

## **Defamatory Statements in Recent Political Landscape and Freedom of Speech**

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### **ABSTRACT**

It is an internationally recognized principle that the prerogative to speak freely is a preliminary human right of the utmost importance. It is a fundamental democratic principle which plays a key role in strengthening other human rights. Concurrently, it is widely accepted that this right is not absolute and the legislature may impose restrictions on it, according to law, for the welfare of the people. The unbridled license may not be given to any person for publishing defamatory material, either libel or slander, which defames the dignity and reputation of others on the plea of the prerogative to speak freely. The prerogative to speak freely must be proportionated against other fundamental rights and constitutional principles. The basic purpose of this article is to explore the “defamatory statement” which harms the reputation of others in the light of UDHR, ICCPR and the Constitution of Pakistan, particularly in the recent political landscape.

**Key Words:** Defamation, Defamatory Statements, Freedom of Speech, Freedom of Expression, Right to Reputation, Human Rights.

### **Introduction**

Only the human beings possess the power of words, the “noble gift of speech”, which distinguishes human beings from other creatures, allows them to multiply their joys, and lessen and unload their sorrows (Cressy, 2010). The documented history of free debate is about 5000 years ago; the evidence shows that there has been developing acknowledgment of speech rights in that era. In the Sumerian civilization, in present-day southern Iraq, approximately 2400 BCE, the first persisting reference to freedom was recorded. Even though the freedom in idea used to be economic freedom, this document, written in cuneiform, which establishes that the thinking of freedom used to be already being examined and debated. The speech rights have been described for Egyptians in the Maxims of Ptahhotep: “Worthy speech is extra hidden than greenstone, being discovered even amongst the slave girls at the millstone”. During the first millennium BCE, excellent proof of free speech rights – not equaled but in few present day countries – began to amalgamate in numerous cultures, which includes Israel, Athens, Rome

and China. The Hebrew Bible is abundant with examples of Prophets admonishing kings because they push aside the people's rights. The fact is important that the kings hardly ever punished such Prophets, although if their preaching was once deemed a risk to the government. Moreover, there is evidence – both from the Bible as well as from recovered letters written in the 6<sup>th</sup> and 7<sup>th</sup> centuries BCE – that the Hebrew people have also been outspoken in dealing with their kings (Sides, 2005).

In Athens, a prerogative to Freedom of Speech (FOS), *parrhesia*, used to be identified for citizenries; for example, the governmental meeting was once recognized the residents' entitlement to speak out, and discussions have been started by way of the Herald's words: “What man has unique recommendation to give to the *polis* and needs to make it known?” (Finley, 1983). However, in Rome there was nothing comparable to *parrhesia* endured by citizens; only the individuals in positions of authority had the prerogative to free speech. The Roman leaders as early as 450 BCE, however, prohibited speech via the Laws of Twelve Tables (Robinson, 1940).

Liu Xiaobo, a Noble laureate, at the time of imprisonment, said that the Freedom of Expression (FOE) is one of the primary human privileges, the foundation of humanity and the mother of truth. Any attempt to block FOS is basically an endeavor to squash on human entitlement, strangulate humanity and quash the truth. The affirmation regarding the status of FOE by Liu Xiaobo is well elaborated not only in history but also in the present day scenario (O'Flaherty, 2015). Goddard, a famous Muslim scholar, said that the academic FOE originated in the Madrasas of Islamic religious schools in the 9<sup>th</sup> century (Goddard, 2000). The views of FOE and liberty have ancient roots and were found in the 18<sup>th</sup> century in France. The concept “Man is born free; and everywhere he is in chains” has been given by Jean-Jacques Rousseau (1712- 1778) and later the same was incorporated in the Article 1 of the “French Declaration”<sup>1</sup> (Jones, 1998).

Sedley, L.J. elaborated that the prerogative of FOS not only embraces the inoffensive speech but also includes irritating, combative, unconventional, unorthodox, undesirable and confrontational speech subject to the condition that it does not instigate violence. Only speaking inoffensively does not have any worth (Redmond-Bate v Director of Public Prosecutions, 1999).

However, with the passage of time, the prerogative of free speech was gradually developed and incorporated in the various regional and international treaties, charters, frameworks, statutes and constitutions but it is not unbridled and unfettered and has some exceptions including “respect of the reputations of others”. This article explores the “defamatory statement” which defames the reputation of others on the pretext of the prerogative to speak freely, particularly in the recent political landscape.

## **Elements of Free Speech**

The FOE as a human right consists of several elements which include “freedom of opinion”, freedom to communicate one's opinion – also named as “freedom of expression” – and “freedom of information”. From these rights together the “freedom of the press” and the “freedom of the media” can be derived (Benedek & Kettemann, 2013).

## **Philosophical Foundations and Purpose of Free Debate**

It is civil and political liberty that everyone has the privilege to contribute to culture. Even though this privilege is helpful to authenticate political self-development, it is not only legitimate but also excels in that aim. Cultural republic, and consequently in cultural liberty, is vital for a liberal culture, although in countries where the democratic culture is not fully developed or not democratic in the least. In addition to that, a cultural philosophy of liberal speech proposes a more conclusive description of whether a lot of expressions which show that have slight to do with political self-development relish the absolute fortification of the US 1<sup>st</sup> Amendment (Balkin, 2016).

In the wide philosophical literature on FOE, there are three obvious values: the first standard of FOE is related to its capability for encouraging to pursue for “truth”; the second standard of FOE is linked to its association with “human sovereignty” and the third standard of FOE is regarding its aptitude to support a democratic government or “self-government” (Schauer, 1982). There are four comprehensive purposes of the prerogative to speak freely as mentioned below (Indian Express Newspapers v Union of India, 1985):

### **a) Attainment of Self-fulfillment**

The FOS is especially important to an individual's self-fulfillment. It is exclusively valuable in intellectual self-development. It is a reflective mind conscious of choices and the possibilities for development that differentiates human beings from other animal species (Lakshmi Ganesh Films v Government of A.P., 2006).

