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Editor's Note

2016 added another chapter to the bleak history of human rights violations in Pakistan. Some of the most flagrant violations of human rights continued unabated. Vulnerable groups, once again, took the brunt of the powerful state and non-state bodies' excesses and/or neglect. More than 50% of registered murders in Gilgit Baltistan were honour killings. Under trial women and juveniles continued to languish in jails, and in absence of any comprehensive prison (probation and parole) plan of paradigmatic shift from retribution to rehabilitation, the population kept swelling. The problem was exacerbated by the ever-increasing back-log of cases in courts, and the lack of a consolidated legal aid regime. Currently, there is a pendency of 1,105,265 cases in district courts of Punjab, an average of 748 per lower court judge. In the circumstances, access to justice, especially to marginalized groups, remains a big challenge. Unrelenting bypass of formal justice mechanisms continues to date. The number of people added to the growing list of missing persons was the highest in six years. Hundreds were killed in police 'encounters'. Furthermore, United Nations Committee against Torture's concluding observations to Pakistan's initial state report of UNCAT exposed Pakistan's lack of purpose in combatting the widespread use of torture throughout the criminal justice process.

With multifarious challenges confronting Pakistan, the volume once again explores a wide variety of issues. Three of the articles explore the thematic area of economic, social and cultural rights. The first, highlights the ideological and legal distinction between civil and political rights and economic, social and cultural rights whereas the second and third deal specifically with the right to culture and the right to health. A detailed critical

assessment of Pakistan' jurisprudence on freedom of expressions is contained in another. A comparative study on witness protection laws and its paramount importance fair trial and due process is explored. Finally, the journal highlights the plight of transgender community and issues pertaining to climate change.

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PROFESSIONALS

THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: TOWARDS A COHERENT JURIDICAL TEST

By Umar Mahmood Khan[1]

ABSTRACT

The normative challenge to the non-justiciability of Economic, Social and Cultural Rights has blurred its line with Civil and Political Rights. As a result there has been a significant advancement in international human rights law, domestic constitutions and common law jurisprudence relating to Economic, Social and Cultural Rights. This has altered the debate from whether justiciable or not to, to what extent justiciable. Pakistani courts also face this dilemma on a daily basis, and its jurisprudence on ESCR litigation is extensively discussed. It is concluded that due to the pull of the express non-justiciability clause on the one hand, and the courts social welfare agenda on the other, the jurisprudence has remained incoherent. Therefore, a coherent juridical test of a hybrid model of strong and weak review is presented; to preserve the expansionist approach of the Pakistani courts but at the same time ensuring that the parliament remains the owner of public policy decisions.

INTRODUCTION

In this essay, I discuss how justiciability of Economic, Social and Cultural Rights ('ESCR'), notwithstanding various normative challenges, has become a reality for many domestic courts. It is because of at least three developments; 1) international human rights law ('IHRL') jurisprudence, 2) express constitutionalization

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of ESCR in domestic constitutions and 3) increased acceptance of domestic courts to treat ESCR as justiciable human rights (HR). Consequently, domestic courts are grappling with this relatively under developed area of judicial review ('JR') on a daily basis, and face a task to formulate a coherent juridical test for such cases.

The essay focuses on Pakistani constitutional courts; the Supreme Court of Pakistan ('PSC') and its high courts. The argument is that the Pakistani courts have employed an ad-hoc and often confusing jurisprudence to deal with ESCR matters. Based on its already developed jurisprudence, and various articles of the Constitution of Pakistan ('COP'), a juridical test which satisfies the dictates of COP and Pakistan's obligations under IHRL is proposed. It also does not significantly deviate from the various juridical tests already established by PSC.

In the first part of the essay the normative foundations of the justiciability debate, are briefly addressed. The essay deals with it briefly because the normative basis of the justiciability debate and the normative shift (or the lack of it) of the narrative around the debate is not the main focus of the essay. The writer does not take a position about this debate. For the purpose of this essay, the writer is only concerned with how the normative underpinnings of this issue continue to inform the opinion of courts confronted with questions about justiciability of ESCR, and how it shapes their jurisprudence.[2] To that extent, the essay deals with certain normative questions surrounding the debate.

In the second part, the jurisprudential advancements in the justiciability of ESCR are discussed in light of IHRL, South African jurisprudence and Indian jurisprudence. The third part deals exclusively with Pakistani jurisprudence on ESCR, and analyses the juridical tests which the courts have employed to decide such cases, and argues that there is no uniform and clear juridical test. Therefore, in the fourth part, a juridical test is proposed, to provide a way ahead for Pakistani courts.

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[2] Normative questions are relevant but are not the only questions judges ask during judicial decision making. Judges are equally, if not more, concerned with the black letter law while deciding cases.

CHAPTER 1

JUSTICIABILITY DEBATE

1.1 Introduction

The designation of ESCR as genuine HR is often challenged on multiple grounds. Some argue that they are not HR because it is difficult to identify the duty-bearers of ESCR (O'Neill, 1996: 131, cited in Meckled-Garcia, 2013: 82). Others focus on their vague nature (which owes largely to the fact that they require progressive realization[3] as opposed to immediate enforcement) in cementing their non-real HR character. Based on the notion of their vague nature, a further argument is constructed that they are therefore 'neither enforceable nor justiciable' (Plant, 1992: 22). If a HR cannot be justiciable and enforceable then is it really a HR? Justiciability of ESCR therefore, is employed as a cogent, often primary challenge to dismiss their status as HR. Civil and Political Rights (CPR) are generally considered justiciable hence; the non-justiciability of ESCR advances the narrative of the differential nature of CPR and ESCR. In fact, as Steiner and Alston point out, it is the most litigious issue in relation to this dispute (1996: 256, cited in Hunt 1996: 24).

The challenges do not end here. Even if we accept that ESCR are justiciable, a further challenge is made that, it is not desirable for courts to decide such matters. These challenges are particularly significant for understanding juridical tests laid down by courts as they are based on the premise that the ESCR justiciability debate has moved past the *whether justiciable or not* to *how and to what extent justiciable*[4]. The desirability challenge is made for at least two reasons; 1) Courts lack the democratic legitimacy to decide matters which often require policy making; 2) Courts lack the institutional capacity to decide ESCR matters which are often

[3] ICESCR 1976, Article 2(1)

[4] Mantouvalou, 2011: 122

technical and require expertise (Hunt, 1996: 24 cited in Muralidhar, 2004: 23).

1.2 Challenge of Democratic Deficit

The first challenge is probably the strongest as it goes to the very heart of the separation of powers debate. It stems from the inherent vagueness of the character of ESCR. The ambiguity is often obvious from the wording of ESCR. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR') obligates the states to take '*all appropriate measures*' to '*achieve progressively*' ESCR to the '*maximum of their available resources*'. Article 26(2) of the Constitution of the Republic of South Africa[5] ('SAC') imposes a duty on the state to '*take reasonable legislative and other measures, within its available resources'* for the *'progressive realization'* of ESCR right to housing. The Constitution of India[6] ('COI') uses phrases like *'strive to promote'* in the general article dealing with most of the ESCR, and *'within the limits of its economic capacity'* with regard to the right to work and education (Article 38(1) & 41). COP in the general clause dealing with most of the ESCR states that if a certain right cannot be realized without provision of resources, then the right becomes '*subject to the availability of resources*' (Article 29(2)).

Based on these provisions, it is argued that interpreting what are appropriate measures in a given set of resources available to a state is a matter generally left to the elected executive branch of the government. Any interference from the unelected judges in policy making decisions, which must be taken by the elected representatives of the people, is highly undesirable in a democratic society. Since ESCR are inherently vague in that they require progressive realization, which entails positive obligations, some have even argued that ESCR are by nature positive rights. However, ESCR are neither positive nor negative. In fact, no right is either positive or negative by its inherent design (Mantouvalou, 2011:

[5] 1996
[6] 1950

110). The CPR can impose positive obligations, and the ESCR can impose negative. Mantouvalou uses the example of *Oneryildiz v. Turkey*[7], a Right to Life ('RTL') case where the European Court of Human Rights (ECtHR) determined that Turkey had violated the RTL (CPR) of the applicants by failing to take precautionary steps (*ibid*.). Similarly, she gives *Grootboom v. Republic of South Africa*[8]as an example of an ESCR case (right to housing) which imposed a negative duty on the state to not evict applicants from their abode (*ibid.,* 111). In other words, it is not the nature of the right which determines whether it is positive or negative, but the obligation that the right imposes on the duty bearer (Shue, 1996: 52, cited in Mantouvalou, 2011: 111).

While it is true that there are more ESCR which impose positive obligations compared to CPR, an acknowledgment that even some handful of ESCR do not impose a positive obligation and can be immediately enforceable[9], shakes the normative foundations of the distinction between ESCR and CPR. Showing that some CPR can be positive[10] further dilutes the border between these HR. Even Neier concedes that there may be *'incidental costs'* and some budget reallocation resulting from CPR litigation (2006, cited in Sen, 2009: 379). As Donnelly puts it, the reason why such challenges are not made against CPR is evidence of the fact that the challenge is more *'ideological or cultural'* rather than being based on the nature of ESCR (Donnelly, 1993, cited in An-Na'im, 2004: 14). Even the United Nations Committee on ICESCR ('CESR Committee') in General Comment ('GC') No. 9 highlighted that there is nothing inherent in ESCR which can render them non-justiciable (CESR committee, GC No. 9: para. 10). Since the division between CPR and ESCR lies at the core of the justiciability debate, a blurring line between the two weakens the challenge to justiciability of ESCR too.

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[7] Application No. 48939/99, ECtHR (Judgment of 30 November 2004)
[8] (CCT 11/00) 2000 ZACC 19
[9] Right to form trade unions or various rights of laborers
[10] Right to a fair trial can require speedy trials

A second theme of defence of ESCR justiciability lies in the doctrine of separation of powers. Separation of powers is dependent on the idea that different branches of the government, apart from performing their respective tasks (which can be contained within watertight compartments), have to perform an essential accountability function. The *'real question'* according to Mantouvalou is not whether the judiciary can supervise this process, but what is an acceptable extent of supervision (2011: 122). Lord Lester also concedes that in case other branches of the government fail, the judiciary has a responsibility to act as an accountability mechanism, and a responsible and capable judiciary in such a society where the executive has indeed failed to ameliorate the social conditions of the people can serve a useful purpose (Lord Lester, 2004: 21, cited in Muralidhar, 2004: 31). He cites the example of India and South Africa while elaborating his argument (*ibid.).* This broader defence also finds corroboration from the trichotomy of power structure of SAC, COI and COP.

Thirdly, ESCR are relatively more ambiguous than CPR because until recently they have not been systemically and comprehensively studied, and are still developing as HR (Mantouvalou, 2011: 113).

1.3 Challenge of Institutional Capacity

The second challenge questions the institutional capacity of the judiciary to resolve ESCR litigation. It is argued that ESCR litigation raises questions which are often beyond the expertise of courts. These technical questions can only be adequately answered by experts in the executive branch of the government. Muralidhar questions a basic assumption of this challenge by stressing that courts are not reluctant to decide ESCR issues because of institutional incapacity but because of their cognizance of democratic deficit (2004: 31). But even if the challenge is real, firstly, as Alston points out, it would mean that by the same logic, CPR should be the exclusive domain of '*criminologists, trade unionists, psychologists, physicians'* (Alston, 1990: 375, cited in Mantouvalou, 2011: 118).

Secondly, judges can rely on experts during a court process (Mantouvalou, 2011: 118). Muralidhar uses the example of Indian courts, where the courts usually rely on expert bodies while dealing with complex matters (2004: 131). Thirdly, in many countries[11] ESCR are already entrenched in legislation, even if not expressly part of the Constitution. In others, judges already deal with policy making matters in private law cases (Palmer, 2009: 27). According to Lord Steyn, since the judges are accustomed to dealing with such matters, any blanket policy of deterring them to decide cases which deal with budget reallocation, is undesirable (Lord Steyn, 2005, cited in Palmer, 2009: 27). Therefore, the courts have little choice but to deal with ESCR matters, and are already performing technical overview in commercial and taxation matters (Mantouvalou, 2011: 118).

CHAPTER 2

DEVELOPMENTS IN JURISPRUDENCE OF ESCR

2.1 Introduction

As is evident from the discussion in Part 1, the dimensions of HR debate have significantly widened in recent times. This is in significant part due to the advent of ESCR as genuine contenders to be called HR. This part of the essay traces this development through three different mechanisms; 1) development of international HR law jurisprudence; 2) express constitutionalization of ESCR; and, 3) increased acceptance of jurisprudence to treat ESCR as justiciable HR. All three can be best exemplified by; 1) CESR committee jurisprudence; 2) SAC and its Constitutional Court's ('SACC') jurisprudence; and, 3) COI and Indian Supreme Court's ('ISC') jurisprudence, respectively. The three are

[11] See for example Indian and Pakistani Factories Act, 1948 and 1934 respectively. Also Pakistani Minimum Wages Ordinance, 1961; Indian Minimum Wages Act 1948

relevant as they carry the most persuasive value in Pakistani jurisprudence.[12]

2.2 International HR Law and ESCR

As the character of ESCR is often determined by its similarity or dissimilarity to CPR, a relevant starting point is to highlight the significant statement regarding the relationship between CPR and ESCR adopted during the Vienna Conference 1993. According to the statement, both sets of HR are, '*indivisible, and interdependent, and interrelated'*.[13] The CESR committee also highlighted the duplicitous treatment of world community while dealing with CPR and ESCR (UN Doc. E/1993/22, cited in Hunt & Khosla, 2009: 3).

CESR Committee's jurisprudence through its general comments has also highlighted these concerns. In GC on the obligations of member states, the CESR Committee obligated states to provide, at the very least, a *'minimum core content'* of ESCR to their citizens (GC No. 3, UN Doc. E/1991/23, Annex III: para. 10). GC No. 9 extended the obligations of GC No. 3, and reminded member states of their obligation under ICESCR to create legal remedies (UN Doc. E/C.12/1998/24). If both these general comments are read together, it essentially means that any citizen who is not provided a minimum core content can invoke a legal remedy,[14] and a State not providing one, will be in violation of ICESCR. Furthermore, in 2008 the CESR committee adopted an Optional Protocol to ICESCR which creates an individual complaint mechanism for the aggrieved nationals of a member state (UN Doc. A/RES/63/117). Leading up to the Optional Protocol, in a 2007 CESR Committee report, the CESR Committee, while commenting on the evaluation of the obligation to take steps to the *'maximum of available resources'* under an Optional Protocol, maintained that, while deciding individual complaints, it can assess the measures taken

[12] *Shehla Zia* case

[13] Vienna Declaration and Programme of Action, 1993

[14] The committee said that this remedy could be administrative as well. But it noted that in most cases the remedy would be judicial.

by a member state on a yardstick of adequacy and reasonableness (UN Doc. E/C.12/2007/1, para. 8). The CESR Committee has also highlighted that, some aspects of ESCR are immediately enforceable and therefore justiciable (GC No. 3, UN Doc. E/1991/123).

Dealing with other matters, relating to the right to water, the CESR Committee in GC No. 15 held that this right was *'indispensable'* for survival and for the enjoyment of most other rights (UN Doc. E/C.12/2002/11: para. 1).

Therefore, the position of CESR committee is very clear in levelling upon the states an obligation to provide,

(i) Immediate enforcement in ESCR capable of that;
(ii) Judicial (or administrative) remedies for all ESCR, especially those which are immediately enforceable;
(iii) Positive obligation to provide a minimum core content of ESCR

2.3 SAC and SACC

Any discussion on the state of ESCR litigation in South Africa starts from its unique Constitution. It grants constitutional protection to most ESCR, and in terms of justiciability, gives them an equal footing as CPR. It is because of this that Justice O'Regan, judge of SACC argues that any attempt to draw a distinction between CPR and ESCR is misdirected in the South African context (cited in Budlender, 2004:33). Some, among the many ESCR which the SAC protects, are the rights to have access to adequate housing (Sec. 26), to health, food and water (Sec. 27).

Another distinct feature of the SAC is that, *prima facie*, it does not leave the question of, whether a State is only under negative obligations or is required to discharge positive obligations, to the judiciary. In this regard section 7(2) of SAC places a duty of '*respect, promote and fulfill'* on the State. Regarding procedural requirements, section 38 has relaxed the *locus standi* requirement and allows individual or representative petitions.

Three important cases of SACC which best explain the courts approach when confronted with ESCR litigation are *Soobramoney v. Minister of Health* ('Soobramoney'),[15]*Republic of South Africa v. Grootboom and others* ('Grootboom'),[16] and *Minister of Health and Others v. Treatment Action Campaign & Others* ('TAC') (Liebenberg, 2008: 81).

Soobramoney was one of SACC's first major decisions on ESCR litigation. The petitioner, of the case was a 41 year old diabetic man in final stages of chronic renal failure (an irreversible condition). In order to survive, he required continuing dialysis treatment but because of his financial circumstances he could not afford a private hospital for this treatment. The hospital (a public one) was not willing to provide him continuing dialysis, as the policy of the hospital was to rationalize scarce resources in a way to prioritize patients who had a chance of reversal of condition. He therefore, brought an action against the hospital, demanding the hospital discharge a positive obligation under section 11, right to life ('RTL'), and section 27(3) (right to emergency medical treatment) to provide him treatment for his chronic irreversible condition, without which he would have most certainly died.

The High Court dismissed the petition and it went in appeal to SACC. SACC also dismissed the case maintaining that the case did not fall within the ambit of section 11 as section 27(3) specifically dealt with health related rights. It further ruled that the case did not fall within section 27(3) as the section only envisaged emergency treatment and not prolonged treatment, which the petitioner in the present case required from the hospital.[17]

There are a number of takeaways from the decision. Firstly, as observed by Scott and Alston, the decision meant that section 27(3) of SAC only imposed a negative duty on the state (2000: 247). Secondly, it endorsed the view that despite express

[15] 1997 (12) BCLR 1696

[16] 2000 (11) BCLR 1169 (CC)

[17] *Soobramoney*, para 13, 20-22

constitutionalization of ESCR in SAC, SACC was still reluctant to engage in areas which could possibly be perceived as policy making (Liebenberg, 2008: 81). The court maintained that as long as the hospital policy was rational, the obligation stood discharged. Thirdly, SACC rejected the expansion of RTL to include emergency health case.

It was in this background that *Grootboom* was taken up by the SACC in 2000. The petitioner, Irene Grootboom, was a resident of a settlement in the outskirts of Cape Town. The settlement mostly comprised the impoverished. It had miserable living conditions with the most basic living amenities absent, like sewer and running water. Frustrated by these conditions, more than 800 residents (around 500 children), left the settlement and settled on some unoccupied area nearby. They were evicted from their new homes by the government soon after.

The residents brought a case under section 26 of SAC against their eviction and for urgent provision of temporary shelter. The High Court relying on the principles established in *Soobramoney*, found that there was no violation of section 26[18] of SAC as the housing policy of the government was rational and many residents were indeed on a waiting list for permanent housing.[19] The SACC, in what became a landmark decision, for SAC jurisprudence and beyond, held that the government was indeed in violation of section 26 of SAC because the government policies did not satisfy the obligations imposed on the government by virtue of section 26(1) and (2). In its first departure from *Soobramoney*, the SACC addressed both how the right to housing is to be negatively protected and positively fulfilled (Budlender, 2004: 38). It also maintained that the obligation of the state is dependent on the class of people involved, and the extent of government

[18] Note that the High Court found that there was a violation of Article 28(1)(c), right of shelter of children.

[19] Some had been on waiting list for over seven years.

obligation had to be decided on a *'case-by-case basis'*[20] by applying the *'reasonableness test'*.[21]

The third case, *TAC,* relates to the government's responsibility to provide a registered medicine called Nevirapine, to reduce the chance of transference of HIV/AIDS from mother to child around the time of child birth. The manufacturers of the medicine offered to provide the government with free medicine for a trial period of five years. The government initiated a trial programme to make the medicine available, free of cost at a limited number of public clinics. This meant that most of the doctors working in public facilities, could not prescribe the medicine. As a result, many patients were deprived of this medicine.

TAC filed a petition against the health ministry on the ground that the medicine had clinical advantages and depriving patients of the medicine was a violation of, among others, section 27 of SAC. TAC accepted the government's argument that, if used alone the medicine would not be as efficacious as if it was when part of a comprehensive treatment plan. But, nonetheless, argued that the decision to prescribe must be left to the medical professionals and should not be decided on a case to case basis.

The SACC decided in favour of TAC and ordered the government to remove the restriction preventing the prescription of the medicine in non-research public facilities. The SACC also directed the ministry to provide adequate counselling environment to educate patients about the proper use of the medicine. In reaching its decision, the SACC deliberated whether section 26 and 27 had a permanent minimum core content (SAC, 1996). The SACC maintained that ESCR do not create *'self-standing'* positive duties on the state.[22] It also rejected the permanent minimum core content obligation by highlighting that it was not only impossible for the State to provide even this minimum standard but that it would compromise the separation of

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[20] *Grootboom.*

[21] *Ibid.*

[22] *TAC,* para. 39

power doctrine if the court started adjudicating every case on that standard. Instead, the court resolved the issue by reaching the conclusion that while there may be a minimum core content in section 26(1) and 27(1); the minimum core content to the extent of other ESCR can be reviewed by the courts on a case-to-case basis by applying the *'reasonableness test'*.[23]

2.4 COI and ISC

Unlike the SAC, the COI protects most of the ESCR in its Part-IV, which deals with '*Directive Principles of State Policy'* ('DPSP') (Pillay, 2014: 388). DPSP include among others, the rights to work[24], food and health care.[25] By contrast, most of the CPR are protected in Part-III of COI as '*Fundamental Rights'* ('FR'). Freedom of Speech[26], freedom to profess religion of choice[27] and RTL and liberty[28] are some of the HR in the FR chapter. As to the justiciability of these chapters, like the SAC, the COI deals with this question in the constitution itself. Article 13 expressly grants FR the status of justiciable HR whereas article 37 *prima facie* bars the justiciability of HR featuring in DPSP.

It is important to highlight that the COI was drafted in 1949[29] soon after its independence from the British rule. The first elected parliament of India faced some similar challenges to the ones confronted by the first elected parliament of South Africa in the post-apartheid era. The extent of the state's social welfare obligations in general, and the nature and scope of ESCR in particular, was extensively debated at the time of drafting the COI (Muralidhar, 2008: 103). Ultimately, it was decided that FR and DPSP should be kept separate as the state was in no position to actualize many DPSPs (*ibid.*, 104).

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[23] *Grootboom*, para. 33 & 41; TAC, paras. 34, 37 & 38
[24] COI 1950, Article 41
[25] *Ibid.,* 47
[26] *Ibid.,* 19
[27] *Ibid.,* 25
[28] *Ibid*., 21
[29] It came into force in 1950

How then has the ISC dealt with the dividing line between Part-III FR and Part-IV DPSP? Before dealing with substantive HR issues, it is noteworthy that the ISC in FR and/or ESCR litigation, has overtime departed from some of its otherwise established adversarial procedural requirements (Rosen, 2006: 98). Firstly, the requirement of *locus standi* (or the burden on the claimant to establish that he/she is aggrieved) has been relaxed. Therefore, anyone can file a FR petition. In some cases a judge can initiate proceedings on his/her own motion (*Suo Motu*) (*ibid,* 99).[30] Secondly, the ISC can establish fact-finding bodies to lessen the burden on petitioners to establish facts which in other adversarial proceedings are on the petitioners (*ibid*.). Thirdly, the ISC employs a multitude of remedies approach, where it can either assume a directive role and issue specific directions[31] in a case, or assume a non-adjudicative role and issue general directions about how the government ought to discharge its obligations under FR and/or DPSP.

The co-relation of FR and DPSP has evolved with time, this co-relation was a question that the ISC confronted from the very beginning. In the court's early jurisprudence it was held that DPSP are subordinate to FR and the division in the COI was evidence of that.[32] But in the *N.M. Thomas*[33] case, the ISC decided that both chapters in the COI were complimentary to each other and neither was more important than the other. This view remains the predominant position of the ISC as endorsed in numerous other judgments.

Having resolved the inquiry relating to the nexus between these sets of HR, the ISC was next confronted with questions about justiciability of DPSP. Holding DPSP as equally important to governance of the state is not tantamount to relaxing the express non-justiciability

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[30] *Rakesh Chand Narain v. State of Bihar*, 1986 (Supp.) SCC 576

[31] *Khatri v State of Bihar*, 1981 AIR 928, 934, in this case the court ordered the government to provide vocational training to prisoners and to pay them compensation

[32] *State of Madras v. Champakam Dorairajan* (1951) SCR 525

[33] *State of Kerala v. N. M. Thomas* (1976) 2 SCC 310 at para. 134, p. 367

clause[34] in the COI. It was in dealing with this question that the ISC employed a unique approach of expanding the contours of CPR to include ESCR (Pillay, 2014: 389). This approach is one of the first divergences from the SACC approach. As noted above, the SAC rejected the expansion of RTL in *Soobramoney*.

One of the first notable incidence of this expansion occurred in the *Maneka Gandhi*[35] case. *Maneka Gandhi* was significant not only because it interpreted RTL liberally to include DPSP but also because it highlighted that the State has positive obligations in FR cases (Rosen, 2006: 106). Furthermore, there was a positive obligation of government action/law to be '*just, fair and reasonable'* (Muralidhar, 2004: 25).

This was followed by two famous cases in the 1980s where the ISC continued its expansionist approach. In the *Olga Tellis* case[36], pavement dwellers anticipating eviction from their slums by the government brought an action against it. The case was filed under, among others, article 21 of COI (1950). Article 21 grants everyone in India the RTL and liberty, which can only be taken away in accordance with law. The contention of the pavement dwellers was not that the government by evicting them would deny them their RTL in terms of living on the pavements, but that their eviction would deny them their means to livelihood thus denying their RTL.

The ISC was therefore, called upon to decide the status of right to livelihood *viz-a-viz* the RTL. ISC interpreted the RTL liberally to include the right to livelihood contending that, the meaning of life cannot be reduced to mere existence, a decision which the ISC had itself paved the way for in its earlier judgments by holding that the RTL includes a right to '*freely moving about and mixing and commingling with fellow human*

[34] COI 1950, Article 37

[35] *Maneka Gandhi v. Union of India and another* (1978) 1 SCC 248

[36] *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 18

beings.'[37] But the answer in *Olga Tellis* was more resounding and clear. In fact, the court stressed that the only possible answer to the question whether the RTL includes within its ambit the right to livelihood, is yes. It was a significant observation because the right to livelihood is covered by article 39(a) of COI, as a DPSP. ISC was fully cognizant of this and addressed this concern in the judgment commenting that DPSP have an equal importance and must be used as an aid to interpretation of FR.

Similarly, in the *U.R. Sharma*[38]case, petitioners had demanded construction of a road to get access to other parts of the country. They argued that their right to access to other parts of the country was included within the RTL. The ISC decided in favour of the petitioners, and in a sense gave a socio-economic dimension to the RTL (Rosen, 2006: 108).

This expansion of RTL continued beyond the right to livelihood and right to free access in other domains. In *Consumer Education & Research Centre v. Union of India*[39], a case concerning right to health of workers in asbestos industries, the ISC connected the RTL to the right to health[40], a right featuring as a DSPS. The ISC ordered the authorities to provide for a safe and healthy working environment for the workers.

Another distinct development in the 1990s was the ISC's review of the government's commitment towards achieving DPSP. This was directly connected to the question of whether India had a positive obligation towards its HR obligations. The ISC had to decide whether, owing to a general government failure to act over a considerably long period of time, a DPSP can be

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[37] *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* (1981) 2 SCR 516. The court observed that the content of the RTL includes anything which is significant for human dignity, which always includes bare necessities of life, p. 529. *Francis Coralie* was the first case where the court broadened RTL meaning based on human dignity (Rosen, 2006: 106)

[38] *State of Himachal Pradesh v U.R. Sharma*, AIR 1986 SC 847

[39] (1995) 3 SCC 42

[40] COI 1950, Articles 39(e), 41 & 42 in Part IV (DPSP)

elevated to the status of FR through judicial interpretation. In the *Unni Krishnan*[41] case the ISC answered the question in the affirmative (Muralidhar, 2004: 25-26).

In this way the expansion of RTL, protected as FR in COI, allowed the courts to bypass the justiciability hurdle of Article 37 (COI, 1950) as they could be justiciable under the broad contours of RTL. But the juridical test that the ISC has developed for expansion of RTL is far from clear. Interpreting RTL to include access to other parts of the country[42] or to social gatherings[43] is not sustainable and balanced.

CHAPTER 3

PAKISTANI ESCR JURISPRUDENCE

1.1 COP

COP is similar to the COI in that it divides FR and PoP into two different chapters. Both the chapters are in Part-II of COP (1973). Chapter 1 of Part-II deals with FR, whereas Chapter 2 covers Principles of Policy ('PoP'). RTL[44], fair trial[45], free speech[46] and religion[47] are some of the HR protected as FR. Rights to housing[48], medical facility[49] and education[50] are some of the HR protected as PoP. Much like the COI, article 8 of the COP deems FR as justiciable HR whereas *prima facie* article 30(2) bars[51] justiciability of ESCR in PoP. An important point to highlight is that COP grants constitutional status of

[41] *Unni Krishnan J.P. v State of Andhra Pradesh* (1993) 1 SCC 645
[42] U.R. Sharma
[43] *Francis Coralie Mullin*
[44] COP 1973, Article 9
[45] *Ibid.,* Article 10-A
[46] *Ibid.,* Article 19
[47] *Ibid.,* Article 20
[48] *Ibid.,* Article 38(d)
[49] *Ibid*.
[50] *Ibid*.
[51] Some authors have noted that the COP does not bar justiciability of PoP in clear terms (Byrne & Hossain, 2008: 130)

FR to certain ESCR, like the freedom from slavery[52], right to property[53] and the right to trade and business[54] (Byrne & Hossain, 2008: 129).

