

**To:** Bolo Bhi

**From:** AJURIS, *Advocates & Corporate Counsel*

**Subject:** Application of the Pakistan Penal Code to Online Content

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### **Provisions of the Pakistan Penal Code Affecting Free Speech**

1. Freedom of speech is a fundamental human right enshrined in and protected by Article 19 of the Constitution of Pakistan, 1973 which states that *“every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence.”*
2. While general parameters have been stipulated in Article 19 of the Constitution as grounds for restricting freedom of speech and expression, the Pakistan Penal Code, 1860 (“**PPC**”) further expands these general parameters by proscribing certain acts in the interests of balancing the collective rights of society with the individual fundamental right of freedom of speech. The provisions of the PPC which seek to restrict freedom of speech are as follows<sup>1</sup>:

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<sup>1</sup> Other statutory provisions which seek to restrict certain types of speech include Article 204 of the Constitution of Pakistan, 1973 (Contempt of Court), Schedule A to the Pakistan Electronic Media Regulatory Authority Rules, 2009 (Code of Conduct for Media Broadcasters or Cable TV Operators), Section 6 of the Motion Pictures Ordinance, 1979 (Principles of guidance in certifying films), Section 3 of the Contempt of Court Ordinance, 2003 (Contempt of court) and Section 3 of the Defamation Ordinance, 2002 (Defamation).

- (i) **Section 294:** Section 294 of the PPC makes engaging in obscene acts, or singing, reciting or uttering obscene songs, ballads or words, in or near any public place, to the annoyance of others, an offence punishable with imprisonment for a term which may extend to three (03) months, or with fine, or with both.
- (ii) **Section 295-A:** Section 295-A of the PPC makes insulting or attempting to insult the religion or religious beliefs of a class of the citizens of Pakistan by words, either spoken or written or by visible representations, with the deliberate and malicious intention of outraging the religious feelings of that class, an offence punishable with imprisonment for a term which may extend to ten (10) years, or with fine, or with both.
- (iii) **Section 295-C:** Section 295-C of the PPC makes the defiling of the sacred name of the Holy Prophet Muhammad (peace be upon him) directly or indirectly by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, an offence punishable with death.
- (iv) **Section 298:** Section 298 of the PPC makes the uttering of any word or making of any sound in the hearing of a person or making any gesture in the sight of that person or placing of any object in the sight of that person, with the deliberate intention of wounding the religious feelings of such person, an offence punishable with imprisonment for a term which may extend to one (01) year, or with fine, or with both.
- (v) **Section 298A:** Section 298A of the PPC makes the defiling of the sacred name of any wife (Ummul Mumineen), or members of the family (Ahle-bait) of the Holy Prophet Muhammad (peace be upon him), or any of the righteous Caliphs (Khulafae-Rashideen) or companions (Sahaaba) of the Holy Prophet (peace be upon him), directly or indirectly by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, an offence punishable with imprisonment for a term which extend to three (03) years, or with fine, or with both.

- (vi) **Section 298B:** Section 298B(1) of the PPC makes (a) reference to or addressing 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”; (b) reference to or addressing any person other than a wife of the Holy Prophet Muhammad (peace be upon him) as “Ummul-Mumineen”; (c) reference to or addressing any person other than a member of the family of the Holy Prophet Muhammad (peace be upon him) as “Ahle-bait”; or (d) reference to, naming or calling his place of worship a “Masjid”; by any person of the Quadiani group of the Lahori group, or by any other name, through words, either spoken or written, or by visible representation, an offence punishable with imprisonment for a term which may extend to three (03) years and a fine.

Section 298B(2) of the PPC makes reference to the mode or form of call to prayers followed by any person of the Quadiani group or the Lahori group as “Azan” either by words, spoken or written, or by visible representation, or reciting Azan as used by the Muslims, an offence punishable with imprisonment for a term which may extend to three (03) years and a fine.

- (vii) **Section 499:** Section 499 of the PPC proscribes the making or publishing of any imputation concerning any person, by words, either spoken or intended to be read, or by signs or by visible representations, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person thereby defaming such person. Section 499, through stipulated explanations and exceptions, goes on to further explain what may or may not be considered defamation under the PPC.
- (viii) **Section 509:** Section 509 makes the uttering of any word, making of any sound or gestures, exhibiting of any object intending that such words or sound will be heard, or that such gesture or object shall be seen by a woman, with the intention to insult the modesty of such woman, or intruding upon the privacy of such woman, an offence punishable with imprisonment for a term which may extend to one (01) year, or with fine, or with both.