The primary requirement of democracy is that the citizens be free to receive all information which may affect their options in the procedure of mutual decision-making and, particularly, in the voting process. After all, the legality of a democratic state is based on the free decisions taken by its citizens regarding all collective action. Consequently, all speech that is related to this collective self-autonomy by free people must enjoy absolute (or contiguous-absolute) shelter (Meiklejohn, 1948).

**b) Discovery of Truth**

John Stuart Mill (1859), who was a British 19<sup>th</sup> Century Liberal and a very eminent philosopher on this subject, in his stupendous work, “On Liberty”, presents a justification in support of FOS that runs something like this: No one is infallible; we all are in mistake every now and again. For that reason it is wrong to silence thoughts and feelings, which may at least contain a seed of truth, perhaps more. To take the liberty of silencing views because they are “wrong” is to assume infallibility. Which person, other than the infallible, can be certain of what is right or wrong? But no one is infallible. Mill's argument for FOS is based on the principle that it helps in the discovery of truth. If every person has the liberty to speak his mind, it will enhance the human intellectual capacity, which promotes the development of society – that is, for the welfare of people. Thus, Mill's argumentation in the discovery of truth is an important consequence of FOS. The main beneficiaries of FOS are those who listen to the speech and not those who express themselves. There is no doubt that individuals gain from FOS and it is the development of society (Petäjä, 2009).

Dworkin sums up Mill's comments in these words: “... particular individuals are allowed to speak so that the community they address may benefit in the long run” (Dworkin, 1985). The right to report the truth is defense in itself; the right to expose is not absolute, for a person may treat information as personal or confidential, but there was no common law forbidding the publication of facts which would instigate hardship to another (Napier v Pressdram Ltd, 2009).

**c) Partaking in Decision Making**

The 1973 Constitution<sup>2</sup> conferred a fundamental right on every citizen to participate in the political governance of the state, while simultaneously reinforcing the constitutional mandate to provide shelter and enhance such right through a self-governing democratic system – fundamental rights of Freedom of Assembly (FOA) and FOS assisted to understand such legitimate imperative (Awais Younas v Federation of Pakistan, 2016). Democracy is a Government by the people via free debate. The democratic form of government itself desires its citizens an effective and rational contribution to the matters of the community. The public dialogue with people's contribution is a primary feature and a rational procedure of democracy which discriminates it from all other types of government. Democracy can neither work nor flourish unless people go out to share their opinions. It is a reality that public debate on matters relating to management has optimistic value (S. Rangarajan v P. Jagjivan Ram, 1989). Discussion on public matters should be uninhibited, healthy, and fully open, and that may well contain vehement, caustic and occasionally unpleasantly severe attacks on government and public officials (New York Times Co. v Sullivan, 1964).

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### **d) Equilibrium between Stability and Social Change**

It provides a procedure owing to that it would be conceivable to structure a sensible equilibrium between stability and social change. There must be a valid object to be dubious of the state regarding this perspective; it is not good for liberal speech rather than it is a pessimistic approach because it pinpoints the iniquities of the rule (Barendt, 2005). If individuals are not allowed to convey their ideas, that views remain untested (Vollenhoven, 2015). Only through free debate the prejudices and concepts of people can be tested and it helps society not to become stagnant (Emerson, 1970). The FOE provides equilibrium in societies to safeguard other rights like public order, justice and personal prerogatives of people (Dugard, 1978). Van Zyl, J. stressed the importance of FOE in a democratic society in the following words “freedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic and Parliament guards these rights jealously ...” (S v Turrell, 1973).

### **Development of Free Debate within the United Nations**

#### **a) Free Debate in UDHR**

The Article 1(2)<sup>3</sup> of the Charter of the UN elaborated that the purpose of UN is to grow well disposed relations among countries based on respect for the rule of equivalent rights and self-assurance of people groups, and to take other proper measures to fortify universal harmony.

The UN adopted the UDHR<sup>4</sup> on December 10, 1948. In the history, first time, a global body approved a set of standards that purported to be valid and enforceable everywhere. The relevance of this declaration as a foundational frame of reference in international legal and political discourse has been demonstrated over the ensuing decades. The human rights – as defined or not in the UDHR – have also become into a source of slogans and rhetorical weapons used in international political and ideological conflicts. However, the UDHR has served as more than just a political tool. People have found motivation in it to fight for better living conditions and to make more civilized politics (Samnøy, 1993).

The UDHR was declared by the UNGA<sup>5</sup> in 1948 as a common standard of success for all peoples and all states. A universal declaration of human rights was incredibly ambitious and groundbreaking in both its conception and its content. It aimed to contribute to the larger project of a comprehensive International Bill of Human Rights and is declarative and exhortatory in nature. The majority provisions of the UDHR's contents have gained the status of legal binding through customary international law, despite the fact that it does not claim to be legally binding. The UN's protection of FOS is built upon Article 19 of the UDHR<sup>6</sup>, which is arguably the most well-known clause on the FOS in any international instrument. It lays out the prerogative of FOS properly and stated that everyone has the privilege to FOS and FOE, which includes to hold opinions without

hindrance and to use any media or method, regardless of boundaries, to seek for, receive, and share information and opinions (Mcgonagle, 2015).

