



Review Paper

Reasonableness of restrictions on freedom of expression in Pakistan

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Abstract

Freedom of Expression like all other fundamental rights is not absolute in Pakistan. Restrictions can be imposed by the state according to the procedure established by the law. However constitution of Pakistan has added a condition of "Reasonableness" for restrictions on Freedom of Expression. This article focus on the test to decide "Reasonableness" of restrictions imposed upon freedom of expression. This article also explores principles embraced by the superior courts for determination of "Reasonableness" of restrictions. The later portion of this article highlights the restrictions enforced on freedom of expression in Pakistan.

Keywords: Freedom of expression, reasonable and restrictions.

Introduction

Freedom of Expression is one of the most widely protected and debated of constitutional rights. Freedom of expression can be traced in almost all parts of the world. Even freedom of expression is available (by some other ways) in those countries that don't afford a comprehensive constitutional mechanism for defending freedom of expression¹. Freedom of speech and expression is also protected in Pakistan constitution². Pakistan is an interesting case when it comes to guarding basic rights and especially with respect to freedom of expression. An independent republic ever since the end of British Rule in 1947, Pakistan has a well-developed constitutional jurisprudence and commitment to constitutional values that sits alongside deep rooted cultural, societal, and religious norms that effect freedom of expression³. However the right of freedom of expression is not absolute in Pakistan and state can impose restrictions on the right. For imposition of restrictions on freedom of expression, the constitution has also fixed the condition of reasonability of the restriction. What is the meaning of Reasonable under the constitution and what are the principles governing the Reasonability of restrictions on freedom of expression are the focus point of this article. The aim of this paper is to determine the test of reasonability of restrictions on freedom of expression. This paper is divided into three parts excluding the introduction. The first part presents the conceptual of freedom of expression. The second part focuses on the test of reasonability of restrictions on freedom of expression. The third part briefly explains the restrictions on freedom of expression in Pakistan.

Methodology

This article is conceptual in nature. A legal research approach⁴ is adopted in this article. A legal research is an organized method of investigating, exploring, analyzing and conceptualizing legal

problems relating to the enforcement mechanisms and the implication of legal⁵. The primary data as well as secondary data was collected from statutes, published law articles, books, and the decisions of superior judiciary. Anwarul Yaqin⁶ in his book has stated that usually legal research involves four diverse methods, namely descriptive, analytical, historical and comparative. In this article, the Descriptive Method of research was used by ascertaining and describing the attitude of superior courts with regard to the interpretation of 'Reasonability' of restrictions.

Foundations of Freedom of Expression: Expression is motif of right and liberty. Right to know and liberty of thinking are the foundations of expression⁷. Expression is vital to the development and completion of individual personality. Freedom of expression is required to fulfill following objectives namely, pursuit of truth, personnel autonomy⁸ and promotion of democracy⁹. Freedom of expression is indispensable in legal systems where people are designated as the sovereign rulers. It is the democracy which makes people sovereign rulers¹⁰. The first objective of freedom of expression is to promote the pursuit for truth. This argument of truth finds its origins in an important statement in liberal political theory in J.S. Mills on liberty¹¹. The dissenting judgment of Holmes J in *Abrams vs US*¹² is also relevant in this that "it is the influence of the idea to get itself recognized in the competition of the marketplace; and that the truth is the lone ground upon which their desires can safely be carried out". The second theory values freedom of expression for its relationship to human autonomy. This arguments on personal development is not only relevant for right holders but also for interests of other people whose rights are violated because of censored approach of life. So in this sense the harm is done to the common interests of all. This argument is possibly the most widely approved in modern legal systems. Free movement of information and expression of thoughts is the

basic element of responsible democracy. It also affords an ample opportunity to people to make their government accountable¹³. As identified by Laski "Democracy is a Government by discussion"¹⁴. According to Krishna Iyer Juge¹⁵, freedom of expression is critical as the censorial authority vests in the hands of public over the Government.

The preamble of constitution of Pakistan states that people of Pakistan provided to themselves the constitution of Pakistan with a view to practice the doctrines of equality, tolerance, social justice, freedom and democracy as presented by Islam. In democratic system of Pakistan, pride has been afforded to right of expression which is the foundation of all liberties. The liberties of expression, thought, belief, faith and worship is one of the basic conceptions of Pakistan constitution¹⁶. Democracy cannot work without human rights as they work as the soul of the democracy. Human rights are rightly termed as the crown of democracy. Democracy is a vacant vessel without availability of basic human right¹⁷. Even though each right is a separate and distinctively enforceable as such, but all the fundamental rights enshrined in our constitution are interconnected to each other. Freedom is an appropriate terminology to elaborate fundamental rights enshrined in the constitutions. However unqualified liberty, in mode of freedom to act by an undisciplined desires can only relate to the violent cave inhabitants or the beasts in the forests. Constitutional rights are tied with or counterbalanced by responsibilities of citizenship that needs as much to be stressed as rights. If the state herself is disordered and endangered than fundamental rights are irrelevant in that country. Thus an equilibrium has to be managed between the fundamental rights and reasonable restrictions¹⁸.

