

Governing Abuse of Free Speech during Elections in Pakistan

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ABSTRACT

Election creates an environment of hate which may lead to potential of violence. Although there are enough laws relating to prohibition of hate speech under the Constitution of Pakistan and the ordinary law like Pakistan Penal Code and Anti Terrorism Act, however, there are special laws which control hate speech during Elections. Although International Instruments protected freedom of speech first but did not prohibit hate speech, however, it was permitted to be limited in certain cases.

Similarly, the Constitution of Pakistan 1973 also guaranteed the freedom of speech but with list of exceptions to prohibit hate speech. For this purpose, all election laws were consolidated in the form of one piece of legislation: the Election Act 2017. It prohibited hate speech under corrupt practices and made it an offence. To assure a free and fair election, it is mandatory for the Election Commission of Pakistan to frame a Code of Conduct for the political parties and the candidates. The Commission is also bound to issue a separate Code of Conduct for the media. Both Codes provide effective legal regimes to control hate speech. However, the efforts to control it can only be successful if all stakeholders struggle to confront this monster.

Key Words: Hate Speech, Freedom of Speech, Election Code of Conduct, Human Rights, Election Act 2017

Introduction

Freedom of speech is a double-edged sword. On the one hand, it is a freedom for one person but, on the other hand, it may hurt feelings of another person on various grounds. Hate breeds hate. Whether hate speech laws are a real remedy or an answer to hate speech is more speech is a question of fact.

In a fledgling democracy, freedom of speech is inevitable. Free debates and healthy expression of opinions are integral part in a society based on justice and human rights. It helps to dig out truth. Only contested issues lead to real solutions. There are as many opinions as many persons on earth. When they are in form of a group or class on ground of a religion, caste, race or gender, they mostly clash with each other. Freedom of one group may be a red line for other as a hate speech.

Therefore, it needs equilibrium between a free speech and a hate speech. Probability of abuse of free speech is twofold in an environment of election. Usually, election campaigns provide an enabling atmosphere of enhanced hate

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speeches. Requirement of limits is increased in such situation than in ordinary circumstances. A.G Norani rightly opined that a communal atmosphere was a byproduct of hate speech. Resultantly, such occasions demand more restrictions and their effective enforcement. A government which does nothing to stop them is culpable. (Noorani, 1992).

Historical Perspective of Hate Speech

Partition of India left Pakistan with no choice except to continue with a constitutional framework of the Government of India Act 1947, under the Independence Act 1947. Although nine precious years were lost to frame a new constitution till 1956, however, the British legacy meanwhile assured continuity of democratic institutions based on principles of a federal and a parliamentary system of Government. Fundamental Rights including freedom of speech was an integral part of the Constitution of Islamic Republic of Pakistan 1956. However, it was not an absolute, negative human right but was subjected to reasonable restrictions imposed by law. With a passage of time, limits increased to prevent a hate speech. A hate speech is mostly a repeated phenomenon and potential victims can hardly avoid them individually (Moon, 2008).

After its abrogation, a new constitution of Pakistan was framed in 1962 after four years of Martial Law. Surprisingly, it missed the constitutional protection of fundamental rights including freedom of speech. However, these rights were guaranteed, after a huge hue and cry, in the form of the first constitutional amendment (Khan, 2009).

Once again, the Constitution was abrogated and after the separation of Pakistan, a new constitution was framed in 1973 by the National Assembly of Pakistan, elected during a general election held in 1971. (Khan, 2009)

International Instruments

Indubitably, Freedom of Speech is a political, negative human right which has been recognized by a new world in which all human beings shall enjoy freedom of speech, according to the Preamble of UDHR. It was passed in a form of a resolution, not constituted as an International treaty. However, the Declaration laid down only few human rights, without any consensus on their numbers and nature. Therefore no restrictions have been allowed under any circumstances. So, it ignored its abuse in case of a hate speech.

For the first time, in an international treaty, hate speech was prohibited on various grounds in the International Convention on the Elimination of all forms of Racial Discrimination (CERD), adopted in 1965. Its Article 4 comprehensively elaborated limits on a free speech, preventing its abuse. Firstly, it condemns all propaganda and all organizations which were based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempted to justify or promote racial hatred and discrimination in any form.

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Secondly, the member states, in addition to censure, undertook to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.

Finally, to achieve this purpose, paying due regards to the UDHR and article 5 of the convention, some practical measures were enjoined for the Parties as they:

- a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.(Article 4 CERD)

Further, Article 5 of the Convention strengthened the freedom of opinion and expression, reasserting on its enjoyment barriers of discrimination on various grounds including hate speech (Article 5 CERD).

