Why the YouTube Ban is Illegal &Undesirable

By Babar Sattar

1. The Ministry of Information and Technology, Federal Government ("Government") has blocked access to YouTube.com on the basis that the website is acting as an intermediary that enables users to view a blasphemous video entitled 'Innocence of Muslims' ("Offending Video") created and uploaded on the website in the United States. YouTube.com has refused to take down the video as it claims the Offending Video does not violate company policy and is not illegal under the laws and Constitution of the United States that protects the right to free speech in an absolute manner (unless it creates an imminent threat to public order pursuant to the clear and present danger test, requires time/place/manner regulation or belongs to a category of speech that is illegal or belongs to a category less worthy of protection such as obscenity or pornography). As YouTube or its parent company Google is not localized i.e. is not registered or locally incorporated in Pakistan and does not have a Pakistan-specific domain, it is not legally obligated nor does it have the technological ability to ensure that the Offending Video is not accessible in Pakistan alone, even if available elsewhere in the world.

2. The Government admittedly directed Pakistan Telecommunication Authority ("PTA") to block YouTube.com on September 17, 2012 after receiving information from security agencies that continuing access to the Offending Video could create law and order problems within Pakistan. The issue of blockage was then reviewed by an Inter-Ministerial Committee of the Federal Government for Web Evaluation that decides matters related to blockage of access to websites ("IMC") on February 8, 2013, and the IMC unanimously decided to continue blocking access to YouTube.com due to failure to find a way to disable access to the Offending Video.

3. At issue in this matter is not whether the Offending Video is protected speech under Article 19 of the Constitution or whether it is desirable to provide access to the Offending Video. The legal issues that arise in the YouTube ban case are the following:

    a. Whether there is legal authority vested in the Government to regulate the Internet or block access to the Internet as a content-based censorship measure;

b. Whether blocking access to YouTube offends the right to speech guaranteed under Article 19 of the Constitution, the right to information guaranteed under Article 19-A of the Constitution, or both;

c. Even if the state has a compelling interest in blocking access to the Offending Video in the interest of maintaining public order or purposes of Article 19 of the Constitution, whether blocking access to all materials made available by YouTube indefinitely to achieve the said purpose would qualify as a reasonable restriction;

d. In blocking YouTube to deny access to the Offending Video can the Government claim to have struck the right balance between the interest of the individuals and the public in upholding freedom of speech and the interest of the society in maintaining public order;

e. Whether the state has a compelling interest in preventing the generation or publication of illegal speech outside the territorial borders of Pakistan or in preventing the citizens of Pakistan from accessing illegal speech without sharing or re-publishing it;

f. If the primary object of the YouTube ban is to deny access to information and unprotected speech from being voluntarily accessed by Pakistani citizens, who could in turn be offending by its content, whether such ban that is meant to protect adult citizens from their own deliberate behavior is in breach of the right to liberty guaranteed under Article 9 of the Constitution; and

g. Whether the state has a compelling interest to forcefully protect some adult citizens against offending their religious or cultural sensitivities through their own voluntary or deliberate actions in such manner that restricts the liberty of all citizens.

Legality of Government's Direction to Block Access to YouTube

4. The immediate issue that arises is whether the Government, PTA or the IMC is endowed with legal mandate to regulate access to the Internet or censor/block content available on the Internet. The fact that the Government has created an IMC suggests that the Government assumes it possesses such legal authority, even though PTA acknowledges that the law vests no authority in the regulator to undertake content regulation.

5. The scope and limitations of public authority were best explained by Saleem Akhtar, J. in *Gadoon Textile Mills v. WAPDA* (1997 SCMR 803):

   "A public authority or corporation is a creature of statute and its sphere of activities and actions are circumscribed by the relevant law. Such juristic person is permitted to do what it is authorized to do by law, unlike a human being who is permitted to do what he is not forbidden by law to do. The corporation created by statute mainly for public purpose with the object of rendering service, providing facilities, conveniences and amenities to public, are required to mold their decisions and actions within the frame of law for the benefit of public."

   At the heart of our constitutional scheme thus lies this distinction between the legitimacy of the acts of a public authority and that of the acts of a private citizen. Given that the Constitution is the fountainhead of all legal authority within the state, no individual or institution can claim any inherent power or authority to do anything in the name of the state that is not empowered by the Constitution and the law. Consequently, the state cannot restrain the individual citizen from enjoying his liberties or freedom of action unless the Constitution and the law explicitly allow and empower the state to curb such freedom.

