threat to the maintenance of public order.

Ordinances are temporary emergency legislation brought about by the executive. If Ordinances are not confirmed by the Parliament or relevant assembly, they lapse. However since this Ordinance came about when there was no Parliament due to the takeover by the military, this issue never arose. The Ordinance was then saved and provided legal legitimacy, retrospectively through Article 225 of the Constitution of Pakistan, 1962 i.e the 2nd Constitution of Pakistan.

When the current Constitution of Pakistan, 1973 was enforced, the MPO retained its legitimacy as an enforceable enactment under the power of the Government to adapt existing laws under Article 268. The law was thus adapted in accordance with the new Constitution and West Pakistan MPO continued to exist as a Federal law while the provinces adapted the law as per the distribution of powers between the Federal and Provincial Governments as envisioned by the new Constitution.

The most notable of these adaptions is the adaption of MPO by Punjab. Punjab adapted the MPO through the Punjab Laws (Adaptation) Order, 1974 (Pb AO 1 of 1974). After the passage of the 18th amendment, the Punjab Assembly has also greatly amended and added to the law. The new offenses and restrictions to free speech added by the Punjab Assembly can only be found in the Punjab version of the statute and not in the Federal enactment (which is followed by most of the other Provinces) thus those offenses and under amendments in the Punjab version only extend to the province of Punjab.

### Power to control publications

As per Section 6 of the MPO, the Federal Government or any authority authorized on its behalf has retained the power to control and restrict publications of any nature if they are deemed to be harmful to the maintenance of public order and restriction of the publication of the material is deemed necessary to avoid or stop any activity which leads to the disturbance to the public order. The Federal Government under Section 6(3) can seize and confiscate all publications which are restricted and take actions to ensure they are not published. As per the proviso to Section 6(3) the Federal Government before seizure and confiscation of the restricted material must first provide a notice to the publisher, editor or maker of the concerned publication and allow the affected party an opportunity to show cause against the order of seizure.

The powers to the Federal Government to restrict publication of materials under Section 6 of the MPO are very wide ranging. As per Section 6(1) subsections (a) to (f) the Federal Government can for any time period it desires and on any subject matter it deems necessary:

a. Restrict or prohibit publications on the subject matter;

b. Obligate a publisher to publish a material in their publication;

c. Obligate a publisher to deliver any material to be published to be submitted for scrutiny before publication of the same;

d. Prohibit the publication of any newspaper, leaflet, any other publication or use of a press completely;

e. Require journalists or informers on any news or information to make themselves available for questioning;

f. Require any document or information being relied upon by a publication to be submitted for scrutiny;

As per the Section 6 this power of the Federal Government is only restricted by three requirements:

I. As per Section 6(1) the directions made by the Federal Government under Section 6(1) subsections (a) to (f) can only be exercised through a written order with reasons explaining the reason for the exercise of the powers which must be addressed to the publisher, editor or maker of the concerned publication and must be delivered to him;

II. As per the Proviso to Section 6(1) all orders made by the Federal Government in exercise of their powers under Section 6(1)(a),(c) and (d) are only valid for 2 months after which the orders will expire;

III. As per Section 6(2) and Section 6(2-a) the Federal Government must allow the publisher or editor or maker of the publication who is affected by the restriction imposed by the order under Section 6(1) the opportunity to file a representation and can rescind, modify or alter the order under Section 6(1) based on the submissions in the representation.

In **Messrs Azad Papers v. Province of Sindh through Secretary Home Department** [PLD 1974 Karachi 81] a Division Bench of the Sindh High Court, in a case involving the prohibition of editing, printing, publishing and issue of a daily newspaper due to two articles published by it which were deemed by the Federal Government to 'cause hatred, contempt and invite dissatisfaction of the public towards the Government', the court held that an order restricting publications under Section 6(1) is effective for 2 months from the making of the order and not from the date of service to the other party. The court also held that affected parties need not avail the remedy of filing a representation and may approach the High Court directly if the order is patently illegal i.e not in accordance with provisions of the MPO.

It is important to note that as per the proviso to Section 6(2) the obligation of the Federal Government to disclose reasons to be provided for restricting the publication of any material or publication to the publisher, editor or maker of the publisher can be done away with if the Federal Government feels that disclosing the reasons would not be in the public interest.