Tests determining reasonableness of restrictions on freedom of expression: Article 19 of Pakistani constitution not only preserves freedom of expression and speech but also present the case of regulation in the shape of "Reasonable restrictions" on freedom of expression. The constitution of Pakistan have presented and regulated the freedom of expression in the following words¹⁹: Article 19 states

"Every citizen shall have the right to freedom of speech and expression, there shall be freedom of press, subject to any reasonable restrictions imposed by law in the interest of 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".

It is a surprising note that in order to impose restrictions it is mandatory that is must be a "reasonable restriction". However the word "reasonable" is not completely defined. It is neither imaginable nor advisable to prescribe any theoretical standard of universal application of reasonableness. Than what exactly is the test and method of defining 'Reasonableness' of restriction within the ambit of freedom of expression? This is an important and pertinent question before proceeding to the different heads

of restrictions. State when wishes to deny to its citizens the enjoyment of fundamental rights enshrined under the constitution, three significant features must be accomplished: i. the restriction on freedom can only be levied by the power of law, executive is not empowered to impose any restrictions²⁰. ii. Each and every restriction should be a reasonable restrictions. iii. Restriction must be correlated to the purposes declared in article 19²¹.

However, in order to check validity of the restriction two fold test is presented under article 19²²: i. Whether the restriction is reasonable one? ii. Whether restrictions is for a purposes declared in the article under which the limitation is being imposed?

Both these questions are to be determined finally by the courts when any law is challenged as unconstitutional. The legislative decision of what restrictions to put on a freedom is not absolute and conclusive as it is subject to review by judiciary in Pakistan. Nonetheless the Superior courts have offered a few broad prepositions for determination of Reasonable Restriction: i. It is the authority of Superior Courts of state to adjudicate whether a restriction is reasonable not reasonable²³. Chief Justice of Pakistan Justice Cornelius, in an significant case of "Abul Ala Maudoodi vs Government of West Pakistan"²⁴ on the subject of reasonableness of restriction observed that "the constitution expressly gave the court power of judicial review of legislation and reason in such affairs being peculiarly the province of the judiciary, it is surely within judicial review to examine both as to the reasonableness of the law itself, as well as the reasonableness of the mode of application of the restriction whether such mode be prescribed by the statute or not". ii. The second broad rule for determination of reasonableness is each and every case of reasonableness will be decided on its own merits and there is no broad rule of reasonableness²⁵. iii. In deciding whether any particular law provides for reasonable restrictions on a fundamental right, not only substantive portion of law but also procedural part by which eventual result is secured has to be scrutinized²⁶. iv. The duration and time of the restriction cannot be unlimited²⁷. v. Principles of state policy are also pertinent while deciding about the fate of reasonableness of any restriction. vi. Reasonable restrictions must necessarily be shaped to maintain the constitutional themes of democracy, freedom, equality, tolerance, social justice²⁸. vii. In examining the reasonableness of any limitations on freedom of expression it should be kept in mind as to whether in purporting to exercise freedom of expression one was infringing upon the right of freedom of expression of others²⁹. viii. It is the responsibility of the state to strike a realistic equilibrium between the requirements for warranting the people's right of free expression on one side and the need to inflict social control on publication and broadcasting business³⁰. ix. Justice Hamood Rehman in Moudoodi Case declared that a restriction will be declared as unreasonable if it is disproportionate to the mischief sought to be prevented or if the law imposing the restriction has not provided any safeguard all against arbitrary exercise of power³¹.

x. It may be clear case of the restriction being reasonable, or it may be a clear case of restriction being unreasonable, or it may be doubtful whether the restriction is reasonable or not reasonable. The way to approach these cases was stated in an Indian case as³². xi. Factors such as the nature of the right of the infringer, the causes and circumstances prompting the restrictions and the manner as well as the purposes for which the restrictions were imposed can be considered for determination of 'reasonableness' of any restriction³³. xii. Origins of sub constitutional restrictions (law or reasonable restrictions) should be grounded in the constitution itself³⁴. xiii. An act of parliament cannot be challenged on ground of reasonableness but the reasonableness is a recognized ground to challenge the validity of subordinate legislation such as rules, regulations etc³⁵. xiv. The burden to show that the restriction is reasonable lies on the state³⁶.

Restrictions on Freedom of Expression in Pakistan

Article 19 of the constitution affords the authority to the parliament to enforce reasonable restraints on freedom of expression "in the interests of" or "in relation to" following³⁷: i. Glory of Islam, Integrity and Security of Pakistan, Friendly relations of states with foreign states, Public order, Decency or morality, Contempt of court and Defamation.

Glory of Islam: Glory of Islam is a valid reason for controlling freedom of expression in Pakistan. Though the restriction for glory of Islam were not incorporated in the earlier constitutions of 1962 of 1956. Former chief justice of Pakistan while commenting on the inclusion of "Glory of Islam" in the part of restrictions observed³⁸.