6. It was unequivocally stated by the Supreme Court in *Pakistan Muslim League v. Federation of Pakistan* (PLD 2007 SC 642) that in order to be legitimate executive action must be backed by law and ought not violate fundamental rights in the following terms:

   "*Any invasion upon the rights of citizens by anybody no matter whether by a private individual or by a public official or body, must be justified with reference to some law of the country. Therefore, executive action would necessarily have to be such that it could not possibly violate a Fundamental Right. The only power of the Executive to take action would have to be derived from law and the law itself would not be able to confer upon the executive any power to deal with a citizen or other persons in Pakistan in contravention of a Fundamental Right…No infringement or curtailment in any Fundamental Right can be made unless it is in the public interest and in accordance with valid law. No doubt that reasonable restriction can be imposed but it does not mean arbitrary exercise of power or unfettered or unbridled powers which surely would be outside the scope of "reasonable restriction" and it must be in the public interest.*"

7. The fundamental rights guaranteed by the Constitution do not confer powers on the state, but responsibilities in relation to citizens and prescribe a line that the state ought not cross in exercise of its powers. To the extent that the state is authorized to infringe upon any fundamental right of a citizen, it must be done in

strict adherence to the requirements and limits prescribed by the Constitution. Justice Saqib Nisar explained this in *K.B. Threads (Pvt.) Ltd. v. Zila Nazim Lahore* (PLD 2004 Lahore 376) in the following terms:

"*The political institutions and social structure rest on the theory that all men have certain rights of life, liberty and the pursuit of happiness, which are unalienable, fundamental and inherent. When these "unalienable" rights are protected by Constitutional guarantees, they are called "fundamental" rights because they have been placed beyond the power of any organ of the State, whether executive or legislative to act in violation of them. They can be taken away, suspended or abridged only in the manner which the Constitution provides…It is thus clear that the fundamental rights are most superior and special in nature and cannot be interfered with without strict recourse to the law and that too subject to the conditions provided for the exercise of these rights*."

8. The Pakistan Telecommunication (Reorganization) Act, 1996 ("Telecom Act") vests no authority in the Government or PTA to regulate access to the Internet to prevent access to unobjectionable content, even though Section 54 of the Telecom Act makes provision for the exercise of police powers of the state in the interest of national security:

54. National Security.—(1) Notwithstanding anything contained in any law for the time being in force, in the interest of national security or in the apprehension of any offence, the Federal Government may authorize any person or persons to intercept calls and messages or to trace calls through any telecommunication system.

(2) During a war or hostilities against Pakistan by any foreign power or internal aggression or for the defense or security of Pakistan, the Federal Government shall have preference and priority in telecommunication system over any licensee.

(3) Upon proclamation of emergency by the President, the Federal Government may suspend or modify all or any order or licenses made or issued under this Act or cause suspension of operation, functions or services of any licensee for such time as it may deem necessary. Provided that the Federal Government may compensate any licensee whose facilities or services are affected by any action under this sub-section.

It is clear that the provision made by law for protection of national security interests does not contemplate blocking or denying access to specific information available on the Internet.

9. There is no other provision within the Telecom Act that either authorizes the Government or PTA to regulate the Internet or content-based access to the Internet. Sub-clauses (ag) and (ah) of Section 57 of the Telecom Act authorize the Government to make rules for the purpose of "*enforcing national security measures within the telecommunications sector*" and "*lawful interception*", respectively. While the provisions of the Telecom Act do not suggest that its purposes include regulating the Internet or access to its content, the Government has also not exercised its rule-making power under the Telecom Act to assume the authority to regulate the Internet or access to it on the basis of content.

10. Articles 19 and 19-A of the Constitution identify freedom of speech and freedom of information as fundamental rights of the citizens of Pakistan. However, neither the right to free speech nor that of access to information is an unconditional right.

11. While creating a fundamental right to free speech, Article 19 also identifies seven categories of speech that are afforded limited protection and can be subjected to reasonable restrictions imposed by law. The seven limited-protection categories of speech include speech reasonably deemed inimical to (i) glory of Islam or its integrity, (ii) security or defense of Pakistan, (iii) friendly relations with foreign states, (iv) public order, (v) decency or morality, or likely to cause (vi) contempt of court or (vii) commission or incitement of an offense.

12. Similarly Article 19-A that creates a fundamental right to have access to information in all matters of public importance also subjects such right to "*regulation and reasonable restrictions imposed by law*."

13. In other words while Articles 19 and 19-A while creating the fundamental rights to free speech and information leave room for the state to encumber those rights or place fetters. However, in doing so that state has been subjected to procedural and substantive requirements.

14. The procedural requirement cited in Articles 19 and 19-A is that any restrictions imposed must be imposed through law. In other words, there is no arbitrary right or discretionary authority vested in the executive branch of the state to curb these freedoms at will. It has been left to the legislative branch of the state to regulate or restrict these freedom, if need be, through legislation. Such legislative authority can of course be exercised in a manner that it further delegates the authority to regulate speech or access to information to the executive branch, to be exercised through subsidiary legislation or as an executive function.

15. The common substantive requirement, also endorsed by both Articles 19 and 19-A is that any restrictions imposed ought to be reasonable. Article 19, however,

imposes a further content-based substantive requirement i.e. only such speech may be restricted that falls within one of the aforementioned limited-protection categories.

16. YouTube.com is a website that allows users to be speakers and recipients of information simultaneously. Those uploading videos or expressing their opinion about such videos are expressing their right to speak. There are others who access materials available on the website to receive information. Denial of access to Youtube.com thus fetters both, the right to free speech and the right to freedom of information.