As per Section 13 any person who violates the order made under this Section is liable for punishment of imprisonment for a term up to 3 years or with a fine or with both.

Power to restrict entry of any newspaper or publication

In a similar vein to the powers under Section 6, Under Section 7 of the MPO, the Federal Government or any authority authorized by it in this behalf, has also retained for itself the power to restrict the entry of any newspaper, publication, leaflet or any other material in any area it deems necessary, for any time period it deems necessary and on any subject matter it deems necessary, to prevent or combat any activity it deems prejudicial to the maintenance of public order in that area.

It is provided however that the Federal Government may only employ this restriction through a notification and this order prohibiting entry of restricted publication must be provided to the publisher, editor or maker of the publications. Additionally, similarly to Section 6, the publisher, editor or maker of the restricted publication may within 10 days of the order file a representation against the order and must be granted an opportunity of hearing. The Federal Government may, on the basis of the representation, rescind, modify or alter the order restricting entry of the publication. It is important to note that unlike the order under Section 6, the order made through notification in Section 7 will not have to be sent personally to the affected party in the forms of a summon. As per Section 9(3) orders by notification will be deemed to have come into knowledge of the affected party.

Similarly to Section 6, under Section 7(2) the Federal Government can seize and confiscate any restricted publication which enters the specified prohibited area under Section 7(1) provided that the order of seizure is communicated to the publisher, editor or maker of the restricted publication and the affected party is provided an opportunity to show cause against the order of seizure.

As per Section 13 any person who violates the order made under this Section is liable for punishment of imprisonment for a term up to 3 years or with a fine or with both.

Additionally, as per Section 17 any person found in possession of the restricted documents or documents against which a seizure order has been made either on his person or in premises owned or controlled by him or for the purposes of delivery (other than post) is liable to be punished with imprisonment for a term up to 1 year or with fine or with both. A person found in possession of restricted material under Section 17 can take the defense that he/she was unaware of the restricted nature of the material and will be acquitted if he/she can prove the same. Furthermore, anyone who allows the use of his postal address to allow the importation of restricted material under Section 17 so as to transport it to someone else is also liable to be punished with imprisonment for a term up to 1 year or with fine or with both.

It is important to note that under the Punjab version of the MPA, the Deputy Commissioner or any authorized public officer can exercise the powers under Section 7.

**Punishing dissemination of dangerous rumors**

Under Section 16 of the MPO, the Federal Government can also punish any person who through any speech, statement, rumor, report or expression creates a disturbance to the maintenance of public order or causes an activity prejudicial to public safety or causes harm or terror to any section of the public, with imprisonment of a term up to 3 years or with a fine or with both.

In **Maulvi Farid Ahmad v. the Government of West Pakistan** [PLD 1965 (W.P) Lahore 135] a 5 member bench of the Lahore High Court held that speeches which criticize the Federal Government or its policies, invite public dissatisfaction against the Federal Government for political and electoral purposes or even just provide political awareness to the public cannot be punished under Section 16 of the MPO. The court held that even if the language used against the State or the government is harsh or inappropriate, if the impugned speech is a peaceful demonstration or speech, it is protected free speech. In aid, the court held that the aim of the speaker has to be kept in mind and his/her past record can also help authorities decide if the speech would actually cause any disturbance to the maintenance of public order. The court also highlighted that only when a person makes a speech or does an activity which shows a tendency to achieve their goals through violence, would the Federal Government be allowed to take action, under the law, to protect the maintenance of public order.

In **Mehraj Din v. the State** [PLD 1972 Lahore 177] the Lahore High Court held that in a case of a political demonstration, members of the protest could all be held liable for even a few placards carrying inscriptions hit by Section 16 of the MPO. It is important to note however, that the court dismissed the charges under Section 16 of the MPO against the accused persons, holding that criticism of policies of the government, especially in a political context, fall within the realm of free and protected speech. The court noted the peaceful and political nature of the protest and held that no action or intention of the accused can be found to create a situation prejudicial to the maintenance of the public order.

In the **State v. Muhammad Arshad Javed** [1995 MLD 667] a Division Bench of the Lahore High Court read in the defense of insanity provided under Section 84 of the Pakistan Penal Code, 1860. The court held that where it is clear to the court that the accused had a mental state or abnormality which renders him or her incapable of knowing the nature of the act or the distinction between right and wrong, the accused cannot be reasonably held to have the requisite mens rea when committing the offense, thus he/she cannot be held responsible for the same.

