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Freedom Of Speech And Expression In The Contemporary World: A Case Study Of Pakistan And Limitations Of Article 19 Of The Constitution Of Pakistan, 1973

Abstract

'Freedom of Speech and Expression' is one of the inherited fundamental right since the birth of mankind and eventually came under the legal umbrella of various constitutions, conventions, treaties and charters of the world. The world community, states legislatures and jurists have further glorified it to be respected and consistently this fundamental right is also enshrined under Article 19 of the Constitution of the Islamic Republic of Pakistan, 1973 with some limitations and restrictions. It struck a balance between 'freedom and diversity in society' in terms of faith, belief and religion, otherwise, the unbridled freedom may create disorder and chaos in the society. The globalized world has taken various legislative steps in furtherance of this Fundamental Right and likewise Pakistan has also promulgated many statutory laws i.e. Defamation Ordinance, 2002 (LVI2002) to be adjudicated in civil nature and also the insertion of section 295A & 295C in Pakistan Penal Code, 1860 (XLV of 1860) and Prevention of Electronic Crime Ordinance, 2009 (VIII of 2009) etc. The prime object is to adjudicate in criminal nature to further rationalize the state laws to secure protected interests of people to restrict the 'freedom of speech and expression', not to hurt the feelings of others, as the society passing through a phase of modern development, invention and advent of new devices of communication and publication. The basic purpose of this research article is to explore all those modern tools of freedom of speech and expression and to rationalize limitations thereof with reference to the Article 19 of the Constitution of Islamic Republic of Pakistan, 1973 as the world is going to enter into a new era of development.

Key Words: Fundamental Rights, Freedom of Speech and Expression, Constitution of Pakistan, Press, Media, Social Media.

Introduction

The origin of Fundamental Rights dates back to 17th and 18th Century's philosophies of Rousseau and Locke, the great philosophers of English common law. These vague and precisely defined notions of ingenuous and natural rights travelled along with the new settlers to the American continent by embracing a precise legal form by the constitutionalists and lawyers in US constitution and its corresponding amendments. The American Judges expounded, explained and defined them further for almost more than a century. In December 1948, thirty

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(30) human rights were approved by the UN General Assembly which became guiding principles to be included in the constitutions of other member countries of the world (M. Munir1962).

Freedom of Speech is a natural right which stems from the birth of a person and is a precious gift of God through which the humans convey their feelings, sentiments, thoughts to others and is known as mother of all liberties(R. Aqa, 2016).Freedom of speech and expression is the kernel of democracy and the fundamental rights are to be interpreted in a way to advance the frontiers of free choice, individual autonomy and freedom, such buoyancy and liveliness is the hallmark of a living constitution in a democratic country (PLD 2017 Lahore 1). Freedom of Speech and Expression is protected in the Constitution of Pakistan 1973 under Article 19. 'Freedom of Speech and Expression' is the foundational and fundamental human right is also not only necessary for the civil society but also cornerstone of democracy which is also protected through the enactments of international and regional treaties/charters (2017 LHC 1305). The freedom of speech and expression enjoys an international protection through various statutes:

- a) Universal Declaration of Human Right (UDHR) has tried to ensure the freedom of expression and opinion through its Article-19.
- b) Under Article-19, freedom of speech and expression is enshrined in an instrument of "International Covenant on Civil and Political Rights (ICCPR)".
- c) Article-10 of the European Union (EU) Convention for the protection of human rights enunciates to ensure protection of freedom of expression.
- d) The American convention on Human Rights which protects the freedom of expression and thoughts under Article-13.
- e) The African Charter on Human Rights ensures destination of individual opinion with in law under Article-9 (R. Aqa, 2016).

The law of defamation has also emphasized some restrictions and remedies in the exercise of freedom of speech and expression, however, at the same time the defamation has various defenses to complement the freedom: Truth of statement made in public interest, honest opinion about public conduct of public functionaries, statement being an opinion about conduct of a person, natural and fair/accurate reporting of court proceedings, honest expression of opinion about merit of the decided case, fair comment about merit of public performance, bonafide censure passed by a person in authority, Accusation made by a person in good faith to a person in authority, accusation made to safeguard the personal interest of the individual or of the public good of a person or to public, putting a person or public on caution against another for public good (2000 PCr. LJ 1847).