17. There are various laws in force in Pakistan that encumber the right to free speech or declare certain categories of speech illegal and regulate the right to information, including, *inter alia*, the following:

    a. Article 204 of the Constitution makes contempt of court an offence and the Contempt of Court Ordinance, 2003 further elaborates that nature of speech that is contemptuous.

    b. Pakistan Penal Code criminalizes speech of various types[1].

    c. Section 20 of the PEMRA Ordinance, 2002, requires licensees to ensure that, "*programs and advertisements do not contain or encourage violence, terrorism, racial, ethnic or religious discrimination, sectarianism, extremism, militancy, hatred, pornography, obscenity, vulgarity or other material offensive to commonly accepted standards of decency*."

    d. Sub-section (1) of Section 6 of the Motion Pictures Ordinance, 1979, states that, "*a film shall not be certified for public exhibition if, in the opinion of the Board, the film or any part thereof is prejudicial to the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality or amounts to the commission of, or incitement to, an offense*."

[1] Section 123-A: Condemnation of the creation of the State, and advocacy of abolition of its sovereignty; Section 124-A: Sedition; Section 153-A: Promoting enmity between different groups, etc.; Section 153-B: Inducing students, etc., to take part in political activity; Section 171-J: Inducing any person not to participate in any election or referendum, etc.; Section 292 Sale, etc., of obscene books, etc.; Section 294: obscene acts and songs; Section 295-A: Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs; Section 295-C: Use of derogatory remarks, etc., in respect of the Holy Prophet; Section 298-A: Use of derogatory remarks, etc., in respect of holy personages; Section 298-B: Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places; Section 298-C: Person on Quadiani group, etc., calling himself a Muslim or preaching or propagating his faith; Section 499: Defamation; Section 501: Printing or engraving matter known to be defamatory; Section 502: Sale of printed or engraved substance containing defamatory matter; Section 509: Word, gesture or act intended to insult the modesty of a woman.

e. Section 3 of the Defamation Ordinance, 2002, holds that, "*any wrongful act or publication or circulation or 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*."

f. The Official Secrets Act, 1923, imposes restrictions against photography, sketches etc. of prohibited and notified areas and the publication of various materials.

g. Laws providing for access to information, including, Freedom of Information Ordinance, 2002, Khyber Pakhtunkhwa Right to Information Ordinance 2013 and Punjab Right to Information Ordinance, 2013.

18. It is evident from a perusal of laws restricting and regulating the right to free speech and information that the legislature has exercised its right to impose restrictions on limited-protection categories of speech identified in Article 19 of the Constitution. To the extent that speech declared to be illegal is generated or published by an individual in Pakistan, the penal consequences of the law would apply, even if such publication uses the Internet as a medium.

19. None of the laws mentioned above, however, criminalize the act of accessing illegal speech. So, for example, a person producing or publishing blasphemous speech is liable to be charged for an offense under law but a person who passively reads such material does not indulge in any wrongdoing. Consequently, anyone in Pakistan who shares the Offending Video on YouTube.com or the Internet would be liable under law but not someone who merely views the video.

20. There is without doubt an abundance of material available on YouTube.com (and on the Internet more generally) that belongs to the limited-protection category of speech and even speech that can be deemed illegal. While creating or producing illegal material in Pakistan is an offence but merely accesses such material is not.

21. There is also no law in Pakistan that criminalizes access to illegal material on the Internet or delegates to the executive branch the authority to regulate access to the Internet. Consequently there is no legal basis for the Government to assume that it has the power and authority to create the IMC mandated to regulate access to the Internet. In the absence of a permissive legislative instrument, the Government, PTA and IMC can't claim to possess legal authority to ban access to YouTube.com.

22. In the event that the state wishes to assume the undesirable function of regulating Internet access to limited-protection categories of speech identified in Article 19 of the Constitution, it would require to do so by promulgating a law that

    a. Vests in the executive the authority to regulate the Internet;

    b. Specifies the criteria for such regulation and the manner in which such regulatory power is to be exercised in order to balance the fundamental rights of freedom of speech and expression of the citizens against the compelling public interest that the state wishes to protect by regulating or denying access to the Internet; and

    c. Provides a mechanism for redress of any grievances due to imposition of such restriction.

Relevant Jurisprudence re Freedom of Speech

23. The need for freedom of speech as well as the need to punish those who abuse such freedom is highlighted by Blackstone (*Corwin*, p. 769) as follows:

    "*Every man has an undoubted right in law to air what sentiment he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. To subject the press to restrictive power of a licenser…is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controversial points in learning, religion and government. But to punish…any dangerous or offensive writings, which when published, shall on a fair and impartial trial be adjudged of pernicious tendency, is necessary for the preservations of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that will is the object of legal punishment.*"

24. The First Amendment jurisprudence produced in the United States is relevant not because the constitutional right to free speech under our Constitution is identical to that afforded under the US Constitution, but because it highlights the philosophy underlying the right to free speech and its need in a democratic society.