Initially, it seems unequivocal and to broker no exceptions or constraints. However, such an interpretation of the clause would be incorrect. The “integrated articles” of the UDHR should not be understood as a series of essentially independent guarantees (Glendon, 2002). Instead of repeating the idea of constraints on rights for each of the privileges they govern, the authors of the UDHR purposefully chose to compress it in Article 29<sup>7</sup> and Article 30<sup>8</sup>. Although, a general catch-all constraints clause is more pleasing in terms of structure. The constraints are hidden in the Article 29(2) of UDHR which elaborated that everyone's rights and freedoms may only be limited in the ways specified by law, and only in ways that are necessary to ensure the due respect and recognition of others' rights and freedoms as well as to uphold the standards of morality, public order, and the general welfare in a democratic society (Opsahl, 1992).

Moreover, the Article 12 of the UDHR<sup>9</sup> describes circumstances in which the law might impose restrictions on the right to FOS in order to defend people against attacks on their reputation and dignity.

#### **b) Free Debate in ICCPR**

Carlos P. Romulo, the president of the UN Conference on Freedom of Information<sup>10</sup> upon signing the General Act of the Conference, said that the document would someday be perceived as the Magna Carta of FOS and FOE (Whitton, 1949). The role of the Conference in the evolution of the prerogative to FOE is the most ignored part of the UN system. A formula was proposed in the Conference for the FOE clause in the UDHR that was quite similar to the final adopted version. There are very few textual negligible modifications between the text proposed by the Conference for the draft Covenant on Human Rights<sup>11</sup> (presently ICCPR) and the text that was ultimately adopted e.g. “shall have” changed to “has” and “shall include” changed to “including”. The present tense, in both cases, was substituted with the modal auxiliary verb “shall”, which eliminated the connotation of (future) compulsion for an essence of immediacy may be more appropriate for a declaratory text like the UDHR. Moreover, the adopted text refers to “freedom of opinion and expression” instead of “freedom of thinking and expression”, as proposed in the draft text. The Conference's formula eventually replaced the phrase “by any means” with “through any media” (Mcgonagle, 2015).

The main concepts outlined in Article 19 of the UDHR are expanded upon in Article 19 of the ICCPR<sup>12</sup> and are coupled with the obligations, constraints, and restraints that direct the actual exercise of the relevant rights. A close analysis of Article 19's text shows that apparently the unobtrusive reference to “special duties and responsibilities” serves as the article's main hub. The significance of this cannot be overstated since it establishes a relationship between the right to free debate in its broadest sense and its permissible limitations. The Article 19 of

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ICCPR must be read in connection with Article 20 of the ICCPR<sup>13</sup> because it imposes additional restrictions on the right to FOS and has even been considered as a fourth paragraph to ICCPR's Article 19. The ICCPR's Article 17(1)<sup>14</sup> provides defense against wrongful assaults on reputation and honor (Mcgonagle, 2015).

Both the ICCPR and UDHR recognize FOE as a basic prerogative under international law. The right to FOE is arguably now enforceable by all states, even those that have not joined the ICCPR, despite the fact that the UDHR is a non-binding document and the ICCPR is only enforceable by signatory nations. This is because of customary international law (Dobras, 2009). Nevertheless, as stated in Article 19(3)(a) of the ICCPR, FOS is not unbridled and imposes "special duties and responsibilities" and may "therefore be subject to certain restrictions" in accordance with law, when compulsory, "for respect of the reputations of others".

### **Defamation Defined and Classified**

A false publication intended to bring someone into disrepute qualifies as defamation. The common law has separated it into two categories a) Libel – a written defamation; and b) Slander – a verbal defamation (Newell, 1890). The libel and slander are only different terms for the same wrong done, particularly, in different manner of publication. The libel is a sort of defamation that is published through printing, writing, images, pictures or anything which is the object of the vision on the other hand slander is a sort of defamation that is published verbally, by spoken words, which is the object of the hearing without lawful justification. Nothing is wrong, in a broad sense, until the accusation or representation that is defamatory is made public. When it is shown to one or more than one party; at that point, it is considered to have been published. When the false accusation is directed only to the party in question, in that case the reputation is not assaulted and presumably cannot be harmed (Cooley, 1879).

Defamatory writing is not considered libel, if it rests in the custody of the composer, and is not seen by anyone else. Similarly, a false accusation is not considered slander if the party who is falsely accused reports it to others either through a complaint or otherwise, because the publication was not created by the defamer. He has, in fact, uttered the accusation, but he has not made it public. If the accused brings the accusation to public attention on his own, he is responsible (Cooley, 1879). The libel might be a criminal or civil wrong (tort) under common law, but slander is purely a civil wrong (tort); although the words may occasionally fall under the criminal law as being rebellious, sacrilegious, or obscene, or as being an objective to commit an offence (The Queen v Holbrook, 1878).

The written words could be considered libel and spoken words as slander, however, the communication is not limited to these two methods. The courts had to develop standards for what constituted libel due to disputes over defamatory information transmitted via various channels. Initially, permanency seemed to be the most important key factor (Mitchell, 2005). Generally, the libels are expressed

in writing or printing, but it is not essential requirement; the defamatory material may be communicated in another permanent manner e.g. a statue, an effigy, a caricature, posters, chalk marks on a wall, or images may be considered libelous (Monson v Tussauds Ltd, 1894).