The initial opinion regarding PoP in COP and their co-relation with FR was that, PoP are merely guidelines for the executive branch of the government in governance matters and are not reviewable by courts (Sattar, 2010: 3). But this position has significantly shifted in the last two decades. At the very least, there is now a consensus that PoP hold a strong persuasive value and serve as an aid of interpretation for FR (*ibid*.).

1.2 ESCR Jurisprudence in Pakistan

The courts in Pakistan derive their jurisdiction from the COP under article 175(2) (Shaikh, 2004 cited in Qureshi, 2014: 8). Article 199(1) (c) grants the High Court jurisdiction to pass an appropriate order for the enforcement of FR, whereas Article 184(3) grants the same power (with lesser procedural requirements) to the Pakistani Supreme Court ('PSC'). Like the ISC, there is no requirement of *locus standi* (aggrieved person), and of an alternate remedy for PSC jurisdiction (Raza, 2004: 74, cited in Qureshi, 2014: 8). Furthermore, PSC can also take *Suo Motu*[55]cognizance of FR matters. According to Byrne & Hussain, the development of simple procedures for FR cases was because of PSC's desire to facilitate such cases (Byrne & Hossain, 2008: 130). It is therefore not surprising that the relaxing of rules of maintainability of petitions was followed by an expansive interpretation scheme employed by the PSC to widen the ambit of FR and ESCR.[56]

One of the earliest cases of expansion of RTL in Pakistan was the *Benazir Bhutto* case.[57] The court while discussing the relationship between FR and PoP stressed

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[52] COP 1973, Article 11

[53] *Ibid.,* Article 22 & 23

[54] *Ibid.,* Article 18

[55] S.M.C No. 16 of 2011, regarding the law and order situation of Karachi

[56] *Darshan Masih v. The State*, PLD 1990 SC 513

[57] PLD 1988 SC 416

on the inseparability and indivisibility of HR within both chapters of the COP. It maintained that the way to harmonize the two chapters was to enlarge the scope of FR to include PoP.

Six years later, the PSC decided its most notable case, *Shehla Zia v. WAPDA*[58], on RTL expansion. The facts of the *Shehla Zia* case were that citizens had directly written letters to the PSC that the government was planning to install a grid station near their residences. The citizens feared for the health hazards of electromagnetic fields emanating from the grid station. While there were apprehensions that the installation of the grid stations in close proximity to the residential area may endanger the lives of neighbouring residents, the threat to life was clearly not as immediate as in cases like *Soobramoney* in South Africa. In fact, the expert reports to the PSC discussed the possibility of health hazards but were not conclusive in their determination. Therefore, the PSC refrained from issuing any specific directive order. The PSC however, issued guidelines that the government should appoint an independent panel of experts who would provide approval before any similar project is taken up in the future.

The actual outcome of the case in terms of construction of the grid station is not as important as the mark the case left on Pakistani jurisprudence and was indeed a watershed moment. It was so because of at least three reasons. Firstly, it consolidated PSC's earlier position[59] of a liberal all-encompassing definition of RTL. In the *Benazir Bhutto* case the expansion of RTL was not a central issue of the case. The comments of PSC regarding expansion of RTL were considered *obiter dicta* and went largely unnoticed. It was probably because of this reason that the case was not even cited as a reliance case in the *Shehla Zia* judgment.[60] The judgment definitively expanded the scope of RTL, and

[58] PLD 1994 SC 693

[59] n. 54 & 55 above

[60] The judgment cited a number of Indian expansion cases including the *Olga Tellis* case, n. 36 above

endeavoured to explain its dimensions. It stressed that the term "life" has not been used in a restrictive way in COP. While it did not expressly state that the State was under a positive obligation to protect and fulfil this right, some of its comments in later cases have been used to extrapolate exactly that. Secondly, and more significantly, unlike the *Benazir Bhutto* case which dealt with CPR and their possible interaction with RTL, *Shehla Zia* was exclusively about the right to health; an ESCR. What made it even more noteworthy was the fact that the right to health for everyone is not expressly stated as a right even in the PoP. Thirdly, the court assumed a very proactive approach in engaging with political actors in resolving the grievance of the petitioners. If it were not for inconclusive expert reports, the PSC may have passed specific directions entailing positive obligations.

Shehla Zia was not a one off case of expansion of the RTL to include the right to health. Three years later, in *Anjuman Tajran Charan v. The Commissioner Faisalabad Division,*[61] the PSC heard a case of raw hides and skins business operating in a densely populated area. Unlike the *Shehla Zia* case, the government conceded the potential health hazards of the foul smell of hides and skins which could lead to pollution. Initially, by way of injunctive relief, the court restrained the relevant businesses from storage of hides and skins in populated areas. At the stage of final order, PSC, apart from issuing a permanent injunction restraining any such business in the locality, also issued detailed directions to municipal authorities, specifically to deal with the businesses affected by the court order, and more generally, to deal with such matters in the future. The court drew a distinction between the High Court's jurisdiction under article 199 and the PSC's jurisdiction under 184(3) of COP by highlighting that while the High Court can only direct the authorities to refrain from an illegal act or to perform an act which they are required to perform as per law; the PSC in addition to these, can also direct the authorities to

[61] 1997 CLC 1281

perform any act (whether part of an existing law/rule or not) to fulfil the FR of citizens. In this way, the court imposed a positive obligation on the municipal authorities in this case.

Similarly, in the *Salt Miners Labour*[62] case, petitioners alleged that government mining in a water catchment area was denying them their right to clean drinking water. The petition was once again filed under Article 9 (RTL) and purported an expansion of life's meaning to include right to clean drinking water, otherwise included as a PoP in Article 37(d) of COP. PSC deciding in favour of the petitioners directed the authorities to immediately halt all mining activities in close proximity of the water catchment area, and ordered constitution of a high powered commission to deal with implementation of the order. Some of the members of the commission were also nominated by PSC.

In a recent Lahore High Court case, *Muhammad and Ahmad*,[63] the court reiterated the expansion approach of the RTL. Relying on the *Shehla Zia* case and ISC case *Samity v. State of West Bengal*[64] (*specifically for right to emergency medical treatment as a RTL*) the court held that a state was under a positive obligation to provide adequate medical facilities in life threatening cases and a failure to do so would be a violation of the RTL.

Apart from the expansion of RTL, courts have also extensively covered the general nature of co-relation between CPR and ESCR. In three fairly recent and high profile cases the PSC looked at this relationship. In the *Hajj Quota*[65] case, it importantly observed that HR (in terms of justiciability) cannot be confined only to CPR. Minimum necessities of life like food, clothing and shelter (ESCR) are inseparable and indivisible parts of CPR. Similarly, in *Alleged Corruption in Rental Power Plants etc*.[66] case, where PSC was looking into the

[62] 1994 SCMR 2061
[63] PLD 2007 Lahore 346
[64] AIR 1996 SC 2426
[65] 2011 SCMR 1621
[66] 2012 SCMR 773

awarding of contracts by the government to international rental power companies, justiciability became a contention. The court during the maintainability stage decided that it could judicially review government actions of awarding contracts to rental power companies as the issue pertained not only to the social and economic well-being of the people, covered in COP as PoP, but also to the RTL and dignity. The court also applied the test of 'reasonableness'[67] to evaluate whether government actions in the case were reasonable and in the interest of public. Finally, in *Province of Sindh through Chief Secretary v. M.Q.M through Deputy Convener and others*[68], the court while discussing the distinction between positive and negative rights commented that many of the HR in the COP are both negative and positive.

There is also no concern regarding the court's acceptance of imposing a positive obligation on the state to provide certain rights. In *Fazal Jan v. Roshua Din*[69]while elaborating the right to equality, the court held that the state must take active steps to protect the rights of children and women. In *Abdul Qayyum v. Chairman Capital Development Authority (CDA)*[70], a case dealing exclusively with PoP, the court held that PoP create 'legitimate expectations', thus creating legal rights. The case concerned petitioners who were employees of CDA and had no recourse to any administrative or judicial forum to challenge their serve terms and conditions. The court had to decide whether an employee could be left without an adequate remedy. It ordered the government to positively ensure and provide a forum for '*inexpensive and expeditious justice'* as protected by article 37(d) (PoP) of COP.

Furthermore, within the realm of the right to education, jurisprudence of Pakistan serves another rich insight.

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[67]*Grootboom & TAC,* n. 23 above
[68] PLD 2014 SC 531
[69] PLD 1990 SC 661
[70] 2015 PLC (C.S.) 617

The right was originally part of PoP.[71] But despite its recognition only as a PoP, courts were willing to acknowledge and engage in petitions on this right. It was often included within a broader definition of RTL, right to dignity[72] or right to equality[73], all FR. This point was made clear by the Lahore High Court in *Syeda Shazia Irshad Bokhari*[74] where the court had to decide whether an increase of fee in a medical college for students admitted on self-finance scheme was in violation of the right to education. The petitioner in the case contended that right to education was protected both under a wider definition of RTL and as a PoP in various articles. The court rejected the second argument observing that the right to education was not expressly recognized as a separate judicially enforceable right in the COP (thus holding that PoP part of right to education was non-justiciable) but accepted the first claim that the right fell within the broader contours of RTL. But the court refused to interfere in the case based on policy considerations. In *Sarah Malik*[75]case, the Lahore High Court decided that under Article 22 and 25 of COP citizens had a FR to education.[76] The decision was echoed in the *Ahmed Abdullah* case[77] and right to education's co-relation to RTL was made the reason to determine that it was indeed a FR.

1.3 Express Non-Justiciability

The jurisprudence of ESCR in Pakistan has not been one dimensional. There are numerous cases in which the courts have interpreted the COP generally, and PoP and

[71] COP 1973, Article 37(a), (b), (c), (f) & 38(d), but after the 18th Constitutional Amendment of 2010, primary education is now a constitutionally protected FR.

[72] *Ibid*., Article 14

[73] *Ibid*., Article 25

[74] PLD 2005 Lahore 428

[75] 2001 MLD 1026 Lahore

[76] This case was decided 9 years before the 18th Constitutional Amendment which included the right to education as a FR in Chapter 1 of Part-II of COP

[77] PLD 2003 Lahore 752

FR specifically, very differently from the analysis presented above.

The Balochistan High Court in *Begum Nasreen Khetran v. Government of Balochistan, Education Department, Quetta*[78], laid down a broad principle claiming the constitutional jurisdiction of the High Court could not be invoked to challenge the legality of a law not in conformity with PoP. The Sind High Court in *Ghulam Mustafa v. Province of Sind through Secretary, Education Department*[79] concluded that PoP do not confer legal rights or remedies but are merely guidelines and general recommendations for the State. The Lahore High Court in Punjab, in *Syeda Shazia Irshad Bokhari v. Government of Punjab through Secretary Health*[80]observed that while PoP are fundamental to governance of the state, they are not justiciable. The Supreme Court in *I.A. Sharwani v. Government of Pakistan*[81], while hearing a case on payment of pensions under article 29 and 40 (PoP) of COP observed that, if in a given situation PoP cannot be achieved without available resources then PoP are to be regarded as subject to availability of the resources. These are some of the many cases in which similar conclusions have been reached. None of these cases followed the precedence of RTL expansion or positive obligations on the State, and none of them highlighted distinguishing features while departing from those cases.

CHAPTER 4

PROPOSED JURIDICAL TEST

4.1 Key factors for a Juridical Test

As is evident from the jurisprudence of Pakistan and ISC jurisprudence, the courts have been unable to devise a coherent and uniform juridical test. The courts are working on a case to case basis, which has resulted in a

[78] PLD 2012 Quetta 214
[79] 2010 CLC 1383 Karachi
[80] PLD 2005 Lahore 428
[81] 1991 SCMR 1041

confusing string of jurisprudence. A coherent and uniform juridical test for PSC ESCR litigation must therefore be devised to ensure sustainable and more effective engagement with ESCR issues. Such a test must take into account the following factors;

1. The juridical tests of expansion of RTL are ambiguous. As a result, the obligations that the overlap between what FR and PoP entail are not obvious. In any new case, it is anyone's guess whether PSC will expand RTL further (or even to the extent already expanded) or will determine PoP non-justiciable (Pillay, 2014: 399). According to Craven, some of this confusion in jurisprudence is understandable because the judges are still not entirely clear about their role in such cases (Craven, 1995: 28 cited in Muralidhar, 2004: 23). The normative challenges to justiciability of ESCR continue to divide opinion even amongst judges.

   There is also a contradiction between the division of FR and PoP in the COP and the shift in narrative relating to the nature and justiciability of ESCR in Pakistan. The division was drafted on the understanding that FR (mostly CPR) are immediately enforceable whereas PoP (mostly ESCR) require progressive realization and availability of resources. Article 29(2) of the COP, which bars justiciability of PoP, states that if a certain right is dependent on the availability of resources, then said right can only be sought if the necessary resources are available, was drafted for exactly that purpose. But as is obvious now, many CPR also necessitate extensive budgetary allocation. Does this mean they should also be non-justiciable by virtue of Article 29(2)? Since, at least some ESCR in PoP are immediately enforceable[82], Article 29(2)'s general bar is imprudent for those HR. Furthermore, the rationale of division

[82] COP 1973, Article 35 & 36

has proved itself wrong because of the various constitutional amendments in the COP which have granted constitutional protection as FR to ESCR.[83]

2. The expansionist approach has both merits and demerits. One concern is that while the list of ESCR which can fall within the ambit of RTL is 'open-ended', it is not 'unlimited' (Rosen, 2006: 110). Therefore, expansionism cannot be a solution for ESCR which cannot fall within the ambit of RTL. Another disadvantage highlighted by Singh is that it demotes the all essential centrality of the RTL to a non-viable and unenforceable right (1986: 249-257). Too much expansion can result in over cautious judges, which may hinder the development in jurisprudence relating to the positive obligations on States.

3. PSC's expansionist approach, like the ISC's approach, is irreversible. The jurisprudence around the expansion is so entrenched in law and politics that it is neither practical not desirable to retreat. This means that an outright non-justiciability approach (Cottrell & Ghai, 2014: 66) for all PoP is not feasible. Possibly the only situation in which extreme judicial restraint may occur is if most of the ESCR in PoP are constitutionally made expressly justiciable as FR. In that event, a rejection of expansion on the lines of *Soobramoney* is possible.

4. Pakistan is a member state to the ICESCR since 2008. Most of the rights covered in the PoP correspond to ICESCR provisions. Pakistan ratified the treaty with a general reservation that it will aim to progressively realize ICESCR provisions within Pakistan's available resources (Sattar, 2010: 1). As Pakistan falls under the category of dualist states, as a general rule a

[83] Right to Primary Education, through 18th Amendment, 2010

treaty does not automatically become part of Pakistani law; domestic incorporation is required before treaty rights become legal rights, and are justiciable (Sattar, 2010: 2). But there are indicators within Pakistani jurisprudence which point towards a trend away from the general rule of incorporation. In the *Missing persons*[84] case, a *Suo Motu* case, in which the PSC was inquiring into media reports of widespread illegal detentions of political dissidents' and alleged terrorists by the armed forces. The PSC relied on the International Convention for the Protection of All persons from Enforced Disappearances (2006), a convention which Pakistan has not ratified to date. PSC observed that it could rely on such instruments to secure the ends of justice. But even if direct implementation through courts is not desirable, the consensus in PSC is that IHRL has persuasive value and can be used as an aid to interpretation of the COP.[85]

5. The most sustainable solution lies in express constitutionalization.[86] The expansionist approach of PSC is a double edged sword in the pursuit of this goal. Constitutionalization requires an amendment to the COP, which requires at least two thirds majority in the parliament. This amount of consensus requires a sustained pressure group, which is curtailed by the expansionist policy, as the policy helps vent some of the frustration of the people relating to government failure in providing basic necessities. But ironically, an expansionist approach is often a pre-cursor to constitutionalization as well (Muralidhar, 2004:

[84] PLD 2014 SC 305

[85] Bangalore Principles on the Domestic Application of International Human Rights Norms

[86] While the challenge of achieving jurisprudential clarity remains, the SACC jurisprudence still offers a case study of relatively more coherence.

31). Muralidhar cites the example of *Vishaka*[87] case where the courts, having determined that the Convention on the Elimination of All Forms of Discrimination Against Women (which India had ratified) was '*binding and enforceable'* in India, made binding guidelines till a law was promulgated by the parliament (Muralidhar, 2008: 105). He also gives the example of *Unni Krishnan*[88] case which led to law and policy on primary education (*ibid*.). *Siliadin v. France*[89] is an example of another case which led to legislation on slavery and forced labour in UK, in 2010 (Mantouvalou, 2011: 129). Similarly, repeated orders from courts in Pakistan led to the constitutionalization of the right to primary education.

4.2 The Juridical Test

Based on the analysis above, a hybrid model of strong[90] and weak[91] judicial review with definitive guidelines is proposed. This will help determine the cases where strong or weak review can be used.

Strong review should be used for all FR cases. Any PoP or non-PoP which falls within the ambit of RTL should be treated as a FR case.[92] But the PSC should devise a coherent juridical definition of life. Equating life's dictionary meaning to its juridical meaning will result in counter-productive jurisprudence. Similarly, narrowing down the definition to mere existence/survival is against the principles of constructive interpretation. A

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[87] (1997) 6 SCC 241

[88] (1993) 1 SCC 645

[89] ECtHR, Application No. 73316/01

[90] Strong review means the power to strike down laws and passing specific binding directive orders

[91] Weak review does not entail the powers of strong review. It contains a mechanism where the the rights will be justiciable but judiciary can only evaluate government performance viz-a-viz its obligations and pass non-binding advisory orders. *Dr. Mobashir Hassan case; Baz Muhammad Kakar v. Federation of Pakistan* PLD 2012 SC 923; Mehram Ali v. Federation of Pakistan, PLD 1998 SC 1445; Wattan Party v. Federation of Pakistan, PLD 2006 SC 697

[92] *Shehla Zia; Olga Tellis: Muhamamd & Ahmad*

sustainable and coherent definition is indeed possible. A perusal of the FR chapter reveals that the RTL was envisaged to be specific only to situations where life is endangered as the phrase used is '*deprived of life*'[93]. The same article also distinguishes life from liberty, as it protects liberty separately because the deprivation of liberty is not always life threatening. But the definition should include certain PoP situations which possibly are life threatening, like protection of minorities[94] and the right to health.

To the extent of RTL, the State must be under a negative and positive duty to protect this HR. The positive duty should include the procedural duty of ensuring all laws/actions are just and reasonable[95], and the substantive duty to ensure reasonable policy and actions are taken for the fulfilment of RTL.[96]

For PoP which are immediately enforceable but do not fall within the ambit of RTL, Article 29(2) should be re-interpreted and the bar to the justiciability of these cases must be removed.[97] Once the bar is removed, the cases should be subject to strong review. However, till express constitutionalization, these cases should not impose positive obligations on the state.

Weak review should be employed for all other PoP cases.[98] The primary reason why COP and COI granted constitutional recognition to ESCR in PoP and DPSP respectively, was to ensure that the State continues to work towards these objectives. In the *Unni Krishnan*[99]case, the government had done nothing for 40 years to implement a DPSP. Even Lord Lester, otherwise a critic of ESCR justiciability, believes that in such situations the judiciary can play a crucial role in

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[93] COP 1973, Article 9. *Muhamamd & Ahmad*; *Samity v. State of West Bengal*

[94] COP 1973, Article 36 (PoP)

[95]*Alleged Corruption in Rental Power Plants etc*

[96]*Oneryildiz v. Turkey; Samity v. West Bengal; Grootboom; Muhammad & Ahmad*

[97] *Abdul Qayyum v. CDA*

[98] CESR Committee, GC No. 9; *Syeda Shazia Irshad Bokhari*

[99](1993) 1 SCC 645

accountability. In these cases, the court can at least initiate a much needed debate, which may result in constitutionalization. Such dialogical remedy framework also makes room for the normative challenge to justiciability of ESCR as it provides space for political manoeuvring to elected representatives (Roach, 2008: 51).

A possible danger of this approach is that the judges may stray into extensive policy making, this is overstated as the judges remain aware of their constitutional role (An-Na'im, 2004: 14). Despite express constitutional protection, SACC has demonstrated remarkable constraint.

Conclusion

Therefore, whatever position one may take on the nature of ESCR or the desirability of their justiciability; the fact remains that they are now part of IHRL obligations, domestic constitutions and common law jurisprudence. These are among the main interpreting guides for a domestic court dealing with ESCR litigation (Palmer, 2009: 34). Therefore, domestic courts are confronted not just with the normative divisions of HR, and the old narrative of justiciability debate, but also with the dictates of their constitution, jurisprudence and IHRL obligations. In this way, the normative debate remains relevant in the development of a juridical test of ESCR cases but the judges are constantly pushed past the foundational hurdle of justiciability of ESCR (based on their intrinsic nature) into the extent and scope of their justiciability.

It is clear from the analysis above that all courts have made a deliberate choice to act as a tool towards social welfare of the society. This is not just true for developing societies faced with grave socio-economic problems, but even first world countries. Rosen concluded, having analysed Canada, South Africa and India, social welfare was a common theme amongst all jurisdictions (2006).

SACC jurisprudence reveals that there is strong merit to constitutionalization of ESCR. It avoids all confusions

and mixed bag jurisprudence regarding the justiciability of ESCR. Instead the focus shifts to stage two; the extent and scope of court review. Moreover, express constitutionalization remains the most advanced model for ESCR jurisprudence (Rosen, 2006). Despite such elevated protection, SACC does not reveal a court overshooting its constitutional mandate.

The ISC and PSC jurisprudence highlights the perils of express non-justiciability clauses. Firstly, as is the case with COP, they have become self-contradictory as a result of constitutional amendments, PSC jurisprudence and IHRL developments. Secondly, express non-justiciability has not achieved its goal of keeping PoP in Pakistan and DPSP in India out of courts. In fact, as pointed out by Cottrell and Ghai, compared to the ISC, the SACC has shown greater restraint, and more engagement with the questions of the extent to which the court can interfere with policy making (Cottrell & Ghai, 2004, cited in Pillay 2014: 387)

Furthermore, the ISC and PSC jurisprudence signifies the reality that courts are part of a larger political picture and must be viewed to share responsibility with other parts of the government. It is precisely because of this that the expansionist approach was evolved initially by the ISC and then followed by the PSC. While the approach has merits, it requires a coherent design to remain sustainable and balanced.

The developments in the jurisprudence of ESCR litigation from SAC, ISC and PSC also reveal that the development of a test is not a straightforward question. Numerous factors are relevant. A coherent test must preserve the rich tradition of the expansionist approach towards RTL, as it allows the PSC to not only discharge its constitutional mandate but also its IHRL obligations. A hybrid model of strong and weak review strikes a balance between the various competing interests. A model of strong review for FR, preserves their importance as well. A positive obligation for RTL cases discharges part of Pakistan's obligations under CESR committee jurisprudence. A model of weak review for

PoP preserves the doctrine of separation of powers, allowing political representatives enough room to devise and dictate policy matters in relation to PoP. At the same time it acts as a check on the elected representatives, and may even be seen as a crucial catalyst to policy reform.

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THE ILLUSION OF FREEDOM: THE JURISPRUDENCE OF ARTICLE 20 OF THE CONSTITUTION OF PAKISTAN, 1973

By Hassan Niazi[1]

To our misfortune, we live in a religion-wise disintegrated society; divided and subdivided into sects and factions, refusing even to offer prayers in a common gathering…believing each other with conviction to be 'Kafirs' and showering such… "Fatawas" abundantly. We can hardly imagine of uniformity of opinion on "righteousness" or otherwise of any one in the country. Such has been our history of over a thousand years

~Justice Zakaullah Lodhi[2]

Introduction

'A Constitution is not just a piece of paper,' spoke Harvard University's Noah Feldman to a transfixed audience.[3]

The talk was on what a Constitution is, and what it is not. The point was that just because something is written down on a piece of paper and called a Constitution, it is not deeply felt by the citizens whom it is supposed to govern; it is a mere illusion.

Nestled within that short sentence is what makes the debates surrounding constitutional provisions in Pakistan myopic. Fundamental constitutional rights must be deeply felt with an almost-to borrow from Professor Hart - 'critical reflective attitude' leading to an 'internal point of view' towards their adherence. They must be deeply acknowledged, especially by those who are

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[2] (B.Z. Kaikus v. Federal Government of Pakistan, [1981])

[3] http://www.youtube.com/watch?v=uzHDpuCuhKc

charged with enforcing them. In the absence of State action to protect constitutional rights, or in the prevalence of State apathy while they suffer gradual erosion, fundamental rights become mere embellishments of elaborate calligraphy on a 'piece of paper.' Pretty to look at, but good for nothing else.

There can be many reasons why this could occur, but this article is concerned with what a specific functionary of the State is doing to protect a specific constitutional right. The former being the superior courts of Pakistan, the latter being Article 20 of the Constitution of Pakistan, 1973 ('The Constitution'); what has the judiciary done when cases concerning this right have come before it? As the guardians of the Constitution the judiciary can play a prominent part in making sure that the promises made in Article 20 do not become an elusive dream.

The task was never going to be easy. Pakistan is different in the sense that the State itself is not neutral when it comes to religion. The Objectives Resolution and Article 227 of the Constitution of Pakistan, 1973 unite to give the Islamic faith an edge. To accommodate religious plurality via Article 20, and yet reconcile it with the principles of Islam, gives rise to the 'Hard Cases' that Ronald Dworkin so often spoke of.

There is barely any literature on the development of the jurisprudence of Article 20[4] in Pakistan, thus, this article seeks to lay out the story of this constitutional right. It describes and analyzes the case law to educate the reader, and help to give a basic framework of the jurisprudence of this right. It will attempt to see whether the right has been given a benevolent construction or a restrictive one. Most of all it will hope to see if the

[4] Article 20 of the Constitution of Pakistan, 1973 reads:

20. Freedom to profess religion and to manage religious institutions.-Subject to law, public order and morality—

(a) Every citizen shall have the right to profess, practice and propagate his religion; and

(b) Every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

courts have successfully clarified the law while protecting the religious freedom of minorities.

This article will unfortunately, due to lack of space, not delve too deeply into Islamic Shariah Law and the tenets of the Islamic faith. It will proceed through the case law chronologically, analyzing court rulings as we pass through the decades. In the conclusion I will hope to assess where the judiciary has clarified the law and whether there are any inherent shortcomings in the jurisprudence.

Growing Pains (1956-73)

Article 20's ancestor can be found in Pakistan's first constitution. The initial promise of religious freedom was made in Article 18 of the 1956 Constitution.[5] An exact replica in wording, the first element that would be subjected to scrutiny would be its limitations.

Religious institutions or places of worship are one of the most sacred embodiments of the beliefs of people. When these institutions are threatened by the actions of the State they raise important questions with regards to the freedom of religion and maintenance of religious institutions. The all-important question of what it means that a right is 'subject to law' came before the Supreme Court in *Jibendra Kishore and others v. The Province of East Pakistan.*[6]

The contention was that the Government of East Bengal could not exterminate *wakf* and *debuttar* properties because they were religious institutions. Furthermore, the argument was that the acquisition of these properties

[5] Article 18 of the Constitution of Pakistan, 1956 reads:

18. Subject to law, public order and morality—

(a) Every citizen has the right to profess, practice and propagate his religion; and

(b) Every religious denomination and every sect thereof has the right to establish, maintain and manage its religious institutions.

[6] (Jibendra Kishore and others v The Province of East Pakistan, [1957])

by the State virtually meant the annihilation of these religious institutions.[7]

According to Muslim law ownership of *wakf* property rests in Allah[8] and in the case of *debuttar*, according to Hindu Law, in the deity.[9] The drastic interference by the Government in these religious institutions led the court towards the view that they hit at the heart of religious freedom,[10] thus infringing Article 18.

One of Pakistan's legendary advocates Mr. A.K.Brohi had argued in the High Court that the words 'subject to law' in Article 18 meant that the right could be taken away by the Government merely by enacting a law that did so.[11] The extract that rejects this restrictive argument deserves to be reproduced here because of how long, as we shall see, it has lasted in our jurisprudence:

The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law. I am unable to attribute any such intent to the makers of the Constitution who in their anxiety to regulate the lives of the Muslims of Pakistan in accordance with the Holy Quran and Sunnah could not possibly have intended to empower the legislature to take away from the Muslims the right to profess, practice and propagate their religion and to establish, maintain and manage their religious institutions, and who in their conception of the ideal of a free, tolerance and democratic society could not have denied a similar right to the non-Muslim citizens of the State. If the argument of Mr. Brohi is sound, it would follow, and he admitted that it would, that the legislature may today interdict the profession of Islam by the citizens because the right to profess, practice and

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[7] (Brohi, 1958)

[8] (Jibendra Kishore and others v The Province of East Pakistan, [1957])

[9] Ibid at page 38

[10] Ibid at Page 41

[11] Ibid

propagate religion is under the Article as much subject to law as the right to establish, maintain and manage religious institutions. I refuse to be a party to any such pedantic , technical and narrow construction of the Article in question for I consider it to be a fundamental canon of construction that a Constitution should receive a liberal interpretation in favour of the citizen especially with respect to those provisions which were designed to safeguard the freedom of conscience and worship."[12]

The important consideration to take from this with regards to Article 18 (and subsequently Article 20) is that the State cannot give a right stated to be fundamental with one hand, and then take it away with the other. Any law which attempts to take away the right guaranteed in Article 18 would be declared ultra-vires, being in violation of the Constitution. The other point is that this interpretation of the term 'subject to law' applies to both Muslims and non-Muslims alike and thus there is equality within the Constitutional framework. Finally, the judgment stands for the precedent that Article 18 should receive a liberal interpretation in favour of the citizens whose right it is to protect.