**Punishing speeches in support of terrorism**

Under the Punjab version of the MPO, Section 6-A creates a new offense which criminalizes and restricts individuals from making speeches:

i. in support of or to propagate or promote; or

ii. tot evoke or attempt to evoke any sympathy; or

iii. project or promote with the intent to glorify; or

vi. to challenge, thwart or oppose any action against; or

v. to hamper efforts to combat or eliminate;

any terrorists, terrorist organizations or any terrorist actions with a punishment of imprisonment of a term up to 3 years or with a fine of minimum Rs. 50,000 and not exceeding Rs. 200,000 or with both.

As per Section 6-A(3) terrorism, acts of terrorism, terrorists and terrorist organizations are given the same meaning as provided for by the Anti-Terrorism Act, 1974 or any other law enforced at the time.

**Power to record certain speeches and punish disobedience**

As per Section 8 of the MPO, the Federal Government through a District Magistrate has the power to make an order to depute police officers to public meetings so as to record the proceedings and statements made therein in the form of a report. The definition of public meeting is wide and also includes private and ticketed events.

In Nawabzada Nasrullah Khan v. The District Magistrate, Lahore [PLD 1965 (W.P) Lahore 642] a 3 member Division Bench of the Lahore High Court held that the power of the Federal Government to depute police officers for recording of public meetings is ultra vires the Fundamental Rights to freedom of assembly and the right to association under the Constitution since the powers of District Magistrate are very wide and not restricted or checked in any manner and the act of recording or monitoring of citizens has a necessary detrimental effect on the exercise of their rights. The court also delineated that a meeting of a political party is not a public event and members of political parties are not a 'portion of the public' or any of its classes and thus orders under Section 8 cannot monitor political events in which the general public is not invited to attend and only party supporters or members are allowed to enter.

As per the Punjab version of the MPO, this power is further expanded with Section 8-A which allows the Provincial Government to make orders for the recording of speeches and makes it a criminal offense for the organizer of the event to fail to follow the order.

As per Section 8-A(1) the Station House Officer (SHO) of a police station with permission of the Sub-Divisional Police Officer may make an order in writing requiring the organizer of a public meeting, being held within the jurisdiction of the police station, to record all the speeches made at the event in an audio and visual format.

The organizer is liable to submit the recording within 24 hours of the last speech being made at the event or by noon of the next day (whichever is earliest) to the SHO. The SHO must provide proof

of acknowledgement of receiving the copy and as per Section 8-A(2) the SHO can then forward the recording of the speeches of the event to any nominated officer or authority of the Provincial Government.

As per Section 8-A(3) any organizer or person found to contravene Section 8-A or the order made under it by the SHO of a local police station to be liable for punishment of imprisonment of a term up to 6 months and a fine of minimum Rs. 25,000 and a maximum of Rs. 100,000.

As per the proviso of Section 8-A the organizer means anyone who has arranged the public meeting, invited people to it or is the owner of the premises where the meeting was held.

As per Section 21-A this offense is also compoundable by the Government on furnishing of administrative penalty of Rs. 25,000 by the accused subject to the fact that it shall not be compoundable if the accused is guilty of a previous offense under this law or has had an offense under this law compounded before.

**Representation against certain orders**

Under Section 20-A all representations made by the publisher, editor or maker of the restricted publication under Section 6(3) or Section 7(2) of the MPO shall be sent, along with the case, to the Review Board made under Section 3(5) as soon as possible.

The Review Board shall provide an opportunity of hearing to the affected party which has made the representation and on the basis of the representation, the submissions of the affected party and any other material placed on record by the Government, produce a report and submit it to the Federal Government along with recommendations. Under Section 20-A(4) if the Review Board reports to the Federal Government that the order of restriction under Section 6 or Section 7 is unjustified, the order shall stand vacated.

**Review Board**

As per Section 3(5) of the MPO the Federal Government through the concerned Governor, shall constitute a Review Board, comprised of a Judge of the High Court as recommended by the Chief Justice of the concerned High Court and a government officer as recommended by the Governor who shall hear representations against orders made under Section 6 and Section 7.