While in the ICCPR, enforced in 1976, the right was reiterated in Article 19, which provided that it was right of everyone to “hold opinions without interference.” It went on to elaborate that “everyone shall have the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” It was contoured by some duties and responsibilities (ICCPR, 1976).

What lacked in the Declaration, the Covenant fulfilled the vacuum, enabling the member states that the right would be subjected to some restrictions imposed by law in special circumstances of a threat to national security, public order or public health and morals. Moreover, it would not extend to damage reputation of other people; therefore, it was not guaranteed by it as an absolute right (ICCPR, 1976).

Its abuse was as well addressed in Article 20 of the International Covenant on Civil and Political Rights. Incitement to hate speech was proscribed on various grounds of promotion of nationalism, racism or religious bigotry, leading to discrimination, hostility or violence (ICCPR, 1976).

Constitutional Provisions

The Constitution of Pakistan guarantees freedom of speech. However, it is not an absolute or an unlimited right but has been subjected to reasonable restrictions imposed by law. It provides a number of speeches as exceptions to the freedom in the following way: Every citizen shall have the right to freedom of speech and

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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 or the integrity, security or defense 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.” (Article 19 Pakistan Constitution)

In the case of *High Court Bar Association v Government of Balochistan* (High Court Bar Association v Government of Balochistan, 2013), the Court explained that the limits and scope of Freedom of Speech was not unlimited, rather subject to reasonable restrictions imposed by law including “extremist hate literature, wall chalking and threatening and spiteful press releases were not permissible because they were contrary to the injunctions (of Islam), undermined the integrity, security and defense of Pakistan, public order, decency and morality” . Adding to its severity, the Court went on to say that “same were also crimes under the laws of Pakistan, and they incited others to commit crime.” (High Court Bar Association v Government of Balochistan, 2013)

While all political speeches were not hate speeches. Rather they were protected under the Constitution. The Sindh High Court defining the scope of freedom observed that “fundamental rights have been placed in the Constitution not merely to protect acts, conducts and views that one may approve of that also and especially to protect with which one may disagree and which one may find unpleasant or unacceptable”. The Court continued to explain the vires of Article 19, observing that “expression of views at a political meeting is one form of speech”. It also included that a person might not like or even hate that (2012 CLC 714).

The Chapter VIII of the Constitution of Islamic Republic of Pakistan has been specified for the Elections. The part is further divided into two chapters. The Chapter I deals with the Institution of Election Commission, qualifications of its members and their removal, and its powers and functions; While Chapter II handles Election Laws and their conduct.

Defining duties of the Election Commission, the Constitution enjoined to hold and conduct an election saying that not only it will “organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.” (Constitution of Pakistan, 1973)

The Parliament is authorized to enact a law in relation to corrupt practices or other offences. It provided as: “matters relating to corrupt practices and other offences in connection with elections to take action..” (Constitution of Pakistan, 1973)

Legal Framework

In the light of the enabling provisions, the Parliament started to enact relevant laws. Recently, the previous laws have been repealed, and now have been consolidated in form of Election Act 2017. The Act and the following Election Rules regulate hate speech, imposing a civil and criminal liability.

Election Act 2017

Consolidating all previous Acts, Ordinances and Orders, a new law relating to election liabilities has been recently enacted by the Parliament: the Election Act, 2017. The Act divides the election offences into two categories. One has been named as corrupt practices and the other is other offences.

Corrupt Practices

It prohibits corrupt practices, including undue influence under Chapter X. Under its Section 167(b), it would constitute an offence if a person “calls upon or persuades any person to vote, or to refrain from voting, for any candidate on the ground that he belongs to a particular religion, province, community, race, caste, bradari, sect or tribe” (Election Act, 2017).

While, under section 170(a) (iii), it would also be an offence if a person “calls down or threatens to call down divine displeasure or the displeasure or disapprobation of any saint or pir”. In addition, the Act, under section 170(a) (iv), as well proscribes a hate speech in form of a threat “to give any religious sentence”. (Election Act, 2017)).

An offence committed, due to a corrupt or an illegal practice, incurs a criminal liability, under section 174, of an imprisonment which may extend to three years or fine or both.

The punishment, if awarded, would be reported to the Commission. The liability before the Commission under the election laws would be independent and in addition to, without falling within the vires of double jeopardy, under section 198 of the Act (Election Act, 2017).

Other Offences

The following Chapter XI deals with formation of a political party. Affirming the fundamental Right to freedom of association, it allows establishing a political party. However, it prohibits three kinds of hate speech while forming a political party, regulating under section 200 (a), (b) and (c).