Development and Significance Of The Freedom Of Speech And Expression

1. Historical Development with reference to the US constitution:

As the journey of jurisprudence has ended after a century's voyage, the first amendment adopted in 1791 is to be established as the symbol of "Freedom of Expression". The text of the first amendment speaks about the freedom of speech and press and doesn't speak about freedom of expression. In American culture, both freedom of speech and freedom of press are embedded together in such a manner that the American court even doesn't make distinction between the two. However, the term freedom of expression is more modern which was introduced in 1921, whilst this term entered in jurisprudence of courts in 1941. As per John Stuart Mill, the freedom of expression and freedom of opinion has a great

contribution in the wellbeing of humanity. In recent, the concept of freedom of expression which reigns in the US is basically the work of supreme court, however, this right is the pure product of common law (Z. Elisabeth V. 84:885). The constitution of USA intends to protect even a controversial speech subject to certain limitations as it believes that the offensive speech can be countered with more speech, in the same way, by curtailing expression, it doesn't promote democracy. The framers of the US constitutions are of the view that to forbid people to speak means to stimulate people to discuss the matter secretly. In US the freedom of expression is in broader sense as compared to freedom of speech which is not treated to be absolute however, in general terms, the government is to impose more content neutral restrictions than content based. 'Hate speech' is a big phenomenon in the freedom of speech and that means to malign a person on the basis of sex, sect, ethnicity or religion, but, US doesn't restrict hate speech as they think that hate speech can't be countered through restriction but with tolerance, truthfulness and best counter speech (US R. 2013).

1. Fundamental Rights and Civil Society:

In a civil democratic society, the word "Right" defined as, a person's right to do, to be entitled, or to have, whilst, in its legal parlance, a right is basically an interest to be protected and enforced either by the statutory law or the constitution, but this right can be abridged or taken away through constitutional amendment, but in case of statutory law, it is termed as the ordinary right which can be amended, abridged or modified through an ordinary amendment in law. Fundamental rights are those natural rights to be enjoyed by every citizen alike without any discrimination and are the harbinger of a civilized, modern and liberal democratic society. They are, however, not absolutely indefeasible, but are so unless or until the government acting in pursuance of the constitution or some law passed pursuant thereto, requires their surrender for consideration of public welfare or safety. To restrict and limit-express or implied- the public authorities- executive, judiciary and legislature-not to interfere in the exercise of these natural rights, is the essence of civilized society (PLD 1959 SC 387). No right can be termed as fundamental if the legislature can take it away by passing a law not without an amendment in the constitution or unless its suspension or surrender is in a national emergency, is specifically provided by the constitution itself (PLD 1957 SC 9).

3. Democratic Essence of Freedom of speech and Expression:

According to Franklin S. Haiman "The Freedom of speech and expression is more beneficial to the eavesdroppers than the speakers, as such, if the listeners and speakers have no access to ideas and thoughts of each other, then it amounts to the violation of the natural right of freedom of expression and speech (R. Aqa, 2016). Freedom of expression is pre-requisite to the democracy due to the three reasons:

- i. Freedom of expression is essential for democracy as, it maintains plurality and diversity in the society in terms of religion, life style, ideology, nationality and ethnicity, however, in pluralist terms the society must co-habitat various conflicting ways of ideas and ideologies.
- ii. Through freedom of expression, one can participate in decision making and the enacting of law, so, the freedom of expression has also a political value which is indispensable to the democratic government.