Security and Integrity of Pakistan: Anything that endangers the existence of the state itself is liable to be curbed. Therefore laws relating to the security and defense of the country, laws relating to maintenance of discipline in the Armed forces, laws relating to sedition, treason espionage, and official secrets will be held to be constitutionally valid. Sedition under English law, embraces all those practices whether by word of mouth, or writing which are calculated to disturb the tranquility of the state and lead ignorant persons to subvert the government. The Superior courts have declared that the restriction imposed by section 123-A of the Pakistan Penal Code are in the interests of the security of the state and are considered as a reasonable restrictions on freedom of expression in Pakistan³⁹.

Friendly relations with other states: State can inflict reasonable limitations on freedom of expression in the interests of friendly relationships with other states. Section 3 of the Security of Pakistan Act 1952⁴⁰ envisages imposition of restrictions on the movement of persons who act or are about to act in a mode detrimental to the exterior affairs of Pakistan, and this provision of the Act has a distinct relation with the maintenance of cordially relations with foreign states. Shukla⁴¹ in constitution of India says "It may be pointed out that it is a

recognized principle of international law that states in their relation with other states are responsible for acts committed by persons within their jurisdiction".

Public Order: The phrase 'public order' is identical with safety, public peace and tranquility. It is of local significance as distinguished from national upheavals like "security of state and law and order". An act prejudicial to public order should affect the public at large. An act which concerns only individual and does not amount to an activity prejudicial to the public peace and tranquility cannot fall within the ambit of article 10(4) and (7) of the constitution 1973⁴². The phrase "public order" or the conservation of public order is one of the main reasons for inflicting restrictions on freedom of expression⁴³. There must be practical and appropriate node between the restriction and the attainment of public order. Subject to the essential requirement of proximate relationship, State is authorized to enact a law allowing a proper authority to impose anticipatory limitations upon specific kinds of actions in an urgency for the purposes of preserving public order⁴⁴.

Decency and Morality: The words 'decency and morality' are comprehensive words. The word 'obscenity' available under England law is almost identical with term 'indecent' as provided in the Pakistani constitution. Section 292 to 294 of the Pakistan Penal Code⁴⁵ provides instances of restrictions on freedom of speech and expression in the interests of decency and morality. However Pakistan Penal Code does not provide any specific test to define obscenity. In famous case of Ranjit Dudesi v. State of Moharashtra⁴⁶, the highest court of India recognized the test presented in R.v.Hicklin⁴⁷ case, which was about judging the obscenity of a matter. The Lahore high court relied on Hicklin Test on Crown v saadat Hassan Minto⁴⁸, in the case Minto a famous writer contributed a short story titled "Thanda Gost" in an Urdu Magazine.

Contempt of Court: Freedom of speech and expression is limited by the rule that no person will be permitted by speech or writing to impede or obstruct with administration of justice. But it is not everything said or written against a judge that amount to contempt of court and it is not only such utterance or writings which are calculated to bring a court or a judge of the court into contempt or to lower his authority or such utterance or writings which are calculated to obstruct the due course of justice or legal process of the courts that amount to it. Article 204 of the constitution of Pakistan enumerates certain classes of contempt of court leaving the rest to be defined by law. Under Article 204⁴⁹ of the constitution of Pakistan, High courts and Supreme courts are empowered to punish any persons who "scandalizes the court or otherwise does anything which tends to bring the court or a judge of the court into hatred, ridicule or contempt". The famous cases involving contempt of court includes the removal of Prime Minister of that time Syed Yousaf Raza Gillani⁵⁰ and the case of Mohsin Tirmizi vs The State⁵¹ who was working as District and Session Judge at Dera Ghazi Khan.

Defamation: Defamation is not within the preview of protected speech under the constitution. A statement that injures an individual's reputation is termed as the offense of defamation. The offense of Defamation involves in taking a person to hatred, ridicule, or contempt⁵². In Pakistan Section-499 of Pakistan Penal Code⁵³ comprehends the law concerning defamation. The civil law on defamation is also available in the form of defamation ordinance 2002.

Commission of Offense or incitement to an offence: Offense is defined by the General clause Act 1897 as "any act or omission made punishable by any law for the time being in force". The principle underlying this restriction is that the right expression does not extend to a provocation to commit an offense, whether the offense intended to be committed is major or minor, cognizable or no cognizable. However incitement is not mere advocacy or approval of an abstract doctrine, and where there is no danger that such advocacy will be immediately followed by practice, there is no incitement to the commission of an offense⁵⁴. The provisions of chapter IV of the Penal Code, relating to abetment, and section 505 relating to statements conducting to public mischief, in as much as they punish abetment of offenses by speech will probably fall within this restriction.

Conclusion

Freedom of expression as all other fundamental right is of paramount interest in Pakistan. However freedom of expression is subject to some restrictions and in order to impose restrictions above mentioned guiding principles must be taken into consideration. Limits are imposed in order to make right attuned with other rights and affords an opportunity to all individuals to relish all fundamental rights. The conditions offered by the superior courts for restrictions must be applied in order to balance freedom of expression with other fundamental rights.

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