Firstly, a political party about to be formed shall not “propagate any opinion, or act in a manner prejudicial to the fundamental principles enshrined in the

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Constitution”. The Constitution, under Article 19, prohibits commission or incitement of an offence, including hate speech.

Secondly, it also enjoins a political party at the time of its formation that it shall not “undermine the sovereignty or integrity of Pakistan, public order or public morality or indulge in terrorism”. Terrorism includes hate speech under section 8 of the Anti Terrorism Act, 1997.

Thirdly, a potential political party shall not “promote sectarian, regional or provincial hatred or, animosity” (Election Act, 2017).

The Election Act also enjoins a political party, under section 201, to frame its constitution, before enlistment, which must include its aims and objectives. Necessarily, the aims and objectives cannot allow an inconsistency with fundamental principles of the Constitution or incitement of an offence of hate speech. Therefore, it impliedly imposes an additional bar (Election Act, 2017).

Liability under the Act

The liability, both criminal and civil, which lies under the Election Act, cognizance of various offences can be taken by four authorities, namely a court of Sessions Judge, a Registration Officer, an Authorized Officer, with powers of a Magistrate of first class, and an Election Tribunal, established under Article 225 of the Constitution.

In case of a hate speech as one of the aim, the Commission, if satisfied, would refuse to enlist or cancel its enlistment due to a later amendment, under section 202(5) of the Act.

Moreover, a political party can be dissolved by the Federal Government, if it is satisfied that the party was, *inter alia*, indulging in terrorism which includes sectarian hate speech under section 212 of the Act. However, the government is bound to refer the case to the Supreme Court within fifteen days (Election Act, 2017).

The effect of such dissolution would be that “any member of such political party, if he is a member of the Majlis-e-Shoora (Parliament), a Provincial Assembly or a local government, shall be disqualified for the remaining term to be a member of the Majlis-e-Shoora (Parliament), Provincial Assembly or local government”, under section 213 of the Act (Election Act, 2017).

In a case of commission of an offence including hate speech, under the Election Act 2017, if a person is convicted by an Election Tribunal, then he shall also “be disqualified for such period not exceeding five years as may be specified in the order from being, or being elected as a Member of an Assembly, the Senate or a local government” (Election Act, 2017).

If a person would be convicted by a Court under the Election Act, then such Court shall report it to the Commission with recommendations of mitigation or remission of any disqualification. Moreover, the Commission is required to constitute a monitoring team to supervise a proper enforcement of the Act, the

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Rules and the Code of Conduct. The report by such team would be sent to an officer nominated by the Commission in respect of each district. He is authorized, after a summary enquiry, to assess the violation of the Act, the Rules or the Code of Conduct. If he finds such breach but “no other punishment is provided under the Act for such violation, he may impose a fine not exceeding fifty thousand rupees” (Election Act, 2017).

Apart from hate speech committed under corrupt practices, any hate speech in form of another offence is also punishable, under section 234 of the Act, which provides a monitoring regime. However, it is limited “to any violation by a candidate or a political party of any provision of the Act, Rules or the Code of Conduct issued by the Commission.” (Election Act, 2017).

If such violation is committed second time, then he is required to refer the matter to the Commission to initiate proceedings against the candidate, including disqualification, under section 234 of the Election Act, 2017.

Candidate Defined

A candidate has been defined under section 2(vii) of the Election Act 2017 as a “candidate means a person proposed and seconded as a candidate for, or seeking, election as a Member”. While a “contesting candidate” has been defined under section 2(xiii) of the Act as it “means a validly nominated candidate who has not withdrawn his candidature”

While “validly nominated candidate means a candidate whose nomination paper has been accepted”, under section 2(xl).

Under section 2(xxxiv), the provision defines that a “returned candidate means a candidate who has been declared elected as a Member under this Act”. Simple definition shows that when an election schedule is announced and a person applies officially to be a member, after being proposed and seconded by others, he can hold out himself as a candidate.

In the case of *Abdul Gafoor v Shah Mohammad*, the Election Tribunal Sind explained a candidate as “a person who has been proposed as a candidate for or who seeking election as a member”. The Court also observed that mere filing of a nomination by a person for a seat might make him a candidate but not for the purpose of disqualification. Even a withdrawal before the election would not validly encompass him as a candidate for election (*Abdul Gafoor v Shah Mohammad*, 1987).

Similarly in the case of *Naeem Hussain Chattha v Tawakkalullah* , the Supreme Court held that a “person whose name had been deleted from election petition had been a validly nominated candidate who had not withdrawn his candidature... such person for all intents and purposes was a ‘contesting candidate” (*Naeem Hussain Chattha vs Tawakkalullah* , 1997).