- iii. The freedom of expression is also essential to the society in terms of moral grounds, as the individual in a democratic society are free to express their opinion, however, any restriction is subject to the violation of individual's moral autonomy
(A. Zuhtu2015)

4. International Acclamation and Recognition of Freedom of Speech and Expression:

The perceptible fact is that all free speech is not a good speech as such freedom of speech is not in the long way a precise public policy (Toni M. 1991). Freedom of expression being recognized as the pillar of democracy is clearly internationally acclaimed through Article-19 of Universal Declaration of Human Rights-UDHR (1948), International Covenant on Civil and Political Rights-ICCPR(1976)as this freedom is pre-requisite for democracy (WJ. Van,2015).Article-13 of the US constitution enunciates that the freedom of expression is the basic fundamental right enjoyed by each individual without any discrimination, and as per principle-2 of the declaration "All people have a right to equal opportunity of imparting, receiving and seeking information by any means of communication without any discrimination based on color, race, language, sex, religion or as such, any other social or political condition, social origin and or minority status. Inter-American system emphasis that all types of speeches are protected under the fundamental right of freedom of expression regardless of any if its content or the extent to which acceptable to the state or society. In Inter-American system, the recent case laws have developed a concept/principle that the democratic system of the state must tend towards broader dissemination of information, ideas and opinions related to the matters of public interest, state, public officials, for which, leaving a narrow space for restrictions intended to be imposed by the state, so, the public officials come under strict scrutiny by the society(IACHR 2013).

5. Freedom of Media

A. Article 19 of the Constitution of Pakistan, 1973:

- i. The freedom of media is conceptually based on the widest dispersal of information through multiple and inimical sources, as, it to sine qua none for the benefit of the people, as such, like freedom to the footing of free people in a free governments, however, any adventure to contravene or to impede this freedom or right would make foul of the right granted under article-19 of the constitution of Pakistan (PLD 2016 SC 692)
- ii. News items should not have been allowed to be published in the newspaper without due care, caution and circumspection and without first ascertaining facts from the concerned quarter in Britain. The false reports published in the newspaper can cause irretrievable and irreparable damage to the reputation and social status of a citizen and can bring bad name to the country. Therefore, it is necessary and desirable that journalists should be most watch full not to publish defamatory material attached upon individuals unless they first undertake responsible pains to ascertain that there are strong and cogent grounds for believing truthfulness for the information which is sent to them. The printer, publisher, editor and proprietor for a newspaper are as much responsible for a defamatory, damaging and disparaging news report published in their columns as if they were the original author and motivator. In the case of defamation, there is no special privilege of a journalist; however,

fair comment on the matter of public interest is permissible what it should not be used as cloak for ventilating some personal vendetta against any one. The court drop proceedings on undertaking to contradict the news in the newspaper (PLD 2002 SCJ 13).

- iii. Freedom of press is the part of the freedom of speech and expression, so, the person engaged in the business of newspapers have not the right greater than the ordinary person, as the freedom of press and speech is not absolute and unlimited, the protection extended to the press can't be stretched to cover wrongdoings, the press must not compromise on public order, morality and decency, otherwise by crossing a limit of criticism, they become liable to contempt however, any columnist, editor or report can't take the shelter of good faith (PLD 1998 SC 823). Freedom of press is to be considered as the most essential part of the democratic system of a country. It is the duty of press to point out the matter to general public, if any authority or public office holder, exceeds his powers, as such, it is the mother of all liberties in a civil society (2000 CLC 904)
- iv. The criticism from the press is essential for a democratic society to make it improve its position, its purpose is only to improve the society in good faith but this privilege can't be extended to the publication in terms of malice and ill will (PLD 2001 Kar. 115)
- v. Freedom implies freedom to say and publish what every citizen wants as long as rights of others are not trampled upon (PLD 1975 Lah. 1198). Subject to the Article-19, the freedom of press has been ensured by Article-19 of the constitution, for all government functionaries and state machinery is supposed to act in such a manner which is advantageous to promote aim of the constitution (PLD 1989 Lah. 12). Freedom of expression, would not give permission to damage honor and prestige of an individual or of a country and nation (1990 CLC 1500). Nevertheless, Cornerstone of free democratic society is the freedom of press and speech which are natural and fundamental personal rights, both these rights are same in nature but are differentiated through the manner of expression as the liability of press is not only confined to periodicals or newspapers but it extends to leaflets, pamphlets or any other vehicle or device to disseminate the information, it is to be noted that the freedom of speech is not only confined to the public addresses and issuing any pamphlet but it extends to all forms of manners necessary to disseminate the information which are need to be applied to let the populace well informed but the right to free speech is to clench the abuse of public authorities. Democracy cannot survive without such freedom. Such right is not absolute, but reasonable restriction can be imposed on the same or reasonable grounds. Reasonable classification is always permissible in law (2004 SCMR 164).
- vi. If the right to freedom of speech and expression is granted under Article 19 of the constitution, then, it doesn't entitles any print or electronic media to start a defamatory complain against any person to harm his political career mere on baseless grounds, as this freedom is not absolute, but subject to some restrictions as Article 19 doesn't protect defamatory matter either in written or oral, as such, an appropriate remedy is

