# Criminalizing Literature of Hate Speech in Pakistan

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## Abstract

At outset, Freedom of Speech was not guaranteed in the Government of India Act 1935. Since Pakistan could not frame its constitution for nine years, for which the Constituent Assembly was empowered under the Independence Act 1947, therefore, the citizens could not enjoy the freedom. However, the Objectives Resolution provided an assurance that fundamental rights would be guaranteed in the awaited Constitution. Eventually, it was provided in the first Constitution of Pakistan1956 and had been protected in the later constitutions as well except some rights during constitutional emergency or abrogation or suspension of the relevant Constitution. There were many provisions before the creation of Pakistan which barred or limited the constitutionally protected freedom of speech, like literature of hate speech under the sections 153A, 295A, 505(2)and 298 of Indian Penal Code. Since Pakistan was achieved on a ground of Two-Nation theory, therefore, many more provisions were inserted to criminalize a hate speech to protect Islamic faith and religious personalities, like 295C, 298-A, 298-B and 298-C. However, the procedural impediments failed to control hate speech successfully under the Code of Criminal Procedure.

Key words: Freedom of Speech, Literature of Hate Speech, Human Right, Judicial Activism, Constitution of Pakistan

## 1. Introduction

Freedom of speech v hate speech has always been a controversial discourse all over the world. No legislature, court or a society has come up with a sustainable common standard. A number of scholars agree that "freedom of speech and protection from the harm of hate speech are two core values that are frequently in opposition."[1] Rather one faces an uphill task to grasp extreme position of First Amendment in America on the one hand, and, on other hand, restive legislation on defamation of religion or blasphemy of religious personalities in Pakistan.

Both, absolutists and restrictionits, advanced a number of arguments for or against hate speech. The proponents of absolute free speech argue that the society is a best judge to assess its value. A ruthless scrutiny will perish irrational ideas. Moreover, hate speech is a mean to find the end of truth; truth is hard to emerge in absence of such speech with no other alternative. Secondly, it assures peace. Peaceful expression of differences and hostilities is

foundation of modern democracies. Moreover, its protection eliminates chances of resort to violence. Thirdly, disregarding the consequences, it is contended that restrictions are opposed to free speech as it is not only an end to achieve truth but it is an itself virtue of a liberal society as a rule.[2]Lastly, the absolutists articulate that it provides an opportunity of a peaceful exchange of ideas; it is not a right only but a duty in a democratic society. It as well provides an opportunity to know about other fellow humans. The answer is not its banning, but vigilance and more speech in face of hate speech.[3]

Contrary to the absolutists, the scholars who favor restrictions on free speech or ban on it forward an argument that democracies are vulnerable to danger of hate speech like emergence of Nazi Germany which was an outcome of a "too much freedom". The second ground cited in favor of ban relates to the dignity of the minority group. The restrictions provide confidence to a member of a minority group who are historically suppressed. He feels as an honorable member of the society in good standing. Their interaction with their society makes them understand that they are its effective part. Equality or equal treatment is an integral part of dignity. Minority groups expect equal social and economic status, while hate speech harm that. The perception of equality enables them to live their lives in calm, grow their businesses and raise their families in peace.[4]

Another reason advanced to tolerate problematic speech refers to distinction between a mere statement, what so ever harmful, and a conduct. However, even in a jurisdiction where hate speech is protected, not banned, a face to face statement is regarded as a conduct. In addition to that the ban is also challenged that it helps establish a specific form of a norm which augments the emergence and fatal dominance of fascism, colonialism, racism, and other forms of extremism.[5]

In a case, where it is widely recognized that there is an expression which is so degrading and hurtful that a state has to intervene and ban the content, then, indubitably, to define literature of hate speech becomes as elusive as hate itself[6]. Like many other disputed phrases and concepts, there is no consensus on its definition due to varying traditions, histories and values of different countries[7].

The first problem of its definition as mostly perceived is that it must be eluded to a group or to a person on the ground of his membership of such a group or community, unlike a defamation which is required to be addressed to a person. To identify such a group or a class of people is a major issue. The second problem, one confronts, is incitement due to hate speech. Once again, there is a

divisive approach on incitement to violence, discrimination or hatred. However, there is a gulf of difference in various jurisdictions regarding the nature of liability in form of civil, criminal or administrative action as an appropriate legislative response. Literature of hate speech which incites to violence is invariably held liable.[8]The research article encompasses, apart from language of hate speech and its various concepts, the development of international standards of free speech and the regulations or bans on it. Focal point of the research is criminal law of Pakistan. It precludes the civil and administrative liabilities, though, sometimes criminal in nature, imposed in case of hate speech. The laws relating to literature of hate concerning media, whether print, electronic or social during election campaign which regulate the literature of hate in Pakistan are not touched here as they need a separate endeavor to be explored.