As per Section 3(5-a) of the Punjab version of the MPO the Review Board will be made by the Chief Justice of the Lahore High Court upon request of the Federal Government and as per Section 3(5-b) shall be composed of three persons, a chairman and two members, all of whom would be either serving or retired judges of the Lahore High Court.

As per Section 3(5-e) of the MPO and Section 3(5-f) of the Punjab version of the MPO the proceedings before the Board and its report shall be confidential apart and only where the opinion of the Board is expressed shall be made public.

**Summary Trials**

As per Section 21 of the MPO, the Federal Government may notify in any area that trials of offenses under this law be carried out under Chapter XX of the Code of Criminal Procedure, 1898 or in a summary manner as per Sections 263 to 265 of the Code.

As per Section 21 of the Punjab version of the MPO, a Magistrate of First Class may try all offenses of punishments of up to 1 year imprisonment or fine or both in a summary manner as per Chapter XXII of the Code.

As per Section 21(2) the Government may notify other offenses under this law to be tried as summary trials by a Magistrate of First Class.

## ANALYSIS

One of the earliest laws made to restrict free speech in the interest of public order, the West Pakistan Maintenance of Public Order, 1960 is heavily influenced by colonial era security jurisprudence which provided Central Governments excessive, overbroad and unchecked powers to restrict, censor and prohibit any form of free speech which was deemed to be politically sensitive.

Promulgated as an ordinance by the military government of Ayub Khan, the MPO was made when there was no constitutional rule of the country and basic civil rights stood suspended. Thus in Nawabzada Nasrullah Khan v. The District Magistrate, Lahore [PLD 1965 (W.P) Lahore 642] the Lahore High Court deemed the unrestricted power provided to the District Management to depute officers to record and monitor public meetings under Section 8 of the MPO to be ultra vires the Fundamental Rights provided by the Constitution of Pakistan, 1962 as this was an excessive restriction on the right to free speech and right to political participation guaranteed to all citizens. Since citizens' Fundamental Rights have been carried forward into the Constitution of Pakistan, 1973 thus arguably the MPO, both the Federal and the adapted version of Punjab, continue to be thoroughly unconstitutional, especially in relation to restrictions on free speech for maintenance of public order, since the law is disproportionate, broadly worded and provides unchecked discretion to the Federal Government to impose blanket bans on speeches and publications. These problematic characteristics of the law are further aggravated by the fact that there is no threshold provided in the law which establishes which speech can be deemed to be prejudicial to the maintenance of public order. Thus the law is seriously liable for misuse and can lead to a freezing effect of protected controversial dissent as the law provides no standards which bind the Federal Government when it decides which speech is harmful to the maintenance of public order and public safety.

Another important feature absent from the MPO which has terrible implications for the right to freedom of speech are the lack of any defenses. Where the Federal Government can prohibit, restrict, censor, monitor and seize content it deems prejudicial to the maintenance of public order under the MPO in an almost unrestricted manner, there are no provisions which address citizen's rights to dissent against the government, make political statements, make artistic expressions and to simply state the truth. Even the remedy provided for representations made to a Review Board is

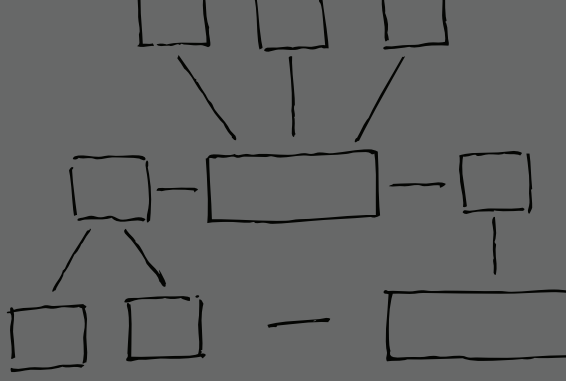
an illusory remedy as no timelines are provided for the deciding of the cases and the impartiality and expertise of the Review Board in relation to free speech law is questionable. Additionally, there are no remedies to ensure the law is not misused by the Federal Government to harass a publisher, editor or maker of a controversial publication or speech.