The Election Tribunal Punjab held that it was not necessary for an already elected member to resign first before filing a nomination for another seat (*Rana Salman Mahmood Khan vs Returning Officer*, 2008).

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Similarly, if a candidate of a political party which boycotted an election was still a candidate and no provision of the election laws did prevent him to challenge a vote process.

The Supreme Court in *Muhammad Khan v Obaidullah Jan Babat* held that a person would not be a contesting candidate, and not a candidate whose nomination papers had been rejected. (*Muhammad Khan V Obaidullah Jan Babat*, 2016 PLD 492 Supreme-Court), 2016).

If the election laws, including hate speech are applied to a political party or its supporters then an announcement of an election schedule may not be required. Therefore, election laws must be applicable on a political party since its formation and to its all office bearers.

The Code of Conduct holds a candidate responsible when the process of an election is triggered. His all hate speeches prior to election are free of liability. The other hurtful ambiguity which helps politician to escape liability is that for different offences, a candidate has been defined differently (Patni & Kaumudi, 2009).

Terrorism and Hate Speech

The Anti Terrorism Act, 1997 under section 8 provides that a person is liable for a hate speech, which is intended to stir-up sectarian hatred, in one of the following four circumstances.

Firstly, he “uses threatening, abusive or insulting words or behaviour”.

Secondly, he “displays, publishes or distributes any written material which is threatening, abusive or insulting”.

Thirdly, he “distributes or shows or plays a recording of visual images or sounds which are threatening, abusive or insulting”.

And finally, he “has in his possession written material or a recording or visual images or sounds which are threatening, abusive or insulting with a view to their being displayed or published by himself or another”. However, their accumulative effect would be measured for a criminal liability (Anti-Terrorism Act, 1997). Its punishment extends to seven years or fine or both.

The Baluchistan High Court, taking a *suo moto* notice of a hate speech of sectarian nature, highlighted the limits on freedom of speech. Differentiating a free speech from a hate speech, the Court observed that “extremist hate literature, wall-chalking, and threatening and spiteful press releases were not permissible because they were contrary to the injunctions (of Islam), undermined the integrity, security and defense of Pakistan, public order, decency and morality” (*High Court Bar Association v Government of Balochistan*, 2013).

The Court as well rightly pointed out that these hate crimes were not only punishable for banned organizations but the hate speech crimes were also crimes under other laws of Pakistan. Moreover, hate speech incited others to commit hate speech. The Court also opined that not only under section 9 of the Anti Terrorism

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Act, 1997 but also the persons or organizations committing murder, advocating murder, indulging in hate speech, spreading hate propaganda contravened the Injunctions of Islam (High Court Bar Association v Government of Balochistan, 2013).

In the same case, another legislation for Balochistan namely The Balochistan Prohibition of Expressing Matters on Walls Ordinance 2001 criminalized hate speech. So the Court treated it along with hate speech under the Terrorism Act. It observed that “those adhering to sectarian, ethnic, extremist and terrorist ideologies mostly resorted to wall-chalking to spread their messages of hate, intimidation and terror. To assure its elimination, the authorities were required to make the public places free of hate speech writings, closely monitoring extremist and hate literature and its propagation” (High Court Bar Association v Government of Balochistan, 2013).

Recently, the Supreme Court of Pakistan as well, in a *suo moto* case, regarding a sit-in protest by a religious political party, affirmed the view of the High Court, observing that “persons carrying out violent acts, or advocacy or propagating violence, or destroying or damaging property, or abusing or resorting to hate speech violated the Injunction of Islam”.(PLD, 2018)

It went on to opine that” it is a matter of great concern when inflammatory, provocative or abusive statements are broadcasted as these have effects of fanning the flames. There are also those who are pushing out hate propaganda.” the Court wondered on impact of the hate speech expressing its dissatisfaction that” the violence that results and continues to express itself is a direct consequence of such broadcast.” (PLD, 2018)

Glorifying the blessing of freedom of speech, the Court observed that it was “cherished by the people of Pakistan, which was protected under the Constitution. Discouraging its abuse, the Court went to say that “however, there is no place in the public discourse to propagate the commission of an offence or to incite people to resort to violence. Broadcasts cannot encourage violence extremism, militancy or hatred” (PLD, 2018).

It is notable that all offences of hate speech, under Pakistan Penal Code, declare only those speeches as an offence which creates hatred or enmity between classes, not within a class. However, the Anti Terrorism Act, 1997 encompasses a sectarian hatred and enmity as well within a group or class. (Anti-Terrorism Act, 1997)

The Election Act 2017 provides that hate speech laws, under section 102 and 228, would apply to both general and bye-elections.