It must be accepted that this is the most logical interpretation of the words 'subject to law'. If the State were allowed to do as Mr. Brohi suggested, then we would have an ever elusive right enshrined in Article 20. The State could easily make a law banning a religious practice in totality and hide behind the limitation that they were subjecting it to law. It could possibly make an integral religious practice (daily prayers for Muslims, Church on Sunday for Christians) an offence punishable under the criminal law. This would be an absurd interpretation because it would allow a sub-constitutional legislation to have the ability to erode a fundamental right.

A lingering question may remain as to the purpose of the limitation 'subject to law' if it cannot do all that has been said above? The answer, is that it would mean that

[12] Ibid

the law may regulate the manner in which religion is to be professed, practiced and propagated.[13] It does not, however, mean that the right or institutions may be abolished altogether.

Mr. Brohi, not one to let the court have the last word in all of this, would later write that the intention behind having this particular limitation was possibly to 'take the right away from the range of administrative interference and thus make it the exclusive preserve of legislative action to interdict it.'[14] He writes in his book that the court's view of the intention of the framers was flawed and it contradicted the express language of Article 18.[15] He raised doubts that because of the court's ruling, every change sought to be made by the legislature that affected religious institutions would be declared ultra-vires.[16]

It is hard to agree with Mr. Brohi's reasoning regarding this for the reasons already mentioned. It cannot be expected that the framers thought that a fundamental right could be swiftly curtailed through a sub-constitutional law. The Full Bench of the Supreme Court's view that the limitation meant only regulation is a far better alternative, even if it leaves the door slightly ajar for the State, through some legal maneuvering, to limit the right. However, it is far better than allowing the State to abolish a right altogether.

The question that the court leaves unanswered is: when is something a religious institution? Brohi writes that 'religious institution' must have a public aspect[17], and something is considered a religious institution when a religious denomination or sect is interested in it as an essential part of its fundamental religious practice. The term 'institution' would then be interpreted as an 'organization for the promotion of some public object'[18] and in the context of a 'religious institution' that public object would mostly be some aspect of religion.

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[13] Ibid
[14] (Brohi, 1958) at Page 388
[15] Ibid
[16] Ibid
[17] (Brohi, 1958) at Page 388
[18] Ibid at Page 389

The same limitation would be discussed in *Abdul Ghani v. Islamic Republic of Pakistan*[19], where Mr. Abdul Ghani sought a direction from the court to be allowed to go for Hajj but challenged the requirements of having a passport, foreign exchange etc. as violating Article 18, since the right to perform the Haj could not be taken away by law. The court's decision cements the fact that Mr. Brohi's concerns were unwarranted. The court felt that *Jibendra Kishore* stood for the principle that the law may regulate the manner in which religion was to be practiced:

By this we do not understand their Lordships to mean that there may be a law which would regulate the actual performance of the pilgrimage, for the actual performance is a ritual which itself constitutes the practice of religion. What is intended to be meant is that if in the performance of a religious duty, certain secular steps have to be taken, then those steps may be regulated by law.[20]

Furthermore, Mr. Brohi's conception that 'Religious institution' meant that the institution needed a 'public character' can be examined in light of the case of *Muhammad Mehdi Ali Khan v. Province of East Pakistan.*[21] Mr. Brohi, arguing on behalf of the Respondents, argued that while it was true that the basis of Islamic law was religion, but from this it could not be said that everything which was legal under Muslim personal law should be classified as a 'religious institution'.[22] His argument was that any other interpretation would take regulation of the personal law of Muslims completely outside the scope of legislation.

Justice Akbar rejected these apprehensions, stating that the State was free to legislate on the personal law of Muslims, but while legislating, they would have to keep in mind the principles of Islam.[23] This somewhat vague

[19] (Abdul Ghani v. Islamic Republic of Pakistan, [1958])
[20] Ibid
[21] (Muhammad Mehdi Ali Khan v. Province of East Pakistan, [1958])
[22] Ibid at Page 213
[23] Ibid at Page 215

statement would make sense if all that Justice Akbar is saying is that the legislature should look to the principles of Islam to decipher whether something is a 'religious institution' or not. If it is, then it may be beyond legislative interference (except for regulatory purposes). This interpretation makes sense on the basis that he continues to subsequently explain whether a *wakf* is a 'religious institution' or not.

The reasoning for holding a *wakf* as a 'religious institution' by the court involved a battle with Mr. Brohi. The Bench stressed the importance of charity in Islam, yet when Mr. Brohi stated that in Islam 'removing anything from the road which may cause hurt'[24] was considered *sadkah*, the court distinguished the *wakf* from such acts, stating that while Mr. Brohi's example benefited certain individuals, 'the object of the wakf is to give the property in the custody of God for the benefit of humanity.'[25] The court stressed that the *wakf* derived from Islamic law, and had a charitable purpose. This means that the court adopted some variation of Mr. Brohi's test of a 'religious institution' having a public purpose.

This led Justice Akbar to answer another question in this case: whether a dedication for the benefit of one's children (*wakf-al-aulad*) fell within the definition of a religious institution?[26] A *wakf-al-aulad* is made primarily for the benefit of one's own family.[27] The problem was, as stated above, that there was no 'public' interest in such a *wakf*. Here Justice Akbar and Justice Chaudhry disagreed. For Akbar, Article 18 (b) protected only those institutions that were established by a 'religious denomination' and not by an individual. Justice Chaudhry believed that even a 'private' institution would be protected under Article 18 (b) as long as it had some public connection. He found that a *wakf-al-aulad* did so as it 'ultimately goes to charity'.[28]

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[24] Ibid
[25] Ibid at Page 216
[26] Ibid Page 218
[27] Ibid Page 219
[28] Ibid Page 231

This difference of opinion would be decided by Justice Ispahani who would agree with the opinion of Justice Chaudhry.[29]

This long legal battle would be finally put to rest on appeal to the Supreme Court. The Appeals were allowed, on other points. The 'public purpose' argument was rejected by Justice Cornelius in his dissent.[30] However, the views of Justice Ispahani remain the law. A 'religious institution' is thus something based on religious sources established by an individual or a denomination of that religion which is for the following purposes: 'religious, pious or charitable'.

This line of cases ends our discussion of the religious freedom Article in the period 1956-73. Before we move into a discussion of Article 20, a brief digression is necessary to understand the problems that would arise with the creation of a court with power to decide on all issues relating to Islam.

A Brief Overview of the Federal Shariat Court

A mechanism for Zia-ul-Haq to implement the infamous Hudood Ordinance was to create a separate court system, assigned with the task of interpreting the new Islamic criminal law.[31] The Constitution (Amendment) Order, 1980 would integrate into the Constitution the establishment of a Federal Shariat Court (FSC) in Islamabad.[32] It was assigned with the power of judicial review of legislation on the basis of the 'Injunctions of Islam'[33]. It could not, however, decide on questions relating to the Constitution. While the ordinary courts dealt with issues relating to Article 20, the FSC maintained a presence over the question whether a law or policy was repugnant to the Injunctions of Islam.[34] A question which it has adjudicated over in a number of

[29] Ibid Page 239

[30] (Province of East Pakistan and others v. Md. Mehdi Ali Khan, [1959])

[31] (Lau, 2006)

[32] Ibid at Page 127

[33] Ibid

[34] Ibid

cases[35]. The duality that would sometimes be forgotten, and would be relevant in our analysis of Article 20 would be the stance that the FSC could not implement or interpret provisions of the Constitution.[36]

Article 20-The First Decade

1976 was a year when the Lahore High Court Bar Association would have something of a face-off with the judiciary. In the process Article 20 would be somehow shoe-horned into the fray. The President of the Bar made a speech criticizing the High Court. The court replied by initiating contempt proceedings under Article 204 of the Constitution against Mr. Shaukat Ali, the then President. His supporters rallied to his cause, taking out a procession bearing placards that further antagonized the superior judiciary. With the High Court initiating contempt proceedings against those it could get a hold of, the case of *The State v. Shaukat Ali Advocate & 3 Others*[37] would raise a surprising Article 20 issue.

The accused argued fair comment and free speech. Both were curtly dismissed by the court. They then argued Article 20 on the principle that by taking out the procession they came within its protection, since according to Islam there was no offence in criticizing a Qazi (Judge).

This argument holds no merit. One cannot argue that the State can only prohibit such conduct which is expressly prohibited by Islam. In the developing world this would

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[35] See for example: Naimatullah Khan v Government of Pakistan [PLD 1979 Pesh 104], Gul Hassan Khan v. Government of Pakistan and another [PLD 1980 Pesh 1]-Note that at this point there were separate Shariat Benches in each Province. For the FSC see Muhammad Riaz v. Federal Government [PLD 1980 FSC 1]

[36] See Articles 203-B and 203-D of the 1973 Constitution and B.Z. Kaikus v. Federal Government of Pakistan [PLD 1981 FSC 1]. However, as Lau points out it should be noted that almost ten years later the FSC invalidated various provisions of the Representation of People Act, 1976, arguing that it was an ordinary law enacted in furtherance of the objects detailed in the Constitution and therefore justiciable: Muhammad Salah-ud-Din v. Government of Pakistan [PLD 1990 FSC 1].

[37] (The State v. Shaukat Ali & 3 Others, [1976])

lead to the conclusion that things like cyber-crime could never be prohibited.

The importance of this case for our analysis lies in the statement it made regarding the 'subject to law, public order and morality' limitation. Again, it would be former Chief Justice Munir who would play a role in the interpretation of this right. The Court quoted from his book to state that Article 20 did not extend to a person 'who conceives of a God and the worship of such God in a manner which may endanger the lives of members of the community in which he lives'.[38] This is more in line with an interpretation of what the term 'public order' means, and finds favour with the interpretation of the term as used in Articles 16, 17 & 19 of the Constitution, where it has been read to be synonymous with public peace, safety and tranquility.[39] It refers to a localized description of order rather than of a national level.[40] Public safety would be a paramount consideration in limiting Article 20.[41] So danger to human life and the safety of the citizens would fall within its purview.[42] The potential hazard must be of a 'public' nature and a threat to 'public safety'.[43] Article 20 would not, then, protect me if I were to argue that it was an integral part of my religion that I must weekly plant a small explosive in a public street.

Article 20, of course, involves the courts having to decipher whether an act is a core part of a particular religion or not. In some situations, the answer to this question will be straightforward. Such as when a curfew was imposed by the State for an indefinite period, without any relaxation in time for Muslims to pray. This was a clear violation of Article 20.[44] It is the cases where

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[38] Ibid at Para 18

[39] (Karim, 2006)

[40] See (Benazir Bhutto v. Federation of Pakistan, [1988]) also see Ghulam Ali Shah v. State [PLD 1970 SC 253] & Haji Malik Aman v. Federation of Pakistan [1993 SCMR 1837]

[41] (Karim, 2006)

[42] (Abdul Hameed v. District Magistrate, [1957])

[43] (Benazir Bhutto v. Federation of Pakistan, [1988])

[44] (Darwesh M. Arbey, Advocate v. Federation of Pakistan, [1980])

differences of opinion exists, mostly because of sectarian divides, that the courts task becomes more difficult.

The *Fiqa Jafria* sect allows a woman to proceed for Hajj without a *mehram*. The Government of Pakistan would issue a circular in connection with Hajj creating an exception in favour of members of the sect which allowed a female to perform the Hajj without a *mehram*. This circular was challenged by Habibur Rehman alleging that it was against the principles of Islam. The FSC determined, upon an examination of the scholarship of the *Fiqa Jafria* sect, that a woman could proceed without a *mehram*, and thus held no infringement of Islamic law. Because this was a case before the FSC they could not go into the constitutional questions, but from the views it expressed it seems like the circular would have been protected under Article 20.[45] These cases show that Article 20 demands courts to examine, through scripture and scholarship of particular sects, whether or not a particular action is indeed a part of that sect's interpretation of their religious faith. The courts must then be both adjudicators of law and faith.[46]

The Muslim Family Laws Ordinance

The Muslim Family Laws Ordinance, 1961 (MFLO) became a subject of dispute in the 1980's, with Article 20 playing a very minor role in a dispute that centered on the Injunctions of Islam. It was the validity of the MFLO that became a concern in the context of criminal cases involving allegations of abduction, rape or

[45] (Habibur Rehman and another v. Federation of Pakistan, [1983])

[46] For another example of this, see the case of Dr. Amanat Ali and others v. Federation of Pakistan [PLD 1983 FSC 15] The case of Mobashir v. Bokhari, [PLD 1978 Lahore 113] is also a telling example. This was a case where the Court refused an injunction against Ahmadis asking for them to be prohibited from calling their place of worship as a 'masjid', calling the 'azan', performing 'namaz', and reciting the Quran. The Lahore High Court denied the petition and referred to the fact that Islam left non-Muslims free to profess and practice their religion. A deeper analysis of the issue posed by Ahmadis will be made in this article with regards to the Zaheerudin case.

adultery.[47] This article is not concerned with the provisions of the MFLO and their compliance with Islamic law, but must point out the relationship between it and Article 20 very briefly.

The MFLO is the subject of a jurisdictional bar in the Constitution that prohibits the examination of its vires in accordance with fundamental rights.[48] A case from Karachi highlights this, where it was argued that because the MFLO's Talaq (divorce) procedure had an overriding effect on the personal law of any Muslim sect it was hit by Article 20.[49] Justice Tanzil-ur-Rehman, who seemed to be on some sort of a crusade against the MFLO during his career[50], could not strike the MFLO down on the basis of a contravention of Article 20 because under clause 3 (b) of Article 8 of the Constitution, the MFLO could not be challenged on the basis of infringing a fundamental right.[51] The protection given to the MFLO would be problematic if the MFLO only adhered to the tenets of Sunni Islam, thus substantially curtailing the faith of Shias and other sects within Islam. This does not seem to be so from the case law.[52]

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[47] (Lau, 2006) at Page 199

[48] For a discussion of this see the case of Noor Khan v. Haq Nawaz [PLD 1982 FSC 265]

[49] Qamar Raza v Tahira Begum, [1988]

[50] See his article PLD 1989 Journal 17

[51] The court however did go on to say that the MFLO could be challenged if in conflict with Article 2-A or the injunctions of Islam. Surprisingly the court seemed to dismiss the interpretation of many eminent Shia jurists as to when a Talaq is valid, holding the Talaq invalid only on the principle that Article 227 (1) of the Constitution read: '*the Quran and Sunnah as interpreted by that sect.'* The same judge would in a later case, (Shaukat Hussain v Rubina, [1989]) only a year apart, trace the history of the MFLO and state that the protection given under Article 8 (3) of the Constitution amounted to suspension of Fundamental Rights guaranteed to the people of Pakistan under Article 20, and that had it not been for Article 8 (3) the MFLO would have violated Article 20. The violation would be because of the differing interpretations of when a divorce would be valid amongst the various sects within Islam.

[52] (Ali Nawaz Gardezi v Lt. Col. Muhammad Yousaf, [1963])

The Quadiani Conundrum

Survival-that would have been the only thought running through the minds of the four men being chased by a mob in Gujranwala. It is 1974 and riots have broken out against members of a particular belief. The four men would not have cared for what Article 20 said, they would not have cared for how it has been interpreted; they knew that it could not save them now. As they were forced to climb atop roofs to evade the mob they must have realized that the law had abandoned them. When they were finally forced to come down, and beaten to death, what they felt or thought cannot be fathomed, but what they heard was the rioters shouting at them to denounce their Ahmadi faith.[53]

The people of the Ahmadi community view themselves as followers of Islam.[54] The extreme emotions described above arise because of differing interpretations with regards to the finality of Prophethood. Mirza Ghulam Ahmad (founder of the Ahmadiyya Community) claimed Prophethood, albeit, one subordinate to that of the Prophet Muhammad (Peace be upon Him).[55] This view is deemed blasphemous by the majority of Muslims in Pakistan.

At first glance there does not seem to be that much difference between the Ahmadi beliefs and that of other Abrahamic faiths. Christians do not believe in a Prophet after Christ, similar views are also held by Jews. The Ahmadis conjure up such violent extremism because of their belief that they are a part of the Muslim faith and not another distinct one. This concept of 'posing' as Muslims would be debated in the superior courts of Pakistan and would result in one of the most infamous cases in Article 20's history.

In 1974, as a result of facing pressure from fundamentalists, Zulfiqar Ali Bhutto moved a

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[53] This story is narrated in (Ahmad Siddiq, 1995) and relates to the murder of Ahmad Ali Qureshi, Manzoor Ahmad, Syed Ahmad, Mahmood Ahmad and the two brothers Bashir and Munir Ahmad during the religious riots against Ahmadis in Pakistan in 1974.

[54] Ibid

[55] Ibid

Constitutional Amendment declaring members of the Ahmadi faith to be 'non-Muslim'.[56] President Zia-ul-Haq would subsequently exclude Ahmadis from participation in political activities.[57] The Zia regime promulgated Martial Law Ordinance XX (Ordinance XX)[58] which introduced the twin towers of oppression: s.298-B and C of the Pakistan Penal Code.

It was now an offence for an Ahmadi to use any of the epithets used by Muslims[59], furthermore, they could not call themselves 'Muslims'[60], or preach and propagate their faith. It also made it an offence for an Ahmadi to 'pose' as a Muslim.[61]

Ripe for challenge, these provisions would come before the FSC and the Supreme Court in two cases: *Mujibur Rehman v. Federal Government of Pakistan*[62] and *Zaheeruddin v. The State*[63].

In *Mujibur Rehman*, Ordinance XX was challenged on the basis that it was repugnant to Islam. The FSC would first delve into a lengthy discussion of whether Ahmadis were Muslim. Let's not forget that the FSC has no jurisdiction to go into constitutional questions. Regardless of this, the FSC still discussed the effect of Article 20 when referring to the Ordinance; thus contradicting established case-law, already discussed, and the Constitution.

Both s. 298-B and C were upheld by the FSC. The Ahmadis belief system was also held to be in opposition

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[56] Article 260 (3) of the Constitution of the Islamic Republic of Pakistan, 1973; also see Ibid

[57] In 1978 a further amendment to the Pakistan constitution provided for separate electorates for non-Muslims in the National and Provincial Assemblies.

[58] The Full title is Anti-Islamic Activities of the Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984

[59] They could not call their place of worship a 'Masjid' or the call to prayer as 'Azan' amongst other things

[60] Ordinance XX section 298-C of the Pakistan Penal Code, 1860

[61] Ibid

[62] (Mujibur Rehman v. Federal Government of Pakistan, [1985])

[63] (Zaheeruddin v The State, [1993])

to the beliefs of Muslims. The bulk of the decision rests on an examination of the Shariah, but when it came to Article 20 the FSC felt that Ordinance XX came within the 'public order' limitation. It felt that when Ahmadis posed as Muslims that amounted to insulting the religious feelings of the Muslim population. It is shocking that the FSC's bias came out so prominently when it blamed the Ahmadis for this turn of events:

Despite these provisions of the Constitution, the Ahmadis persisted in calling themselves Muslims and their faith as Islam. They remained impetuously epathetic [sic] and insensitive to the perturbation of the Muslims of Pakistan.[64]

There is an assumption here by the FSC. The majority of adherents of a faith are born into that faith. Ahmadis call themselves Muslims because they have grown believing that they are-much like most of the people in Pakistan have grown believing the same about their faith. To make the argument, as the FSC has done, that they are deliberately performing a masquerade to insult Muslims is absurd. They have grown to believe they are Muslims because that is what their belief is.

An examination of a number of Quranic verses also followed.[65] The FSC accepted that Islam was a religion of tolerance, and there was no compulsion in religion. Then it went on to give an interpretation that showed a leaning towards compulsion rather than tolerance. An example of this is when the counsel for the Petitioner stated that restraining Ahmadis from calling themselves Muslims amounted to turning them out of their religion.[66] The FSC was of the opinion that there was nothing in Ordinance XX that supported this argument:
We have already considered this question and have reached the conclusion that the Quadianis of either persuasion are not Muslims but are non-Muslims. The Ordinance, therefore, restrains them from calling

[64] (Mujibur Rehman v. Federal Government of Pakistan, [1985]) at Para 9
[65] Ibid at Page 89. Counsel for the Petitioner relied on 2:256, 8:29, 10:99, 10:108, 26:3, 90:10, 91:8, 91:9, 91:10
[66] Ibid at Page 89-93

themselves what they are not; since they cannot be allowed to deceive anybody specially the Muslim Ummah by passing off as Muslims.[67]

Again, the FSC misses a vital point. Ordinance XX turns them out of their religion because it is the belief of Ahmadis that they are Muslims. They have grown with that belief and thus they do not believe that they are 'deceiving' anyone. The FSC constantly resorted to what is often called the 'sky is falling' line of reasoning as they saw Ahmadis posing as Muslims to be a constant threat:

This cannot be tolerated and non-Muslims cannot be allowed to encroach upon the rights and privileges of the Muslim community to the utter disintegration of the Ummah.[68]

The 'disintegration of the Ummah'? Because a small minority in Pakistan holds a different opinion? It seems the FSC is suffering from Pakistan's misplaced views that it is the sole guardian of the Islamic faith. These arguments formed the crux of the 'public order' reasoning.

Following this the FSC then proceeded to make a bizarre statement regarding Article 20:

These verses and conditions are also not sufficient for holding in favour of the fundamental rights of non-Muslims to propagate and preach their religion among Muslims. Despite this it is for the Islamic State to allow the non-Muslims to preach their religion as has been done in Article 20 of the Constitution, but this can be allowed if the non-Muslims preach as non-Muslims and not by passing off as Muslims. It is for the legislature to lay down other conditions also.[69]

What is tolerance of other religions if they cannot speak of their faith amongst Muslims? According to the FSC if someone 'poses' as a Muslim, he cannot preach to

[67] Ibid
[68] Ibid
[69] Ibid at Page 117

Muslims and that is a limitation that exists in Article 20. Regardless of the fact that the FSC has no jurisdiction to say what is and is not a limitation to Article 20, why on earth would Ahmadis, who believe themselves to be Muslims, preach to other Muslims about converting to Islam if they are already Muslims? What does 'preaching' faith mean? Can an Ahmadi and a Muslim not sit down and debate their own perspective views or would this also be wrong considering that the Ahmadi believing himself to be a 'Muslim' is preaching to a member of the Islamic faith?

The FSC in its attempt to keep the 'sky from falling' seems to have gone to great lengths to keep the Ahmadis quiet. Resorting to going beyond their jurisdiction to say that Ordinance XX fell within the 'public order' exception to Article 20.

Although this article does not examine questions relating to Islam, a word must be said about the FSC's views on freedom of religion in Islam. Scholarship contradicts the claims made by the FSC because in Islam both Muslims and non-Muslims are entitled to propagate their religion, and they may defend it against attack.[70] This is so regardless of whether such an action is launched by 'their co-religionists or by others'.[71] Consider, for a second, a Malaysian case where a Muslim converted to Christianity and attempted to convert other Muslims to the faith. The Malaysian Constitution has a very similar religious freedom clause.[72] The Supreme Court dismissed the argument made that the actions of the accused were a threat to the security of the country:

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[70] (Kamali, 1997) at Page 87

[71] Ibid

[72] The Federal Constitution of Malaysia, 1957 declares in Article II:

(1) Every person has the right to profess and practice his religion, and subject to clause (4) propagate it.

Clause 4 provides that a state law, and in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law, may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

As regards the alleged conversion of six Malays, even if it were true, it cannot by itself in our opinion be regarded as a threat to the security of the country.[73]

If a member of another faith actually converting Muslims into that faith is not a 'threat' why did the FSC hold that the Ahmadis through their preaching could disintegrate the Muslim Ummah?

As for the argument that people 'posing' as Muslims cannot propagate their faith within the Islamic community. This finds no basis in contemporary scholarship, since Islam validates the 'freedom of the individual to propagate the religion of his following through sound reasoning and argumentation. Thus Muslims are required in the Quran to resort to courteous reasoning to attract others to Islam and to permit the practitioners of other religions to employ the same methods.'[74] There is no distinction between someone having a different view of the Islamic faith. Furthermore, religion by its very definition is interpretation.[75] By preventing Ahmadis from interpreting their religion the FSC has effectively infringed their freedom to religion.

As for the 'public order' views of the FSC, to examine these properly we must first look to the case of *Zaheeruddin*.

The Sky is Falling

Zaheeruddin involved appeals by Ahmadis convicted for wearing badges inscribed with the *kalma tayyaba.*[76] It also included constitutional challenges to Ordinance XX. The cases involved another appeal concerned with the constitutionality of a decision by the Punjab Government to ban certain celebratory activities of the

[73] (The Minister of Home Affairs v. Jamaluddin bin Othman, [1989])

[74] (Kamali, 1997) at Page 104 referring to Wafi and Awdah and interpreting verses from the Quran

[75] (Aslan, 2005)

[76] (Reading, 2004), the *Kalma Tayyaba* is the Muslim expression of faith that 'there is no god but God and Muhammad is His Prophet.'

Ahmadi community to take place to mark the hundred year anniversary of the faith.[77]

The majority in *Zaheeruddin* upheld the constitutionality of the law and practices, but gave two major reasons for doing so:

i) The Public Order exception to Article 20;

ii) Analogies to Trademark Law.[78]

The public order rationale is summed up in the following extract:

...It is in this background that one should visualize the public conduct of Ahmadis, at the centenary celebrations and imagine the reaction that it might have attracted from the Muslims. So, if an Ahmadi is allowed by the administration or the law to display or chant in public, the Shaair-e-Islam, it is like creating a Rushdie out of him. Can the administration in that case guarantee his life, liberty and property and if so at what cost? Again, if this permission is given to a procession or assembly on the streets or a public place, it is like permitting civil war. It is not a mere guesswork. It has happened, in fact many a time, in the past, and had been checked at cost of colossal loss of life and property…the reason is that when an Ahmadi or Ahmadis display in public on a placard, a badge or a poster…the 'Kalima'…it would amount to publicly defiling the name of the Holy Prophet (p.b.u.h.) …thus infuriating and instigating the Muslims so that there may be a serious cause for disturbance of the public peace, order and tranquility and it may result in loss of life and property…In that situation, the decisions of the concerned local authorities cannot be overruled by this Court, in this jurisdiction. They are the best judge unless contrary is proved in law or fact.[79]

To some extent, as argued by Reading[80], the Court in linking the actions of Ahmadis to problems associated

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[77] Ibid

[78] Ibid

[79] Zaheeruddin at Page 1777-78

[80] (Reading, 2004)

with 'public order' rather than notions of immorality or religious laws, allowed it to pave the way for future judicial decisions concerning Article 20 to not follow the potential thorny path of sectarian discussions concerning the Islamic faith.[81] Instead future opinions, bound by precedent, would concentrate on 'public order'.

However, does this not give the opinion of the local mob far too much weight? To consider an example, at this point Pakistan is steeped in sectarian violence against the Shia sect. The Shia's annual procession during Muharram could possibly result in mob violence. If the Punjab Government bans this integral practice of that sect, it could potentially rely on *Zaheerudin* to give a higher regard to the opinions of the mob rather than protecting the members of that sect from the mob. The court allows the State to absolve itself of the responsibility of protecting the life and liberty of these individuals through its judgment. The decision narrows Article 20 to 'majority is authority' rule. It would make it seem like judgments such as the Lahore High Court in *Manzoor Hussain Bokhari v SP City, Lahore*[82] would be decided differently. In that case adherents of the Shia sect assailed the validity of an Order passed by the District Magistrate, Lahore rejecting their application for issuing a license for taking out the 'Ulam Procession' in village Shahpur.

The Court in granting this relief, held the Order passed by the District Magistrate to be in violation of Article 20. This was the scenario before *Zaheerudin* however. Thus as per *Zaheerudin*, members of minority groups who are targeted by extremists can only exercise their faith in areas where they are a majority.

Zaheeruddin also seems to be in violation of the 'proportionality rule'. The State could have adopted the 'least restrictive means' to maintain public order. This could have been achieved by regulating the processions and practices of Ahmadis in certain areas and the State providing them with security from mob violence. This

[81] Ibid

[82] (Manzoor Hussain Bokhari v SP City, Lahore, [1990])

would have been a much more appropriate practice rather than 'criminalizing' their conduct altogether. Ordinance XX may never have passed the 'strict scrutiny' test.[83] Reading argues that perhaps Zaheeruddin could be justified on the basis of Article 20's limitation of 'morality', and thus Zaheeruddin is compliant with the moral views of Islam.[84]

'Morality' is also a limitation given in Article 17 of the Constitution. If read with Article 31 it seems to suggest that the morality here is the morality of the Islamic faith. Although there is acceptance in case law that morality is a very subjective term[85], however, the morals of Islam shine through, as in *Islamic Republic of Pakistan v. Abdul Wali Khan*[86]:

Recently legislation was reported to have been introduced in one of the Scandinavian countries to legalize marriage between a brother and his sister. This would be an impossibility in Pakistan, even if the measure is passed by a unanimous vote, because of the Quranic Injunctions.'[87]

But there are many tenets of faiths other than Islam that have different moral standings on issues than those of Muslims. Christianity, for example, does not believe in circumcision, which is an integral element in Islam. Can Christians be banned from doing so by a law made by Parliament? As per the statement in *Islamic Republic of Pakistan v. Abdul Wali Khan* it could be banned on the basis of impugning the moral standards of Islam.