3. While the aforementioned provisions of the PPC make it an offence to engage in certain proscribed speech and/or conduct, it is pertinent to note that pursuant to Section 5 of the Code of Criminal Procedure, 1898 (“CrPC”) which states that “*all offences under the Pakistan Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained,*” the procedure for trial of such offences is delineated by the CrPC. Furthermore, Schedule II to the CrPC contains a Tabular Statement of Offences which stipulates, *inter alia*, whether the aforementioned offences under the PPC are bailable offences or otherwise.

#### **Application of Pakistan Penal Code to Online Content & Competent Forum for Issuing Directives for Blocking of Online Content under Provisions of Pakistan Penal Code**

4. There is currently no provision in the PPC that makes the aforesaid provisions (that impose restrictions on the freedom of speech and expression) explicitly applicable to content published and made available on the Internet. The expressions “*words, spoken or written*” and “*visible representation,*” as employed in the aforesaid provisions, have however provided the courts with ample room in the past to consider as valid various mediums in which such words or visible representations have been expressed. In determining whether an offence related to proscribed speech and/or conduct under the aforesaid provisions has taken place, courts have considered mediums as diverse as articles in monthly magazines (*Suleman vs. Kala*, PCr.LJ 1994 Karachi 747), wedding invitation cards (*Nasir Ahmad vs. The State*, PCr.LJ 1992 Lahore 2351), inscribed bed sheets (*Mubammad Ali vs. Qadir Khan Mandokhail*, PLD 2006 Karachi 613), audio cassettes (*Haji Bashir Ahmad vs. The State*, YLR 2005 Lahore 985), banners and badges worn by a person (*Khurshid Ahmad vs. Government of Punjab*, PLD 1992 Lahore 1), writing on the wall (*Rasheed Ahmad Khan Alias Abdul Rasheed vs. The State*, PCr.LJ 1988 Karachi 1595) and a documentary film (*Syed Mehmood Ali vs. Network Television Marketing (Private) Limited*, CLD 2005 Karachi 840).
5. It is pertinent to note that in none of the aforementioned cases have the Courts concluded that the offending words and/or speech was expressed in a medium which ought not to be

deemed “speech” or “publication” for purposes of the PPC. In other words the courts have so far adopted an inclusive approach for the various mediums in which the offending speech has been expressed and have not created exclusions for any particular type of medium. Based on the aforesaid cases and the broad language used in the provisions of the PPC, it is likely that the Courts will employ a broad interpretation thereof in order to apply such provisions to online content if the aim is to *“maintain the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence”* in light of the Constitution.

6. In terms of a forum competent to issue directives to block online content based on provisions contained in the PPC, the Inter Ministerial Committee for Evaluation of Websites (“**IMCEW**”) – which has been routinely issuing directives for blocking various websites and online content during the past couple of years – is not a competent or legitimate forum as no set of statutory rules and/or regulations grants it the power or mandate to issue such directives. However, it must be borne in mind that the intermediary service provider (whether the host of the website or the network service provider) is not in a position to determine on its own the legitimacy of the forum issuing the directive for blocking access to online content. Therefore what is required in the present circumstances is a declaration from a competent judicial forum in Pakistan, in view of the laws in force, as to whether the IMCEW is duly authorized to request social media websites such as Facebook and Twitter to block access to pages due to availability of content on such pages that amounts to unprotected speech the publication or making of which constitutes an offence under the PPC.
7. In the event that a competent judicial forum in Pakistan declares that the IMCEW is not, in view of the laws in force, duly authorized as such, the IMCEW may be abolished and/or disbanded in the same manner in which it was created i.e. by orders of the Government of Pakistan. In this respect, Section 21 of the General Clauses Act, 1897 states that *“where by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.”* By virtue of

Section 21, therefore, the authority or body which has been granted the power to pass an order is also entitled to vary, amend, add to or rescind that order. The superior courts of Pakistan have also reinforced such principle by holding that *“the authority competent to make order had the power to undo it”* (Malik Muhammad Din vs. Chief Administrator Auqaf, Government of Punjab, Lahore and another, CLC 2006 Lahore 60).

### **Limitation of Intermediary Liability with respect to Online Content**

8. A crucial aspect with respect to material published or made available online which must be considered by Courts is intermediary liability that may be attributed to the host of the website on which such material is published or the network service provider linking the end user with the Internet. In this respect, there is currently no provision in the PPC that limits or expands the liability of such host or network service provider. The Electronic Transactions Ordinance, 2002 limits the liability of network service providers under Section 40 and provides that *“in the absence of intent to facilitate, aid or abet, a network service provider shall not be subject to any civil or criminal liability solely for the reason of use of his telecommunication system in connection with a contravention of this Ordinance by a person not subject to the direction or control of the network service provider.”* However, Section 40 only limits intermediary liability in the contravention of the Electronic Transactions Ordinance, 2002 and does not provide an overarching statutory basis for exclusion or limitation of intermediary liability for offences committed under other laws for the time being in force.
9. Indian law, for example, comprehensively treats the issue of intermediary liability in Section 79 of its Information Technology Act, 2000. This law, which also proscribes publication and transmission of information that is obscene in electronic form by virtue of Section 67, as amended by the Information Technology (Amendment) Act, 2008, unequivocally provides that:  
  