## 2. Criminal Law and Hate Speech in Pakistan

To promote harmony and tolerance and to get diversity, its root in the subcontinent society consisting of various religions, cultures and civilizations, the British introduced many provisions in the Indian Penal Code 1860 to punish hate speech. Lord Macaulay reasoning for the laws against hate speech stated that "no man ought to be at liberty to force, upon unwilling ears and eyes, sounds and sights which must cause irritation….. If I was a judge in India, I should have no scruple to punish a Christian who should pollute a mosque"[9].

Unlike American and European approach, Pakistan widely legislated, in substance and procedure, anti-hate speech laws. Based on the ideology of Two Nation theory, which meant a separate religious identity with a right of a separate sovereign state, Pakistan was naturally prone to excessive culture of hate speech. One of the primary reasons for demand of Pakistan was a communal or sectarian hate between two large communities of Hindus and Muslims.[10]

Apprehensions of Muslims that their identity based on religion, culture and history would be jeopardized after British Raj, in an independent India, which Hindu majority fueled in form of distrust and hate between the two major communities of the subcontinent proved as inevitable truth.

The penal laws of British India started criminalizing literature of hate at outset. Pakistan not only jealously retained those laws to maintain harmony among various communities but also extended its scope to include more subjects and persons. It ranged from hate speech against religion, state, government, army and judiciary to provocation of crimes and sectarianism. Not only general

principles and substantive criminal law: the Pakistan Penal Code 1860, but also special laws were enacted to criminalize the literature. However, mere hate speech without ensuing consequences is not punishable, which meant that all hate speeches were not crime.

## 3. Provisions of Pakistan Penal Code

### 3.1. 153A

Another law which usually governs the prohibition and the punishment is section 153A of the Pakistan Penal Code. Both speech and writings which are loaded with capacity to disseminate enmity, hatred, ill-will among different groups and communities have been proscribed and made punishable for imprisonment of three years or fine or both. The purpose was to penalize "fissiparous communal and separatist tendencies, and secure fraternity so as to assure the dignity of the individual, and unity of the nations"[11]. However, malicious intention was a pre requisite[12].

The Lahore High Court, at an early stage, recognized the fact that certainly preaching of one religion would hurt the other religion and vise versa but there was a thin line to be observed to avoid the vires of section 153A. Kiyani J. emphasized that an honest preaching might inflict injury which could be ignored. While differentiating a thin line, he opined that "but a limit must be drawn somewhere and even a laudable effort knows limits. It the limit where controversy ends and malice begins, that is to say, where the speech or writing does not further the ends of the controversy and said a thing which could be unsaid without injuring the controversy or saying it, not exactly "with seats" but with a little bitterness as can be brought to the occasion"[13]

Since, due to partition of India, some leaders of political parties could not come into term with new fact of creation of Pakistan, therefore, such parties and their leaders were tried to be brought under the vires of section 153A.

In the case of the *State v Abdul Ghaffar Khan(called Bacha Khan)*, a leader of a political party, was tried under the section. The Court held that the section 153A along with similar anti hate speech laws were not inconsistent with fundamental right of freedom of speech, guaranteed by the constitutional provisions. Rather such law was within the four corners of the reasonable restrictions[14].

While interpreting the provisions, the West Pakistan High Court, Lahore in the case of *Muhammad Khalil v The State*[15] observed that such "hate speech must be to promote hatred among classes, groups or communities but among sects or people in general". The Court went on to classify a sect from a class, observing that section 153A " deals with different classes of people of Pakistan, the order of the Government takes notice of the religious feelings of the different sects of Muslims". Then the Court amalgamated a demarcation line between a sect and a class, observing that "the section 153A was intended to cover a case where a Shia, for instance, injures the religious feelings of a Sunni, or a Muslim injures the feelings of a Hindu".

Similarly, in an earlier case, *Mahmood Ahmad Abbasi v The Administrator of Karachi*,[16] while interpreting the word class, the court observed that they were used in a restrictive sense as denoting a collection of individuals or groups bearing a common and exclusive characteristic which may be associated with their origin, race or religion". It was also observed that those words included their "numerical strength as large as could be grouped in a single homogeneous community".