Another problem within the MPO is how most of the restrictions under the law which provide for scrutiny, monitoring, censorship, restriction and seizure of dissenting publications and speeches are exercisable by the Federal Government to 'prevent any activity prejudicial to the maintenance of public order'. This form of free speech censorship, in which the harm caused by the speech is predicted and not actually caused, is premised on a prior restraint system of restriction. Prior restraint systems of censorship of free speech are obsolete and excessive forms of restraints on free speech, as the evil or mischief which the law aims to prevent, by restricting the exercise of a speech or expression in the public interest, has not yet taken place. As the harm or mischief under which the impugned speech is banned, is only presumed and not proven by fact, therefore it allows the Federal Government to make predictive, undebatable and almost impossible-to-rebut presumptions when making orders to restrict the exercise of free speech by its citizens.

**RECOMMENDATIONS**

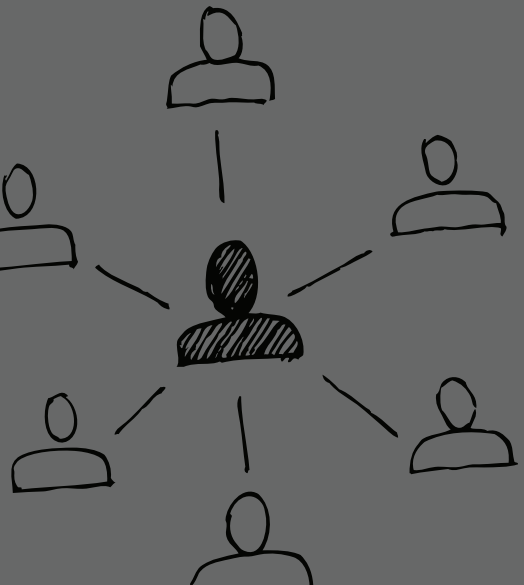
1. Parliament should immediately repeal MPO and promulgate a more clearly and carefully worded law, which balances the rights of citizens to make political speeches and dissent against the State with the legitimate governmental interest of maintaining public order and restricting speech which can lead to violence and serious disturbances to public safety.

2. The Superior Courts of Pakistan should strike down the MPO, under the touchstones of the right to freedom of speech provided by Article 19, as it is an unreasonable restriction on free speech due to its overbroad nature, the freezing effect it has on legitimate political speech, the unchecked powers it provides to the Federal Government, the lack of defenses available to the accused and the unfettered use of prior restraint systems of censorship.



Section 5

# Analysis



# Chapter 12
# ANALYSIS AND CONCLUSION

**Pakistan's International Obligations in relation to Free Speech**

Pakistan is a state party to the International Covenant on Civil and Political Rights, 1996 (ICCPR) which in Article 19 obligates states to protect the right to freedom of speech and expression and only restrict speech in a very limited manner. Pakistan earlier had filed a reservation to Article 19 of the ICCPR but in 2011 removed this reservation, accepting to implement Article 19 in its full spirit.

As per Article 19 of the ICCPR restrictions of freedom of speech must match the following criteria to be valid:

i. The restriction must be made under law. This requirement also entails that the law restricting freedom of speech must be 'concrete, clear and unambiguous' and must be concise and clearly worded. The test to ensure that a restriction is not vague, overbroad or open ended is that the courts must be able to determine that a citizen can reasonably foresee which speech is protected and which is not. If the wording of the restriction is such that citizens cannot reasonably foresee which speech is allowed and which is not, the restriction, even if placed by law, is not valid.

ii. There needs to be a nexus between the restriction imposed and the legitimate governmental interest it is made under. This requirement establishes two elements every restriction on free speech must meet to be valid. One that it is made to curb a legitimate governmental interest i.e in the case of Pakistan, under Article 19, the government must show it is made in the interest of the six subject headings provided by Article 19 of the Constitution of Pakistan and not some other interest. Secondly, the restriction imposed is directly connected with avoiding the harm the government is concerned in curbing when making the restriction. No restriction on free speech is valid if it is made intending to curb speech in favor of one legitimate governmental interest but actually aims or causes restrictions on free speech in some other area.

iii. Lastly, the restriction must be necessary and proportionate to the harm which is trying to be curbed. The necessity element for a restriction on free speech imposed by law can only be met if the government can show that the restriction is the least intrusive tool that can be used to curb the harm to a legitimate governmental interest. If a less restrictive or intrusive alternative exists which can be used by the government to protect that interest, then the restriction will not meet the necessity test. As far as proportionality goes, it must be shown by the government that the restriction imposed is not excessive to the harm which is trying to be curbed. The extent and scope of the restriction must not surpass the problem it is meant to tackle.

vi. When evaluating the necessity and proportionality of a restriction to free speech, it must also be identified that certain forms of speech such as political speech should be afforded greater protection due to their heightened importance in a democratic society.