*“79. (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-section (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.*

(2) *The provisions of sub-section (1) shall apply if—*

- (a) *the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or*
- (b) *the intermediary does not —*
  - (i) *initiate the transmission,*
  - (ii) *select the receiver of the transmission, and*
  - (iii) *select or modify the information contained in the transmission;*
- (c) *the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.*

(3) *The provisions of sub-section (1) shall not apply if—*

- (a) *the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;*
- (b) *upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.*

*Explanation.- For purposes of this section, the expression “third party information” means any information dealt with by an intermediary in his capacity as an intermediary.”*

10. Section 79 of the Information Technology Act, 2000 of India is very broadly worded and therefore ousts intermediary liability under “any law for the time being in force.” Section 40 of the Electronic Transactions Ordinance, 2002, in comparison is insufficient to grant intermediaries immunity against legal challenges and Pakistan will thus need to carve out such liability as a general matter of law.
11. Under Sections 294, 295-A, 295-C, 298, 298A, 298B, 499 and 509 of the PPC as they presently exist, liability could attach to intermediaries for third party actions in their capacity as “publishers” of online content which contains “words” and “visible representations” proscribed by such sections. To explicitly exclude such liability, there would be need to introduce a broadly worded statutory provision that protects intermediaries for actions of third parties (similar to Section 79 of the Information Technology Act, 2000 of India) notwithstanding which law is being relied on in bringing such legal action against the intermediary. Such non-obstante statutory provision when promulgated later in time to all existing provisions (which seek to proscribe certain types of speech and/or expression) shall provide the courts with an overarching statutory basis to exclude liability for intermediaries.
12. Furthermore, there has been no jurisprudence produced so far by the superior courts of Pakistan that delineate the scope and extent of liability of intermediaries for offensive and/or illegal actions and conduct of third parties that utilize the forum afforded by the Internet/intermediaries. Even in cases such as the ban on YouTube ordered via the interim order dated 17.09.2012 passed by the Supreme Court of Pakistan in CMA No. 3908/2012, the Supreme Court has passed general strictures but there has been no detailed consideration regarding the respective roles and responsibilities of parties involved in enabling expression of speech on the Internet, with no intervention of intermediaries, as opposed to the more involved role of a publisher in traditional/print media. In determining the liability of intermediaries for a medium such as the Internet, questions such as whether the offences related to unprotected speech are strict liability offences and whether the issue of intent may be raised as a defense by intermediaries shall have to be addressed and clarified by the courts.

### Present Situation

13. The PPC, while it does describe what actions related to speech constitute offences in Pakistan and are thus proscribed under our legal framework, does not explicitly exclude use of the Internet as a medium and as laws are drafted for times to come and are interpreted accordingly, it might be difficult to argue that the offences stipulated under the PPC are not offenses if perpetrated through use of new mediums or technologies.
14. Furthermore, with respect to the extraterritorial application of the provisions of the PPC to offences committed beyond Pakistan, Section 3 of the PPC stipulates that *“any person liable, by any Pakistan law, to be tried for an offence committed beyond Pakistan shall be dealt with according to the provisions of this Code for any act committed beyond Pakistan in the same manner as if such act had been committed within Pakistan.”* The courts have further elaborated on the extra-territorial application of the provisions of PPC to the effect that if a foreign person engages in conduct which is an offence in Pakistan, the same may be held guilty and punished as such without any limitation as to his corporeal presence in Pakistan at the time.
15. The relevant question thus becomes Pakistan’s approach to enforcing the law or curbing speech that is unprotected for purposes of Article 19 of the Constitution. The state can choose to act against individuals indulging in conduct that constitutes an offence under the PPC ex post facto or it can opt for a more intrusive and ambitious approach of trying to prevent the publication of unprotected speech through a stern enforcement regime.
16. The latter approach would be overbroad and will necessarily result in censorship of protected speech along with unprotected speech and strike the wrong balance in upholding the right of individuals to free speech while penalizing those who abuse such right and exercise it in such manner that qualifies as an offence under the laws of Pakistan. The possibility of extinguishing unprotected speech such as pornography from the Internet is very remote. Conceiving an enforcement regime with such an impossible administrative object will not only be futile but will result in intermediaries outside Pakistan disregarding even legitimate and pressing requests of Pakistani law enforcement agencies.