The Sind High Court in the case of *Sayed Ghulam Sarwar v The State* held that "speech made by one person could not be attributed to others as the liability had to be specified".[17]

The Provincial Government notified a booklet named "Firqay Kesay Mit Saktay Hain" notified to be forfeited on the grounds that it was blasphemous, subversive and likely to hurt sentiments of the Muslims. The Court held that the Government did not apply its mind according to law, while deciding without highlighting objectionable contents of the booklet, therefore, the notification was null and void.[18]

In a latest case, the Chief Court of Gilgit-Biltistan observed that "it was the domain of central or the provincial government, or an official empowered on their behalf to move a complaint for invocation of S. 153A, P.P.C." It went further to warn that requirements of section 196 had to be strictly complied and any defect would be incurable. It was mandatory and could not be overlooked.[19]

### 3.2. 295A

The section was inserted in 1927 and made the speech, almost resembling to blasphemy or defamation of religion, punishable, which was later enhanced up to term of ten years imprisonment or fine or both. [20]

It required that the speech must be deliberate and malicious. Moreover, it must be with an intention to outrage the religion or religious beliefs of a particular class. The punishable defamation of religion required an act, under the section, including a speech as an act whether in oral or written form.

The legislative history is excruciating. A pamphlet was published by a member of Muslim community about Sita, a much respected Hindu goddess, as a lady of objectionable moral character in 1927, in Lahore. In reaction, a member of Hindu community, Mr Rajpal, wrote a book insulting the Holy Prophet (PBUH). The accused was arrested but had to be acquitted later as no law existed to punish such a hate speech which caused insult to a religion or its founder and leaders of a religion.[21]

It prompted fierce protests all over India. Then this section was inserted to punish a speech causing defamation of a religion or its personalities. The purpose was not to punish an inadvertent or innocent speech but a deliberate and malicious one which induced an enmity among various classes. The determining factor to make a person criminally liable under the section was his state of mind. Mere peaceful professing, practicing, or preaching of a religion, howsoever outrageous for others, was precluded from the vires of the law[22].

When its constitutionality was challenged later in India on the test of fundamental right of freedom of speech, the Supreme Court of India upheld the law, observing that it did not include any or every act of insult or its attempt, but only its aggravated form with a deliberate or malicious intention[23].

Kayani, J. in a leading case of *Jesus in Heaven on Earth*, demarcated between an innocent and a malicious defamation of religion, observing that the law visited not the honest errors but the malice of mankind. Drawing a fine line, he opined that “the honest preaching of a creed, however, which a man sincerely believes will lead to the salvation of humanity, being an effort worthy of emulation, the injury intended may be ignored”.[24]For a long time, after independence of Pakistan, the case law is evident that a lot of cases were dismissed on the ground that the prosecution required a prior permission of the federal or a provincial government in case of an offence under section 295A of the PPC to initiate a case against an accused.

Surprisingly, the complainants were mostly a Muslim against a Muslim or a non-Muslim against a Muslim, but it never happened that a Muslim was a complainant against a non-Muslim. Till partition the law was confined to defamation of a religion among classes but in post independence era, it was

judicially recognized to include an insult within a class or among different classes of Islam.[25]

### 3.1.3. 295C

The Constitution of Pakistan, after second amendment, declared the Holy Prophet (PBUH) as a last prophet of Islam. On the other hand who believed otherwise was declared a non Muslim. Later, it was criminalized as a hate speech to derogate the last Prophet of Islam (PBUH). The following provisions were inserted in the Pakistan Penal Code under Section 295C:

"Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine."[26]

Amending the procedural law under the same Act, the presiding judge had to be a Muslim. Moreover, the law of blasphemy was distinguished from other hate speeches, making a mere act punishable like an offence of strict liability.

Since insertion of the crime and punishment was legislated as an ordinary law, therefore, it was challenged before the Federal Shariat Court on the test of Islam alleging that such law was a violation of injunctions of Islam.[27] The Court declared it Islamic. Moreover, a private member Bill was moved by a member of National Assembly. The relevant Ministry replied that the judgment of FSC was an admitted position, referring to blasphemy laws in various Muslims and non Muslims countries.[28]

The Supreme Court of Pakistan in *Nasir v State* observed, while distinguishing a blasphemy from benign words which would have special meanings due to particular knowledge of a complainant, that "Ex facie use of expressions in the invitation card *prima facie* did not create in a Muslim or for that matter anyone else, any of the feelings of hurt, offence or provocation etc. nor was the same derogatory to the Holy Prophet Muhammad (PBUH) or the Muslims"[29].

A former governor of the Punjab was assassinated, due to advancing an argument to repeal the law[30].