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[83] See in the United States (Sherbert v Verner, [1963]) it was generally accepted that if a law substantially burdened religious freedom, the government had to pass the 'strict scrutiny' test, i.e. establish that the law was passed to achieve a compelling government interest and was narrowly tailored in the sense of adopting the least restrictive means to achieve the government's lawful objective. See my article on religious attire: Headscarf and Religious Attire: A Matter Between God And The State? A Comparative Perspective. Published in UCL Human Rights Review Volume I

[84] (Reading, 2004)

[85] See Crown v. Saadat Hassan Minto [PLD 1952 Lahore 254]

[86] (Islamic Republic of Pakistan v Abdul Wali Khan, [1967])

[87] Ibid at Page 176

On this basis, Reading's opinion may have some merit, however, the Court was not ruling on the 'morality' limitation of Article 20. Throughout it relied on the 'public order' exception. We cannot integrate the 'morality' requirement into the 'public order' limitation because that would be doing injustice to the wording of Article 20, which says that the right is subject to: law, public order and morality. Public order is thus clearly different from morality.[88]

Zaheeruddin also reinterpreted the wording 'subject to law' in Article 20. Rejecting the distinction between 'positive law' and 'Islamic law', the court took the position that due to the incorporation of the Objectives Resolution, the injunctions of Islam as contained in the Quran and Sunnah are the 'real and effective law'.[89] According to this view the power of judicial review has also been enhanced[90], and therefore, even the Fundamental Rights as given in the Constitution must not violate the norms of Islam.[91] This is almost surely in conflict with the decision in *Hakim Khan v. Government of Pakistan*[92], which held that the Objectives Resolution was not above any constitutional provision.

In his dissenting opinion Justice Shafiur Rehman first rejected the position that the incorporation of the Objectives Resolution asked for the fundamental rights to be in conformity with Islamic Injunctions.[93] He rejected the 'subject to law' interpretation given by the majority, reiterating the views expressed in *Jibendra Kishore*[94]. He also took the view that most of Ordinance XX was unconstitutional as violating freedom of religion.[95] His statement in conclusion of this case is especially noteworthy:

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[88] (Reading, 2004)
[89] Zaheeruddin at Page 1774
[90] Ibid at Page 1773
[91] Ibid at Page 1775
[92] (Hakim Khan v Government of Pakistan, [1992])
[93] Zaheeruddin at Page 1742-1744
[94] Ibid at Page 1744
[95] Ibid at Page 1746-48

Our difficulty in handling these appeals has been that the respondents have by and large argued the matter as if the vires of the impugned portions of the Ordinance are being tested [more] for their inconsistency …with injunctions of Islam than for their inconsistency with the Fundamental Rights. This has brought in religious scholars volunteering to assist the Court generating [a] lot of avoidable heat and controversy at the argument and post-argument stage.[96]

The other aspect of *Zaheeruddin* dealt with the court's reasoning that in prohibiting the use of distinguishing characteristics of Islam by the Ahmadis. According to the Court, Ordinance XX was in line with statutes that regulated commercial activity, targeted deceptive marketing practices and protected trademarks.[97] The Ahmadis were thus urged to 'coin their own epithets'[98]. This is interesting, although wholly problematic. The least of the problems is that there is a clear difference between religion and commercial law[99], that the law relating to trademarks is associated with proprietary rights and the ability to make a profit. The Court assumes that there is a possibility that a religion can have a copyright on God.[100]

Karen Parker sums up by saying that the courts in Pakistan fail to keep in view that:

i) *'Religion is not a commercially valuable property nor is Islam a registered company;*

ii) *Goods and material objects have been considered at par with religion, faith, belief and Shaa'ir [Islamic custom] which is a universal heritage and a part of the beneficent Divine*

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[96] Ibid at Page 1749

[97] (Mahmud, 1995) to maintain this line of reasoning the Court relied upon s.20 of the Indian Company Law, Chapter X of the Trade and Merchandise Marks Act of 1958 of India, Chapter XVII of the Indian and Pakistan Penal Codes, and English Company Law

[98] Zaheeruddin at Page 1779

[99] (Ahmad Siddiq, 1995)

[100] Ibid

> *dispensation. Reference to trade mark and Company law is entirely misplaced.*[101]'

The court, in *Zaheeruddin*, relied on American case law to substantiate their argument. This reliance is also rebutted by Siddiq by citing case law that shows that religious prayer and names cannot be trademarked. Citing *McDaniel v Mirza Ahmad Sohrab*[102] - where the Plaintiff asserted that the Defendants did not have the right to represent the Baha'i faith through their publishing, their meetings, or through their commercial enterprises without authorization from the recognized religious leadership, namely, the National Spiritual Assembly. The plaintiffs alleged that any representation or solicitation in the name of the Baha'i faith by the defendants was a misrepresentation to the public that such use was officially authorized. The court held that the plaintiffs had no cause of action as they had no right to a 'monopoly' on the name of a religion. Siddiq further cites the case of *Christian Science Board of Directors of First Church of Christ v Evans*[103] which held that religious names and terms are 'generic' and thus not subject to trademark law.

Aftermath

As pointed out, the precedent set by *Zaheeruddin* seems to give far too much leeway to local or provincial government to give in to the views of extremist mobs. Whether this was so in its aftermath is a question that requires examination.

In *Malik Ghulam Yousaf v District Magistrate, Attock*[104], the Petitioners belonged to the Shia sect and wanted to take out the 'Zuljinah' and 'Alam' procession during Muharram. They were forbidden from doing so except under s.30 of the Police Act, 1861. The Petitioners subsequently submitted an application for the grant of a

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[101] (Parker, 1993) cited in Ibid

[102](McDaniel v Mirza Ahmad Sohrab, [1941])

[103] (Christian Science Board of Directors of First Church of Christ v. Evans, [1987])

[104](Malik Ghulam Yousaf v District Magistrate, Attock, [1995])

license to the District Magistrate. This application was denied on the basis that the grant of the license had not been approved by the police. The provisions of s.30 were thus challenged under Article 20.

This looks to be a prime case to fall within *Zaheerudin's* 'public order' exception. This is all the more so since the contentions of the Respondents were that members of another sect strongly objected to the taking out of this procession.[105] The High Court stated regarding s.30:

If on the other hand, any religion is practices or propagated in public by speeches, processions or placards, it may clash with the rights of others so as to lead to the breach of the peace. It is to provide for such contingencies that the Constitution qualifies the freedom to profess and practice religion so as to make it subject to law. Therefore, it is wrong to suggest that Fundamental Right 20 guarantees absolutely the right to profess or practice religion or that the public authorities are not empowered to control the situation impairing the law and order. On this view of the matter, therefore, we cannot accept the argument that section 30 of the Police Act is in conflict with Fundamental Right 20.[106]

In so many words the Court uses the public order exception in *Zaheerudin*. However, with regards to the District Court's order, the Court took a different turn and said that Article 20 could not be dependent on the objection of a 'hot-head' of a different religion.[107] The Order was then held to be void under Article 20. This decision confuses more than it clarifies.

Hisba & Change

In 2005 the Supreme Court of Pakistan was faced with the potential to make a landmark ruling. An attempt was being made, through a radical religious law, to enforce a brand of Islam in the North West Frontier Province (NWFP). The NWFP was being governed by religious parties with an ideology sympathetic to the Taliban since

[105] Ibid
[106] Ibid at Page 1513
[107] Ibid at Page 1514

2003.[108] Known as the Hisba [Accountability] Act, 2005, it aimed to establish a stronger Islamic moral hold over the NWFP. The main thrust was establishing a government agency headed by a cleric given the title of Mohtasib (Ombudsman).[109] This agency would oversee the Islamization of everyday life in the province. A police force was also made to implement religious norms.[110] The President saw the bill as a violation of fundamental rights[111], and asked the Attorney-General to challenge its constitutionality.[112]

The case came up before a Full Bench of the Supreme Court of Pakistan[113]. One of the questions was undoubtedly whether the Hisba Bill violated, inter alia, Article 20 of the Constitution of Pakistan, 1973.[114] The Hisba Bill did have a provision which gave power to the Mohtasib to protect the rights of minorities, particularly to give regard to the sanctity of their religious places[115]. However, having it written in the law is one thing, putting implementation into the hands of a government sympathetic to the Taliban is another.

The order of the Mohtasib under s.12 of the Hisba Bill was not confined to official maladministration but also to persona/individual religious rights of citizens. Basically the moral code or interpretation of the Shariah that the Mohtasib deemed fit would have to be followed by all citizens. This is an enormous amount of power in the hands of a cleric. An individual thus having different religious standards of understanding the Shariah, as per his sect, would have no option but to obey the Mohtasib because of his large and total power.[116]

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[108] (Kapiszewski, Silverstein and Kagan, 2013]
[109] Ibid
[110] Ibid
[111] Ibid
[112] Ibid
[113](Reference No.2 of 2005 by the President of Pakistan, [2005])
[114] Ibid at Page 880
[115] S.23 (xvii)
[116] Reference No.2 of 2005 by the President of Pakistan, [2005]) at Page 901

The Court held that the private life, personal thoughts and the individual beliefs of citizens cannot be allowed to be interfered with.[117] It held that certain provisions of the Bill, such as ones asking the Mohtasib to monitor if Islamic values were being adhered to, violated Article 20, because it was a fact that different sects of Muslims had different values and etiquettes, and the interference by the Mohtasib would deny the rights guaranteed under Article 20.[118]

The Supreme Court then made statements on the 'public order' exception[119] of Article 20:

i) While the legislature may not interfere with mere profession or belief, law may step in when professions breakout in open practices inviting breaches of peace or when belief, whether in publicly practicing a religion or running a religious institution, lead to overt acts against public order;

ii) Whenever or wherever the State has reason to believe that the peace and order will be disturbed or the religious feelings of others may be injured, so as to create law and order situation, it may take such minimum preventive measures, as will ensure law and order.[120]

The 'least restrictive measure' test is glimmered in this extract, and the striking down of the Hisba Bill itself is a great achievement for Article 20. Article 20 then protects differing interpretations of faith within different sects (although not if you are an Ahmadi, the distinguishing feature being 'posing' as a Muslim). The Supreme Court still retains the 'public order' definition given in *Zaheerudin*. This test is still subject to the same criticisms already mentioned, however, now the State after assessing that a 'public order' scenario exists, as per the definition given in *Zaheerudin*, would then need

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[117] Ibid

[118] Ibid at Page 917, 921

[119] The court cited Jibendra Kishore, the Benazir Bhutto Case & Zaheerudin in coming to its views on public order.

[120] Ibid at Page 924

to take the 'minimum' steps needed to preserve law and order yet not unduly restrict Article 20. This is a welcome change.

A New Beginning?

Sometimes the expression 'saving the best for last' comes in the natural order of things. The jurisprudence surrounding Article 20 that we have examined so far has been weak, ad-hoc, and has sought to curtail the right rather than expand it. Out of this fire, rises phoenix like, a justice that Article 20 needed for a rather long time after the Munir court.

In 2014 the Chief Justice of the Supreme Court was Tassaduq Hussain Jillani. Taking the reins of a court known for taking *Suo Motu* notices, mostly on the whims of Ex-Chief Justice Chaudhry's own moral predilections. The new Chief Justice was a man who felt deeply about the plight of the minorities in Pakistan and the jurisprudence of Article 20.

'78 killed, over a 100 injured' blared the headlines in Pakistan's newspapers. A church service had been subjected to a twin suicide bombing in Peshawar. The service had just ended in the church, and as the worshippers greeted each other an explosion threw them to the floor. Survivors recounted how they saw the wounded everywhere they looked. Ball bearings used in the explosive cut through the church walls, while pages of the Bible were found scattered and torn. Grieving relatives would block the Grand Trunk Road highway with bodies of the victims. Justice was nowhere to be found, injustice laughed at the State's hollow condemnation of the attack. Somewhere, Justice Jillani watched with horror and a resolve took over him.

S.M.C No.1 of 2014[121] was a *Suo Motu* action regarding the attack on the Church in Peshawar and threats to the Kalash tribe and Ismailies in Chitral. It also referred to the desecration of religious places of worship of minorities.

[121](S.M.C. NO.1 Of 2014, [2014])

What this judgment does is that it is the first real attempt at giving Article 20 a broad interpretation, and trying to seize upon it as a means for the protection of the religion of minorities wholeheartedly. Justice Jillani writes that the right to freedom of religion enshrined in Article 20 cannot be interpreted in a manner which has the effect of encroaching upon the religious freedoms of minority religions in Pakistan.[122] His view was that the very genesis of Pakistan was grounded in the protection of the religious rights of all, especially those of minorities.[123]

The first important point that this judgment addresses regarding Article 20 is that 'religion' cannot be defined in 'rigid terms'.[124] It must be construed liberally to include freedom of conscience, thought, expression, belief and faith.[125] Neither should Article 20 be curtailed by attributing an interpretation that is exclusively community-based.[126]

It makes points that were sidelined in most of the prior judgments on the topic. Thus Article 20 makes no distinction between Muslim and non-Muslim, as it is to give all religions equal protection without favouring the Muslim faith or any sect within any religion whatsoever.[127]

The most powerful point was the rejection that law, public order and morality were to be interpreted in Islamic terms.

The very term law, public order and morality has been used in non-religious terms as the notion of law or public order or morality is not reducible to the Islamic meaning of these terms. Therefore, Article 20 has a certain preeminence in the Constitution being only subject to the general restrictions of law, public order and morality, which three terms cannot be interpreted or

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[122] Ibid at Page 713
[123] Ibid at Page 714
[124] Ibid at Page 716
[125] Ibid Paragraph 13
[126] Ibid
[127] Ibid at Page 717-718

used in such a restrictive way as to curtail the basic essence and meaning of the pre-eminent right to religious conscience.[128]

Does this impliedly overrule *Zaheerudin's* 'public order' interpretation? Such an argument could be made because that interpretation was far too restrictive, and gave a far higher preference to the morality of Islam. It seems that after this judgment the term 'morality' would not be confined to the morality of the Islamic faith, but rather a collective morality. This would be a meaning that would not restrict the 'basic essence' of Article 20. As long as Article 20 and its limitations favour the Islamic faith, true religious plurality and freedom cannot be achieved. Justice Jillani by not allowing Article 20 to make a distinction between Muslim and non-Muslim has given the judgment that allows Article 20 to truly bloom.

Furthermore Article 20 is interpreted as saying that even a minority sect within a religion can practice its interpretation even if it conflicts with the majority view.[129] It stresses that non-Muslims have just as much right to propagate their religion as Muslims. This is a rejection of the points made in *Mujibur Rehman* regarding this issue. With the Supreme Court coming out in such full support of Article 20, we may be on the brink of a new beginning, where the freedom of religion may go from being an illusion to a reality that protects the rights of all religions in Pakistan and not just the majority.

From the 11th to the 12th of April, 2015 a Conference on the Judicial Enforcement of Human Rights in South Asia[130] took place in Lahore. Justice Jillani as one of the speakers outlined the following considerations that went behind the judgment of S.M.C No. 1 of 2014:

i) Minorities being vulnerable, the Constitutional guarantees have become 'hollow promises'

[128] Ibid at Page 718

[129] Ibid

[130] Organized by PILER: Pakistan Institute of Labour Education and Research

made worse by the general apathy of the public towards minorities.

ii) Though the Constitution of 1956, '62 and '73 all provide for judicial review and the rights of minorities, there is no case law that establishes the parameters of freedom of religious expression. Through this judgment the Supreme Court wished to contemplate on these issues.

iii) Courts have come to be seen as conservative guardians of the status quo; they must instead act as catalysts for social change.

iv) The Supreme Court has an obligation to protect liberal institutions, because only liberal institutions can safeguard can safeguard the progress of a free democracy. The decision of creating a taskforce-or reforming curricula etc.- were all aimed at protecting liberal institutions.

v) The Supreme Court is also a pedagogical institution and it has to promote constitutional literacy among the public-owing to the direct relationship between the citizen and the constitution. As per Justice Learned Hand: 'Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it…'

vi) Certain freedoms of the constitution must be interpreted in the times we live in. As per William Brennan, '(…) the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not on any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.'

Although this author would disagree with the last of these points[131], the views expressed by Justice Jillani are evocative of all that is needed to protect a right as important as Article 20. If future Justices keep these principles, and the points made in the judgment itself, in mind when interpreting Article 20, we will surely be ushering in a new beginning for this right.

Conclusion: Is there Hope?

We are all born into faith. In that we have no choice. As we grow, so do the variety of our choices. Our choices impact our beliefs and how we wish to live our lives. One such choice is our religious beliefs which inspire a wide spectrum of emotions within us. This belief system which nurtures the growth of a conscience within individuals- a deep connection with a strong moral code; plays a powerful part in our lives and of those around us. 'Religion,' spoke the Dalai Lama, 'is important for humanity, but it should evolve with humanity.' Much like there our grey areas in the arena of morality, a problem of subjectivity that many natural lawyers were at pains to decipher, there are differing interpretations of faith. This will ultimately lead to certain individuals who will believe that their interpretation was and is the only one that is right, all others being heretics. We try to curb legitimizing these views, but when the State adopts one interpretation of faith, one interpretation of morality, this is when things start to fall apart in an area such as the freedom of religious faith.

Our analysis shows that Article 20's jurisprudence is lacking. It went through differing periods. From 1956-73, it was interpreted much more liberally and its limitations were sought to be curtailed by the Munir Court. In the process clarity was imbued through the definition of the terms 'subject to law', 'religious institution' etc. With the coming of the Zia regime, and the setting up of the FSC, the right was constantly interpreted to favour the Islamic faith with the FSC

[131] There is a threat that such a philosophy would make the judge into the legislature by imposing his own morality or subjective biases into the law.

trespassing in domains it was better of leaving alone. The term 'public order' evolved from something akin to a 'mob-veto' to 'minimum preventive measures', although this interpretation still, in this author's opinion, gives far too much weight to an extremist majority rather than asking the State to fulfill its responsibility of protecting people of minority faiths. The 'proportionality' test has only been glimmered, and has not been implemented in Article 20's jurisprudence. A measure that may be drastically needed along with the 'strict scrutiny' test utilized in the United States. With Justice Jillani's 2014 judgment, Article 20 does not now favour the Muslim faith but is to be interpreted equally for all religious denominations. The term 'morality' is no longer the 'morality of the Islamic faith' but rather more akin to the 'public morality' tests adopted in the judgments of the European Court of Human Rights. A more secular standard than the one previously adopted by our superior courts.

As of now, Article 20's jurisprudence has not described exactly what 'religious expression' is? What, as asked by Justice Jillani, are its parameters? The courts have not looked at these questions, and without them the jurisprudence regarding Article 20 will not solidify.

To go back now to where we began, the question: is Article 20 a mere embellishment on a piece of paper? This author believes that this would be a harsh criticism to make. True, the status of minorities in Pakistan is abysmal, but the superior courts have post-*Zaheerudin* sought to curb religious intolerance, and have tried to give Article 20 a liberal interpretation to protect religious freedom. The blocking of the Hisba Bill and the judgment of Justice Jillani highlight this. The Supreme Court has often become the main locus for the struggle between moderates and conservatives, although it falls short of advancing a truly progressive human rights agenda by Western Standards, it has nonetheless, as said by Hirschl, 'served as a bastion of relative cosmopolitanism in otherwise increasingly religious Pakistan.'[132]

[132] (Hirschl, 2010)

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RECONCILING NON-STATE ARMED GROUPS WITH HUMANITARIAN INTERVENTION: THE SYRIAN CASE

By Rana Hamza Ijaz[1] & Ali Zafar[2]

Introduction:

In December 2012, the Syrian National Congress, comprising a coalition of Non-State Armed Groups (NSAGs) was recognized as the legitimate representative of the Syrian people as opposed to the Assad regime. This marks a notable shift from the historical engagement with such groups which was either unofficial or deemed illegal in international law. While previously armed rebel groups were secretly funded as means for proxy wars in Afghanistan, Democratic Republic of Congo, Bangladesh, Angola and many other countries, this recognition marked a new era in terms of official reconciliation of non-state armed groups with international humanitarian law.

Generally, international law has had no legal basis for the aforementioned engagements with the non-state armed groups as it focuses on interactions with state only. There is, however, an implicit recognition that even non-state armed and rebel groups are bound by rights and obligations under the International Humanitarian Law. Up till the recognition of the Syrian National Congress, only state had the monopoly of violence, which could only be challenged, through the support and approval of UN, by other states. Consequently, in cases where the state used force against its own people in violation of their human rights or was guilty of committing crimes against humanity, only international actors had the legal authority to intervene. The Syrian case, therefore, presents an interesting question to the existing body of legal and academic works on the subject of humanitarian intervention: If NSAGs can be accepted as legitimate actors with a

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humanitarian intent, can they also be validated as legitimate proxies for humanitarian interventions?

This paper looks at the existing framework for humanitarian intervention, namely the 'responsibility to protect (R2P)' and assesses its capacity to differentiate between legitimate and non-legitimate NSAGs. Under the post-counter terrorism discourse, it is argued that there are strong and compelling reasons for the inclusion of NSAGs in the current framework. Also, we argue that the Syrian case provides us with enough evidence to suggest that the existing state-centric framework can also be used to determine the legitimacy of non-state groups in a manner similar to that for states. There is however, a need to tread with caution as a departure from state-centric approach can have unexpected and, perhaps, drastic consequences for the world order.

Responsibility to Protect:

In 2001, the Canadian Government presented the doctrine of Responsibility to Protect (R2P) through the International Commission on Interventions and State Sovereignty (ICISS). The doctrine works on the idea of responsibility; a sovereign state has the responsibility to uphold the sovereignty of the state by protecting its citizens and if the state fails to fulfil this responsibility then the responsibility falls on the international community to react (ICISS, 2001). The three pillars of R2P are:

[1] Primary responsibility of protecting the citizens from crimes against humanity, genocide, ethnic cleansing and war crime rests on the State,

[2] It is international community's responsibility to assist and support the State in upholding its responsibility and

[3] In the occurrence of State's failure to uphold its responsibility it is the responsibility of the international community to use means of diplomatic, humanitarian or

other appropriate measures on a collective basis to protect the citizens under the guidelines of UN Charter.[3]

The need to have the doctrine of R2P, finds its roots in several humanitarian interventions, unilateral or multilateral, gone wrong. Be it India's intervention in East Pakistan to enable the establishment of Bangladesh (1971) or Economic Community of West African States' (ECOWAS) intervention in Liberia (1990) and Sierra Leone (1997) or Tanzania's intervention in Uganda (1978) to dethrone Idi Amin or US, UK and France's set up of safe havens and no-fly zones in Iraq to protect Kurds and Shiites (1991). These interventions did not entirely qualify on the humanitarian justification and had to be backed by other justifications of self-defence and understanding of present or previous UN resolutions. But the case that mainly contributed to the need to have a doctrine of R2P was NATO's intervention in Kosovo (1999). Security Council passed three resolutions in 1998 denouncing the actions of Federal Republic of Yugoslavia as a threat to peace and security and having catastrophic humanitarian consequences, yet the Security Council did not approve of the use of force by NATO. NATO, irrespective of the Security Council's disapproval, conducted an eleven week long operation. This incident that challenged the right and wrong under international law and rekindled the debate on what is formally legal and what is morally justified, and proved to be the foundation of the need to have R2P.[4]

R2P can be seen as a "multi-layered and multi-dimensional" doctrine that, theoretically, seeks lesser coercive means and rather supports a gamut of policies that include prevention and early warning.[5, 6] R2P is a comprehensive presentation as compared to the humanitarian intervention: as military intervention in R2P is not a privilege and should be viewed as the last resort after having exhaustingly pursued preventive

[3] (UN, 2009)
[4] (Erdogan, 2016)
[5] (Archibugia and Chandler, 2009)
[6] (Bellamy, 2010)

measures, such as diplomacy, economic sanctions and warnings.[7, 8] Unlike the humanitarian intervention the R2P doctrine requires the international community to rebuild after the completion of intervention in order to facilitate the citizens. The doctrine also holds the involved actors of the international community accountable for their actions and work they have done.[9, 10] Rebuilding and accountability are integral to the R2P doctrine and this is so, because humanitarian intervention's initial basis of the right to intervene is replaced in R2P by the idea of responsibility.[11] While humanitarian intervention's emphasis was on states, the R2P doctrine brings the international community into a framework of responsibility and protection; adding layers of diplomacy, sanctions and warnings into the system before a military intervention is deemed necessary.[12]

Although R2P has been an improvement on the previous structure of humanitarian intervention, there have been a lot of concerns with the doctrine especially after its first case of Libya. According to Mamdani[13], responsibility to protect does not come off as a solution to the humanitarian problems rather it is itself a product of the power relations of the world. R2P is also viewed as the amalgamation of realpolitik and humanitarian cause with northern hegemony and exercise of power at its centre. R2P in essence commits the very crimes that it was formed to protect.[14] Barkawi and Laffey (2006) believe that R2P shifts the power dynamics to the West, even further, by endorsing the notion of "liberating the natives" and portraying the West as the "saviour of human rights". Erdogan (2016) believes that R2P promotes the concepts of neo-liberalism and the doctrine

[7](Breau, 2006)
[8] (Zyberi and Mason, 2013)
[9] (Thibault, 2012)
[10] (Massingham, 2009)
[11] (Arbour, 2008)
[12] (Thakur, 2016)
[13] (Mamdani 2010)
[14] (Naruzzaman, 2013)

is “Euro-centric western neo-liberal expansion”, which is used as an “excuse for exploiting the resources by big states”, and in an indirect manner “questions the authority of Security Council” by “taking away people’s voice” and “prolonging the conflict”.

The Libyan case aptly explains the reservations of various academicians and professionals over the doctrine of R2P. The preventive and early warning stages of the R2P were skimmed through rather quickly in the Libyan case and within hours of the UN-Sponsored Military action the “buyer’s remorse” was sensed as the advocates of such an intervention started criticizing the actions of it.

NSAGs in Syria:

Non-State actors (NSAs) have generally been considered as challengers without any formal responsibility, yet they hold significance in the current armed conflicts. Although the NSAs do not formally contribute to the international humanitarian law yet, the NSAs can play an important role in the protection of IHL and citizens. There is no universal definition for NSAs but the most appropriate one for the purpose of this paper is the one given by NGO Geneva Call: “An organized group with a basic structure of command operating outside state control that uses force to achieve its objectives”.

There are as many as 1200 armed groups operating in Syria today. Free Syrian Army (FSA) and its allies are backed by international actors such as US, France, Arab League, EU etc. Hezbollah along with some groups is out there to defend its ally and brothers, namely the Syrian Government. Independent State of Iraq and Shaam (ISIS), Al-Nusra and their allies are backed by the likes of Al-Qaeda, resulting in wide-spread scepticism over their methods and roles. Other Radical Islamist Groups such as Ahrar-al-Shaam are also fighting for an Islamic system in Syria.[15]

Amongst them the most active ones in terms of size and area captured are:

[15] (Schmitt & Mazzetti, 2013)

[1] The Supreme Kurdish Council operates in the Kurdish areas in northern and north eastern Syria. The council initially aimed to fill the gap created by the retreating Syrian army after the civil war and claimed 'self-governance' of Kurdish populated region of Rojava in North-Eastern Syria. The Council has always aimed to keep itself from an arm's length of conflict yet there have been deadly clashes with the government troops and rebel fighters. The Democratic Union Party (PYD) is working to establish local structures of self-administration and law and order.[16]

[2] The Free Syrian Army (FSA) was established in 2011 by former Syrian Army officers who fled to Turkey. In 2012 several rebel brigades formed a coalition known as the Supreme Military Council as a "moderate and stronger alternative to jihadi rebels". FSA is observed as a "loose network" of rebel groups instead of a strong united force and the groups that are a part of this coalition maintain their different agendas, identities and commands. Some of the brigades that are a part of this coalition are: Martyrs of Syria Brigade, Northern Storm Brigade and Ahrar Souriya Brigade.[17]

[3] The Jabhat-Al Nusra; former ally of Al-Qaeda in Syria which operates in Levant and is a Salafist armed group operating against the government and does not recognize Syrian Military Council. Al-Nusra is considered to be one of the most effective rebel group operating in 11 out of 14 provinces of Syria. Initially the operations of the group were considered to be sporadic with suicide bombing as their trademark but later they started organized and disciplined rebel operations and offensives. Initially, operating as one ISIS and Al-Nusra parted ways in 2013. Al-Nusra has gained popularity amongst the locals by providing public goods and services.[18]

[16] (BBC, 2013)
[17] (O'Bagy, 2013).
[18] (BBC, 2013)

[4] ISIS; operating against the government is a Sunni Salafist armed movement. ISIS has been by far the most notorious of the armed groups operating in Syria and the UN has held it responsible for mass war crimes, human right violations and ethnic cleansing. The group actively operates in the northern and eastern provinces of Syria and has taken part in a number of major rebel operations. ISIS has had tense relationship with other rebel groups such as Ahrar al-Sham, Ahfad al-Rasoul, and Northern Storm Brigade; ISIS has also attacked civilian population of Shiite and Alawite sects.[19]

[5] Ahrar-ul-Sham; is a Sunni Salafist armed group operating in Levant against the government and it also does not recognize Syrian Military Council and have formed their own Syrian Islamic Front (SIF) with as much as 10 rebel groups. Ahrar-ul-Sham fighters are famous for their disciplines, and creative manoeuvring in the offensives; they were amongst the first rebel groups to use "improvised explosive devices" and they regularly attack the military bases to loot the weapons. The group also has a "technical division" responsible for committing cybercrimes and a "relief office" that is responsible for provision of public goods and services.[20]

[6] Hezbollah has been active in Syria since 2011 and actively since 2014 in support of Ba'athist government forces across Syria. The main motive behind Hezbollah's interest in Syria is to counter the Western involvements in Syria. Hezbollah has also been fighting a proxy Iran-Israel war in Syria catering the interests of Iran. Hezbollah has also been involved in fighting against other rebel groups of Syria such as Al-Nusra, FSA and Ahrar-ul-Sham.[21]

Theoretical Evolution of Discourse on NSAGs:

The debate on legitimacy of engagement with the armed groups has been polarized by the views on the positioning of the state in the international system. As pointed out by Ulrich (2012) the traditional realist

[19] (Lund, 2013)
[20] (Lund, 2013)
[21] (Sullivan, 2014)

approach, which is still dominant in the theoretical framework that governs international response to a conflict, looks at a statist view of the system and emphasizes on the use of force for suppression and control over NSAGs. The institutionalist approach, on the other hand, aims at changing group objectives and policies through negotiations but are, nonetheless, reliant on state and supra-state international organisations for any action. Finally, the constructivist approach focuses on the more abstract foundations of resistance and aims to explore normative assumptions about the violence and identity espoused by the conflicting parties.