available in the law to an aggrieved person if he has established his locus standi(2010 CLC 546).

- vii. Article 14 of the constitution enunciates that the dignity of a person and home is inviolable. If any defamation is caused to any person, it also ultimately affects the dignity, honor and respect of a person. No attempt either individual or collective is allowed to be made to degrade and disgrace any person which has not only been protected by the constitution but Islam has also given a great value to the dignity of a man and home, whilst exercising a right under Article 19, one should take care to ensure that his freedom of speech and expression should not transgress the limits of Article 14 of the constitution (2010 YLR 1647)

B. Social Media:

- i. Article-19 of the constitution of the Islamic Republic of Pakistan, 1973 emphasizes in clear terms that the liberty in this Article is not absolute but subject to certain restrictions and limitations in terms of security, defense of the country and glory of Islam or morality, cordial relations with worldly states, decency and Public order, such like is the position of Article 19of the Constitution of Pakistan, inserted after the promulgation of 18th amendment which provides the right to information, but, it is also subject to some restriction, however, some persons twist the Articles of the constitution to axe their own grind. There is no cavil to say that the advancement in technology has converted the whole world in to a global village for which internet is being considered as the basic vehicle to disseminate and to share knowledge to benefit the public at large, however, few users of internet have started to use it for destructive purpose, in shape of face book, twitter etc to achieve their nefarious designs by violating law of the countries and hitting religious feelings of all communities under the cover of freedom of speech and expression(2017 LHC 1305)
- ii. Still no legislative work exists in any country of the world to examine social media. In Belgium, the social media users are being benefited due to the broader scope of the freedom of expression however, the Belgium doesn't wants to apply different stands to the social media users to apply same level of protection to the freedom of expression to all persons, because, the social media posts are considered as the private posts which are hardly to be proved as defamation. The social media posts are not considered as the public speech in the true sense because the person posting a comment in the group of face book is not aware of the situation that all group members are seeing the comments in the group, but in contrast, in Italy, social media posts are considered unequivocal about public name in courts, similarly, in Netherlands, the social media users are treated in the same way as to bloggers, so, the social media expression is involved more leniently by the Dutch courts as compared to Italian courts. Social media users in Spain don't come under legislative framework, neither enjoyed any preference nor have any disadvantage (G. Marie-pierre 2016)

Limitations Of Freedom Of Speech And Expression

1. Public Interest:

Fundamental Rights of any person can only be surrendered and clenched only in the collective lawful interest of the community/society or public interest, for which the public interest is the collective interest of the community inclusive of foreign policy of a country, public morality, public order, national security and public health. Public interest has captured a prominent place in the law as it interferes in the fundamental rights of person (PLD 2010 Lah. 230).

2. To maintain Social Order:

It is essential to preserve and maintain the spirit of freedom of speech and expression whilst, it is also necessary to place some restrictions on the freedom to maintain social order, however, no freedom and liberty is absolute and unrestricted. The freedom of speech and expression also includes the right to get and receive information (PLD 1993 SC 473).

3. To Maintain Balance in Diversified Society:

Freedom of expression, in the democratic society of today, the decision makers appreciate the diverse views and opinions, but at the same time also vitalize the acceptance of these diverse views. Today, the main challenge to the freedom of speech and expression is to maintain a balance between the provisions of the freedom of speech and expression with peace, security and law & order in the diverse society in terms of faiths and beliefs, as such, even in most liberal democratic societies like USA, this freedom is also subject to some restrictions, because, unbridled freedom incurs chaos and disorder in the society. Like other liberal and modern democratic societies, Pakistan also ensures the right of freedom of speech and expression subject to some restrictions in terms of national security and religion (L. Sadaf& N. Elishma 2016).