However, due to its potential abuse on grounds of sect, politics, ethnicity, tribalism or personal enmity, there are strong voices for and against its repeal.[31]

### 3.1.4 298

From the British era, there are other provisions in the Pakistan Penal Code which include various different circumstances to prohibit a speech and criminalize it. The Section 298 as well addresses to a different kind of hate speech by criminalizing of uttering any word, along with a sound or a gesture, by which a person deliberately and maliciously with an intention of wounding the religious feeling of any other person. The offence is not a crime of strict liability. It requires a deliberate and malicious intention to wound religious feelings, which may include a religion itself or a religious personality.

Therefore, its ambit is wider than other hate speech provisions of the Code. The difference between 298 and 295A is that various words of literatures have been used to impose a criminal liability. In accordance with one law "wounding" is prerequisite, while "outraging" is compulsory under the latter. Although 298 is wider in scope than other provisions of hate speech, however, the punishment is less which may extent to one year, fine or both.

The Lahore High Court, in a case of *Abdul Razzaq v State*, elaborated the difference between the above sections of the Code, simplifying in a plain language.[32]

Mere statements, alleging that someone had changed his religion, were not enough to attract the provisions of Section 295A or 298 of the Code, the Court observed.

A mere probability that the words would remotely injure the religious feelings of a person may not constitute an offence of criminalized literature. There is a thin line between freedom of religious discussions or exchange of opinions and vires of this offence.

### 3.1.5 298-A, 298-B and 298-C

The law relating to criminalize a hate speech was further amended to include other speeches, during Islamization process of General Zia's regime. The Sections 298-A, 298-B and 298-C of the PPC were inserted to cover more areas of hate speech. The Section 298-A was inserted in 1980 while the Sections 298-B and 298-C were inserted in 1984. All these newly inserted Sections extended the blasphemy law to cover other religious personalities, emblems and titles like Section 295C.

The Section 298-A criminalizes the use of remarks which derogate, in any form, defiling “the sacred name of any wife (Ummul Mumineen), or members of the family (Ahle-bait), of the Holy Prophet (peace be upon him), or any of the righteous Caliphs (Khulafa-e-Rashideen) or companions (Sahaaba) of the Holy Prophet (peace be upon him)”. The punishment is three years or fine or both.

While the Section 298-B and 298-C specifically addressed to the Qadiani group. Although it was already declared non Muslim by a constitutional amendment in 1974, however, the group was not subject to any punishment if it used any title resembling to Islamic nomenclature for their religion and religious personalities.

The Section 298-A prohibited the Qadiani community torefer by any words to any person “ other than a Caliph or companion of the Holy Prophet Muhammad (peace be upon him), as "Ameer-ul-Mumineen", "Khalifatul- Mumineen", Khalifa-tul-Muslimeen", "Sahaabi" or "Razi Allah Anho";refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as "Ummul-Mumineen";refers to, or addresses, any person, other than a member of the family "Ahle-bait" of the Holy Prophet Muhammad (peace be upon him), as "Ahle-bait"; orrefers to, or names, or calls, his place of worship a "Masjid".” The prohibition covers the use of words which refer “to the mode or form of call to prayers followed by his faith as "Azan", or recites Azan as used by the Muslims.”

Similarly, the group would be punishable if they would propagate or preach by any word, introducing them as Muslim. The Section 298-C prohibits any member of such community to refer “his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims”.

First it was challenged in Federal Shariat Court that these provisions were inconsistent with the Injunctions of Islam but the Court upholding the law observed that “Ahmadis were not Muslims according to the tenets of Islam and that therefore any restrictions imposed on the Ahmadis's claim to be Muslims would not be repugnant to Islam as laid down in Quran and Sunnah”. [33]

When the argument of test of Islam failed in the Federal Shariat Court, then the group had the last option to challenge it in the Supreme Court of Pakistan, on a ground, that it was inconsistent with the freedom of religion guaranteed under the Constitution. The question was, in detail, discussed in the Supreme

Court[34].The Court as well upheld the law, declaring that the criminal law amendment in the Code was not violative of the religious freedom.

### 3.1.6. 505(2)

Although Pakistan Penal Code has enough provisions to contain and control a hate speech, however, the limit of prohibition was broadened increasingly, inserting new provisions in form of Sections 295-C, 298-A, 298-B and 298-C. Besides them, the Section 505(2) also criminalized a hate speech which promoted "disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities", "on grounds of religion, race, place of both, residence, language, caste or community or any other ground whatsoever".