25. In upholding a near absolute right to free speech, Holmes J., stated the 'clear and present danger' test in *Schenck v. U.S.* ((1918) 249 U.S. 47 @ 52) as follows:

"*We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done…The law's stringent protection of free speech would not protect a man in falsely shouting 'fire' in a theatre, and causing panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force…The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and danger.*"

The concept of free flow of ideas and a marketplace of divergent ideas being the best determinant of their truth, Holmes J held the following in *Abrams v. U.S.* ((1919) 250 U.S. 616 @ 629):

"*Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to let itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.*"

26. The Indian Supreme Court rejected the 'clear and present danger' test in *Babulal Parate v. Maharashtra* ((1961) 3 S.C.R. 423) holding that the US Constitution did not make provisions for imposition of restrictions on free speech as was done under Article 19(2) through (6) of the Indian Constitution. While the superior courts in Pakistan have not explicitly rejected the 'clear and present danger' test, it is arguable that to the extent that the legislature imposes restrictions on limited-protection categories of speech listed under Article 19 of our Constitution and such restrictions are reasonable in view of the state interest that is sought to be protected by their imposition, the clear and present danger test, even though more protective of freedom of speech and therefore desirable, ought not be applicable under our Constitution in view of the explicit permission for imposition of restrictions. However, to the extent that any restriction is being imposed on speech on grounds that it is essential to maintain public order, the clear and

present danger test would be a useful one in determining whether the restrictions imposed are reasonable in view of the effect and proximity of the speech to the danger posed by it.

27. In *Ramji Lal Modi v. U.P.* ((1955) 1 S.C.R. 1004) wherein Section 295A of the Indian Penal Code was challenged for violating the right to free speech, the Indian Supreme Court declared the provision to be legal for being reasonable 'in the interest of public order', by holding that Article 19(2):

"*…protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression 'in the interest of public order', which is much wider than 'for maintenance of public order'. If, therefore, certain activities have a tendency to cause public disorder, a law penalizing such activities as an offense, cannot but be held to be a law imposing reasonable restrictions 'in the interest of public order' although in some cases those activities may not actually lead to a breach of public order.*"

28. Notwithstanding the discretion allowed to impose restrictions in the interest of public order, the Indian Supreme Court held in *S. Rangarajan v. P. Jagjivan Ram* ((1989) 2 S.C.C. 574 @ 598-99) wherein the Madras High Court had revoked a U certificate issued to a Tamil film, that courts ought not cower under threats of violence posed by the mob in the following words:

"*We are amused yet troubled by the stand taken by the State Government with regard to the film which has received the National Award. We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it? If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threat of violence. That would be tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.*"

29. The status of freedom of speech as a fundamental right and the limits of such right under our Constitution is similar to that in India, as Article 19 of the Constitution explicitly subjects the right to free speech to limitations also listed therein. Dwelling on the right to freedom of speech and the associated right to receive information, the Supreme Court stated in *Independent Newspaper Corporation (Pvt.) Ltd. v. Chairman Fourth Wage Board and Implementation Tribunal for Newspaper Employees* (1993 PLC 673) that:

"*Article 19 of the Constitution guarantees right of freedom of speech and expression. It ordains that there shall be a freedom of press subject to reasonable restrictions imposed by law elucidated therein. The freedom of expression includes the right to receive information through organs of public opinion and the freedom of press on its, turn rests on the assumption that there is a wide dissemination of information. Such dissemination inevitably contemplates absence of restraints. Thus any measure which directly or indirectly puts restraint on or curtails the circulation of newspaper, due to any factor, including cost of production and resultant increase in the price thereof should, in so far as possible, be avoided.*"

30. However, while recognizing the importance of free speech as a fundamental right, the Supreme Court has also stated in no uncertain terms that such right is not absolute and remains subject to the restrictions prescribed by the Constitution. In *Jameel Ahmed Malik v. Pakistan Ordinance Factories Board* (2004 SCMR 164) the Supreme Court held that:

"*In a democratic set-up, freedom of speech/expression and freedom of press are the essential requirements of democracy and without them, the concept of democracy cannot survive. From perusal of Article 19, it is, however, absolutely clear that above right is not absolute but reasonable restrictions on reasonable grounds can always be imposed. Reasonable classification is always permissible and law permits so*."

31. The question, however, in the present case is not whether the Offending Video is protected speech under Article 19 of the Constitution and whether banning such Offending Video would be a reasonable restriction in the interest of glory of Islam or morality or public order. The question is whether denying access to YouTube as a whole, which provides a forum for expression of legally protected speech and a source of legally accessible information, is a reasonable restriction imposed in the interest of glory of Islam or morality or public order, when it is accepted that the object of blockage of YouTube is solely denial of access to the Offending Video.