4. Civil or Criminal Prosecution:

Two ways are there to which the government may restrict speech, however, the most common way is to establish a special category of speech, as such, the defamatory speech of obscenity, which would be subject to civil suit or criminal prosecution and if, any person is involved in such like category of speech, be subjected to trial and sanctioned be imposed. The prior restraint occurs in two ways, firstly, a person in intending to deliver a speech to be disseminated, such as, a movie, be sent to a governmental body for a permission/license and secondly the court may issue an injunction against an intending speech (A. Kathleen 2014).

5. Necessary Conditions to Improve Limitations:

Internet-American courts have emphasized that the right to freedom of speech and expression is not absolute in the strict sense, but, subject to some limitations and restrictions, however, the basic three conditions must be fulfilled before imposing limitations:

- a. Limitation must be precise, defined and must be cleared in legal parlance in respect of formal and material sense.
- b. The limitation must be aimed to achieve the set objectives as per constitution.
- c. Limitation should be precisely essential to achieve set legitimate aims strictly in proportion to the end sought (IACHR 2013)

6. Exploitation of Minority Groups:

The freedom of speech is guaranteed to every citizen under article 19 of the constitution of Pakistan, 1973, albeit, through with certain dimensions of “law and order”, national security, and “glory of Islam”, however, these restrictions have

exploited to some extracts against various minority groups (L. Sadaf& N. Elishma 2016).

7. Intolerance in Society:

In Pakistan there are some limitations on the freedom of expression, despite the constitutional provision, for which, the multiple factors have played their role in this sorry state of affairs, however, censorship, harassment, killing of human rights activities, narrow legislation and crack down on religious minorities are the main factors. In spite of that, Pakistani society has become more intolerant with the passage of time, for which, the education system and curriculum is far to be contributing to violence and intolerance to the society, but, the religious intolerance has counter-productive means in shape of chaos and disorder in the society. So, to discourage hate speech and material which instigates discrimination on the basis of ethnicity, religion or race, media, civil society, academia and religious organizations have to play a role of watch dog (L. Sadaf& N. Elishma 2016). The right of freedom of speech and expression which is today being portrayed as the culmination of recent modern time was basically introduced by the Holy Prophet (PBUH) 14000 years ago. It is to be acknowledged that respect, tolerance, speech and expression go hand in hand whilst degrading and insulting others ultimately devalues the civil society as such their concept is according to the Islamic teachings (2017 LHC 1305).

8. Presence of ‘Mens Rea’:

Accused in an alleged act of willfully damaging, defiling, and desecrating the Holy Quran or any part of it, will amount to a criminal offence committed intentionally to achieving desirable objectives whilst in absence of intention and “Mens Rea” accused can’t be held guilty except in exceptional circumstances and circumstantial evidence (PLJ 2007 Cr. C Pesh. 1130).

Conclusion

The above research study has unfolded that the freedom of ‘Speech and Expression’ dully acclaimed internationally and to be the foundational fundamental right to be inherited since the birth of a mankind, its scope and significance has far reaching affects to create a balanced, democratic, tolerant, equitable, promising and peaceful civil society, to be termed it as the mother of all liberties however, this liberty and freedom is not to let it to be unbridled but to some limitations and restrictions by establishing a balance between this freedom and diversified society in terms of ethnicity, religion, sect and language etc., even in the US law- which is considered as the most broader law in freedom of speech and expression which doesn’t support limitations in the strict sense – also supports some restricted and narrow limitations, so, the purpose of these limitations is to restrict the freedom not to be stretched to the extent to worsen the diversification of the society, to create violence and to hurt the feeling of others for which this freedom helps to fertilize various views during dialogue in a society to make it a civilized democracy to deliver a good governance to be directly translated in to the wellbeing of the people.

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