Cross cutting these ideas is the post counter-terrorism discourse where, post-9/11 period, there has been a rising tendency to label all armed actors as spoilers or terrorists who threaten to destabilize or over-throw the existing socio-political structures.[22] However, as Rawski (2009) argues, despite these concerns, there is a growing agreement on the inadequacy of a statist approach to a world order populated with transnational corporations, private security companies, terrorist organizations and armed groups operating across borders.

One of the most detailed analysis on this matter is provided by Clapham (2006 & 2010) who concluded that a major shift in this regard is that non-state actors are increasingly expected to adhere to the principles of international law. A similar view was propounded by Rodley, as early as in 1993, that while the traditional understanding of international human rights law suggests that it may be applicable to states alone, the state-like behaviour of the non-state armed groups can bind them to human rights obligations. Tomuschat (2004) built on this analysis to further argue that non-state actors have human rights obligations as they are competing for legitimacy and legal validation from the international organizations.

This evolution of the way international humanitarian and human rights law are perceived has manifested itself in

[22] (Podder, 2013).

the two major international conflicts that have arisen post-R2P, namely Libya and Syria. The Libyan case, especially can be seen as a watershed moment in the way engagement with non-state armed groups is perceived. Firstly, the UN Commission of Inquiry on Libya (2011) clearly stated that "where non-state groups exercise de facto control over territory, they must respect fundamental human rights of persons in that territory." But more importantly, as observed by Paris (2014), the UN Resolution Number 1973, which allowed for military strikes against the Qaddafi forces, was also interpreted by the likes of USA, Great Britain and France among others, to have relaxed the embargo; the interpretation suggested that arms could be provided to rebel groups as it would be categorized as aid, which is provided in order to help the population to defend themselves in particular circumstances.

Subsequently, France admitted to air-dropping light weapons and ammunition to rebels in the mountains south-west of Tripoli. Similarly, Qatar also admitted to provision of approximately 20,000 tons in weapons to the rebels 'with the blessing of Western intelligence agencies'.[23] While the legality of these actions is still debated by many and is believed to be in contravention of the resolution 1973, the willingness of major powers to interpret the resolution in the aforementioned manner can be seen as a major advance towards engaging non-state armed groups in humanitarian intervention in the future.

Can NSAGs be Legitimate Actors?

While the Libyan case may be seen as a major event in terms of willingness to engage with the armed groups in humanitarian interventions, the Syrian case provides, perhaps the most important study in the possibility of accepting NSAGs as legitimate actors in humanitarian conflicts. The Syrian rebels, under the banner of National Coalition for Syrian Revolutionary and Opposition Forces, was recognized by more than 100 countries, including GCC (Gulf-Cooperation Council),

[23] (Black, 2011).

France, the EU, UK and the USA as the legitimate representative of the Syrian people.

Even though this recognition of the rebel groups as legitimate representatives marks a major deviation from the traditional state-centric approach and also demonstrates a willingness to engage with these armed groups, there still remains considerable doubt as to whether these actors can be legitimate actors in intervention. Their ability to comply with international human rights law and uphold these standards during conflict has been questioned time and again.

The International Commission of Inquiry, entrusted with investigation of human-rights abuses in Libya (2011), concluded that anti-Qaddafi forces committed a broad range of war crimes and crimes against humanity, including "extra-judicial executions, torture, enforced disappearance and indiscriminate attacks and pillage." Similarly, Amnesty International claimed that rebel groups committed a number of war crimes, including detention, torture and lynching of pro-Qaddafi segments of the population. Furthermore, those who weren't murdered were brutally tortured, which also included electric shocks.

The situation in Syria is no different, where the UN Independent International Commission of Inquiry on Syria accused Syrian rebels of "war crimes, including murder, extrajudicial killings and torture... perpetrated by anti-government armed groups." Furthermore, as Etzioni (2013) suggests, the government is not the only guilty party in Syria, rather the rebels have matched the human right violations by the government; the UN commission even suspected use of chemical weapons by rebel groups.

The aforementioned allegations against the armed groups raise serious questions with regards to the ability of these groups to act as responsible agents of humanitarian intervention. Nonetheless, as the latest report by the UNHCR on Syria suggests, despite these concerns, the armed groups are continuously being used by the international actors as proxies in the conflict.

There is, thus, a need to differentiate the legitimate groups from the illegitimate ones.

The legitimacy of any actor can be broadly divided into three types of categories: internal legitimacy, legal legitimacy and moral legitimacy.[24] The R2P doctrine, makes use of the just war principles to determine the legitimacy of the intervening actors. We use the same set of principles to assess if the existing framework can be used to determine the legitimacy of the non-state armed groups as intervening agents.

Just War Principles and the Case of Syrian Armed Groups:

The responsibility to protect doctrine posits the legitimacy of intervening actors on the just war principles put forward by Michael Walzer in his Just War Theory, which is largely accepted as the seminal and foundational work on this subject. This section makes use of the different types of groups present in Syria and evaluates them on the aforementioned six principles, which also allows for discussion on efficacy as well as short-comings of these principles to yield substantive results. For the purpose of this paper, the rebel groups are broadly classified into 3 groups: the members of the Syrian Coalition, groups with linkages with the terrorist organizations such as ISIS and Al-Qaeda and finally pro-government groups lead by Hezbollah.

[24] (Walzer, 1977)

1. Just Cause: The R2P doctrine states that in order "for "(For Humanitarian Intervention) to be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur" This particular principle is perhaps the easiest to argue for, as it depends entirely on the actions of the actions of those in violation of human rights. In Syria's case, for example, the targeting of civilian population by the government and its other violations of human rights (including allegations of use of chemical weapons) can be argued to provide a just cause for intervention, in the same way as it sufficed in the case of Libya.

2. Right Intention: As per the R2P document, the primary motive for the intervening agent must be "to halt human suffering." In stating so, however, the framework acknowledges that the intervening agents might have additional motives as well. For example, the intervention in Libya was authorized to protect civilian lives. However, NATO decided to extend the scope of this authorization and successfully caused a regime change in Libya. As argued by Yoshida (2013), this led to many people questioning the initial intention of the NATO countries, with access to Libyan oil reserves being a major and direct interest.

Furthermore, as the report by the ICISS itself admits, political leaders "facing internal rebellion or secessionist violence will often be concerned about giving additional momentum or "legitimacy" to those causing their problems." In supporting rebel groups, this can especially cause doubts as it can be used as a tool for legitimizing interference in internal matters of a state and as Pattison (2008) argues, this could weaken international law and create further destabilization.

While mixed-motive problems can cast doubt over any intervening agent, the commitment of the intervener to minimize human rights violation can be assessed through their actions. In Syria's case, while it is clear that Hezbollah and the likes of ISIS, Al-Nusra etc. Are in a power struggle and are, therefore, devoid of right intention. The case of FSA and its allies is more complex. The reports by UNHRC and other human rights organizations have been damning in terms of undermining the commitment of FSA and allies to uphold their human rights obligations. However, FSA and its allies have shown an increased willingness to gain legitimacy and also agreed to a code of conduct that promises to uphold human rights and international humanitarian law. In short, the question of right intention is as tricky for armed groups, as it is for an external intervener.

3. Last Resort: The R2P suggests that "Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored." In other words, an armed intervention can only be undertaken as a last resort, when all other measures have failed.

The criteria is more important in the case of armed groups as they are already in a state of armed conflict. It is, therefore, important to analyse the actions of NSAGs on two levels: a) whether or not they were willing to explore peaceful means before the outbreak of violence and b) their willingness to return to non-violent methods for a peaceful resolution of the matter. While FSA can be claimed as a response to the government's transgressions against peaceful protestors, the participation of other armed groups such as Al-Nusra, Ahraar-al-Shaam etc. Have resorted to armed struggle from the word go.[25]

[25] (Miller, 2014).

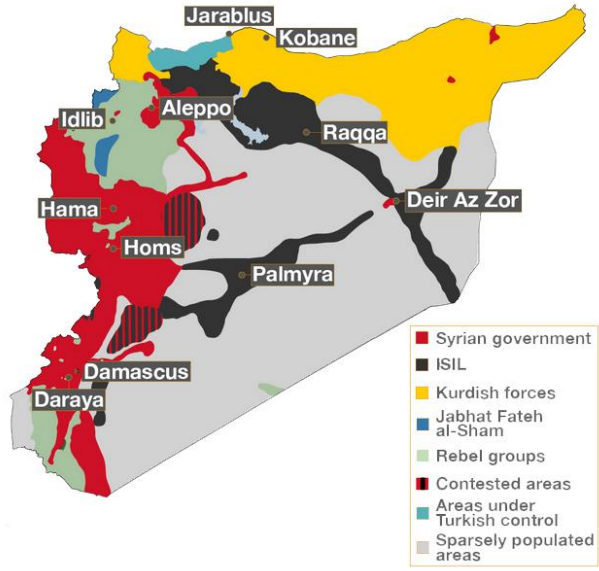
The willingness to explore negotiation and peace talks is once again difficult to assess in the case of FSA and allies. The first president of the SC, Ahmed Mouaz al Khatib, pushed for peace talks with the Assad regime and also entered into negotiations such as Geneva 2. However, this put his leadership at odds with various factions in the coalition. His subsequent resignation and the succession of Ahmad Jarba, led to a more hard-line stance by the rebels in opposition to any peace process (ibid). Lately, the rebels have once again demonstrated a willingness to come to the negotiation table but it can be largely attributed to the territorial gains by the Assad regime during the last year.

4. Reasonable Prospects: One of the most important criteria that is propounded by the R2P is that the intervention should have reasonable prospects of halting the sufferings that led to the intervention in the first place. This is important because as Pattison (2008) notes, a failed intervention can make the situation worse off.

It is, therefore, important to look at the extent of internal and political legitimacy that a group enjoys as it would play a key role in determining their chances of success[26]. Similarly, as argued by Paris (2014), territorial control can be a key factor in determining not only the legitimacy of the armed non-state actors but also their prospects for success.

The situation with regards to the political legitimacy and territorial control of non-state actors is more complex. The rebel groups are predominantly Sunnis, who comprise approximately 60% of the total population.[27] However, as shown in the map below, they exercise control over least amount of area in Syria.

[26] (Buchanan, 2008)
[27] (Carpenter, 2013)



Source: Institute for the Study of War, 2016

The Libyan case, however, suggests that arms and logistic support provided by the external actors coupled with local knowledge and support enjoyed by the domestic groups, can yield effective and quick results. This can increase the likelihood of success in cases where humanitarian intervention is merited. The same holds true for Syria, where international support to different groups at different stages of the conflict has helped them gain ground against their opponents (ibid).

5. Proportional Means: The R2P doctrine also posits that "The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective." The rationale is that excessive use of force or lengthy interventions can cause additional sufferings and can have negative unintended consequences for the people.

   According to the UNHRC, this has remained a concern for armed groups and has been discussed

earlier in detail too. The human rights violations by the state were met by equal digressions from the rebel groups and even once the groups had control over a certain territory, they resorted to indiscriminate violence against civilian population.[28] Similarly, in Libya, fighting among rebel groups has continues long after the fall of Qaddafi regime, and has plunged the country into political chaos (ibid). It is therefore, important to look at the proportionality of response by rebel groups and their willingness to comply with international norms for the sake of determining their legitimacy.

6. Right Authority: The original just war principles of *jus ad bellum* propagated the principle of "who can, should intervene"[29]. However, R2P is clear in its declaration of UN Security Council as the right authority that can legitimize humanitarian intervention. Moreover, as Pattison (2010) suggests, in exceptional cases, regional organisations such as the African Union can and have authorized interventions. Finally, the R2P itself provides the option of Uniting for Peace Procedure of the General Assembly, where it can make recommendations for enforcement when the Security Council is unable to decide[30]. However, such a recommendation would require two-thirds majority in the General Assembly, which is highly unlikely.

Nonetheless, either of these three criteria can be applied to grant legal and legitimate status to the non-state armed groups in a similar way as it is extended to state-led interventions.

Conclusion

One may ask what can be the potential benefits of including Non-State Actors in the R2P framework of the Syrian case. Non-State Actors can play a crucial role at all the three stages of an R2P framework. Due to

[28] (Etzioni, 2013)
[29] (Walzer, 1977)
[30] (ICISS, 2001)

the support they receive from the locals and by international support and pressure they can play a hefty role in prevention of a large scale conflict situation. Non-State Actors, due to the support of the locals and extensive knowledge of the people, landscape and culture are more apt to react in the case of a broader conflict. Non-State Actors can play a greater role in the rebuilding process than an international actor due to their genuine interest in the peace and reconstruction process of the region.

One of the major criticism on humanitarian intervention was the lack of interest that the international actors showed in the reconstruction and rebuilding process of the country. Be it Libya or Afghanistan: the international actors "came, conquered and left" without reconstructing the infrastructure, rebuilding the society and so much so establishing peace (rebels are still fighting in Libya to take charge). In this regard Non-State Actors can be an optimal tool to correct this issue due to following reasons:

1. Legitimate Non-State Actors who fulfill the just war principles will not "leave" because they are the locals and even if they don't play a role in rebuilding and peacekeeping process they will be held accountable on some level from their supporters unlike the international actors who can pack up and leave whenever they feel like doing so.
2. Non-State Actors, if they are to fulfill the just war principles, are fighting for a cause; the whole reason why they took up arms started a movement is based on an ideology which involves betterment of the people and region. Hence, any support given to these groups can bring about a more democratic change than an international actors because these groups have support from locals and act as representatives of these people.
3. One of the reasons behind international actors leaving the job undone is the pressure they have to face from their taxpayers who claim that "it is not their war" and it is true. But, if legitimate

Non-State Actors are engaged rather than the international actors then it will be their war and they will make sure to complete it.

4. Although there are numerous benefits of engaging Non-State Actors, yet there are plethora of challenges associated with them as well. It is very hard to differentiate the genuinely interested legitimate actors from the spoilers who are working on an outsider's agenda. Involvement of Non-State Actors can further tarnish the image of the state due to their historic involvement with notorious armed groups involved in mass terrorist movements.

Nonetheless, this article offers sufficient proof for the claim that existing R2P framework has the ability to reconcile non-state armed groups as legitimate actors in humanitarian intervention. Despite the grey areas that can be seen in the case of Syrian NSAGs, it can be argued that the principles of legitimacy propounded by R2P can be applied to the NSAGs and states alike.

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STUDENTS

THE RIGHT TO HEALTH AND PAKISTAN'S PREDICAMENT

By Fatima Mehmood[1]

Introduction

Constitutionally enshrined, practically prioritised and politically valued; the healthcare situation in the various developing nations of the world sees only an uphill slope. However, on the healthcare front, Pakistan has witnessed nothing but a persistent and steep decline over the few years. This decline is compounded by both the State's inability to interfere when flagrant abuses of healthcare rights take place as well as the inaction of the State in fulfilling its internationally-recognised obligation,[2] i.e. to positively work towards improving and widening the scope of health care in the country.

With a soaring infant mortality rate,[3] a declining life expectancy,[4] a striking dearth of medical practitioners[5] and a health care budget which has continued to represent the smallest segment of the Gross Domestic Product;[6] the call for change is imperative and incontestable in Pakistan. It would not be an exaggeration to assert that the appalling health indicators make the issue of health care rights a matter of life and

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[1] The author is a second year student of the LLB (Honours) University of London International Programmes.

[2] Article 25 of the Universal Declaration of Human Rights, Article 12 of the International Covenant on Economic, Social and Cultural Rights, Article 24 of the Convention on the Rights of the Child, Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, Articles 12 and 14 of the Convention on the Elimination of All Forms of Discrimination Against Women, Article 25 of the Convention on the Rights of Persons with Disabilities.

[3] 53.9 deaths/1,000 live births as per the CIA World Factbook (2016).

[4] 67.7 years is the average life expectancy of the total population as per the CIA World Factbook (2016).

[5] Wasif, S., 2013. "World Health Day: In Pakistan, Health Care Remains A Luxury. Islamabad: The Express Tribune": 1 doctor for every 1,206 people, 1 bed for every 1,665 people and 1 dentist for every 16,426 people.

[6] Human Rights Commission Pakistan's Annual Report 2015 revealed that only 0.42% of the GDP was spent on health.

death. This essay shall, therefore, highlight the non-existence of adequate legal protection of health care rights in Pakistan and the extremely urgent need to rectify the deplorable state. In doing so, this essay shall also explore potential legislative solutions and ways to comply with the international standards in light of this mounting problem of healthcare rights.

Towards constitutionalizing the right to health

Before moving on to consider any statutory legislation on healthcare, it is absolutely vital to point out at the outset that Pakistan has not constitutionalised the right to health. The closest constitutional protection is perhaps found in Article 9 of the Constitution of Pakistan,[7] which refers to a general "right to life". This absence of a constitutional right to health is the root of a heap of problems. Had this right been afforded constitutional protection, rampant health care violations would have been justiciable and catered to more effectively. People denied access to health care facilities could have commenced legal proceedings as it would then be a matter of a breach of a constitutional right. This would have urged the State to prioritise the provision of healthcare rights. Even if gradually, it goes without saying that this would have had the ripple effect of an amelioration of the health care situation in the country.

The increasing significance of the constitutionalization of the right to health can be seen by the fact that while only 33 percent of the constitutions adopted prior to 1970 addressed at least one health right, 60 percent of those introduced between 1970 and 1979 included the right to health and only one of the 33 constitutions adopted between 2000 and 2011, did not protect at least one health right.[8] It can be easily inferred from these figures the enhanced position being given to health care rights around the world. Perhaps, it is time for Pakistan to take a step in a similar direction as well.

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[7] "No person shall be deprived of life or liberty save in accordance with law."

[8] "A Constitutional Right to Healthcare" by Mark Wheeler (2013)

What is even more intriguing is how developing nations of the world have given pre-eminence to a right to health in their constitutions. For example, the Constitution of Bangladesh places upon the State a positive duty to strengthen the provision of healthcare facilities to its citizens.[9] The Constitution of Bhutan places a similar positive duty to protect upon the State.[10] While the aforementioned countries and their like, place the right to health in the chapters on principles of public policy within their constitutions, other states recognise this right as a fundamental human right within their constitutions. For instance, among numerous others, Indonesia[11] and Maldives[12] have both elevated this right

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[9] Article 18(1) of Constitution of People's Republic of Bangladesh: "The State shall regard the raising of the level of nutrition and the improvement of public health as moving its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and other intoxicating drinks and drugs which are injurious to health."

[10] Article 9(21) Constitution of the Kingdom of Bhutan: "The State shall provide free access to basic public health services in both modern and traditional medicines."

[11] Article 28H Constitution of the Republic of Indonesia: "1) Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care.
(2) Each person has the right to facilities and special treatment to get the same opportunities and advantages in order to reach equality and justice."

[12] Article 23 Constitution of the Republic of Maldives: "Every citizen the following rights pursuant to this Constitution, and the State undertakes to achieve the progressive realisation of these rights by reasonable measures within its ability and resources:
(a) adequate and nutritious food and clean water;
(b) clothing and housing;
(c) good standards of health care, physical and mental;
(d) a healthy and ecologically balanced environment;
(e) equal access to means of communication, the State media, transportation facilities, and the natural resources of the country
(f) the establishment of a sewage system of a reasonably adequate standard on every inhabited island;
(g) The establishment of an electricity system of a reasonably adequate standard on every inhabited island that is commensurate to that island."

to the uppermost status of a fundamental human right within their respective constitutions. These examples show how the recognition of a constitutional right to health is not dependent on whether a country falls under the category of developed or developing. All countries, regardless of their status in the economic world order, have a duty to provide for this most basic of rights within their constitution and then to work towards its practical protection.

Hence, having established that constitutional protection of the right to health is, in fact, the right way forward for Pakistan. This paper now turns to examine what such a constitutional right should ideally entail. According to a Working Paper Series of the Harvard Global Health Initiative,[13] there is a threefold criteria in the definition of a constitutional right to health. The first criterion is the scope of this right. While the author of the working paper recommends the right to health contain the guarantee of the right to access healthcare, it would be more efficacious to expand the definition of a healthcare right beyond mere access and onto a certain minimum standard of quality as well. The second criterion propounded is that such a right must be an individual right, enforceable through the independent judicial review or specific complaint process. This criterion is extremely important to ensure the actual enforcement of the constitutional right and this is what will distinguish a constitutional healthcare right from a statutory one. The third, and last criterion promulgated is that this right should be explicitly written in one or more provision(s) of a country's Constitution. Therefore, the example of Indonesia and Maldives given above is precisely what an ideal constitutional right to health should entail.

[13] "The Effect of a Constitutional Right to Health on Population Health in 157 Countries, 1970–2007: the Role of Democratic Governance" by Hiroaki Matsuura (July 2013)

Problems with the statutory guarantees of health care rights

The passing of the 18th Constitutional Amendment in 2010 brought forth a "double blow" for the healthcare system of Pakistan.[14] Not only was the Federal Health Ministry abolished but the issue of health was devolved to the provincial governments. This backward constitutional step bypassed the prospects of making access to basic health facilities an obligation of the State.

This devolution was intended to "improve service delivery and increase healthcare utilisation at the grassroots level"[15], and to achieve the Millennium Development Goals 2015.[16] However, neither of the two aims has even been remotely achieved to date, suggesting that devolution of the health sector has deteriorated healthcare instead of elevating it. Studies and surveys show a centralized healthcare system is both more cost-effective for governments and more efficient in the provision of services to its users.[17]

At the moment, there is no specific statutory provision that criminalises medical negligence; such tortuous acts are dealt with under the general penal provisions of Shariah law. An in-depth examination of the text of the Pakistan Medical and Dental Council Ordinance, 1962 confirms that the medical law regime is weak and inadequate. It cannot help resolve wider issues relating to the right to health and within that right, a right to be treated by a reasonably competent medical practitioner.[18]

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[14] Sabatinelli, R. J. a. G., 2014. Political Determinants of Health: Lessons for Pakistan. Pakistan Journal of Medical Sciences, 30(3), pp. 457-461.

[15] Shiraz Shaikh, I. N. A. N. A. Z. Z. F. A. K., 2012. Experience of devolution in district health system of Pakistan: Perspectives regarding needed reforms. Journal of Pakistan Medical Association, pp. 28-32.

[16] Goal 4: reduction of child mortality
Goal 5: improvement in maternal health
Goal 6: combatting AIDs, malaria and other diseases

[17] Anderson, S., 2010. Centralized health care more cost-effective, offers better access to preventive services.

[18] Amanullah, A., 2011. Medical Law Regimen in Pakistan. Gomal Journal of Medical Sciences, 9(1).

This is an alarming state of affairs, especially in light of the numerous cases of alleged medical negligence in the recent past. For example, the year 2009 saw the high-profile tragic death of three-year old Imanae Malik from a series of gravely negligent actions by a private hospital.[19] Independent inquiries in cases of medical negligence exhibit an array of causes, ranging from unqualified doctors and nurses to severe malpractice and carelessness.[20] These are issues that need to be tackled promptly by specific pieces of legislation. Such legislation is vital not just to punish offenders and obtain repatriation for victims but also to encourage careful practice in the health care system and to act as a real deterrent which safeguards the best interests of citizens. Therefore, it is evident that there is a crucial lacuna within healthcare laws in Pakistan which needs to be filled in by new legislative provisions.

Universal Health Coverage and Human Rights

According to the definition provided by the World Health Organisation, Universal Health Coverage (UHC) "means that all people and communities can use the promotive, preventive, curative, rehabilitative and palliative health services they need, of sufficient quality to be effective, while also ensuring that the use of these services does not expose the user to financial hardship". UHC has proven to be instrumental in revamping the healthcare apparatus in different countries. An ideal example would be that of Thailand, where the implementation of UHC has resulted in significant drops in mortality, impeccable rise in life expectancy and most commendably, a reduction of disparity in provision of health care between the poorer and richer regions.[21]

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[19] "PMDC holds hospital responsible for Imanae's death" Asif Chaudhry — Published May 07, 2015

[20] Muhammad Hanif Shiwani, A. A. (2011). Medical negligence: A growing problem in Pakistan. Journal of Pakistan Medical Association, 610-611.

[21] Sen, A., n.d. Universal Health Care: The Affordable Dream. Harvard Public Health Review, Volume 4.

The nexus between UHC and the human rights of a State's citizens is unequivocal. In fact, the most common cited argument for pursuing UHC is the protection of human rights.[22] It would be apt then to suggest that UHC is the most efficacious way to encapsulate a human right to health in Pakistan. This will a solid means of moving forward, though it may prove burdensome for a developing country like Pakistan. However, examples from across the globe are proof of the fact that it is not an impossible goal to achieve. Indeed, the greatest obstacle is the widely-held assumption that a right to health is a "positive" right; that it requires action on behalf of the State. It is strongly asserted that this radical categorization of rights into 'positive' and 'negative' is detrimental to the overall development of a human rights culture. All rights, in fact, as Henry Shue[23] has argued, have three facets: a duty to protect, a duty to fulfil and a duty to respect. According to this school of thought, the right to health is not strictly a positive right; it has elements of all of the aforementioned duties. It does require action on the State's part but at the same time, it demands of the State interference when violation of that right occurs. So, it can be inferred that Pakistani policymakers and legislators should not view the right to health as a positive right which would place a substantial burden on an already developing country. This right should be viewed as requiring a balanced culmination of both positive action towards progress on part of the State as well as immediate actions to tackle existing healthcare violations.

Thus, Pakistan needs to work towards implementation of a UHC policy if the health care situation is to be alleviated. Doing so would also be in accordance with the World Health Organization standards,[24] which encourage countries to adopt a human rights-based approach to health to ensure all health programmes

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[22] American Medical Association, 2015. Promoting Health as a Human Right in the Post-ACA United States. AMA Journal of Ethics, October.17 (10).

[23] "Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy" (1996)

[24] WHO Health and human rights Fact sheet N°323 December 2015

improve the enjoyment of the right to health for all equally. Such an approach should ideally be based on non-discrimination, availability, accessibility, acceptability, quality, accountability and universality.

Conclusion

It is an indisputable fact that healthcare in Pakistan is astoundingly deplorable. It has been more than sixty years since Pakistan has realised independence, yet these sixty years have not witnessed a single piece of legislation or a single policy which has uplifted healthcare indicators in the country, albeit temporarily. History is only pervaded with examples of the healthcare situation mounting towards doom. This is an issue which needs to be realized on a priority basis as adequate healthcare facilities are, in fact, prerequisites for citizens to be able to enjoy their other fundamental rights as well. This is not to say that the right to health is top in the hierarchy of human rights, but it is to say that this right forms the foundation of other rights. Thus, basic healthcare needs of every citizen need to be given constitutional protection in order to afford to this fundamental human right the prominence that it deserves. Simultaneously, the legislative frameworks need to be refashioned to better serve the healthcare interests of the citizens and to prevent flagrant healthcare abuses in the country.

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Constitution of the Kingdom of Bhutan, Article 9(21)

Constitution of People's Republic of Bangladesh, Article 18(1)

Constitution of Pakistan, 1973

Constitution of the Republic of Indonesia, Article 28H

Constitution of the Republic of Maldives, Article 23

Convention on the Elimination of All Forms of Discrimination Against Women, Articles 12 and 14

Convention on the Elimination of All Forms of Racial Discrimination, Article 5

Convention on the Rights of the Child, Article 24

Convention on the Rights of Persons with Disabilities, Article 25

Hiroaki Mastuura, *"The Effect of a Constitutional Right to Health on Population Health in 157 Countries, 1970 2007: the Role of Democratic Governance"* (July 2013)

International Covenant on Economic, Social and Cultural Rights, Article 12

Mark Wheeler, *"A Constitutional Right to Healthcare"* (2013)

Muhammad Hanif Shiwani, A. A. (2011). *Medical negligence: A growing problem in Pakistan. Journal of Pakistan Medical Association,* 610-611.