### **Defamation Prerequisites**

G.P. Singh, J. said that, in order to constitute a libel case, it must be established that the alleged statement is a) false; b) written; c) defamatory; and d) published by the defendant and caused special damage. The defamatory remarks spoken to the plaintiff alone and not in front of a third party were not subject to legal recourse, because there was no publication. A document that contains defamatory statements may also be published by being read out to a third party or by being dictated to a clerk, typist or stenographer. In either situation, the communication constitutes slander instead of libel (Osborn v Thomas Boulter & Son, 1930). It is essential that the specific damage appear to be a natural outcome of the spoken words (Speake v Hughes, 1904). A slander claim may be maintained without the proof of specific damage if a) the plaintiff is accused of a criminal offence (not necessarily an indictable one) (Webb v Beavan, 1883); b) the plaintiff has an infectious or contagious disease, inclining to exclude the plaintiff by the society; c) any deleterious imputation is made that negatively impacts the plaintiff in his office, profession, business, or trade and that imputation assert to him unfitness for, or misbehavior in, that calling (Hopwood v Muirson, 1945); and d) the plaintiff is a girl or woman and the words are meant to imply un-chastity or adultery on her part. The common law did not allow for legal action without the proof of specific damage in cases where a girl or woman was accused of being unchaste by the use of words. However, the Slander Act<sup>15</sup> abolished the requirement of proving specific damage in the cases when statements accuse a girl or women of being unchaste or having adultery (Singh, 2010).

### **Defamation Defenses**

Turner said that the defenses in the case of defamation are a) a statement is based on truth; b) a statement is a fair (opinion) comment; c) a statement is on a matter of public interest; d) a statement has an absolute or qualified privilege; and e) a statement published with consent. He added that a statement is considered to have an absolute privilege if it is of such a character that no action will be taken for it, regardless of how false and defamatory it may be, and even if it is made maliciously – that is, with some wrong intension. The prerogative of FOS is allowed to completely outweigh the reputational rights. The cases where the right to FOS can be upheld to such a high standard are very rare in number and quite unique in nature. The speech has absolute privilege if a) the statements made during the judicial proceedings before any court or tribunal, whether by the judge, parties, counsel, witnesses, or advocate (Trapp v Mackie, 1979); b) a fair and



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accurate report of public proceedings before a court, if published concurrently with the proceedings in a newspaper; c) anything said in one of the two houses of the parliament i) during a debate, ii) during a committee meeting, and iii) by witnesses to committees, but this does not apply to the defamatory statements made by a member of parliament outside of the house (*Church of Scientology of California v Johnson-Smith*, 1972); d) the parliament published papers, reports, or proceedings on the directions of either house; e) the specific communications between senior officers (ministers) of state during official duty, where absolute communication freedom is essential although a citizen may lose its reputation (*Chatterton v Secretary of State for India*, 1895); and f) the defamatory communications between spouses (*Turner*, 2014).

Heuston and Buckley elaborated that the law acknowledges that there are certain circumstances in which a person, not acting maliciously, is permitted to make defamatory statements about another. The prerogative of FOS takes precedence over the prerogative of reputation, but only to some extent. The statement must be made in good faith and without the use of any indirect or inappropriate motive. The protection may apply in these circumstances which are available in the doctrine of qualified privilege. So, the qualified privilege is an intermediate case that falls between having no privilege at all and having absolute privilege. The qualified privilege has the same effect as absolute privilege and the statement cannot be quoted in court. A statement is protected if it is expressed in good faith by a person while performing a private or public responsibility, whatever moral or legal, or while doing his own affairs, in the cases where his interests are at stake (*Toogood v Spyring*, 1834). It is neither desirable nor possible to have a comprehensive list of such circumstances (*London Association for Protection of Trade v Greenlands Ltd.*, 1916), however, the usually agreed main instances of qualified privilege are a) a statement is made by any person during the performance of a private or public duty, either moral or legal (*Toogood v Spyring*, 1834); b) a statement is made for the protection of some lawful interest e.g. for the protection of his own reputation, it is essential reciprocity that the person to whom a statement is conveyed must have a corresponding interest to receive the information (*Adam v Ward*, 1917); c) the fair and precise reports, published in newspaper or elsewhere, by the parliament, judges, and some other public proceedings (*Kingshott v Kent Newspapers Ltd.*, 1991); and d) the professional and confidential conversations between the lawyer and its client for getting and receiving advice without any fear in the interests of justice (*Minter v Priest*, 1930). It is not a conclusive list of qualified privileges and may be varied on case to case basis (*Heuston & Buckley*, 1997).

Lord Atkin developed a standard to determine whether words might have a defamatory connotation “in their ordinary interpretation”. He proposed a test by saying: would the statements incline to reduce the complainant in the opinion of right-thinking members of society generally? If it is determined that the words are capable of creating defamation, then the jury will decide whether or not the words were defamatory on case to case basis (*Sim v Stretch*, 1936).

Lord Nicholls held that regardless of the circumstances, the common law should not create a new “subject matter” category of qualified privilege called “political information”, as doing so would not adequately protect reputation and would violate the principle of not distinguishing political information from other matters of public concern. However, he also believed that qualified privilege is available in respect of political information when the established common law test is satisfied. He added that the following considerations should be made when applying the defense a) the significance of the allegation; the public will be deceived more and the person will be injured more, if the charge is wrong; b) the nature of the information and how much the subject is a matter of public concern; c) the source of the information; some sources are unable to have the direct knowledge of the events in detail, some people have their own agendas or are being funded for their stories; d) the actions are taken to validate the information; e) the prestige of the information; f) the significance of the matter; g) whether the plaintiff was asked for response; h) whether the article comprises the essence of the plaintiff's version of events; i) the article's tone; and j) the contexts and timing of the publication. These defenses are not final and the weightage to be accorded to these as well as any additional relevant elements depends on the circumstances (Reynolds v Times Newspapers Ltd, 1999). The defense might be considered as a question of law instead of a question of fact on case to case basis (Jameel v Wall Street Journal, 2006).