The Test of Reasonableness and Striking the Right Balance between Competing Rights

32. In relation to restrictions on the freedom of speech under Article 19 of the Indian Constitution the test of reasonableness that has come to be widely accepted was laid down in *Madras v. V.G. Row* ((1952) S.C.R. 597 @607) as follows:

"*It is important…to bear in mind that the test of reasonableness, whenever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the same of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of restrictions, considered them to be reasonable.*"

33. Explaining the need for the right balance between the fettered right and the public interest to be protected through the restriction imposed, it was held in *Chintaman Rao v. M.P.* ((1950) S.C.R. 759 @763) that:

"*…limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, this is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by Article 19(6) it must be held to be wanting in that quality.*"

34. Where there are two competing rights or two public interests, the courts are required to balance such rights and interest in determining the question of reasonability. In the context of balancing public interest in freedom of speech against that in preventing unfair influence being brought to bear during administration of justice, Lord Reid in *A.G v. Times Newspapers* ((1974) A.C. 273 @ 294) stated that:

"*Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.*"

35. The courts in Pakistan have largely endorsed the Indian test of reasonableness and the need to strike the right balance between the disadvantage imposed on the individual and the advantage the public is envisaged to derive[2]. In *East and West Steamship Company v. Pakistan* (PLD 1958 SC 41) it was held that:

"*A 'reasonable restriction' in the sense of Article 11 is one which is Imposed with due regard to the public requirement which it is designed to meet. Anything which is arbitrary or excessive will of course be outside the bounds of reasons in the relevant regard, but in considering the disadvantage imposed upon the subject in relation to the advantage which the public derives, it is necessary that the Court should have a clear appreciation of the public need which is to be met and where the statute prescribes a restraint upon the individual, the Court should consider whether it is a reasonable restraint, in the sense of not bearing excessively on the subject and at the same time being the minimum that is required to preserve the public interest*."

36. It was emphasized in *Saiyyid Abul a'la Maudoodi v. Government of Pakistan* (PLD 1964 SC 673) that it was for the executive to establish to the satisfaction of the court that it had complied with procedural and substantive requirements in exercising authority in a manner that restrained the fundamental freedoms of citizens in the following terms:

"*The Courts cannot regard themselves as satisfied that a citizen's freedom has been subjected to a reasonable restriction unless it is proved to their satisfaction that not only the grounds of the restrictions as stated by the law are reasonable in themselves, but they have been applied reasonably as required by the Constitution. The only manner which the Courts themselves would regard as reasonable is that existence of the factual grounds of the restriction should have been established in the mode which the Courts recognize as essential where a right to life or liberty or property is concerned, namely, after a proper hearing given to the person concerned. . . . Any presumption that the authority in question has acted in accordance with justice or reason or equity, if made by the Courts in respect of such actions, would amount to a denial of the duty which the Courts are called upon to discharge in respect of these fundamental matters. The duty of the Courts would be thus to apply the principles of reason and justice according to the procedures with which they are familiar, to the ascertainment of the questions whether the restrictions in themselves are consistent with justice and reason, whether the conditions for their application have in fact been established, and whether they have been applied by competent authority. These are matters falling*

[2] See *Tafazzal Hossain v. Government of East Pakistan* (PLD 1965 Dacca 68)

within the large principle of judicial review as a power possessed by the Courts, for the correction of excesses in action."

37. In enunciating the concept of reasonable restrictions, the Supreme Court has also held that where pursuit of a public purpose requires imposition of restrictions on protected rights, the purpose ought to be pursued in such manner that is least restrictive of fundamental rights. *In Pakistan Muslim League v. Federation* (PLD 2007 SC 642) it was stated that:

"*A reasonable restriction is one which is imposed with due regard to the public requirement which it is designed to meet. Anything which is arbitrary or excessive will of course be outside the bounds of reasons in the relevant regard, but in considering the disadvantage imposed upon the subject in relation to the advantage which the public derives, it is necessary that the Court should have a clear appreciation of the public need which is to be met and where the statute prescribes a restraint upon the individual, the Court should consider whether it is a reasonable restraint, in the sense of not bearing excessively on the subject and at the same time being the minimum that is required to preserve the public-interest…A restriction is unreasonable if it is for an indefinite or an unlimited period or a disproportionate to the mischief sought to be prevented or if the law imposing the restrictions has not provided any safeguard at all against arbitrary exercise of power.*"

38. The jurisprudence on free speech and reasonable restrictions raises the following issues:

    a. Has it be established to the satisfaction of the court that the Government is legally competent to regulate the Internet or block access to a website on the Internet?

    b. Has it be established to the satisfaction of the court that complete denial of access to YouTube as a whole is a reasonable restriction in order to block access to one video?

    c. Has it be established to the satisfaction of the court that indefinitely banning a forum that largely hosts protected speech as a means to deny access to some illegal speech is a reasonable and not an overbroad restriction?

    d. Has it be established to the satisfaction of the court that that such restriction strikes the right balance between the interest of individuals and the society in upholding freedom of speech against the public interest in

protecting the religious sentiments of the majority community from being offended due to the existence of a blasphemous video?

e. Has it be established to the satisfaction of the court that in indefinitely banning complete access to YouTube without affording affected parties the right to a hearing is in accordance with constitutional due process requirements?