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Universal Declaration of Human Rights, Article 25

World Health Organization, *Health and Human Rights Fact Sheet N°323* (December 2015) http://www.who.int/mediacentre/factsheets/fs323/en/

ORANGE LINE METRO TRAIN PROJECT: A THREAT TO THE RIGHT TO CULTURE

By Yumna Arshad[1]

Introduction

Lahore, the majestic city, is home to 10,355,000 people according to a report published in 2016[2]. Apart from its magnificent history and elegant culture, it has seen several developments in the recent years like Lahore Ring Road, Metro Bus Service and Elevated U-turns at several roads etc. In order to cater to the ever-increasing population of Lahore, Punjab Government once again initiated the Lahore Orange Line Project in collaboration with China. Running through the city of Lahore along "Multan Road, McLeod Road and GT Road"[3], the Project will facilitate public transport.

No doubt that Orange Line Metro Train Project will cater to a large portion of the population of Lahore, but it has also raised an issue of fundamental importance: the violation of the right to culture and its reconciliation with the right to development. The project threatens and endangers the existence of twenty-five of Lahore's protected cultural heritage sites.[4] Various international and domestic legislations protect both the rights, right to development as well as the 'right to participate in cultural life.' Unfortunately, the right to culture has long suffered due to the non-binding nature of international legal instruments, the absence of international legal mechanisms to report violations of human rights and the ineffective implementation of laws by the Government of Pakistan.

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[1] The writer is currently pursuing her BA-LLB (Hons) from Lahore University of Management Sciences and is expected to graduate in July 2017.

[2] (Demographia World Urban Areas, 2016)

[3] (Environmental Protection Agency, 2015),

[4] (Threatened Heritage Sites | Lahore Metro Aur Aap, 2016).

Defining the 'Right to Culture'

Before this paper delves into the analysis of the Orange Line Metro Train Project violating the right to culture, it is important to understand what actually the right to culture is. According to Edward Burnett Tylor, the founder of cultural anthropology, *"Culture ... is that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society".* Farida Shaheed, United Nation's Special Rapporteur in the field of culture expands this definition of culture into three broad dimensions; freedom of 'artistic creativity', 'right to access cultural heritage' and the 'respect for cultural diversity.[5] If the Orange Line Metro Train Project is examined through this lens, it can be declared in violation of the right to culture for several reasons. First of all, some cultural sites are being completely demolished such as Mauj Darya Shrine and Andrews Presbyterian Church. Secondly, the view of some historical sites is being obstructed by elevated construction such as Shalamar Gardens, Ghulabi Bagh Gateway and Chauburji. Lastly, cultural sites of minorities are also under threat such as Jain Mandir, Naulakha Presbyterian Church and Cathedral Church of the Resurrection.[6]

Everyone's 'right to participate in cultural life'

i. International Law

After looking at some of the adverse effects that the Orange Line Metro Train Project will have on the historical sites of Lahore, the question arises: should these endangered sites be protected? The answer lies in the fact that the right to culture is protected by various international legislations. First of all, Article 27, Paragraph 1 of Universal Declaration of Human Rights (UDHR) protects the right to culture by declaring that *"Everyone has the right freely to participate in the cultural life of the community…"* Furthermore, Article

[5] (Shaheed, 2014)

[6] (Environmental Protection Agency, 2015)

15, Paragraph 1 (a) of International Covenant on Economic, Social and Cultural Rights (ICESCR) entails that the *"State Parties to the present Covenant recognize the right of everyone to take part in cultural life…"*

Under these provisions, the right to 'take part in cultural life' has been divided into certain elements by General Comment Number 21, adopted by the ICESCR; these elements are availability, accessibility, acceptability, adaptability and appropriateness. The requirements entail that cultural goods must be open for everyone without discrimination and the government must ensure the protection of these rights through various policies and programs (General comment no. 21, Right of everyone to take part in cultural life, 2009). Pakistan has ratified all of the above instruments hence, it is obliged under its provisions to allow the people of Pakistan to participate in their cultural life. A UN delegation has also requested the Pakistani Government to halt this development program. Karima Bennoune, a UN Special Rapporteur, said that the construction for the Orange Line Metro Train Project is endangering "pre-partition buildings" as well as "minority places of worship".[7]

Moving on, Pakistan is also a signatory to UNESCO World Heritage Convention 1972 under which the Shalamar Gardens are a protected site[8]. In fact, the Shalamar Gardens had been placed under 'World Heritage List in Danger in 2000' because the hydraulic tanks of the Garden were accidently destroyed by the expansion of the Grand Trunk Road. The Gardens were recently removed from the Danger List in 2012 due to which, in a letter from UNESCO to the Government of Pakistan, concerns have been shown regarding the destruction of the Gardens once again by the ongoing construction of the development project in its vicinity.[9] Pakistan has also ratified UNESCO's Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 and under Article 1 of the

[7] (NewsWeek, 2016)
[8] (Centre, 2016)
[9] (Rossler, 2016)

Convention, the Government of Punjab is obligated to protect cultural monuments, groups of buildings and sites being affected by the Orange Line Metro Train. Article 4 of the Convention states:

> *"Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage"*

Although international legislations protect the right to culture, the system becomes inefficacious because of various factors. Firstly, the enforcement mechanisms are very ineffective. Secondly, individual grievances and complaints cannot be dealt with under ICESCR as Pakistan has not signed onto the Optional Protocol to it. Thirdly, it is a failure on part of the Government of Punjab because the officials fail to comply with any of the directives given by UNESCO as declared by Lahore Conservation Society in a letter to Aga Khan Foundation.[10]

ii. Domestic Law

Being a dualist country, Pakistan needs to incorporate international laws into domestic legislation to give a binding effect to these laws. Hence, Pakistan has enacted several domestic legislations protecting the rights to culture. First of all, under Section 22 of the Antiquities Act, 1997, *"no development plan or scheme or new construction on, or within a distance of two hundred feet of a protected immovable antiquity shall be undertaken or executed except with the approval of the Director General"* or *"with the approval of the Government or the Committee"* in case of Section 11 of The Punjab Special Premises (Preservation), Ordinance 1985. With reference to the Orange Line Metro Train Project, the Acting Director General refused to issue No Objection Certificates (NOC) arguing that twenty one of Lahore's Mughal and Colonial listed heritage sites are threatened

[10] (Tiwana, 2016)

by this project especially the Fort and Shalamar Gardens. The Director General was suddenly replaced and the new Director General issued NOCs for the construction of the Train along the antiquities and special premises sites within forty-eight hours of his transfer.[11] The Lahore High Court recently held the revised NOC to be ultra vires and unlawful. The Court held that the Committee producing addendums to NOC was composed of members that were directly under the government's control hence it was initially incapable of giving an unbiased decision.

It was also observed that the NOC was given without examining the location, age or condition of either special premises or immovable antiquities.[12] Before the final decision was passed, an interim order under the same title was given under which the Government of Punjab was ordered to halt the construction of the project within 200 meters of the cultural heritage sites. These orders were not complied with.[13] Unfortunately, the High Court judgment has been appealed against before the Supreme Court, where a judgment has been reserved in the case.

Moving on, Section 5 of Environmental Protection Act of 1997 established Pakistan Environmental Protection Agency (EPA) for the protection of the environment under which buildings and structures are protected (*Environmental Protection Act 1997, section 2 (x)).* This Act further prescribed the issuance of Environmental Impact Assessment (EIA) Reports that are regulated under Section 1 of Pakistan Environmental Protection Agency Regulations 2000. The Report was also presented in the case of the Orange Line Metro Train Project approving Orange Line on the condition that environmental issues would be mitigated.[14] Unfortunately, EPA failed to persuade the government to act in accordance with the report because of its limited financial resources, poor co-ordination and

[11] (Mumtaz, 2016)
[12] PLD 2016 Lah. 699
[13] (Hussnain, 2016)
[14] (Hasnain, 2015)

inadequate public involvement.[15] Even though a public hearing was conducted in which the authorities instructed the government to "construct the track passing through Chauburji and Shalamar Gardens underground", no consensus could be arrived at.[16] According to the interview of Professor Furrukh Khan, even the underground construction will not be effective as the foundations of the cultural heritage sites will weaken over a period of time. The EPA also established Pakistan National Conservation Society in 1992, according to which the government is required to take effective steps to protect cultural heritage.[17] It has also proved to be futile as almost ninety cases, relevant to Orange Line Train, have been pending before the courts of Pakistan in March 2016 as informed by an environmental lawyer, Rafay Alam whilst giving a lecture at Lahore University of Management Sciences (LUMS).

Minorities' Right to Culture

i. International and National Legislations

Another aspect of the right to culture is to protect the culture of the indigenous people and the minorities living in any country. For example, minorities' right to culture is protected under The United Nations Declaration on the Rights of Indigenous Peoples, 2007, Article 27 of International Covenant on Civil and Political Rights 1976, UNESCO Universal Declaration on Cultural Diversity 2001 and UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005. Pakistan is a signatory to all these international conventions, and the Constitution of Pakistan exclusively states that "any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same". Under these laws, the Orange Line Metro Train Project is in violation of the right to culture of indigenous people because a

[15] (Aslam, 2006)
[16] (Hasnain, 2015)
[17] (Banuri, 1993)

number of historical sites targeted are of minorities living in Lahore. These endangered sites include Mauj Darya Shrine, Shah Chiragh Shrine, Mosque and Garden, Mominpura Graveyard, Jain Mandir and Historic Precinct, Andrews Presbyterian Church, Naulakha Presbyterian Church and Cathedral Church of the Resurrection.[18]

ii. Reconciling the Right to Culture with the Right to Development

Aside from the absence of enforcement mechanisms for international legislations and domestic laws, the right to culture faces other challenges such as its reconciliation with the right to development. Similar to the right to culture, the right to development is also protected under international legislations for example Article 55 of The Charter of United Nations 1945, Article 22 of The UDHR 1948, Article 1 of ICESCR 1976, Declaration on the Right to Development 1986 and The Rio Declaration on Environment and Development 1992. The aim of the right to development is defined as, 'to continuously provide people with opportunities for their well-being' through several 'developmental policies' (Frequently asked questions on the right to development, 2016). Hence, the Government of Punjab is of the view that such a project would provide a safe and efficient transport system which will in turn 'provide better customer experience'.[19]

No doubt the right to development is an integral part of a country, but arguments in favour of this right fall apart in the present case for several reasons. First of all, whereas the Constitution of Pakistan recognises the right to culture, it does not recognise the right to development as a fundamental right.[20] Secondly, in a country like Pakistan where people are deprived of even the most basic necessities of life like housing, food or education,

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[18] (Threatened Heritage Sites | Lahore Metro Aur Aap, 2016)

[19] (Tender Document for Financing Plus Engineering, Procurement and Construction of Metro Rail Transit System on of the Orange Line in Lahore, 2016)

[20] (Iqbal, 2010)

what is needed is 'sustainable development'. Sustainable development is defined as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs".[21] Principle 3 of the Rio Declaration on Environment and Development 1992 also lays down a similar concept to which Pakistan is a signatory. Thus, the construction of the Orange Line is in violation of this Rule as it is being constructed at the expense of the right to culture violating the right of future generations to enjoy and participate in cultural life of Lahore.

Different case studies also reveal that the right to development must not be protected at the cost of culture. Firstly, the judgment in the Shehla Zia Case[22] was significant since it forbade the government agencies from initiating developmental projects which posed serious threats to the environment. Secondly, Narmada Bachao Andolan Movement once started in India with respect to the construction of Sardar Sarovar Dam on River Nirmada. After several protests, the World Bank withdrew its financial support as the construction of the dam was feared to result in environmental degradation.[23] Thirdly in Kosovo, it was declared to be a violation of the right to culture when the authorities 'excavated part of its [Zočište Monastery] land to widen a local road' increasing the threat of landslide endangering the 'graveyard within the Monastery estate'.[24]

All of the above case studies show that social and cultural rights like the right to a healthy environment and right to culture are given precedence over the right to development. Hence, it can be said that even though the construction of the Orange Line Metro Train is a developmental project, it cannot be pursued at the expense of Lahore's culture.

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[21] (Drexhage and Murphy, 2010)

[22] PLD 1994 SC 693

[23] (The Story of Narmada Bachao Andolan: Human Right, 2013).

[24] (Challenges in the Protection of Immovable Tangible Cultural Heritage in Kosovo, 2014)

Conclusion

Inferring from the above, it can be concluded that the right to culture is not only protected by several international legal instruments but also by internal laws of Pakistan that grant these rights to its citizens. In pursuance of these laws, the Orange Line Metro Train Project must not continue as UNESCO, Lahore Conservation Society, *Lahore Bachao Tehrik*, Aga Khan Fund and the civilians of Lahore have continuously requested the government halt the operations of this project. Sadly, one can only lament over the cultural crisis in Lahore as international laws lack a process of accountability and hence the Government of Punjab cannot be forced to stop. In addition, domestic laws also suffer from corruption and political agendas due to which their enforcement becomes difficult. Encountering these challenges, one can only hope that the cultural heritage of Lahore is protected and public concerns do not go unattended because if once done, the damage will be irreparable.

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WITNESS PROTECTION POLICY: A COMPARATIVE ANALYSIS

By Hijab Waseem[1]

"For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process." – Article 10A Constitution of Pakistan, 1973.

Witness testimony can be crucial for a fair trial and due process, rights granted by the Constitution of Pakistan 1973. However, both these rights are constantly hindered when the state fails to protect key witnesses during trials. Witness protection is central to the criminal justice system especially when combating organized crime. The closed nature of organized crimes such as trafficking or drug and ammunition dealing, makes it difficult to prosecute using traditional investigative methods. Offenders often attempt to prevent witnesses from providing a statement to the court. The state must adopt measures to prevent witness coercion, intimidation, corruption or any bodily harm to the person.[2] Currently the only piece of legislation pertaining to witness protection is the Sindh Witness Protection Act, 2013,[3] being the first of its kind. Implementation remains a live issue and continues to violate the rights of both parties; both parties have a right to cross examine a witness in order to have a fair trial. This paper discusses the need for legislation and its implementation to protect witnesses along with the assessment of existing laws that do provide some safeguards as well. It also analyses other jurisdictions for a positive comparative study on how to construct a strong policy to facilitate witness testimony. The author strongly believes that a lack of security for witnesses is one major factor why fundamental rights, especially in

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[2] (Eniko, 2006)
[3] (Sindh Witness Protection Act 2013, 2013)

the criminal justice system, are violated.

Current Status: Sindh Witness Protection Act 2013

Despite being a step in the right direction, it is pertinent to note that the *Act* is only applicable to Sindh. This highlights the need for nationwide legislation which allocates funds and enacts rules to protect any witness participating in a criminal trial. The Act provides various mechanisms to protect or stop a witness from turning hostile, if threatened, which should be enacted by other provincial assemblies. After the establishment of the Witness Protection Programme, the Government of Sindh can provide the witness with a new identity, conceal his or her identity during any proceeding trial or investigation, reallocation, video conferencing, etc. The protection extends to the family of the witness and compensation is provided if killed or permanently incapacitated during participation.[4]

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[4] Section 4(2) reads:
The actions in the Programme may include the following:-
(a) making arrangements necessary –
(i) to allow the witness to establish a new identity;
(ii) to allow the witness to conceal his or her identity by wearing a mask, changing his or her voice, appearance or any other form of segregation during the investigation or trial, or examination under the law;
(iii) to allow video conferencing in order to secure the protected person; provided that such arrangements are approved by the concerned authority under this Act;
(iv) to protect the witness otherwise; or
(b) relocating the witness;
(c) providing accommodation for the witness;
(d) providing transport for the property of the witness;
(e) providing reasonable financial assistance to the witness, whenever practicable, for obtaining a means of livelihood;
(f) providing compensation to the legal heirs, if the protected person is killed due to his participation in the Programme, in case of death or permanent in capacity of the protected person during his protection, providing free education to his or her dependent minors;
(g) Making special arrangements for security of witness for reasonable period of time.
(h) The above mentioned protection and facilities will also be provided to the family members of the witness if he or she demanded.

The question that arises is, how much of the Act is actually implemented? Section 5(1) of the Act states that a Witness Protection Advisory Board is to be established to carry out is function which will be to implement law. The Board will consist of various government officials.[5] However, up till 2014 no such action had taken place because of the indifferent attitude of bureaucrats and officials.[6] None of the officials stated in the Act were aware of the Protection Advisory Board's existence.[7] There seems to be a severe lack of communication between the relevant officials and not a single witness has been successfully protected under the 2013 Act.[8] Had the Act been implemented, the Sabeen Mahmud case might have gone differently.[9] Her driver Ghulam Abbas was essential to the case, because he had seen her killer and identified him before the magistrate. Unfortunately, the State did not provide him with witness protection or any of the applicable measures relevant in his situation. He was shot twice.[10] There are

[5] Section 5(1) reads:
Government shall establish a Board to be known as the Witness Protection Advisory Board, which shall consist of –
(i) the Secretary, Home Department, Government of Sindh, who shall be its Chairman;
(ii) the Secretary, Law Department, Government of Sindh;
(iii) the Secretary Finance, Government of Sindh;
(iv) the Advocate General Sindh;
(v) the Inspector General of Police, Sindh;
(vi) the Inspector General of Prisons, Sindh;
(vii) the Prosecutor General, Sindh
(viii) the representative of the Provincial Commission on Human Rights;
(ix) the Additional Inspector General, CID, Sindh. Constitution of the Board.
(2) The Additional Inspector General, CID shall also act as Secretary of the Board.
[6] (Tunio, 2014)
[7] (Tunio, 2014)
[8] (Tunio, 2014)
[9] (Ali I. , Key witness in Sabeen Mahmud murder case shot dead in Karachi, 2015)
[10] (Ali I. , Dawn , 2015)

many cases, such as the Wali Baber case[11], which highlights the need for a comprehensive, nationwide legislation and a witness protection program. The Act is in place but its efficacy remains questionable because the right to a fair trial and due process is still being violated.

Various jurisdictions have adopted national legislation pertaining to witness protection. Organised crime is also of an international nature, which is why it is important to shed light on where Pakistan stands when it comes to international instruments concerning this issue. Pakistan is a signatory and has ratified the UN Convention Against Transnational Organized Crime.[12] Article 24 of the Convention encourages state parties to adopt appropriate measures to protect witnesses and reinforces that this be done without interference with due process and the rights of the defendant.[13] Articles 25- 29 further state cooperation between State parties and exchange of information and training of law enforcement personnel is encouraged. Pakistan remains in violation of Article 29 and in fact is in violation of The Act as well. Section 5 (3) (a) states that the Advisory Board should advise the Unit on formulation of policies that are in line with international practice.[14] The Act lays out factors to consider when including and excluding a person into the programme, very much in line with international practice. However there does not seem to be any implementation of such criteria. [15]

The State needs to strengthen executive function. It is not enough to arrest the accused and produce him in court. The police must provide sufficient security for witnesses to allow cross examination and allows for both adversaries to have a fair trial.

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[11] (Tanoli, 2015)
[12] (Nations, United Nations Treaty Collection , n.d.)
[13] (Nations, UNODC, 2004)
[14] (Sindh Witness Protection Act 2013, 2013)
[15] (Sindh Witness Protection Act 2013, 2013) Section 14, 16

Comparative Analysis: USA

While Pakistan is struggling to provide an effective Witness Protection Programme, the United States is far more advanced in this area. It would be best to compare a jurisdiction with a comprehensive legislative and executive structure when it comes to protecting witnesses.

Witness protection is a phenomenon as old as the Ku Klux Klan (KKK) Act, 1871 where people were encouraged to testify against the KKK without fear for their lives.[16] Currently the Federal Witness Protection Programme is in place. It was formulated by the Organised Crime Control Act, 1970. Legislative intent was twofold; to encourage people involved in such crimes to come forward as informants and to repay citizens who came forward to testify.[17] Currently the programme is not limited to protecting individuals testifying against organised crime, but any crime, as long as it poses a threat to their safety.[18] But the most important point to observe here is that, this program is run by the US Marshal Service which allows greater control of information and increased anonymity of identities of witnesses.

The Act provides for formulation of an Advisory Board and Unit which consists of various officers and members or the police force. It is important to understand people's growing mistrust in police which may only add to their hesitation to come forward with testimony. The idea that this task should be carried out by the army is worth discussing. The army is seen as trustworthy and effective by citizens. It is debateable that witness protection should remain an executive function, but with current lack of implementation, the former idea is more plausible than the latter.

A closer look at the California Witness Protection Programme, 1997 (CWPP) reveals similarities between

[16] (Shah, 2015)
[17] (Pranati, 2007)
[18] (Pranati, 2007)

the current statuses of our local Program. Like Sindh, the CWPP relies on local agencies to provide whatever is necessary to protect a witness.[19] Despite sharing resources, they have managed effective use of the program by identifying specific problems. Community intimidation is fear and non-cooperation with law enforcement agencies. Potential witnesses have consistently witnessed acts of violence committed against those who do cooperate with the police, which reinforces the message that cooperation with the police is far more dangerous than perjury. In the United States, punishment for obstruction of justice is slight compared to penalty for murder which is why people feel they have much more to gain from coercing or intimidating a witness.[20] In light of this, the California Street Terrorism Enforcement and Prevention Act (STEP Act) was passed in 1988.[21] This is very similar to the situation in Pakistan where community intimidation is common. This can be attributed to the high acquittal rate, lack of effective witness protection programmes and the loopholes in our criminal justice system. Criminals understand the probability of being sentenced for the actual crime is very low, compared to how successfully they can intimidate a witness. The State needs to acknowledge these social issues and enact legislation such as STEP Act.

Direct intimidation can be prevented by keeping the identity of the witness anonymous, a point which is essential to witness protection and is also mentioned in Section 4 (2) (a) (i) and (ii) of the Sindh Witness Act 2016. American courts recognise this as an essential safeguard in various cases.[22] So much so, the court has declared that the right to cross examine a witness is not absolute when there is an active threat to the witness's wellbeing.[23] Pakistani courts need to understand that in

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[19] (Pranati, 2007)

[20] (Pranati, 2007)

[21] (Pranati, 2007)

[22] Alford v United States: The defense counsel was not permitted to question the witness as to his current place of residence for his own safety, preventing disclosure of evidence.

[23] United States v Palermo

special circumstances the right to cross examine should be waived. Where this is not possible, other measures from the Act such as, segregation of some form during the trial must be implemented.

United Kingdom

The National Crime Agency oversees the UK Protected Persons Service which was upgraded and "re-branded" to improve coordination between the police force.[24] It is important to understand that a lack of communication between state officials responsible for running the Pakistan Witness Protection Programme and the Advisory Board, only slows down the criminal justice system. All state bodies need to work in unison to provide services including legal counsel to any person before he or she signs the agreement allowing admittance to the programme. Delays in any part of the procedure endanger the witness and provide a window of opportunity to the accused to intimidate said witness. Britain's attempt to improve coordination should be reproduced in Pakistan. This in turn should allow for a more effective protection program where anonymity is maintained from the very beginning of the investigation and trial.

India

Like Pakistan, India does not have a witness protection programme but the courts are starting to highlight its importance.[25] It is important to note how witnesses are protected in this jurisdiction. Justice Usha Mehra and Justice Pardeep Nandrajog gave guidelines to the police on how to protect witnesses in response to a petition filed by Neelam Katara.[26] Courts have the discretion to give guidelines where there are gaps in legislation. This is an option that can very much be exercised by all courts in Pakistan. Later those guidelines may be incorporated into legislation. Indian Courts have

[24] (Shah, 2015)
[25] (HT, 2016)
[26] (Shah, 2015)

recognised that a right to a fair trial includes witness protection in case of a threat to his or her safety.[27] Recognition of these principles and provision of guidelines assist the legislature while placing pressure. Along with that, it is important to note that there are penalties in place for disclosure of witness and victim identities in the Indian Jurisdiction. The Indian Penal Code, penalises the disclosure of the identity of a rape victim.[28] The Juvenile Justice (Care and Protection of Children) Act, 2000 criminalises the publication of any information that may lead to the identification of a juvenile.[29] It is important to understand that the identity of a witness should not only be protected because of physical threat, but because they maybe also be victims. Children who are victims of abuse may suffer in society because they have been identified. Our legislation does not appreciate or cater to such cases, where witness protection is required for victims of rape, abuse, etc.

Conclusion

Compared to the United States and the United Kingdom, Pakistani law can easily be seen as outdated when it comes to witness protection. Since the US model is far more developed, implementing a similar structure would be a good starting point for Pakistan. Any court opinion and guidelines need to be incorporated into consolidated legislation. We need an Act which caters to all of Pakistan, forming witness protection programs for each province. There is a dire need for stricter implementation. For this, we need a body that reviews the function and acts of the Board are in accordance with law. Like the United States, a separate body of officers should be given the responsibility to protect witnesses. State police lacks accountability and funding and are inadequate in their function to protect witnesses as seen in Sindh. And like the United Kingdom, there needs to be greater co-operation between state bodies to cut down on delays. The program should extend to witnesses who

[27] G.X Francis v Banke Bihare Singh, Maneka Snajay Gandhi v Rani Jehtmalani.

[28] (Pranati, 2007)

[29] (Pranati, 2007)

are also victims during a trial. Protection from stigmatization should be given importance. With all the above in place one should start to see a drop in the acquittal rate. As a result, the accused and the defendant may be granted the right to a fair trial and the respect of due process will be maintained in the criminal justice system.

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IS THE EXACERBATION OF CLIMATE CHANGE ESSENTIALLY AN ISSUE OF HUMAN RIGHTS?

By Syed Ahmad Omer Akif[1]

Introduction

Scientists today have unequivocally established that the rapid climate change that we are witnessing is directly linked to human activity in the form of carbon emissions causing the Greenhouse Effect.[2] These emissions are interfering with natural patterns and the pace of environmental change and are responsible for increasing the earth's temperature at a threatening pace. This has inadvertently deprived millions of people all around the world of their basic human rights. Particularly those in most vulnerable and poorest of conditions. Not surprisingly, this same group of people is the least responsible for the emissions of greenhouse gases that aggravate the climate change process.[3] This essay will attempt to study whether a human rights based approach is an appropriate mechanism of dealing with climate change concerns and in providing remedies to those affected by it. Firstly, one needs to understand the abstract thought behind applying a human rights lens to climate change and its significance. This framework will be examined in the context of Pakistan and how basic rights are affected by climate change. To this end, there needs to be some depiction of the nature and variety of rights which are violated through climate change activities. Then the limitations of the human rights framework have to be scrutinized before valuating the

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[2] The Centre for International Environmental Law : Climate Change & Human Rights, A Primer – Introduction

[3] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change (26th November 2015)

prognosis of the human rights method and presenting a vision for the times to come.

Rationale behind the Human Rights Based Approach

Quite recently, it was realised by The UN Framework Convention on Climate Change (UNFCCC) and the UN Human Rights Council that climate change is not only a threat to the environment but also negatively impacts millions of people and communities globally.[4] The Human Rights Council has concluded that the adverse consequences of climate change are directly infringing upon the right to safe and adequate water, food, health and housing of many people and communities.[5] In the words of Oregon State University philosophy professor 137 fulfil137 Professor Kathleen Dean Moore, climate change is damaging food supplies, spreading disease and creating refugees, and it is poised to become the most massive human rights violation the world has ever seen."[6] This realisation would have been of little value if such infringements were only due to natural processes and not as a result of pollution caused by humans themselves. Since this is not the case and certain actions of governments and corporations contributing to the Greenhouse Effect can directly lead to violations of numerous fundamental human rights recognised by states through conventions and charters, it is possible to hold governments and corporations accountable for such transgressions within a legal framework.

Before moving further, it is crucial to understand what human rights are and why they matter. Human rights are

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[4] Centre for International Environmental Law, "Human Rights & Climate Change" http://www.ciel.org/issue/human-rights-climate-change/

[5] United Nations Human Rights Office of the High Commissioner, "Climate Change impacts enjoyment of human rights' http://www.ohchr.org/EN/NewsEvents/Pages/Climatechangeimpactsenjoyment.aspx

[6] Aljazeera "How Climate change destroys human rights http://www.aljazeera.com/humanrights/2013/12/how-climate-change-destroys-human-rights-20131217174532837148.html

generally recognized as universal legal insurances that help protect individuals and groups against any actions that intervene with our ability to enjoy the most essential freedoms and entitlements.[7]

These rights have been incorporated in many global legal instruments such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Governments are compelled to respect, promote, protect and 138ulfil these human rights without exceptions. In addition to this, the spirit behind the very existence of human rights is a celebration of inherent human dignity, equality and value of life.[8] Subsequently, the adoption of such a potent moral and legal framework makes clear distinctions between obligations, violations and remedies that would otherwise be hard to achieve. This is perhaps the single most important reason why a human rights based approach is used by activists and litigants to target big firms and powerful states whose unrestricted activities are creating disastrous consequences for millions of people. Identifying climate change as a human rights problem will naturally affect the trajectory of global efforts that are put in place to mitigate climate change effects and adapt to the changing environment. They will possibly be governed by broader principles of international human rights and norms including rights to participation and information, accountability, equity, transparency and non-discrimination.[9]

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[7] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change (26th November 2015) ,"Why integrate human rights in climate change-related actions?"

[8] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change (26th November 2015) ,"Why integrate human rights in climate change-related actions?"

[9] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations

Another interesting finding documented by the Fifth Assessment Report (AR5) by the Intergovernmental Panel on Climate Change is that among all people affected by climate change, people who are socially, economically and politically marginalized are the most vulnerable to climate change and also to its response measures i.e. adaptation and mitigation.[10] The UN Deputy High Commissioner for Human Rights Flavia Pansieri states that "those who have contributed the least to greenhouse gas emissions will be the ones who bear the greatest burden; the poorest people, in the poorest countries, their children, and all our children."[11] This finding makes the integration of human rights and climate change all the more necessary to protect those who are already subsisting in miserable conditions. Merging the two domains will naturally bring a human element to the effects of climate change and warrant greater urgency and priority from states and international bodies.