## **Free Debate in Pakistan**

### **a) Constitution of Pakistan 1956**

The Bill of Rights was not incorporated in the Government of India Act, 1935 by its drafters due to that the fundamental rights were not granted in the interim Constitution of Pakistan, 1947. The idea of a Bill of Rights, as included in the Constitution of USA and many other contemporary constitutions, appealed greatly to the nationalist leaders during the freedom movement because the people of British India under British rule were deprived of basic rights. It was, therefore, natural for the drafters of the first Pakistani Constitution to pay attention for the incorporation of Bill of Rights in the constitution of the newly born state. The first Constituent Assembly of Pakistan during its preliminary session on August 12, 1947 constituted a special committee on the fundamental rights of the citizens<sup>16</sup>. The interim report of the special committee on fundamental rights was approved in 1950 before approval of any other laws of the constitution. The one and only point made in the interim report on fundamental rights was, in the words of Liaquat, “to respect the dignity of man” (Khan, 2017).

The first Constitution of Pakistan was enforced on March 23, 1956, and finally Pakistan became “the Republic” after nine years of efforts. However, following numerous ideological disputes the Constitution of 1956 had guaranteed

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numerous fundamental rights. The prestige to speak freely was entrusted under Article 8 of the Constitution<sup>17</sup> subject to permissible constraints enforced by law including “defamation” (Khan, 2017).

#### **b) Constitution of Pakistan 1962**

President Iskander Mirza abrogated the 1956 Constitution and imposed martial law in the country on October 7, 1958. The Commander-in-Chief of the armed forces at the time, General Muhammad Ayub Khan, became the Chief Martial Law Administrator. General Ayub Khan overthrew Iskander Mirza on October 27, 1958, and subsequently declared himself as president (Pardesi, 2012). The text of the new constitution was endorsed by Ayub Khan's Cabinet in January 1962. The so-called Constitution of 1962 was declared by President Ayub Khan through a speech on March 1, 1962, and it was enforced on June 8, 1962. The Constitution of 1962 is one of the exceptional constitutions in the world which ignored the idea of justiciable fundamental rights in its very notion (Khan, 2016). However, the first amendment act<sup>18</sup> granted nineteen justiciable fundamental rights including to speak freely subject to equitable restraints prescribed by law including “defamation”.

#### **c) Constitution of Pakistan 1973**

Ayub Khan resigned from his office and transferred the power to General Agha Muhammad Yahya Khan, Commander-in-Chief of the armed forces, who proclaimed martial law and abrogated the 1962 Constitution on March 25, 1969 (Pardesi, 2012). The National Assembly, which was elected in December 1970, adopted the interim constitution, which was enforced on April 21, 1972 after the withdrawal of martial law (Khan, 2017). The Constitution of 1973 was approved by the National Assembly on April 10, 1973, was ratified by the Assembly's President on April 12, 1973, and came into effect on August 14 of the same year. Based on the adult franchise, the directly elected representatives of the people unanimously approved the 1973 Constitution (Khan, 2016).

The newly approved constitution guaranteed fundamental rights to all citizens. It put a strong emphasis on basic prerogatives by declaring that any prevailing law, custom, or usage enforced by law that was incompatible with any clause of fundamental rights would be null and void to the limit of its incompatibility and that no authority in Pakistan, including the federal government, a provincial government, the legislature, the National Assembly, or any local authority, was authorized to make any law, regulation, or order that might be incompatible with any clause of the fundamental rights. Any such law, regulation, or order would be void to the extent that it was repugnant<sup>19</sup>. The conversant democratic prerogatives and freedoms, including the prerogative to speak freely, were incorporated in the new constitution, with the usual qualifications (Khan, 2017).

Muhammad Ali Mazhar, J. said that one of the fundamental rights that is regarded as the cornerstone of democratic institutions is the FOS and FOE, which is guaranteed under Article 19 of the Constitution<sup>20</sup> (Flt. Lt. (Dr) Shariq Saeed v Mansoob Ali Khan, 2010). The word "defamation" was originally present in Article 19 of the 1973 Constitution<sup>21</sup> but was substituted to "commission of" by the fourth constitutional amendment. The constitutional amendment that removed the word "defamation" from Article 19 of the Constitution and replaced it with the words "commission of" has increased the scope of press freedom, but it does not give license to the press to publish material that is harmful to the interests of any person or may cause damage to their reputation, honor, or prestige. Article 19 grants Freedom of Press (FOP) but the press must exercise due care and caution before publishing any material in the press, verify its accuracy from the relevant sources, and maintain themselves within the boundaries and ambit of the provisions of Article 19 of the Constitution. The press is not free to publish anything it desires, but its freedom is subject to such reasonable restrictions as may legitimately be imposed under a law in the public interest and glory of Islam (Sheikh Muhammad Rashid v Majid Nizami, 2002).

G. H. Malik, J. held that every individual has a right to his reputation, and there is also a commensurate commitment not to undermine that reputation and thereby instigate damage to the individual concerned (Sultan Ali Lakhani v Mir Shakil ur Rahman, 1997). A person's reputation is given the highest protection under Article 4(2)(a)<sup>22</sup> of the Constitution. Moreover, Article 14(1)<sup>23</sup> states that the dignity of man and the privacy of one's home are inviolable prerogatives of every person. The defamation of any individual by written or spoken words or any other methods of communication diminishes a man's dignity, which is fully secured by the constitution. Thus, it is not only the constitutional obligation of the state, but also of all persons who are living within the state of Pakistan, to respect and regard the dignity of every person of Pakistan; otherwise, anyone who commits an act of malice by defaming another person is guilty under the law (Liberty Papers Ltd. v Human Rights Commission of Pakistan, 2015). The prerogative to speak freely does not mean that anyone has the prerogative to use it in a way that degrades the respect and dignity of the nation's constitutional institutions (State v Mati ullah Jan, 2018). The prerogative to speak freely did not entitle the print or electronic media to launch a campaign against any individual that was defamatory or intended to harm and damage his political career on spurious grounds (Wali Muhammad Khoso v Federation of Pakistan, 2010).