Many of the laws made to establish 'reasonable restrictions' on free speech in Pakistan will fail the four tests established above by the ICCPR in Article 19. Many laws, especially those which criminalize speech in Pakistan, are vaguely worded and overbroad, which destroys the concept of reasonable foreseeability for citizens to know which speech is restricted and which is not. The line in the sand is not clearly drawn and thus citizens are indicted in criminal cases for speech they never knew was restricted.

Secondly, laws restricting free speech in Pakistan are also never judged on their necessity, proportionality or their nexus to the harm trying to be avoided. In the interest of restricting speech for the public good or any of the other grounds for restrictions, the Government imposes restrictions which are too broad or too excessive. Along with restricting protected speech directly, these forms of broad, vague, imprecise and disproportionate restrictions also have a freezing effect on protected free speech.

Lastly, there is a lack of accepting that certain forms of free speech deserve greater protection due to their importance in a democratic society. Political speech and artistic expression in Pakistan are particularly heavily restricted without any form of greater protection or leeway offered to them.

**Conclusion**

After a thorough review of the laws in Pakistan made to restrict free speech and the case law of the courts interpreting and enforcing these laws, several meta-level problems in Pakistan's jurisprudence on free speech become apparent which are the root cause of why restrictions to free speech in Pakistan continue to excessive, vague and disproportionate.

These meta-level problems in our free speech jurisprudence are underlying factors, which can be seen to affect all of the relevant stakeholders, such as law making bodies, governmental agencies and the courts of law, when cases relating to freedom of speech and restrictions therein are being decided in Pakistan.

Some of the meta-level problems identified are as follows:

**I. Excessive delegation**

Whereas Article 19 of the Constitution of Pakistan only allows reasonable restrictions to be made by law under six distinct subject headings, unfortunately a review of the laws made to restrict free speech in Pakistan shows us that the Parliament of Pakistan has abdicated its responsibility to legislate restrictions on free speech in favor of executive bodies and statutory regulators.

This is quite problematic since under Article 19 the restrictions which are allowed to be made under the six subject headings are not self-executing provisions. Meaning, they necessarily require further law making so that they can be exercised.

Laws on restriction of free speech such as the PEMRA Ordinance, PECA, MPO and the Motion Pictures Ordinance, 1979 however delegate responsibility to restrict content and free speech under these subject headings to executive agencies and statutory regulators such as PEMRA, PTA,

District Magistrates and the Motion Pictures Censor Board without providing them any guiding principles.

This is a form of excessive delegation, where Parliament has handed over their exclusive law making power to unelected executive agencies and statutory regulators, which is an unconstitutional delegation of powers.

**II. Vagueness**

As already discussed excessively in this report, laws criminalizing and restricting free speech must be carefully and precisely worded. Much of the laws criminalizing speech in Pakistan i.e provisions under PECA, PPC and MPO leave too much discretion in the hands of the executive and citizens are not provided reasonable foresight to know exactly which speech will lead to a criminal sanction and which will not.

In the infamous judgement of Zaheerudin v. State (1993 SCMR 1718) the Supreme Court of Pakistan recognized that vague laws, especially criminal statutes, are liable to be struck down as unconstitutional. Sadly, however, there are very little instances of courts exercising their power to strike down laws due to vagueness. This is because courts in Pakistan try to save legislation by trying to provide clarity on an ad-hoc basis. This obviously leads to arbitrary and discriminatory enforcement of the laws and makes unelected judges policy makers.

**III. Independence of executive agencies and regulators**

With laws in Pakistan providing executive agencies and statutory regulators extraordinary powers to not only enforce legal restrictions on free speech and content but also to define which speech is protected and which is not, it is very important that these agencies and regulators and the directives and policies they make for restriction of speech in their respective spheres i.e electronic media for PEMRA and online content regulation for PTA, are free from governmental or any other form of interference.