Code of Conduct

Under section 233 of the Election Act 2017, the Commission is bound to frame two Codes of Conduct: One for political parties, contesting candidates, election agents and polling agents, with their consultation. The second one shall be framed

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for security personnel, media, and election observers, which would be binding on all of them.

There shall be a monitoring regime established by the Commission, under section 234 of the Act, to monitor the enforcement of the Act, the Rules and the Code of Conduct.

For the last general election held in 2013, the Commission issued a Code of Conduct for the political parties, contesting candidates, election agents and polling agents, with their consultation, in light of the directions given by the Supreme Court in the case of Workers (Party v. Federation of Pakistan , 2011)

The Item no. 15 of the Code enjoined that “contesting candidates and their supporters shall refrain from speeches calculated to arouse parochial and sectarian feelings and controversy of conflicts between genders, sects, communities and linguistic groups.” (Code of Conduct, 2013)

The problem is that, on the one hand, the Election Act 2017 is binding on, under section 233(3), “a political party, a candidate, an election agent, a polling agent, security personnel, media and an observer shall follow the Code of Conduct during an election” (Code of Conduct, 2013).

A political party includes its leaders, candidates, agents, members, donators and supporters

On the other hand, the Code provided that it would apply to contesting candidates and their supporters only, under item no. 15 of the Code.

The Code is not an optional or a moral instrument to be followed or ignored, but the violation is sanctioned with punishment. A monitoring team for each constituency or a group of constituencies, constituted by the Commission, will report to a nominated officer for each District. He is authorized to punish for violation of the Code for an offence, if expressly not punishable by another authority established by law.

Apart from the anomaly of scope of the application of a Code of Conduct to a political party or to a contesting candidate, under the Act and the Code, there is an overlapping monitoring and penal regime.

On the one hand, the Act, under section 234, empowers an officer nominated by the Commission to monitor and punish in case of violation of the Act, the Rules and the Code. On the other hand, under the last item of the Code of Conduct issued for the general election of 2013, it would be the District Returning Officer and Returning Officer who was obliged to ensure implementation of the Code of Conduct, in their capacity as Magistrate First Class, in case of any violation by any candidate or a political party. He was also authorized to take any action on violation, in accordance with laws, including disqualification of the candidate (Code of Conduct, 2013).

Similarly, a Media Code of Conduct was also issued for the same general election, applicable to both electronic and print media. Its Guideline 2.2(b) obliged that media including broadcaster and publishers of newspapers would “discourage all forms of hate speech that can be interpreted as incitement to violence or has the

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effect of promoting public disorder”, asserting on “freedom of expression and the rights of journalists to report freely should be respected by all parties/candidates and state authorities during the election.”(Guideline 2, 2013)

Guideline 4 also obliged that “the media have a duty to respect and promote tolerance and avoid all forms of expression that might be interpreted as incitement to violence or hatred on the basis of religion, creed, gender, or ethnicity”. (Guideline 4, 2013)

To monitor the media, a different regime was suggested in the form of a Complaint Committee by the Commission, comprising of representatives from PBA, APNS, PCP, CPNE, PTV, PBC, PFUJ, SAFMA and SAWN and headed by the Additional DG (PR), ECP (Guideline 15.2, 2013).

For the preparation of a general election, due in 2018, the Election Commission of Pakistan is in process to issue a new Code of Conduct or Guidelines (Dawn, 2016).

Conclusion

In sum, hate speech during election period is more harmful, due to an enabling situation, when enmity ordinarily touches its height. Religion, race, caste and color issues are artificially raised to score better at a poll. A lot of comprehensive acts of hate speech have been addressed in the Election Act 2007. Many others are handled under Pakistan Penal Code. Above all, a Code of Conduct at each election is issued separately, with consultation of political parties and their candidates which help a lot to control and contain it.

However, confusion about the definition of a candidate makes it impossible to apply the provisions of hate speech. It is synergized with other confusion whether it applies to all people or only to candidates or candidates of political parties.

Owing to their consolidation, election laws are comprehensive to handle this problem during election. However, it needs a political will and an administrative support by the federal, a provincial and local governments for their successful implementation.

For this purpose, it becomes inevitable to save more resources on the disposal of Election Commission, at all levels, enabling it to conduct a free and fair election mandated under Article 225 of the Constitution.

Last but not the least, the role of modern and vibrant media is an integral part to achieve the purpose of a just election. Only the media, both electronic and print and to some extent social media, has the power and capacity to expose, name and shame, and to bring such people to justice, who commit such offences of hate speech during election.

Hate laws not only strengthen a developing democracy but assure respect of the rights of equality and human dignity during election.

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