## **Defamation Laws in Pakistan**

### **a) Pakistan Penal Code 1860**

Muhammad Roshan Essani, J. stated that someone commits defamation if he makes or publishes any imputations about another person with the intent to hurt that person's reputation and he knows or has a reason to suspect that doing so will

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cause that person's reputation to suffer as per Section 499 of PPC<sup>24</sup>. However, it is subject to a legitimate exception, namely the public good and an opinion expressed in good gesture regarding a public servant's conduct while discharging his official duties or regarding that public servant's character and an opinion expressed in that context in good faith for the public good. The condition precedent for the same is that it was said publicly without malice and in the genuine interest of the public. The public man, while holding a public or official position, cannot claim immunity from criticism because it is essential for a vibrant society. However, the Section 500 of PPC<sup>25</sup> prescribed the punishment of defamation (Abdul Karim v Abu Zafar Qureshi, 2001). The simple publication of an accusation does not automatically constitute defamation. Hence, the *mens rea*, or purpose, is an essential ingredient of defamation to constitute a crime (Shash Begum v Bashir Ullah, 2013). Faisal Arab, J. held that a person may file a separate lawsuit, under Section 499 of PPC, against that person who willfully publishes a defamatory statement to hurt one's reputation (Aysha Bibi v Additional District Judge, Lahore, 2018).

Sagheer Ahmad Qadri, J. said that while committing the crime of defamation, the accused actually harms the reputation of the victim, as defined in Section 44 of PPC<sup>26</sup>, because he intends to lower the status of the victim in the eyes of his fellow beings, within the circle in which the victim moves, or among those who know or respect him. He added that the complaint against the offence of "defamation" can only be filed, under Section 198 of CrPC<sup>27</sup>, by the aggrieved person for prosecution under PPC. However, the definitions of the words "complaint" and "person" are defined under CrPC<sup>28</sup> and PPC<sup>29</sup> respectively (Malik Muhammad Shoaib Bhutta v Abdul Aziz Mohmand, 2010).

#### **b) Defamation Ordinance 2002**

Khalid Ali Z. Qazi, J. said that even before the Defamation Ordinance 2002, the tort of defamation could be actionable, under Section 9 of CPC<sup>30</sup>, before the civil courts of Pakistan (Raees Ghulam Sarwar v Mansoor Sadiq Zaidi, 2008). Muhammad Ali Mazhar, J. said that a special law was promulgated, in the year 2002, which incorporated specific clauses pertaining to the defamation law. The Ordinance<sup>31</sup> defines that "publishing" refers to the communication of the words to at least one person who is not the target of the defamatory statement, and includes broadcasting over the Internet, newspapers, or other means of communication. The publication in the sense of the law refers to the dissemination of defamatory statement to a person other than the target of the writing. There is no publication of a statement if it is communicated directly to the intended recipient. However, the statement is considered to be published if the words "complained of" be communicated to someone other than the plaintiff. The Section 3 of the Ordinance<sup>32</sup> explained that any unlawful act or publication or dissemination of a defamatory statement or presentation made orally, in writing, or visually that damages a person's reputation, tends to lower him in the eyes of others, or tends to lower him to ridicule, unfair criticism, dislike, contempt, or hatred shall be

actionable as defamation. This section also elaborates two forms of defamation as a) slander; and b) libel. The oral defamatory statements or representations are actionable under slander and written or visual defamatory statements or representation are actionable under libel (Flt. Lt. (Dr) Shariq Saeed v Mansoob Ali Khan, 2010).

Ijaz Anwar, J. said that the defamatory statements published in a newspaper are believed to be false, so it is the plaintiff's responsibility to show that the defendant published the alleged defamatory statements, after that, the defendant prove that the statements are based on truth (Zafar Hijjazi v Muhammad Ayaz Mushwani, 2020).

The defamatory words are actionable without the proof of specific damage, as per Section 4 of the Ordinance<sup>33</sup>, but damage is implied when it is established. The purpose of the damages is to compensate the injured party. It might be physical harm, loss of reputation, business or emotional pain and suffering (Sufi Muhammad Ishaque v The Metropolitan Corporation, 1996). The damages are classified as a) general damages; and b) special damages (Abdul Majeed Khan v Tawseen Abdul Haleem, 2012). Sajjad Ali Shah, J. elaborated that the general damages, most probably, refer to the suffering and mental torture brought on by derogatory or false words. However, the special damages on the other hand, are defined as the actual but not necessarily the outcome of the injury that was allegedly suffered (Munawar Ahmed v Muhammad Ashraf, 2021). Moreover, no defamation claim is made against the accused when a statement is published for the benefit of the public and to protect the interests of its author, and there was no malicious motivation (Aun Saieed Hashmi v The State, 1976).

Ijaz Anwar, J. held that the Section 5 of the Ordinance<sup>34</sup> offers all potential defenses that may be brought in response to the claims or lawsuit filed for damages, which include a) not an author of the defamatory statement; b) the matter published in good gesture; c) truth and published for the welfare of public; d) brought the assent of accuser; e) offer to tender apology but not accepted by the accuser; f) offer to publish denial but refused by the accuser; g) privileged communication as consultation between lawyer and its client; h) has absolute<sup>35</sup> or qualified<sup>36</sup> privilege (Zafar Hijjazi v Muhammad Ayaz Mushwani, 2020). Ali Baig, J. elaborated that a suit can be filed within six months of the publication of defamatory material as prescribed under Section 12 of the Ordinance<sup>37</sup>. This Ordinance is a special law that specifies a time restriction for filing a defamation suit (Malik Ebadat Khan v Saeedullah Yousafzai, 2020).