This independence means more than just token independence to decide matters of content restriction on their own but also financial, institutional and political independence from the government. If the funds and accounts, directives and policies made by and the appointments and replacements of the heads of these agencies and regulators is open to any form of interference or direction from the political government at the time, then these executive agencies and statutory regulators will become tools to suppress dissent.

Any form of over or covert control of regulators of free speech, especially those who have been given carte blanche power by the Parliament to restrict free speech and expression on any of the six subject headings mentioned in Article 19 of the Constitution, is therefore a dangerous proposition which is antithetical to the idea of democracy and the right to free speech.

**IV. Fourth Generation Warfare**

A relatively new phenomenon in the modern world, free speech and press freedom is now also

constructed as a prime national security concern by state authorities. While propaganda in war and restrictions on free speech due to national security are not new concepts in the modern world, the protections to free speech, especially online free speech, are currently being eroded as militaries around the world have begun to use the internet as a battle field for the spread of ideologies. This worldview of seeing free speech as a weapon or war tool is slowly disseminating from national security agencies to civilian statutory regulators and even to the courts of law.

In 2016, PEMRA, the statutory regulator of electronic media in Pakistan, banned content from India, even neutral entertainment content, from being broadcasted in a tit-for-tat move, as Indian channels had earlier stopped airing content from Pakistan due to military tensions between the two countries. While the Lahore High Court in 2017 struck down this restriction for being excessive of PEMRA's mandate and for being ultra vires the restrictions allowed to free speech under Article 19, the Supreme Court of Pakistan reinstated the ban in 2018, citing the military tensions between the countries as adequate grounds to do so and observing the detrimental effect it has on the culture of Pakistan in January 2019.

This form of weaponization of free speech by the courts of law and regulators of free speech and content which lead to blanket bans on the basis of national security are very troublesome and should be discouraged.

Justice Oliver Wendell Holmes, a famous American jurist and Supreme Court judge, in his famous dissent in *Abrams v. United States* 250 U.S. 616 (1919) elucidate the concept of the right to free speech and expression, enshrined in the First Amendment of the Constitution of the United States of America, with the allegory of a marketplace of ideas. He argued that speech should be regulated and not restricted by governments, even if the speech is dissent of the most troubling nature, as citizens must be allowed to engage with ideas freely. Those ideas and opinions which are rejected by society as harmful and having no value, shall automatically disappear similarly to how bad products and companies run out of business. Thus, citizens should be allowed to freely trade in the ideas they believe in and speech should only be restrained in the rare occasion where it has an immediate danger of causing unlawful conduct.

Pakistan has many ways to go in developing its jurisprudence and laws on free speech and expression and the restrictions to be placed upon them in the public interest. One hopes that one day, the free marketplace of ideas, where ideas can be freely traded and where citizens can decide which speech and expression is to be valued and protected and which can be consigned to the annals of history, becomes a reality in Pakistan. Unless it does, our right to free speech and expression will always remain under threat.

MediaMatters forDemocracy
Policy Research & Advocacy Initiative

Media Matters for Democracy (MMFD) works to defend the freedom of expression, media, Internet, and communications in Pakistan. The main premise of our work is to push for a truly independent and inclusive media and cyberspace where the citizens in general, and journalists in specific, can exercise their fundamental rights and professional duties safely and without the fear of persecution or physical harm. We undertake various initiatives including but not limited to training, policy research, advocacy, movement building and strategic litigation to further our organizational goals. We also work on acceptance and integration of digital media and journalism technologies and towards creating sustainable 'media-tech' initiatives in the country. MMfD recognises diversity and inclusion as a core value of democracy and thus all our programs have a strong focus on fostering values and skills that enable and empower women, minority communities, and other marginalized groups.

چارہ گر
LEGAL AID FOR DIGITAL EXPRESSION

Charahgar, a legal aid centre initiated by Media Matters for Democracy, aims to provide free legal assistance to journalists and media who have been targeted for exercising their right of journalistic expression online. Charahgar seeks to facilitate those who are standing up to the prevalent persecution and approach Courts in order to safeguard the right of free speech granted under Article 19 of the constitution and to restore democratic values. Through a network of lawyers deployed in the major cities throughout the country, we are all set to work towards our goals of securing the internet as a safe space for journalists and other media actors.