Subsequently, the mitigation and adaptation strategies that will be adopted are likely to become more effective and inclusive if they are representative of sufferings of the more threatened communities. A human rights based approach can allow states and organisations like the UN to confront the many externalities of climate change by empowering all groups of people especially the most vulnerable. This kind of a strategy can streamline existing policies and procedures on climate change and

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Framework Convention on Climate Change - Understanding Human Rights and Climate Change (26th November 2015) ,"Why integrate human rights in climate change-related actions?"

[10] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change (26th November 2015) ,"Why integrate human rights in climate change-related actions?"

[11] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change (26th November 2015) ,"Why integrate human rights in climate change-related actions?"

make them more relevant, responsive to emerging threats and sensitive to human needs.[12]

Rights Implicated by Climate Change

The connection between climate change and human rights is beyond debate, however the challenge of reconciling the two remains. A study conducted by the UN High Commissioner for Human Rights (OHCHR) closely examined the relationship between climate change and the rights that it implicates.[13] This study along with almost all other international reports on the subject emphasise the deleterious effects of anthropocentric (induced by emission of greenhouse gases) climate change on basic human rights including the right to life, water, food, health, development, self-determination and housing. All of these rights form the crux of major international human rights charters and conventions such as UDHR, ICCPR and ICESCR. The OHCHR study in particular observes certain climate patterns and their specific impact on human lives. It is the interaction of these two that brings in contention many human rights into the picture. Let's consider each of these environmental alterations one by one, their impact on human societies and the rights they implicate as listed in the study:

Rise in water levels: There has been a substantial rise in sea levels globally which has led to many devastating floods such as 2010 Pakistan floods, where more than 1.8 million people were displaced. Similarly, it has led to erosion and increased siltation of land and water. All of these cumulatively have led to the loss of lives because of drowning and injuries. There has also been a decrease in available clean water and land (agricultural and other) while causing great damage to property including homes, coasts and even beaches (threat to

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[12] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change (26th November 2015) ,"Why integrate human rights in climate change-related actions?"

[13] The Centre for International Environmental Law : Climate Change & Human Rights, A Primer – OHCHR'S Analytical Study

tourism). This clearly impacts civil and political rights including self-determination, life and culture under ICCPR Articles [1,6,27] and rights of health, means of subsistence, standard of living and adequate housing under ICESCR Articles [1,1].

This also implicates the right to property in the UDHR Art 17.[14,15] Right to life is specially protected under Article 9 of the Constitution of Pakistan, which has often been interpreted to include provision of adequate food and water to citizens so that they are not deprived of life or liberty except in accordance with law. This was specifically construed by Lahore High Court which opined that fundamental rights that include right to a healthy and clean environment and public trust doctrine supported a claim against the government in a petition by a farmer. In this case, the indecisive inaction, complacence and delay of federal and provincial governments to tackle climate change was put under the spotlight. The LHC further stated that climate change is one of the most defining problems of our time that is interfering with the earth's eco-system causing excessive floods, droughts in Pakistan leading to grave problems of water, food and security.[16]

Temperature Increase: the unstable weather changes and increased temperature of the earth by 1 degree Celsius has led to a variation and rise in disease carrying agents such as the recent surge of Zika virus and Chikungunya virus.[17] The warmer temperatures have greatly affected fishing in terms of altering the traditional cycle through which it used to function and has caused many species to

[14] UNHCR, 'International Covenant on Civil and Political Rights'

[15] UNHCR,' International Covenant on Economic, Social and Cultural Rights'

[16] http://www.humanrights.dk/news/climate-change-human-rights-concern

[17] The Guardian, "Climate change may have helped spread Zika virus, according to WHO Scientists. < http://www.theguardian.com/world/2016/feb/11/climate-change-zika-virus-south-central-america-mosquitos>

Bryan Meason and Ryan Paterson, "Chikungunya, Climate Change and Human Rights' – Harvard School of Public Health,

go extinct. In short, warmer climate is giving rise to the spread of diseases, changing the nature of commercial fishing and hence the livelihood of many people. It is also affecting tourism by destroying coral reefs and different breeds of fish. The element again invokes the right to life under ICCPR Article 6 and rights to health, means of subsistence and adequate standard of living under ICESCR Articles 1, 6, and 12.

Extreme Weather Events: The oddly shifting weather is giving rise to more frequent, high intensity storms and cyclones than ever before. These extreme elements are causing hordes of people to dislocate while heavily damaging their lands and bringing their lives to a standstill. Infrastructure is being harmed, water is getting contaminated and schools are being closed. This factor alone hinders the realisation of all economic and social rights under ICESCR along with the right to life.

Changes in rainfall cycles: The haphazard precipitation cycles are making weather conditions more and more unpredictable, hence leading to uncertainty and lack of planning. Erosion is taking place at a faster rate than ever before and disease vectors are changing too. This is leading to prolonged periods of droughts, famines and also floods in places where such conditions did not exist previously. Right to life, health and means of subsistence are again under scrutiny.

All of this research simply demonstrates that the problem of climate change is in fact a problem of human rights as well. Each violation of a human right can be traced back to an impact on some human sphere that can further be associated with some change in the climate that is essentially caused by human activity.

Challenges to the Human Rights Based Approach

Despite the irrefutable evidence of climate change directly influencing the provision of numerous human rights, there exist a set of heavy challenges that create serious difficulties for states and international organisations in formulating policies and procedures on climate challenge issues through a human rights

framework. Some of these issues were highlighted in a report by the International Council on Human Rights Policy[18]:

The first and perhaps the most challenging is that of compliance and enforcement. This is a transcendent problem of international law which aggravates when dealing with economic and social rights and rights of migrants. The status of justiciability of economic and social rights is still unclear as many states do not consider them as their primary obligations to citizens. While the case for civil and political rights like the right to life is definitely stronger but even they cannot be implemented effectively since the harm wrecked through climate change can only be attributed to the perpetrators indirectly. The challenge of enforcement was reiterated in an interview by the Federal Secretary of Climate Change Affairs Pakistan, Mr. Syed Abu Ahmad Akif[19], who remarked that without the voluntary compliance of states to abide by regulations and carbon limits, the battle against climate change is a lost cause. Mr. Abu Akif further stated the sovereignty of states has always been in an adversarial relationship to international humanitarian law and sanctions against states would not be effective until the more powerful and major polluting states like America, China and India strictly restrict their own carbon emissions and abide by what they advocate for other states.

Similarly, there is the problem of insuring local accountability within states. This is true especially for developing and under developed states. While such countries have negligible contribution to the greenhouse effect, they usually incur the most damage from climate change. In the same interview, Mr. Abu Akif gave Pakistan's example which is currently the 8th most vulnerable country to the climate change impact, but it ranks on number 130th in the list of pollutants causing

[18] International Council on Human Rights Policy, "Climate Change and Human Rights A Rough Guide, Why the Silence on Human Rights

[19] *Interview, Syed Abu Ahmad Akif,11th March 2016, Federal Secretary of Ministry of Climate Change

climate change. While a significant source of this damage is high GHG (Greenhouse gases) emissions of more industrialized and populous countries, the state's lack of resources, poor water conservation techniques, weak implementation of laws and poor infrastructure worsens the impact. Under the existing international norm on the State's duty to provide economic and social rights, the State is under an obligation to achieve progressive realisation of them. This is problematic because if the state cannot be made liable for failing to fulfil certain rights immediately under normal conditions, it would be next to impossible to hold it accountable for events it is not directly responsible for.[20]

There is also an underlying problem of creating extra-territorial responsibility of states. As discussed above, the State is often not directly responsible for infringement of human rights but an external actor outside it. This is where international human rights law fails to provide an efficient remedy. Extraterritorial jurisdiction is not as easy to enforce as it was in colonial periods because nation states have become stronger and territorial sovereignty is inviolable. Mr. Abu Akif also posited that the problem of transnational pollution and the concept of externalities are acting as major hindrances to the success of the human rights approach. He elaborated that the externalities created by carbon emissions are not comprehensively covered under international human rights law. He further stated that while, it is the responsibility of polluting states to compensate other states for the negative externalities of their actions, and the international law framework does not possess the capacity to compel these states to do so.[21]

Another challenge to the human rights based approach is applicability of human rights law under emergency situations. It is not unusual for states to suspend certain rights in major cataclysmic events such as famines,

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[20] International Council on Human Rights Policy, "Climate Change and Human Rights A Rough Guide, Why the Silence on Human Rights

[21] *Interview, Syed Abu Ahmad Akif,11th March 2016, Federal Secretary of Ministry of Climate Change

floods and adopt other necessary stringent measures to ensure the greater good of the public, in the broader national interests of the State. Moreover, sometimes different rights of multiple actors may conflict with each other. This can be particularly problematic if, for example, the property rights of the perpetrators are protected along with the right to life of the victims. This leaves states and international bodies in a dilemma about which rights to uphold. Most of the challenges facing the human rights based approach are not those of principle but of implementation and legal enforcement.[22]

Future Vision and Recommendations

Now that we have developed some understanding of the importance of the human rights based approach to climate change and the nature of its shortcomings, it is imperative to canvas the way forward for the integration of human rights within the existing narrative of climate change. While all efforts combined in mitigating and adapting to climate change have been quite limited so far, some essential steps need to be taken with a far sighted vision to combat the effects of climate change. In order to develop any substantive plan, the objectives first must be clarified. The OHCHR defines the primary obligation of States and other duty bearers in a list of key messages on Human Rights and Climate Change as the mitigation of climate change juxtaposed with the prevention of its negative human rights impacts.[23] This is basically the gist of the whole human rights argument that gives precedence to the harm done to individuals and communities in violation of their basic rights as the exclusive yardstick through which the impact of climate change is to be determined. Secondly, states and international bodies like the UN need to equip all

[22] International Council on Human Rights Policy, "Climate Change and Human Rights A Rough Guide, Why the Silence on Human Rights

[23] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change, Key Messages on Human Rights and Climate Change (26th November 2015)

persons with the capacity and the resources which allows them to successfully adapt to changing circumstances and not remain vulnerable.[24] Thirdly, the OHCHR underscores the importance of international collaboration and cooperation to jointly protect and fulfil rights of the victims of climate change.[25] This includes uplifting some of the burden from weaker and poorer states and voluntarily complying with international standards and conventions. The case of climate refugees is of prime importance in this context where the developing states are expected to have tens of millions of refugees and internally displaced people due to climate change. It is incumbent upon developed states to share some of this burden and open their borders to these people. Similarly, values of equity and non-discrimination need to be put at the fore front of all climate change policies in order to make sure that the most marginalized societies do remain the most vulnerable to climate change.[26]

Accountability and the disbursement of maximum available resources to climate related issues is absolutely necessary if any progress is to be made.[27] Lastly, states should facilitate greater public participation in policy making while making available all information

[24] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change, Key Messages on Human Rights and Climate Change (26th November 2015)

[25] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change, Key Messages on Human Rights and Climate Change (26th November 2015)

[26] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change, Key Messages on Human Rights and Climate Change (26th November 2015)

[27] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change, Key Messages on Human Rights and Climate Change (26th November 2015)

regarding climate effects and calamities so that all response mechanisms are in line with the will of the people.[28]

There is little doubt that few real efforts have been made by global actors, to address the underlying failures of the existing structure of global governance in resolving or finding a solution to the climate change crisis. Numerous reports have been published and various conferences have been held without achieving any substantial progress. However, there are signs for some optimism after the recent COP 21 in Paris, where all world leaders unanimously accepted the gravity of climate change. Some important lessons can be derived from this event including a number of astute recommendations for the future. The most indispensable one includes advancing the traditional form of knowledge of indigenous peoples to make appropriate use of resources for agricultural purposes and the adoption of community based monitoring systems that operate on early warning indicators. Another crucial requirement is to create response measures of adaptation and mitigation by placing the interest of the people and their human rights at the centre. This involves giving precedence to voices of the unheard i.e. the most vulnerable, the poor, the children, indigenous people and women. In order to determine their situation, the committee recommends the formation of impact assessments that will prioritize people in terms of the severity of the threat they face from climate change.[29]

[28] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change, Key Messages on Human Rights and Climate Change (26th November 2015)

[29] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change - Understanding Human Rights and Climate Change, Key Messages on Human Rights and Climate Change (26th November 2015)

Conclusion

In light of the arguments made earlier and the evidence given, one can conclude that the issue of climate change is certainly an issue of human rights as well. That being said, the human rights based method may not be the most efficient approach to climate change, given the enforcement and compliance issues. It is high time, that all global actors including states, activists, lobby groups and international groups come together on one platform and work together to combat the ever increasing threat of climate change.

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UNHCR, *'International Covenant on Civil and Political Rights'*

A TRANS BY BIRTH: LIFE OF A TRANSGENDER PERSON IN PAKISTAN

By Beenish Zia[1]

Introduction

The current situation of the transgender people in Pakistan is inhumane. Something as basic as the definition of the term 'transgender persons' is unclear, conflicting and misunderstood. Transgender persons do not enjoy the same rights as females and males in Pakistan. There is an evident need to reconcile the subject with Sharia Law in order to address the issues faced by the transgender community. The importance of Sharia law cannot be underestimated or neglected. Transgender persons face problems with education, jobs, social acceptances, violence and harassment. The lack of legislation and attention in this area makes it hard to ensure transgender people are getting their constitutional rights. Pressure must be put on the State to move towards specific legislation and create a friendly environment for transgender people. The paper will discuss all these matters and suggestions in great depth. It is high time that something big and effective is put in action to help with the social stigma of being a transgender person.

Who are transgender people?

The term 'transgender' is often used but lacks a fixed meaning. Without any established definition, the term is interpreted differently depending on the context. The literal meaning of the word is 'cross-gender'. The original interpretation of the term suggests it only includes those people who live in the identity of a gender different from the one they are assigned to at birth, but without seeking sex reassignment surgery.[2] In

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[1] The author is a second year student pursuing her law degree at University College Lahore under the University of London International Programmes.

[2] Bolich, Gregory G.,Today's Transgender Realities, retrieved from Google Books.

other words, transgender people have a gender identity or gender expression and/or behaviour that differs from those culturally associated with the sex to which they were assigned at birth.[3] In a broader sense the term encompasses gender-queer people like bi-gender, pana-gender, gender-fluid or agender people.[4] The term transgender itself is very often used interchangeably with transsexuals, male-women, eunuchs, she-male and even for cross-dressers. In short, transgender can be used as an umbrella term to include all non-easy fits of the society in the sense of gender conformity.

However, for the purpose of this article, the term transgender will only hold its original meaning as mentioned in the previous paragraph. All other interpretations have their own assigned terms and all the different terms have their own distinctions. For example, transvestite is used for cross-dressers or cross-clothed whereas, eunuch typically is used for male who has been castrated.[5]

Even in Pakistan, transgender persons are addressed using many different words. In respectable gatherings they are addressed as the third gender, a polite alternative in Pakistan's national language, Urdu, is 'Khawaja Saran' or 'Khawaja Siran'. Other words include Hijara/Hijri and Khusra/Khusri. These alternative terms are sometimes considered offensive in Pakistan. Gender activists in Pakistan have promoted the term; Khawaja Sira' as a politically correct term, alternative to 'hijra'.[6]

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[3] Craig & Heith, *Encyclopedia Of Social Deviance*, Sage Publications, 2014

[4] Transgender, https://en.wikipedia.org/wiki/Transgender

[5] Khan, *Understanding the Rights of Our Transgender Community,* http://potdrum.com/human-rights/understanding-the-rights-of-our-transgender-community

[6] "Hijra" - Definition, https://en.wiktionary.org/wiki/hijra#cite_note-2

Transgender people in Pakistan

The current situation of transgender people in the Pakistani community is still in flux as stereotypical taboos and norms developed over the years continue to prevail. The topic lacks social awareness and acceptance which has resulted in mental, physical and emotional violence towards transgender persons.

A matter of great concern is the lack of laws governing this area. This gap in the law allows for easy manipulation and violation of the rights for transgender persons. For example, it is illegal for them to marry and thus any sexual activity they engage in, incriminates them.[7] This is because such marriages are often seen as same sex marriages. This interpretation is problematic because it leads to severe punishment under the existing laws.[8] Even if we ignore the lack of legislation, the constitutional protections are largely ignored in practice, and the fundamental rights of transgender people are violated. Most frequently, the transgender community has fallen victim to harassment and sexual violence by the police and other powerful men. A very brutal, yet, accurate reflection of the problems faced by the transgender community is the recent 'Sialkot incident'.[9] Here, a group of men from a local gang took hostage of

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[7] *International Gay and Lesbian Human Rights Commission,* Human Rights And Transgender People in Pakistan, Feb 2008 https://www.upr-info.org/sites/default/files/document/pakistan/session_2_-_may_2008/iglhrpakuprs22008internationalgayandlesbianhumanrightscommissionuprsubmission.pdf

[8] S. 377 of the Pakistan Penal Code reads:
Unnatural offences:
Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine.

[9] *Nine Arrested for Brutally Torturing Transgender Person in Sialkot,* Dunya News, 14th Nov 2016 http://dunyanews.tv/en/Pakistan/360877-Nine-arrested-for-brutally-torturing-transgender-p

several transgender persons and violated them throughout the night.

The victims were brutally tortured, gang-raped, made to drink the urine of their tormentor and burned with cigarettes.[10] The abuse was taped by the tormentors themselves and leaked onto social media to further embarrass the victims. It was claimed that this incident was for extortion of money. However, those reportedly present at the site of the incident claimed that such gangs simply torture transgender persons for amusement, and they are present in every city of Pakistan.[11] This is only one occasion which was brought to light because of the media attention associated with it. However, such incidents are a daily occurrence targeting the transgender community in Pakistan and thus require immediate attention.

Apart from harassment, the transgender community falls victim to lack of educational and work opportunities. Since the transgender community is not really accepted in Pakistan, they have limited opportunities in comparison to everyone else. Take the example of Riffie Khan, a transgender person who has a double master's degree.[12] Despite her plausible academic accomplishments, she was not able to hold down a job because of her sexual orientation. Riffie had a job at the National Medical Centre Karachi, as a front desk officer (way below her academic capacity) but she was forced to leave even this job as she did not "fit in."[13]

Riffie is just one example of the numerous transgender persons in Pakistan who suffer from discrimination in their professional and personal lives. "It's the educated

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[10] *Five Arrested in Sialkot After Horrific Video of Man Beating Transgender Goes Viral,* The Express Tribune (14th Feb 2016) http://tribune.com.pk/story/1230533/five-arrested-sialkot-horrific-video-man-beating-transgender-goes-viral/

[11] Ibid

[12] Akhtar, *Transgender Women in Pakistan,* News Pakistan, BBC News http://www.newspakistan.tv/transgender-in-pakistan-by-mahwish-akhtar-jinnah-university-for-women/

[13] Akhtar, *Transgender Women in Pakistan,* News Pakistan, BBC News http://www.newspakistan.tv/transgender-in-pakistan-by-mahwish-akhtar-jinnah-university-for-women/

people that upset me the most," she says.[14] "When they discriminate against people like me, it hurts even more."[15]

Due to this unjust and uncalled-for discrimination, the transgender community has to resort to their traditional calling of being an entertainer. They sing and dance, in tougher times they beg and even resort to prostitution with no other means of earning a living. They are rejected by their families as soon as their sexual orientation becomes evident. Even their mothers do not wish to associate themselves with transgender persons. The social stigma attached to having a transgender child triumphs over the family bond. The lack of attention and importance given to transgender persons is further evident through the fact that there is no official record stating the number of transgender person's in Pakistan. Unofficial sources estimate numbers between 80,000 to 350,000-500,000 and believe there to be around 60,000-70,000 transgender persons in Karachi alone.[16]

Earlier this year there were some *fatwas* (sermons of the Islamic scholars) addressing the right of transgender people to marry. These marriages were declared to be absolutely legal in the eye of the religion.[17] This was a major step forward for the community but the proper implementation of this legal right to marry requires legislative movement.

Another highly neglected area is the lack of clarity over how to address a transgender when arrested or in need of medical attention.[18] On 9th August 2016, Sumbal, a transgender woman from Abbotabad was shot three times as a result of her resistance against her abduction

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[14] Ibid

[15] Ibid

[16] Ali, *Transgender Tragedy in Pakistan*, Daily Times http://dailytimes.com.pk/opinion/22-Nov-16/the-transgender-tragedy-in-pakistan

[17] *Fatwa Allows Transgender Marriage,* Dawn News (27 June 2017), http://www.dawn.com/news/1267491

[18] Human Rights Watch, Pakistan: Attacks on Transgender Women Surge, https://www.hrw.org/news/2016/08/22/pakistan-attacks-transgender-women-surge (22nd August 2016)

and rape.[19] She was not admitted into the district hospital because there were only male or female wards. Sumbal lost her life due to the staff's inability to place her in a ward.[20] Later, the district police refused to register her case. Finally, an FIR was registered as a result of the transgender activist's protest outside the hospital.[21] Many transgender persons are violated as a result of being imprisoned in the wrong gender prisons, while others die fighting over which ward they should be placed in. On the matter of imprisonment, transgender persons are kept with men. One can imagine the kind of ridicule and harassment they face inside their cells. Gender friendly prisons are also part of the Centre for Restoration of Human Dignity's (CRHD) mandate. One cannot imagine putting a male and a female prisoner together then why do the same with a transgender person.

What is the law in Pakistan with respect to transgender people?

I. The Constitution

To better understand the situation of transgender persons in Pakistan it is essential to look at the Constitutional standing over this issue along with the rulings of Sharia Law. Islam is the state religion and 95-98% of the population of Pakistan is Muslim hence it plays an integral role in the development of such situations.[22]

The Constitution of Pakistan, 1973 does not address transgender people directly, but its fundamental rights guarantee security of each and every citizen of

[19] Ibid.

[20] Ibid.

[21] Human Rights Watch, Pakistan: Attacks on Transgender Women Surge, https://www.hrw.org/news/2016/08/22/pakistan-attacks-transgender-women-surge (22nd August 2016)

[22] World Population Data Sheet, Population Reference Bureau (2014) http://www.prb.org/pdf14/2014-world-population-data-sheet_eng.pdf

Pakistan.[23] The first part of the Constitution deals with issues of life, liberty and property, individual equality, prohibition of slavery, right to fair trial, to provide safeguard as to arrest and detention as well as providing safeguard against discrimination in services[24] and other basic fundamental rights which are provided to all the citizens. Thus the transgender community of Pakistan, by way of right should have the same fundamental rights as all other citizens. It is clear that the Constitution itself does not explicitly make mention of sexual orientation or gender identity but it does contain certain provisions which may impact the constitutional rights of transgender citizens. These provisions include:

- Part II, Article 37. The government pledges to promote Islamic values among its Muslim citizens, to protect marriage and the family and to oppose obscenity.
- Part II, Article 38. The government will guarantee all of citizen's education, job training, and Medicare services, including social insurance.
- Part IX, Article 227. Islam is the official state religion, and all laws, rules, regulations and other such legislation must be compatible with Islam, as defined by a government appointed Islamic council.

II. Pakistan Penal Code

Before moving on to the Pakistan Penal Code (PPC), it is important to elaborate on the term 'LGBT'. The term brings transgender persons on the same canvas as of lesbians, gays and bisexuals. It is quite evident when observing the historically legal standing and arguments,

[23] Constitution of Pakistan, Fundamental Rights and Principles of Policy, http://www.pakistani.org/pakistan/constitution/part2.ch1.html

[24] Ibid.; A, Gerges James Wynbrandt foreword by Fawaz A., *A Brief History of Pakistan.*

and political hesitations over this topic that, the transgender community has suffered greatly due to the assumption that all gays, lesbians, bisexuals and transgender persons belong to the same pool and are subject to same rights. At the expense of this assumption, under the PPC, since 1860 same-sex sexual acts are a crime punishable by 2-10 years of imprisonment. Moreover, after the Hudood Ordinance an LGBT Pakistani can face a secular or an Islamic punishment and sometimes both. However, it appears that a more common punishment is police harassment, fines or jail time. This takes effect due to Section 337 of the PPC which states:

> **Of Unnatural Offences**
> ***Section 377:*** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine.

This provision appears to encompass the entire LGBT community. Political parties, interest groups and other such organisations in Pakistan are required to respect Islam and public morality, which may preclude any endorsement of LGBT rights altogether. However, upon a more literal interpretation this provision excludes transgender persons and hence their rights do exist. This literal interpretation and the rights of the transgender persons came to light in 2009.

In the result of a constitutional petition (*Dr. Mohammad Aslam Khaki & another v. Senior Superintendent of Police (Operation) Rawalpindi & others on 12 December 2009* (ICJ, 2009)), filed on behalf of the transgender community of Pakistan before the Supreme Court, it was held that transgender citizens of Pakistan did have rights. In the process of this petition, specific problems were noted. The court recognised that the transgender community faces problems mostly in the area of inheritance, voting, registration of identity, employment and schooling. All of these five problems

were dealt with in the final judgment. The court declared that the right of inheritance should be enforced. The court directed the Social Welfare Department to ensure that any person including transgender persons must have their inheritance tracked down and given their share, if any. Additionally, the registration sheets which previously had only two columns, male and female, will now include a third column for the third-gender/transgender. The status of transgender persons was to be confirmed through an unspecified medical test. Furthermore, the Election Authority and the Social Welfare Department agreed to combine their efforts to make sure that all the registered transgender persons are entered into the voter's lists, for the first time, ensuring voting rights for them. Besides this, the court noted the inexistence of any provision specifically admitting transgender children into schools. Education is a fundamental right for every citizen, as established by the Constitution under Article 22, read with Article 25. Lastly, the Supreme Court highlighted an extremely alarming issue: harassment. To address this heinous act, the law enforcement institutions were to create mechanisms to prevent these problems from occurring.

Even after the 2009 Supreme Court ruling there has been no further development or legislation to ensure the protection against discrimination and harassment of transgender persons. The official protection was provided in 2011 to the 'third gender' by the Supreme Court of Pakistan.[25] The 2011 judgement called all provincial governments to recognize the 'third gender' and the rights of transgender people.[26] The judgement focused on directing different officials to work together and create a safer environment for transgender people.

[25] LGBT Rights in Pakistan, https://en.wikipedia.org/wiki/LGBT_rights_in_Pakistan

[26] Knight, *When Being Counted Can Lead to Being Protected: Pakistan's Transgender and Intersex Activists,* Human Rights Watch (6th November 2016) https://www.hrw.org/news/2016/11/06/when-being-counted-can-lead-being-protected-pakistans-transgender-and-intersex

For example, the police were called to improve their response to cases involving transgender persons.[27]

The rights of transgender people under the Sharia

Given the nature of the Pakistani legal system, it is integral to discuss what Sharia says about the transgender rights. The Constitution of Pakistan is a man-made law which has been developed and further intends to develop compatibility with the Sharia law.

Islam does not only recognise the existence of transgender persons but also defines the rights and laws of life in regards to them. However, it is essential to highlight the fact that Islam also only recognises a narrow interpretation of the word 'Transgender'. This means that only those who are born with the organs from both the genders are considered to be transgender in the context of Islamic teachings. Islam also recognizes two types of transgender persons: Male dominant transgender and a female dominant transgender.[28] Under Sharia Law there is a prescribed procedure to determine whether a transgender person has dominant male or female features and organs.[29] Once established, the transgender person is to be treated in accordance to their gender-category. Given their gender determination, the transgender can marry another person (transgender or not) from the opposite sex, just as easily and rightfully as any other person.[30] Due to this clear method of distinction between the type of transgender persons and the given clarification of who actually falls within the ambit of a transgender, they are not considered as a third

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[27] Ibid

[28] *What does Islam Say?,* Quora https://www.quora.com/What-does-Islam-say-about-transsexuality-their-rights-social-status-etc-How-does-it-feel-to-be-a-Muslim-transsexual-what-issues-do-they-face

[29] Marrying a transgender in Islam, http://www.islamweb.net/emainpage/index.php?page=showfatwa&Option=FatwaId&Id=82158

[30] Is it permitted to marry a transgender in Islam, Quora, https://www.quora.com/Is-it-permitted-to-marry-a-transgender-person-in-Islam

gender. They are addressed as just any other male or female being and are subject to all the rights established and emphasized upon. They are to be given the same level or respect, dignity and opportunities as any other living being.

In conclusion, Islamic law not only recognizes the existence of transgender persons but also treats them fairly. This simple fact holds the most significance because this means that they are subject to all those detailed basic human rights provided by Islam. They are to be treated as just another human being, not inferior nor special. They should be raised by their families, provided with education, protection, treated with respect, dignity and provided with all the same opportunities.

There are varying perceptions on the Sharia aspect, and its teachings regarding transgender persons. However this paper will limit itself to the teachings discussed above.