## **Conclusion**

The FOS and FOE are the foundations of all democratic institutions and are necessary for the smooth functioning of the democratic procedures (Romesh Thappar v The State of Madras, 1950). The FOS, unanimously recognized as both a decisive and foundational human right, is not only the keystone of democracy,

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but indispensable to a flourishing civil society<sup>38</sup>. While explicitly recognizing fundamental rights of every citizen regarding the liberty of speech, expression, press and liberty claimed by the citizens shall always be subject to constitutional sanctions and according to law (*Masroor Ahsan v Ardeshir Cowasjee*, 1998). The principles on which the power of the state to impose restrictions is based that all individual rights of a person are held subject to such reasonable limitations and regulations as may be necessary or expedient for the protection of the general welfare (*Shukla & Singh*, 1994).

The privilege to live is not restricted to negligible living, privilege to live means profound life, which can be possessed with dignity. The rule is required to be stretched out further to the situations where any defamation is caused, in light of the fact that the human dignity, respect and regard have more weightage than the physical luxuries and necessities (*Shehla Zia v WAPDA*, 1994). It has been acknowledged for a long time that the law must balance free speech prerogatives with the privilege to reputation. It is believed that the individuals and organizations to be titled to provide shelter to their hard-earned reputation from defamatory assaults (*Adibe*, 2010). The defendant's publication of malicious accusations against the plaintiff is illegal and unlawful, which defames the plaintiff's reputation in the eyes of general public (*Kazim Ali v Ishaq Ali*, 2022).

The alleged statement which is false, defamatory, not has absolute or qualified privilege and cause special damage is not granted protection under free speech clause of UDHR, ICCPR and Constitution of Pakistan, 1973. Concurrently, the alleged statements of the political figures to say rebellious, mutinous, thief or corrupt to other politicians, nation's constitutional institutions, judiciary or armed forces in their public speeches, which defames their reputation, damage their political career, degrades the respect and dignity of the constitutional institutions and demoralized the armed forces are not protected under the free speech clause and can be prosecuted according to prevailing law. The *mens rea* is an essential ingredient to constitute defamation as criminal wrong but not necessary in civil wrong (tort).

The purpose of laws which are designed to restrict defamatory speech is to provide shelter to the dignity of people against assault. The inhabitants of a society have equal status as they would be equally entitled for basic justice and rudiments of their reputation (*Waldron*, 2012).

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<sup>1</sup> French Declaration of the Rights of the Man and of the Citizen 1789

<sup>2</sup> Constitution of Islamic Republic of Pakistan 1973, Article 17

<sup>3</sup> The Charter of the United Nations 1945, Article 1(2) stated that to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

<sup>4</sup> The Universal Declaration of Human Rights, 1948

<sup>5</sup> UN General Assembly

<sup>6</sup> The Universal Declaration of Human Rights 1948, Article 19 stated that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

<sup>7</sup> The Universal Declaration of Human Rights 1948, Article 29 stated that (1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

<sup>8</sup> The Universal Declaration of Human Rights 1948, Article 30 stated that nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

<sup>9</sup> The Universal Declaration of Human Rights 1948, Article 12 stated that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

<sup>10</sup> United Nations Conference on Freedom of Information held at Geneva, Switzerland from 23 March to 21 April, 1948.

<sup>11</sup> The Draft Covenant on Human Rights, Article 17 stated that (1) Every person shall have the right to freedom of thought and the right to freedom of expression without interference by governmental action; these rights shall include freedom to hold opinions, to seek, receive and impart information and ideas, regardless of frontiers, either orally, by written or printed matter, in the form of art, or by legally operated visual or auditory devices. (2) The right to freedom of expression carries with it duties and responsibilities and may, therefore, be subject to penalties, liabilities or restrictions clearly defined by law, but only with regard to: a) Matters which must remain secret in the interests of national safety; b) Expressions which incite persons to alter by violence the system of government; c) Expressions which directly incite persons to commit criminal acts; d) Expressions which are obscene; e) Expressions injurious to the fair conduct of legal proceedings; f) Infringements of literary or artistic rights; g) Expressions about other persons natural or legal which defame their reputations or are otherwise injurious to them without benefiting the public; h) The systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples and States; A State may establish on reasonable terms a right of reply or a similar corrective remedy. (3) Measures shall be taken to promote the freedom of information through the elimination of political, economic, technical and other obstacles which are likely to hinder the free flow of information. (4) Nothing in this article shall be deemed to affect the right of any State to control the entry of persons into its territory or the period of their residence therein.

<sup>12</sup> International Covenant on Civil and Political Rights 1966, Article 19 stated that (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include 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. (3) The exercise of the

rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

<sup>13</sup> International Covenant on Civil and Political Rights 1966, Article 20 stated that (1) Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

<sup>14</sup> International Covenant on Civil and Political Rights 1966, Article 17(1) stated that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

<sup>15</sup> Slander of Women Act of 1891

<sup>16</sup> On 12th August 1947, a special committee called the “Committee on Fundamental Rights of Citizens and Minorities of Pakistan” was appointed to look into and advise the Assembly on matters relating to fundamental rights of the citizens, particularly the minorities, with the aim to legislate on these issues appropriately. Retrieved November 17, 2022, from <https://na.gov.pk/en/index.php>.