It resembles to the Section 153-A of the Code as both require that promotion of enmity must be between two groups or classes, excluding an enmity within a same group. Similarly, *mens rea* is compulsory to be proved under both provisions of the Code. However, the distinction between them is that the Section 505(2) not only requires making of statements only but to punish an accused, necessarily, the statement must be published as well.[35]

## 4. Relevant Law of Code of Criminal Procedure

To curb hate literature, the Pakistan Penal Code comprehensively prohibits that and imposes criminal liability. However, unjustified procedural barriers make it equal to impossible to prosecute and punish an accused. The prohibition has been qualified, limiting scope of hate speech laws, under section 196 of the Code of Criminal Procedure, which requires that such a criminal case could only be initiated by a federal or a provincial government.

Resultantly, it enjoins that to take cognizance of an offence of hate speech, a prior permission of the Central government or a Provincial government or an officer empowered by such governments would be necessary. The section 196 of the Code of Criminal Procedure provides that no court shall take cognizance, inter alia, of offences including section 153-A,295-A and 505.So the procedural requirement fatally affects the liability and fails to deter a potential offender.

In *Abdul Razzaq v State*, the Lahore Court unequivocally stated that non-compliance of S. 196 of the Code "would render the subsequent proceedings

nullity in the eye of law". Removing any doubt, it established the principle that "when law required a certain act to be done, in a particular manner, it had to be done in that manner, for its validity. [36]

Therefore, no retrospective permission of filing of a complaint would fulfill the requirement of the law. Anyone can be a complainant to ask for a prior sanction from either of the government.

Even cognizance of a criminal conspiracy cannot be taken by any court without prior permission of the sanction, under section 196 which includes the offences of hate speech under section 153-A, 295-A and 505.[37]

On the question of cognizance without prior approval of a relevant government, a civil judge took cognizance of an alleged crime under section 153-A, the Tribunal held that the civil Court, due to bar of section 196 of Code of Criminal Procedure, was not authorized to take cognizance, without prior approval of the relevant Government.[38]

The Lahore High Court also followed the same approach, in the case of *Naheed Khan v State*, observing that "reading the provisions of S.153-A, P.P.C. with S.196, Cr.P.C. would show that lodging the case against the accused without getting permission from competent authority had resulted in violation of mandatory provisions of law"[39]. Therefore, entire proceedings were held coram non judice.

Even an FIR launched by an S.H.O. was held to be insufficient for the purpose of section 196 of the Cr.P.C. as he was not considered as an authorized person. In *Syed Nawaz H*ussain *v State*, the court held that "the informant in the case had lodged the first information report, who was not central/provincial government, nor they were the persons duly authorized for the purpose as envisaged under s.196, cr.p.c". Therefore, "proceedings carried out by the court on that report was coram non judice, ab initio void and nullity in the eyes of law"[40]

The Supreme Court went one step further to assert the significance of a prior sanction, observing that "case in an offence under s.153-a, p.p.c., could not be proceeded on the report prepared under s.173, cr.p.c". If so the result of"non-adherence and observance of the provisions of s.196, cr.p.c., rendered the subsequent proceedings a nullity". Moreover, it also said that "where a condition for the exercise of jurisdiction, was not fulfilled, the whole proceedings, subsequent thereto would become coram non judice, and would have no legal effect, and would render the whole exercise, not only illegal, but

also without jurisdiction"[41]. Resultantly, the presumption of innocence of the accused was maintained to be presumed.

Similarly, in case of criminal conspiracy of an offence which required prior sanction of a relevant government, the cognizance is also prohibited, under section 196-A.

However, under section 196-B, a preliminary investigation by a district police investigation officer is allowed, particularly, where there is an apprehension of an offence of hate speech covered under section 196 or 196-A, under section 196-B of the Code of Criminal Procedure.

Another impediment is that no one can be a complainant except an aggrieved person. The trial and conviction shall be void and illegal in case of a complainant other than an aggrieved person.

On the one hand, the negative impact of these procedural complexities is that powerful people are mostly not held liable for hate speeches. They get rid of a criminal liability, influencing discretionary powers of authorities. The outcome is that cognizance of such cases is a rare phenomenon in Pakistan.

On the other hand, due to abuse of some hate speech laws, there is increasing demand from the civil society to extend the ambit of procedural bulwark to all hate speech laws.

## 5. Conclusion

Since Pakistan is an Islamic Republic based on an ideology, therefore, it is not surprising that there are more limits on a free speech. Hate speech has been criminalized increasingly and heavily specifically in post independence era. To control hate speech, it is not enough to expect that mere few criminalizing provisions of law or reasonable restrictions on a free speech would resolve the issue. It requires a comprehensive and sustainable struggle to contain the problem, promoting principles of tolerance, peace, harmony and mutual respect of different opinions, trusting in human rights and democracy.

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