Internet, Information Age and Moral Panic

39. There exists no central control over the Internet and there is no one state or regulatory agency that can regulate the Internet. The Internet also does not respect territorial boundaries. In an international legal order rooted in the nation-state system wherein municipal legal system exercise jurisdiction within the sovereign territory of the state and cooperate with international agencies or municipal systems of other states to the extent that there is need to exercise jurisdiction beyond borders, the Internet creates a unique jurisdictional problem.

40. The autonomy of the Internet and the free and instant flow of information that it enables have created a moral panic for not just the state but also the society. This problem is not exclusive to Pakistan, but even states and societies in the West have wrestled with the issue of how Internet is making it harder for the state to control speech and the information available to the citizens on the one hand, and for parents to limit access of children to unwanted information or protect their own privacy on the other.

41. The response of states in reacting to the manic created by the Internet has varied:

a. States like China and Saudi Arabia have introduced nationwide filtering mechanisms to control the Internet as a forum of free speech and source of information;

b. US, Canada and UK have reconciled with the autonomy of the Internet and inability of any one state to create an international standard for regulation of content of the Internet and have preferred to focus on self-regulatory measures enabling citizens to exercise more control over what they or their children can access on the Internet.

c. Other countries such as the Germany have criminalized certain forms of speech (such as pro-Nazi speech or denial of the Holocaust) in view of its own socio-political sensibilities and have not followed the absolute freedom of speech model of the US. But Germany has refrained from

attempting to control access to or availability of such speech on the Internet to the extent that it is being generated within other countries.

42. While considering the desirability of regulating the Internet as a policy measure, it is essential to understand how the Internet actually functions and why that makes it exceedingly hard to control access to information available on the Internet without making means of such control overbroad, while also making the administrative burden of enforcing such control prohibitive. To do so it is useful to read the findings of fact (paragraphs 6 through 96 and 117 through 123) in the US District Court judgment in *ACLU v. Reno* (http://law.duke.edu/boylesite/aclureno.htm) that summarizes the nature of the history and nature of the Internet, how individuals access the Internet, the various methods available to communicate over the Internet, the challenge of restricting access to unwanted online material and the means devised to do so and the problem of offshore content and caching.

43. It is clear that technology has outpaced the speed with which a majority of states and societies were reconciling with concepts of freedom of speech and access to information.

44. There is need to engage in a policy-based discourse on whether access to undesirable online materials ought to be denied. This has to be accompanied by a rights-based discourse on how denial of access, if undertaken by the state on a nation-wide level, would infringe the fundamental rights of citizens.

45. It is arguable that as a policy measure it is undesirable to regulate access to the Internet as a content censorship measure for the following reasons:

    a. The Internet and websites such as YouTube are forums of speech as well as repositories of information. The nature of the medium is such that unless you block the link to a particular piece of information or speech that is deemed illegal denying access to the website as a whole blocks more legal speech and information than illegal. Additionally, the tools and methodology employed to restrict access to a particular piece of information requires scrutiny of a wide range of electronic communication and intrusion into its content in such manner that in turn infringes on other protected rights, such as the right to privacy.

    b. It is now well established as part of the First Amendment jurisprudence in the US that the protection of free speech or exceptions to it cannot be applied uniformly to all media. Justice Jackson has held in *Kovacs v. Cooper* ((1949) 336 U.S. 77 @ 97) that "*[t]he moving picture screen, the*

radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself". Pakistani free speech jurisprudence ought to recognize that the restrictions that might be reasonable in relation to the newspaper or broadcast, by virtue of absence of barriers to such information and ready access of children etc., might be unreasonable in relation to the Internet.

c. It was held in the US District Court decision in *ACLU v. Reno* that, "*Internet communication, while unique, is more akin to telephone communication, at issue in Sable, than to broadcasting, at issue in Pacifica, because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online. Even if a broad search will, on occasion, retrieve unwanted materials, the user virtually always receives some warning of its content, significantly reducing the element of surprise or "assault" involved in broadcasting. Therefore, it is highly unlikely that a very young child will be randomly "surfing" the Web and come across "indecent" or "patently offensive" material*." Pakistani free speech jurisprudence ought to reflect that there are natural barriers to inadvertent access to illegal or undesirable material and thus the chance of accidental access to such material is almost non-existent. A user accessing the Internet to deliberately search and access illegal or undesirable material does not fall within the vulnerable segment of the society that needs state protection or patronage.

d. The autonomous and truly global nature of the Internet also means that it is simply not possible for any one nation-state to regulate it successfully. Even if authorities in Pakistan had the legal mandate to regulate access to the Internet as a content censorship measure and it was desirable as a policy measure to ensure that the Offensive Video is not accessible to anyone in Pakistan, it is not possible to do so by blocking YouTube. Given the presence of proxy servers, YouTube and the content available on YouTube is readily available to anyone who is determined to access it. Further, YouTube is only one of the video hosting sites. There are many others as well and even if Pakistan was able to block all proxies, all video sharing websites and all search engines, with prohibitive administrative costs, it might not be possible to ensure that no one in Pakistan is able to seek access to the Offending Video on the Internet.

e. While the state might not be able to obstruct access to the Offending Video or other illegal or undesirable content on the Internet, there are

innumerable technological solutions that afford individual consumers the ability to regulate and prohibit deliberate or accidental access to such materials. Whether it is software downloaded on personal computers that can be used to obstruct access to undesirable material or industry-wide rating systems that enable consumers to help determine the desirability of content based on agreed community standards, it is such deregulated private measures that are effective tools in preventing access to undesirable content and not overbroad state regulation.