<sup>17</sup> The Constitution of the Islamic Republic of Pakistan 1956, Article 8 stated that every citizen shall have the right to freedom of speech and expression, subject to any reasonable restrictions imposed by law in the interest of the security of Pakistan, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

<sup>18</sup> The Constitution (First Amendment) Act, 1963 (I of 1964) enforced from January 10, 1964

<sup>19</sup> The Constitution of the Islamic Republic of Pakistan 1973, Article 8 stated that (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

<sup>20</sup> The Constitution of the Islamic Republic of Pakistan 1973, Article 19 stated that every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press...

<sup>21</sup> The Constitution of the Islamic Republic of Pakistan 1973, Article 19 stated that ... subject to any reasonable restrictions imposed by law in the interest of the glory of Islam 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. (Section 4 of the Constitution (Fourth Amendment) Act, 1975 (71 of 1975) substituted the [commission of] in place of the word “defamation”, in Art. 19, (w.e.f. November 21, 1975)).

<sup>22</sup> The Constitution of the Islamic Republic of Pakistan 1973, Article 4(2)(a) stated that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

<sup>23</sup> The Constitution of the Islamic Republic of Pakistan 1973, Article 14(1) stated that the dignity of man and, subject to law, the privacy of home, shall be inviolable.

<sup>24</sup> Pakistan Penal Code 1860, Section 499 stated that 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. This section provides ten exceptions i) imputation of truth which public good requires to be made or published; ii) on public conduct of public servants; iii) conduct of any person touching any public question; iv) publication of reports of proceedings of courts; v) merits of case decided in court or conduct

of witnesses and other concerned; vi) merits of public performance; vii) censure passed in good faith by person having lawful authority over another; viii) accusation preferred in good faith to authorised person; ix) imputation made in good faith by person for protection of his or other's interest; x) caution intended for good of person to whom conveyed or for public good.

<sup>25</sup> Pakistan Penal Code 1860, Section 500 stated that whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

<sup>26</sup> Pakistan Penal Code 1860, Section 44 stated that the "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

<sup>27</sup> The Code of Criminal Procedure 1898, Section 198 stated that no Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Pakistan Penal Code or under Sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence.

<sup>28</sup> The Code of Criminal Procedure 1898, Section 4(h) stated that complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person whether known or unknown, has committed an offence, but it does not include the report of a police officer.

<sup>29</sup> Pakistan Penal Code 1860, Section 11 stated that the word "person" includes any Company or Association, or body of persons, whether incorporated or not.

<sup>30</sup> The Code of Civil Procedure 1908, Section 9 stated that the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

<sup>31</sup> Defamation Ordinance 2002, Section 2(e) stated that "Publication" means the communication of the words to at least one person other than the person defamed and includes a newspaper or broadcast through the internet or other media.

<sup>32</sup> Defamation Ordinance 2002, Section 3 stated that (1) Any wrongful act or publication or circulation of a false statement or representation made orally or in written or visual form which injures the reputation of a person, tends to lower him in the estimation of others or tends to reduce him to ridicule, unjust criticism, dislike, contempt or hatred shall be actionable as defamation. (2) Defamation is of two forms, namely (i) Slander; and (ii) Libel. (3) Any false oral statement or representation that amounts to defamation shall be actionable as slander. (4) Any false written, documentary or visual statement or representation made either by ordinary form or expression or by electronic or other modern means of devices that amounts to defamation shall be actionable as libel.

<sup>33</sup> Defamation Ordinance 2002, Section 4 stated that the publication of defamatory matter is an actionable wrong without proof of special damage to the person defamed and where defamation is proved, damage shall be presumed.

<sup>34</sup> Defamation Ordinance 2002, Section 5 stated that in defamation proceedings a person has a defence if he shows that (a) he was not the author, editor, publisher or printer of the statement complained of; (b) the matter commented on is fair and in the public interest and is an expression of opinion and not an assertion of fact and was published in good faith; (c) it is based on truth and was made for the public good; (d) assent was given for the publication by the plaintiff; (e) offer to tender a proper apology and publish the same was made by the defendant but was refused by the plaintiff; (f) an offer to print or publish a contradiction or denial in the same manner and with the same prominence was made but was refused by the plaintiff; (g) the matter complained of was privileged communication such as between lawyer and client or between persons having fiduciary relations; and (h) the matter is converted by absolute or qualified privilege.

<sup>35</sup> Defamation Ordinance 2002, Section 6 stated that any publication of statement made in the Federal or Provincial Legislatures, reports, papers, notes and proceedings ordered to be published by either House of the Parliament or by the Provincial Assemblies, or relating to judicial proceedings ordered to be published by the court or any report, note or matter

written or published by or under the authority of Government, shall have the protection of absolute privilege.

<sup>36</sup> Defamation Ordinance 2002, Section 7 stated that any fair and accurate publication of parliamentary proceedings, or judicial proceedings which the public may attend and statements made to the proper authorities in order to procure the redress of public grievances shall have the protection of qualified privilege.

<sup>37</sup> Defamation Ordinance 2002, Section 12 stated that an action against (a) an author, editor, proprietor or publisher of a newspaper, (b) the owner of a broadcasting station, (c) an officer, servant or employee of the newspaper or broadcasting station; or (d) any other person; for defamation contained in the newspaper or broadcast from the station or its publication otherwise shall be taken within six months after the publication of the defamatory matter came to the notice or knowledge of the person defamed.

<sup>38</sup> In its very first session, the UN General Assembly declared that the Freedom of Information [which inheres in the Freedom of Expression] is a fundamental human right and...the touchstone of all the freedoms to which the United Nations is consecrated. See Resolution 59(1), 14 December 1946.

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