46. It is further arguable that as a legal measure too it is undesirable to block YouTube or regulate access to the Internet for being offensive to fundamental rights for the following reasons:

    a. The state has the jurisdiction to declare what conduct would be deemed a crime within its territorial boundaries. Consequently, it can declare that creating speech within the limited-protection categories mentioned in Article 19 or sharing it is illegal and punishable by law if done in Pakistan (as declared by Germany in relation to pro-Nazi speech). But the state has no legitimate basis to determine what speech is illegal or undesirable when created in other countries and not specifically meant for publication in Pakistan. If for example, access to the Offending Video created in the US is declared a crime, wouldn't those trying to access it through YouTube whose religious sensibilities consequently get offended due to its content, not be themselves liable for an offense? Likewise if there are other events that transpire elsewhere in the world, such as the news of the bigoted American Pastor Terry Jones threatening to burn the Holy Quran, would it be legitimate for the state to ban all online newspapers or media houses even within Pakistan, in order to ensure that such news does not reach Pakistan and threaten public order in our country?

    b. While Article 19 of the Constitution identifies limited-protection speech categories, Article 19-A does not entitle the state to prevent access to limited-protection speech. The Internet has created a marketplace of information that allows individuals to speak as well as receive information simultaneously. In order for the state to block access to the Internet as a content censorship measure, the state would have to establish that it has a right to declare access to limited-protection speech an offense as well or that blocking access to limited-protection speech is a reasonable indirect measure aimed at preventing the creation and sharing of illegal and undesirable speech.

c. Blocking YouTube as a means to prevent access to YouTube is an overbroad and counter-productive measure, as while it fails to block access to the Offending Video for the curious individual interested in seeking access to the video, it does block access to all the rest of the legal and beneficial material available on YouTube and the use of YouTube as an pedagogical forum by schools and universities etc. in Pakistan.

d. Blocking YouTube or seeking regulating access to the Internet as content censorship measure is disempowering for the ordinary individual. Given the barriers to entry in traditional media, whether newspapers or broadcast, the Internet and social media have a level-playing field for the ordinary individual to express his thoughts, ideas and opinion.

e. The means of regulation of any medium by the state is through the institution of a licensing system. In the instant case, the state is seeking to regulate content produced by individuals by imposing sanction on the intermediaries, even where neither the individuals nor the intermediaries in question need any license from the state to produce speech or host it. While this might be possible or even desirable in case of broadcast (again due to the 'surprise' or 'assault' elements that attach to broadcast content that might be undesirable for children etc.), it is undesirable to hold intermediaries such as YouTube or other internet sites liable for content or ideas produced by individuals from various nooks and corners of the world.

f. In banning access to YouTube indefinitely over content privately produced by a citizen in a foreign country without taking into account the impact of such action on all other users of YouTube in Pakistan not interested in such offensive content, the state has neither abided by due process requirements by enabling interested and affected parties a hearing or taking into account their concerns nor has the measure been narrowly tailored to block the offensive speech without adversely affecting access to legal speech.

g. In banning access to YouTube, the state has struck the wrong balance between the public interest in free speech and the community interest in public order. If the object of the state is to prohibit access to all blasphemous or obscene material that has the potential of offending the religious sensitivities of Muslims in Pakistan, blocking YouTube does not accomplish that goal, especially given that the video is still accessible through use of proxy websites. If the object of the state in banning YouTube is to placate and appease segments of the society who threaten to

create a law and order situation within Pakistan to exhibit their anger over the actions of private individuals who created the Offending Video in a foreign country, it is tantamount to succumbing to premeditated threats of violence as opposed to protecting community interest by preempting an unexpected imminent threat to public order.

h. Given that there is no assault element in a YouTube video, it is the publication or drawing of public attention to the Offending Video that can incite violence and disturb public order. By blocking access to YouTube as a whole, the state is endorsing a legal value set wherein both instigating hatred and violence and being readily incited and provoked to act violently are being recognized as protected rights even when there is no element of surprise in the matter. In other words the indefinite YouTube ban does not satisfy the clear and present danger test, as opposed to a limited time denial of access that the state deemed essential to take precautionary measures to protect an immediate and inadvertent outbreak of violence.

i. Banning access to YouTube ought not be termed as a compelling state interest, because its object is not to permanently block access to the Offending Video (which is still available through proxy servers and causing no threat to public order) but to make a political statement that any website such as YouTube that will not take down the Offending Video in appreciation of the religious sensibilities of Muslims will be punished by being shutdown in Pakistan. In other words while being fully cognizant of the fact that citizens can elect not to access or watch the Offending Video given its content or the YouTube as a whole, the advocates of YouTube ban wish to impose fetters on the liberty of fellow citizens who might not wish to discontinue use of YouTube as a whole due to its decision not to take down the Offending Video globally. The state's decision to fetter the liberty of one set of citizens on the demand of another set of citizens on how the former ought to act is a breach of the right to liberty protected under Article 9 of the Constitution.

Guarding Moral Virtue versus Maintaining Public Order

47. Preventing the creation of undesirable material in other countries and societies cannot be a legitimate or compelling state interest. Declaring through promulgation of law what speech within the limited-protection category is illegal speech, creation or publication of which within Pakistan would be an offense, would be a legitimate or compelling state interest. But that is not what the state is doing in blocking access to YouTube.

48. Facilitating the adult citizen in acquiring means to assert better control over the information that a citizen is confronted with might be a reasonable state interest but controlling access to what might be deemed immoral by a segment of the society as opposed to what has been declared as illegal by the state cannot be a legitimate state interest.

49. Preventing an imminent threat to public order is a legitimate state interest. But neither infringing fundamental rights of all citizens to guard religious sensibilities of a segment of the society from being offended can be a legitimate state interest nor cowering to the threat of violence by such segment of the society if the state does not act in a certain way that is deemed by such segment as a satisfactory response to placate its anger can be legitimate response of the state.

50. The blocking of access to predominantly legal content in response to the threat by a section of the society that its premeditated response to the state's refusal to do so would be resort to violence and incitement of violence, cannot amount to striking the right balance between public interest in free speech versus that in public order. In submitting to the demand of one section of the society what the actually doing is allowing such segment to dictate to the rest of the citizens how they ought to exercise their own rights and liberties and consequently the right to liberty of all citizens guaranteed under Article 9 of the Constitution.

Conclusions

51. Pursuant to Article 19 and 19-A of Constitution, the Government has no legal authority to block access to YouTube. Regulation of access to the Internet as a content-censorship measure can only be undertaken if authorized by law promulgated by the parliament.

52. While it would be undesirable to attempt to regulate access to the Internet or Internet content, any law promulgated for the purpose would need to

    a. Abide by due process requirements by prescribing a mechanism for those affected by blockage of access to the Internet to be afforded a hearing and an appeal process to remedy arbitrary, unreasonable or overbroad exercise of authority;

    b. Identify the authority or agency endowed with the responsibility to undertake access regulation on the basis of content to render such exercise of regulatory authority legal; and

c. Prescribe the considerations to be borne in mind by such authority in blocking access to the Internet and guidance on how to strike the right balance between competing interests should the need for blockage arise.

53. The object of ensuring that illegal and undesirable material – obscene, pornographic, blasphemous, violence inciting etc. – does not accidently or inadvertently reach children or adults who do not wish to be confronted by such material, is a legitimate state purpose. But the state exercising its police powers on the insistence of one segment of the public to control what other adult members of the society are able to access, as a means to protect their morals, is offensively paternalistic that offends the values of human agency, free choice and the ability of an adult to distinguish between right and wrong that form the basis of a civilized, pluralistic, democratic society.

54. Fundamental rights have come to be recognized within all rule-of-law based systems as those inalienable rights of human being that they cannot and ought not be denied. Subjecting such rights to broad restrictions or contriving legal tests of reasonableness in relation to fundamental rights that readily allow the state to infringe individual rights amounts to moving away from the global consensus of civilized people that fundamental rights are inalienable.

55. Allowing the infringement of fundamental rights on the ground that upholding such rights might offend segments of the society or encourage them to turn violent or incite violence and in striking the balance between the public interest in upholding fundamental rights and that in maintaining order, the state must err on the side of public order amounts to rendering fundamental rights meaningless.

56. The need for inscribing fundamental rights within the Constitution and providing that no laws must be promulgated that infringe upon fundamental rights is to protect these rights from the majority and its tyranny. If it was desirable that in any conflict between the rights of the individual and rights of the community the law should side with the latter, there would be no reason or need to identify fundamental rights within the constitution of a democratic state instead of leaving their protection to majority vote or sentiment.

57. The state has a legitimate interest and duty to enable citizens to practice their religion freely and prevent other citizens from indulging in hate speech that offends the religious sentiments of any class of citizens. The state however has an obligation to ensure that the right of citizens to live their lives in accordance with their own religious beliefs and practice their rights and liberties in accordance with such beliefs is not transgressed by any segment of the society that wishes to impose their view of religion and the choices that ought to be made to protect

religious sensibilities on others. If the manner in which one segment of citizens exercise their rights and liberties is offensive to another segment of citizens, not because the actions of the former are offensive to the religious beliefs of the latter but because the latter believe that the former are not exercising their rights in a rightful manner most suitable for the protection of their religion, the state in siding with the latter infringes the right to liberty protected under Article 9 of the Constitution.