Progress

Many non-governmental organisations, governmental organizations and individuals have worked and are still working towards helping the transgender community gain their social status within Pakistan. Constitutionally, a transgender person can get a computerised national identity card which makes them eligible for voting and many other legal documents. The Supreme Court announced a 2% quota in all governmental and non-governmental departments.[31] Many fatwas, which hold great value in Pakistan, have declared that transgender persons may marry just like all other individuals. The fact that there is a declaration allowing the transgender community to marry freely is evidence of how important the issue of rights for a transgender person is. The government has reportedly introduced new programs to provide economic opportunities and jobs to transgender

[31] Saeed, *Transgender Pakistanis - Making Ends Meet,* Express Tribune (30th August 2015) http://tribune.com.pk/story/945233/transgender-pakistanis-making-ends-meet/

people. They have not only planned but practically implemented programs like the Transgender Tax Collector program in 2012.[32] A group of transgender people would go to the houses of the elite in Pakistan, and ask them to pay their taxes. This scheme could be seen as both a good or bad thing; it was very successful for tax collection purposes. At the same time, the transgender community had proper paid jobs and recognition in society. It was definitely a step forward for them as they attracted media attention for their work rather than some violation of their rights. However, there was a negative to this, as the scheme also ended up using the transgender community as a means of ridicule to send to the elite, who would embarrass and demean them as well. So this scheme was an attempt to make a positive change for the transgender community but it definitely had some flaws.

Beyond this, many organisations like Gender Interactive Alliance Pakistan, She-male Association, Transgender Association, AAWAZ,[33] Itehad Barae Haqooq-e-Kahwaja Sira Pakistan,[34] Khawaja Siran Society (KSS) are actively working for the rights of transgender people. Media and news channels have been raising the issue of discrimination and brutality against the transgender community but only when something extreme happens. There is a lot more that can be achieved by media coverage, and this is the most effective way to change the mindset of the masses. Currently, a drama named 'Khud Mera Bhi Hai' is on air on a well-known entertainment channel, addressing the social stigma attached to a transgender child. The concepts suggests that a transgender is a creation of the same God who created other beings and it is unfair to treat them any

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[32] *Pakistan's Transgender Tribe of Tax Collectors,* CNN (15th April 2011)
http://edition.cnn.com/2011/WORLD/asiapcf/04/14/pakistan.tax.collectors/

[33] Khan, *Transgendered Identity*,
http://aawaz.org.pk/cms/lib/downloadfiles/1431927760Transgendered%20Identity.pdf

[34] Ibid.

different. It is written by Asma Nabeel and directed by Shahid Shafaat.[35]

Previously, such bold topics have been used by the drama industry and have proven to be an extremely helpful medium to get the message across. Beside this, a transgender activist and a social worker 'Kami Sid' have opted and given the opportunity to step into the fashion world by posing in a photo shoot conceptualized by Waqar J Khan[36] with the intent to reach out to a greater spectrum of people and to portray the normality of a transgender.

Recommendations

There is a lot more that needs to be done and that can be done to help the transgender community fit in and get the respect and dignity that they deserve. Firstly, the transgender community must be seen as separate persons falling within the term 'LGBT'. Once transgender people are considered separate from gays and lesbian, they will attain progress at a better pace in Pakistan. This will be in compliance with Sharia and thus will attract support from the masses in Pakistan.

Next, there is a clear need to increase awareness to end the social stigma attached with the transgender community. This can most effectively be done through fatwas addressing them, more awareness seminars, and awareness campaigns in schools and on news channels. The government can get involved with schools and ensure that transgender people are enrolled without any discrimination. Raising awareness for the rights and treatment of the transgender people will help ensure that the existing perception of transgender people being less than others does not seep into the new generation. Apart from awareness there needs to be a move towards legislation for transgender people in Pakistan. Focused

[35] *Khuda Mera Bhi Hai*, ARY Digital, http://www.arydigital.tv/khuda-mera-bhi-hai-exclusive-ary-digital-drama/

[36] Qaq, *Kami For Her Modelling Debut*, IMAGES (28th November 2016) http://images.dawn.com/news/1176661/

laws regarding the transgender community will help strengthen the position of these people in society as well.

There is also a need for clarity over the 2009 judgment over areas such as the medical test required to establish a transgender. Another issue in that area is the need to register by the name of their biological fathers. This was a major setback as many families don't want to affiliate with their transgender child. The transgender community themselves want to register in reference to their *guru* -- the transgender who raised them and took them in when their family rejected them. They should be allowed the right to do so.

The police should be kept under a close supervision in regards to harassment of Transgender persons and at the very least, the capital city of every province should have a jail or holding cell for transgender persons at least to the point where awareness brings them shoulder to shoulder with other individuals. Media should be encouraged and provided incentives to take on such social and human right matters seriously. Committees and think-tanks should be set up, to address the matter in a more efficient manner.

Conclusion

It is tragic to see how big of an issue being a transgender person has become. Society at large needs to understand that just like a man has no say in being born a man and a girl has no say in being born a girl, a transgender person has no say in being born transgender. A human is a human, and every human should be treated like one. All the issues and challenges faced by the transgender community are created by society, and a socially aware and responsible society will need no time to eliminate all the illogical taboos and norms. The sooner the Pakistani community accepts the transgender people as who they are, the better it will be for the society.

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PROSTITUTION IN PAKISTAN: AS A HUMAN RIGHTS VIOLATION NOT A CRIMINAL OFFENSE

By Orubah Sattar Ahmed[1]

Abstract

This paper aims to look specifically at the female sex workers in the Red Light Area in Lahore. Firstly, the paper lays down a general background and provides a historical perspective of the laws and legal issues that exist due to Pakistan's position on prostitution. After examining the national laws and establishing that sex workers have no legal redress we can move on to assess the position of international law on the issue. The international community seems rather torn over whether prostitution should be seen as a human right or a human rights violation. This will be examined by delving into feminist theory regarding bodily autonomy and choice. Both the international and national legal status of the issue will be discussed to show that sex workers in Pakistan do not have any legal avenue to address their grievances. Primary research consisting of 238 surveys and interviews with a criminal lawyer in Lahore and a humanities professor will reinforce the findings. A possible legal solution will then be discussed on how the situation for female sex workers in Lahore can be improved. This paper argues that prostitution is legally and socially seen in Pakistan as a criminal offense and this is problematic; rather it should be seen as a human right violation. Due to the limited scope of this paper, only female sex workers would be discussed.

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I. Through the Years; A Brief Historical Context of the Red Light Area

Initially prostitution in South Asia, especially during the Mughal era, involved female courtesans who were also romanticized as artists in Urdu literary works.[2] The system underwent significant change after the subcontinent was colonized by the British. The practice became firmly regulated including new health regulations which called for checking for diseases and so, diminished much of the allure surrounding the courtesans.[3] It was after the colonial era ended that the art form of dancing started separating from just sexual intercourse. According to Fouzia Saeed, the pressures of Hindu Nationalist Movement had segregated these two activities before the partition by associating sex as demeaning, which later seeped in the psyche to an extent that human rights groups initially ignored the plight of female sex workers.[4] Later during Ayub Khan's reign, the official policy of the state included trying to eradicate prostitution by seeing sex workers as the problem and not the client. Much of the legislation introduced helped legally incapacitate this increasingly marginalized group and is still intact today. The fact that Bengali women were increasingly being trafficked in Pakistan for prostitution meant that less protection was afforded to sex workers in general. Now, only sex is sold in Heera Mandi and dancing as an art form has lost its appeal and is near extinction in this part of Lahore; sex workers became increasingly replaceable.[5]

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[2] Jehan Shibli, 'Women at Work: A Study of Pakistani Domestic Workers and Prostitutes in the UAE, 1971-2009' (Master of Arts thesis, McGill University 2010) <http://digitool.library.mcgill.ca/webclient/StreamGate?folder_id=0&dvs=1457678083532~772> accessed 11 March 2016

[3] Philippa Levine, *Prostitution, Race and Politics: Policing Venereal Disease in the British Empire* (New York: Routledge 2003) 56.

[4] Fouzia Saeed, 'Good Women, Bad Women: Prostitution in Pakistan' in Geetanjali Gangoli and Nicole Westmarland (ed), *International Approaches to Prostitution: Law and Policy in Europe and Asia (*Policy Press University of Bristol 2006) 141,164.

[5] (n 1)

II. Critique of Current Legal Position

Only after one has an understanding of Heera Mandi and its background can we move on to the subsequent effects of the lack of legislation on this issue, in Pakistan. After analysing the existing legislation on this issue the relevant international laws applicable to the situation will be discussed.

a. Pakistan

i. Legislation

The Constitution of Pakistan states in Article 37 (g) that the State shall 'prevent prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements.' It is clear that a constitutional provision justifies any action taken by the State that aims to "prevent" prostitution, thus not specifying what means may be taken.

Furthermore, the Pakistan Penal Code 1860 criminalizes the two specific actions under section 371 (a) and (b), namely the selling and buying of a person for the purposes of prostitution; making both actions punishable for a maximum of twenty five years imprisonment and a fine. Yet another provision, inserted during Zia Ul Haq's regime, makes sexual intercourse between unmarried individuals a criminal offense.[6] All these laws should be seen in conjunction with The Punjab Suppression of Prostitution Ordinance, which is directly applicable to Heera Mandi since it is applicable to Lahore and makes soliciting a crime.[7] Taken together, this proves that

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[6] 496 B. Fornication:

(1) A man and a woman not married to each other are said to commit fornication if they wilfully have sexual intercourse with one another. (2)Whoever commits fornication shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees.

[7] The Punjab Suppression of Prostitution Ordinance, 1961 Section 4. Punishment for soliciting.— Whoever in any street or public place or place of public resort or within sight of and in such manner

Pakistan's position is such that it makes prostitution a crime for clients (through charges of fornication), sex workers (through soliciting and fornication) as well as pimps and traffickers. This also means that there is a risk of sex workers not approaching courts for even minor legal issues out of fear of having a counter suit filed against them since the way they earn their living is a criminal offense.

According to Hammad Saeed, a practicing criminal lawyer, this does not end here for in his practice, he has seen a case where a prostitute who made a charge of kidnapping against a man saw the accused acquitted. This was in part due to "certain presumptions" made about her character, which diminished the value of her testimony.[8] This account should also be seen in light of section 151 of Evidence Act 1984 which states that "[t]he credit of a witness may be impeached…[in a case] when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character." While it is generally presumptuous and sexist in nature to stereotype rape victims, it is even more deadly for sex workers in Pakistan who are vulnerable to attacks due to the nature of their work. Case law can be used at this point to show another reality that arises with such laws.

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as to be seen or heard from any street or public place, whether from within any house or building or not,—

(*a*) by words, gestures, wilful and indecent exposure of her person or otherwise attracts or endeavours to attract attention for the purpose of prostitution, or

(*b*) solicits or molests any person or loiters for the purpose of prostitution, shall for a first offence be punished with imprisonment which may extend to six months, or with fine which may extend to two hundred rupees, or with both, and for a subsequent offence with imprisonment which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

[8] Hammad Saeed, 9 March 2016, Criminal Lawyer High Court and owner of law firm 414 Law Chambers

ii. Case Law

One of the cases that demonstrates the phenomenon of diminished testimony is *Muhammad Nawaz v The State*[9], where a married woman of three children alleged that she was raped. While the circumstances of the case were discussed, one of the arguments made by the defense that the court took into account was that, many witnesses had come forward stating that the woman had a "loose character".[10] The defendant was acquitted due to lack of evidence and the diminished testimony of the petitioner because of the way her character was brought into question. This becomes more problematic because sex workers would be hesitant to approach courts due to the fear of being charged with fornication in a counter suit. Apart from this, no allegations of abuse or rape can be brought forward due to the assumptions associated with them.

Especially problematic is the seemingly radical interpretation of existing law over the last decade. Consider this with the judgments that were coming out of Lahore courts in the 1970's that held a "[p]olice-officer could not investigate such offenses without obtaining prior permission of Magistrate".[11] This meant that police officers had to follow a procedure and actually obtain a warrant before raiding a brothel and arresting sex workers. In a 2001 judgement it was stated that they could not start such proceedings merely on "spy information" or after receiving tips from informants.[12] Yet, within the 2000's judgments such as *Mst. Shaila v The State* [13] emerged, the court held that there was some justification for the police acting without a warrant. Just because the raid was successful in arresting sex workers engaged in *zina*, the judge disregarded the importance of due procedure because the

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[9] 1985 PCr.LJ FSC 761

[10] Ibid

[11] *Shamim Ara v Nawab Khan* 1976 PCr.LJ Lahore 1407; see also *Malik Zakauddin v The State* 1971 PCr.LJ Lahore 152, *Azim Khan v The State* 1970 PCr.LJ Lahore 77.

[12] *Nasreen versus Station House Officer* 2001 PCr.LJ Lahore 685

[13] 2002 YLR Lahore 178

case was helping prevent a "moral wrong" in society. These case laws indicate that the little rights that are granted by the law are not above being scrutinized for loopholes to punish sex workers.

Thus, it makes sense that in a survey carried out over a sample size of 238 people; 60.3% thought that sex workers in Pakistan cannot approach courts for a remedy against any wrong done to them.[14] What is left to be seen is whether international law takes a definitive stand on this issue.

b. International Law

Articles 1 and 2 of the Universal Declaration of Human Rights (UDHR) are often construed by pro-prostitution advocates and abolitionist advocates to further their own position.[15] For the idea that rights and freedoms are universal in nature can mean that everybody has the right to bodily autonomy and are free to choose whatever profession they want. At the same time, the word "dignity" in Article 1 of the UDHR is heavily used by abolitionist advocates for it is this very concept that according to them is being violated through prostitution.

This is further fortified by the preamble of The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949 which states that 'prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare

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[14] Survey conducted, 9-11 March 2016, all results attached to appendix.

[15] Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2 Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

of the individual'. Prostitution here is specifically linked to the idea of being incompatible with the dignity of a person.

The language of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) is also of interest as it states that "State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."[16] A careful perusal shows that the international community is clear on the evils of trafficking women for prostitution and suppressing that. However, a firm position on whether prostitution is universally legal or not has not been taken. This can be seen from how only the exploitation of prostitution is something that the States intend to suppress and not prostitution itself. Especially important here is that even if this were to be construed otherwise, sex workers in Pakistan would not be able to file an individual complaint before CEDAW based on any wrong that has been done to them. This is because Pakistan has not consented to such a procedure when it ratified CEDAW (or any other Treaty) as stated by the United Nations Human Rights' Office of the High Commissioner's website.[17] As far as sex workers in Pakistan are concerned they neither have adequate recourse to courts in Pakistan nor can they approach international courts for any redress.[18]

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[16] The Convention on the Elimination of all Forms of Discrimination Against Women 1979, Article 6

[17] United Nations Treaty Ratification Status for Pakistan <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=131&Lang=EN> accessed 11 March 2016

[18] UN Aids presented a report that called for decriminalizing prostitution that was met with uproar by the world community that was roughly split in their opinion; see also Joanna Walters, 'Campaigners protest against United Nations Stance on prostitution' (*The Guardian,*21 September 2013) <http://www.theguardian.com/society/2013/sep/21/united-nations-prostitution-sex-trafficking> accessed 11 March 2016

c. Ongoing Human Rights Debates

The debate which is only briefly stated above is not novel for many radical feminist groups who posit that by decriminalizing prostitution, legal protection would be given to sex workers instead of marginalizing them based on ethical or moral arguments regarding their profession.

According to Farrukh Khan, this position is taken by Amnesty International as well and stems from the idea of bodily autonomy that propounds the equal right of everyone to make their own choices in life.[19] When asked if he thought that prostitution is a profession that is taken up willingly in developing countries like Pakistan, he referred to the local media narrative that posits accounts of students in Lahore engaging in prostitution and pornography. This makes it seem like there is consent involved, for they wish to earn money. What is problematic however, he states, is that even this narrative is driven by poverty and high college fees and should not eclipse the very real plight of women such as those in Heera Mandi who do not get into the profession willingly. This criticism is roughly along the same lines that the International Committee for Prostitutes' Rights received when they published the World Charter for Prostitutes' Rights in 1985 which set out to '[d]decriminalize all aspects of adult prostitution resulting from individual decision'.[20]

However, this position seems inherently flawed since the notion of individual decision here is seen without taking into consideration the socio-political factors that perpetuate individuals to become sex workers. So while there is a definitive line separating women who are trafficked into Heera Mandi (which is also internationally condemned), those that are born into families can be misconstrued to have "chosen" that life just because a time period has lapsed and they have not

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[19] Farrukh Khan, 9 March 2016, Literature Professor Lahore University of Management Sciences

[20] World Charter for Prostitutes' Rights ,1985 <http://www.walnet.org/csis/groups/icpr_charter.html> accessed 11 March 2016

gotten out of it. Catherine Mackinnon therefore, rightly argues that the way consent is seen in prostitution is problematic because looking at it as a mere monetary exchange is shallow evidence of a woman consenting to engage in sex. She therefore does not classify it as a profession that should be legalized, but rather, sees it as rape.[21]

In fact the idea that prostitution is consensual is used to argue that it is something that a prostitute can get out of since her consent is involved. The truth is more often than not completely opposite, especially for women living in Heera Mandi for:

> [o]nce entered, prostitution results in "a state of servitude" which may be maintained through overt coercion and physical abuse but is more frequently the result of emotional blackmail, economic deprivation, marginalization, and loss of identity. The general lack of programs for the reintegration of prostitutes into society and the general social taboos still existing mean that only the most determined and courageous manage to rebuild their lives.[22]

This discourse has also been called out by India as being inherently flawed because it is "homogenizing prostitutes and not seeing them in their multiple roles" as women who also have to provide for their families by having a narrow construction of consent.[23]

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[21] Catherine Mackinnon, 'Trafficking, Prostitution, and Inequality' (2011) 46 Harvard Civil Rights-Civil Liberties Law Review 273, 309

[22] Laura Reanda, 'Prostitution as a Human Rights Question: Problems and prospects of United Nations Action'(1991) 13 (2) Human Rights Quarterly < http://www.jstor.org/stable/762660> accessed 11 March 2016

[23] Geetangali Gangoli, 'Silence, hurt and choice: Attitudes to prostitution in India and the West' (6) Asia Research centre Working Paper < http://www.lse.ac.uk/asiaResearchCentre/_files/ARCWP06-Gangoli.pdf> accessed 11 March 2016

Survey results indicate a similar opinion shared. One of the questions asked was whether the respondents thought that in Pakistan or other developing countries, sex workers enter into the profession by free will; to which an overwhelming 70% answered no. The research had its weakness as it was conducted with 53.6% of the respondents between the ages of 18-21. However, the respondents were roughly equally spread between both genders and included people from major cities in Pakistan. The only question that remains after the legal and social analysis is: what possible solution can be availed?

Possible Solution and Conclusion

Sweden is the first country where a particularly radical approach to dealing with prostitution was coined by feminist policymakers. They argued that the way consent should be viewed in society with respect to prostitution is in grave need of re-evaluation. [24] Hence, in 1990 Sweden criminalized prostitution so that only clients and pimps could be targeted for indulging in cases of paid sexual intercourse and not sex workers. What is even more interesting is that this approach was later taken up by Ireland and Norway.[25] The idea behind this new kind of legislation is clear if one ascribes to theories such as those propounded by Catherine Mackinnon. In the Pakistani context while their success rate cannot be completely guaranteed, ideologically the theories do make sense. For in a developing country like Pakistan where most women indulge in prostitution purely due to the monetary consideration involved, the driving factor is to use money to get out of situations created by wealth disparity, marginalization of groups and inequality. Hence, the concept of consent seems skewered in this kind of sexual intercourse. So, by criminalizing (and practically implementing) it purely for clients and those involved in trafficking or selling of women in Heera Mandi, the market for prostitution can

[24] Gunilla Ekberg, 'The Swedish Law That Prohibits the Purchase of Sexual Services' (2004) 10(10) Violence Against Women 1187,1218

[25] May-Len Skilbrei and Charlotta Holmstrom, 'Is there a Nordic Prostitution Regime?' (2011) 40 (1) Crime and Justice 479,517

be effectively diminished. Furthermore, criminalizing an act that many women are forced into and that brings them closer to being behind bars and stigmatized, instead the establishment of rehabilitation centres would be a better alternative.

It would therefore prove more fruitful to change the perspective in which prostitution is viewed in Pakistan. Nothing can be achieved by legally marginalizing an already exploited group, by making prostitution a criminal offense. Instead prostitution should be viewed as a human rights violation. The alternative posed by Sweden therefore seems to be a fair enough experiment to try for legalizing prostitution completely. It would not be possible because of the religiously charged atmosphere in Pakistan. This is further supported by the survey results that showed 70.9% did not agree that prostitution should be legalized in Pakistan and 66.2% of the respondents answered that they considered prostitution as a human rights violation.

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Survey conducted, 9-11 March 2016, all results attached to appendix.

The Convention on the Elimination of all Forms of Discrimination Against Women 1979

The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others 1949

The Punjab Suppression of Prostitution Ordinance, 1961

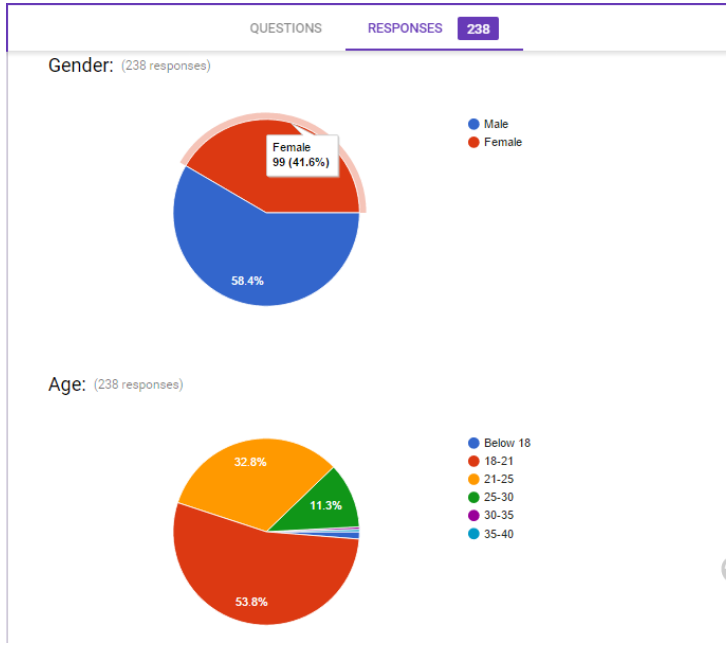
Universal Declaration of Human Rights 1948

World Charter for Prostitutes' Rights 1985 Walters J,'Campaigners protest against United Nations Stance on prostitution' (*The Guardian,*21 September 2013) <http://www.theguardian.com/society/2013/sep/21/united-nations-prostitution-sex-trafficking> accessed 11 March 2016

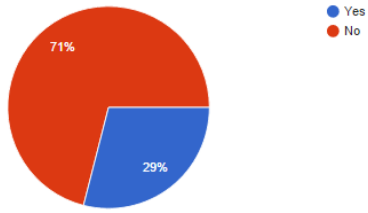
Appendix A

1. **Survey Results**
   Total 5 Questions asked from 238 respondents
   a. To view individual 238 responses please go to: https://docs.google.com/spreadsheets/d/1n28pKOtsF-8RrF5e7C0Mtd4vk6ddHEsiWkod1aGcyIk/edit?usp=sharing

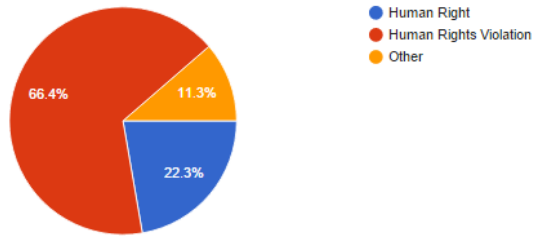
   b. Consolidated data is given below:



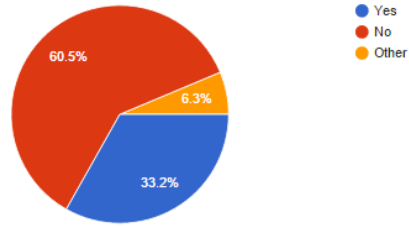
Do you think prostitution should be legalized? (238 responses)



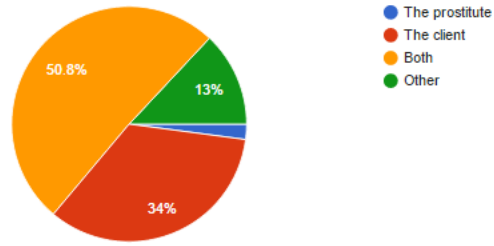
Do you think that prostitution is a human right or a human rights violation?
(238 responses)



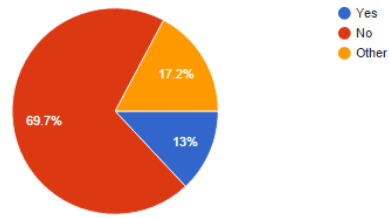
Do you think prostitutes in Pakistan can approach courts for a remedy against any wrong done to them?
(238 responses)



Who should be held liable in a court if a charge of fornication is brought forward:
(238 responses)



Do you think that prostitutes in Pakistan or developing countries enter the profession of their own free will?
(238 responses)



APPENDIX B

Key Informant Interviews

1. Farrukh Khan, 9 March 2016, Literature Professor Lahore University of Management Sciences, Humanities Department

   Interview conducted in person.

2. Hammad Saeed, 9 March 2016, Criminal Lawyer High Court and owner of law firm 414 Law Chambers, Office No. 414, 4th Floor Sadiq Plaza,69- The Mall Road, Lahore, Pakistan.
   a. Tel: 042-36280453
   b. Mobile: 0322-4229176
   c. Email: hammad.saeed@414law.com

   Interview conducted over phone

CUSTODIAL TORTURE IN PAKISTAN DURING TICKING TIME BOMBS: AN INCONVENIENT REALITY

By Omer Imran Malik[1]

A Case for Realistic Jurisprudence

The truth is, as Americans we love torture. We keep it to ourselves of course. But come on, when it comes to evildoers? Torture's okay. Hollywood certainly knows that. Dirty Harry. Boom. Charles Bronson in Death Wish. Denzel Washington in Man on Fire. Heroes torturing the bad guys. In theatres all across the country we cheered. We like torture! Is there potential for abuse? Without question. The events at Abu Ghraib prison were deplorable. But do we really think they happened in a vacuum?[2]

Torture or enhanced interrogation of suspected criminals in police custody is a human rights abuse, which plagues citizens of all countries across the world. The right to be free and protected from torture is a human right which is promised to all. However, this malaise is seen no more apparent across the world than it is seen in Pakistan. Some argue that given specific circumstances, if the State resorts to torture, it is justified. These arguments have been proven to be popular and also legally valid to some extent, removing the absoluteness of the prohibition against torture.

This paper seeks to answer whether the right of all citizens to be free from custodial torture in Pakistan is a farce. It aims to do that by investigating the reality of the right as a substantive value proposition of our society. This paper will not be advocating or dealing with the morality, effectiveness and methods of custodial torture. It only aims to explore the reality of this right as an accepted, substantive right proposition in Pakistan. This

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[1]The writer is currently pursuing his BA-LLB (Hons) from Lahore University of Management Sciences and is expected to graduate in July 2017.

[2] David E. Kelley Productions, 'Boston Legal: Tortured Souls (Season 1, Episode 15)' (2005).

paper also provides recommendations to help draft more effective legislation to protect the rights of the accused by advising regulating, if not stopping, enhanced interrogation techniques.

The reality on the prohibition against torture

In The Relative Universality of Human Rights[3], Professor Jack Donnelly argues against the notion that Human Rights are a purely Western construct. He argues that these rights are conceptually universal and while interpretations may vary, substantively, these values are accepted by the people of the international world. He further argues that these interpretations, however different, have to be accepted. This ensures that there is an overlapping consensus on the idea of human rights.

Using this argument, along with showing how many of the substantive values of Human Rights can be found to be common across various cultures, Donnelly argues that regardless of different interpretations and enforcement mechanisms: the world as a whole subscribes to these values not due to coercion but voluntary acceptance.

Pakistan is a signatory of many International legal regimes which outlaw custodial torture absolutely: The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the International Convention on Civil and Political Rights (ICCPR). Article 7 of the ICCPR provides that no person can be subjected to torture but provides no definition, this is rectified by the UNCAT, which defines torture as:

'Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or

[3] Jack Donnelly, 'The Relative Universality Of Human Rights' (2007) 29 Human Rights Quarterly.

coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'[4]

In regards to the legality of custodial torture, the ICCPR makes it incumbent on the State to ensure it investigates and prosecutes incidents of torture. Also there is the landmark judgment of *Gafgen v. Germany*[5] by the European Court of Human Rights (ECHR), in which police officers in Germany threatened to torture a child kidnapper for information and the court had to decide the legality of the evidence obtained through such coercion, is a leading authority.

The kidnapper confessed to kidnapping and murdering a child under the threat of torture by German authorities, his confession helped find the child's body and collect other evidence. The German domestic courts held that the confession that had been obtained under the threat of torture was inadmissible as it was obtained through duress. However the German courts believed that other evidence collected by the authorities (and a subsequent confession of guilt by the accused, obtained without any duress) through that confession, which was elicited by the threat of torture, were admissible.

The ECHR upheld the German domestic court's judgment, citing that the evidence obtained through the threat of torture can be admissible and it had no bearing on the judgement, the accused's right to a fair trial was not violated. This case overturned the earlier, absolute prohibition to custodial torture, as was seen in *Jalloh v. Germany*[6], in which inhumane treatment by law enforcement authorities was used to collect evidence from the accused. The ECHR in *Julloh* held that evidence obtained through such methods would not be admissible. Thus *Gafgen* has also drawn a distinction between evidence obtained through inhumane treatment and torture (or the threat of torture).

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[4] *Torture In International Law* (APT 2008).

[5] *Gafgen v Germany* [2010] ECHR, 759 (ECHR).

[6] *Jalloh v Germany* [2006] ECHR, 721 (ECHR).

On the domestic front, Article 14 of the Constitution of Pakistan, 1973 restricts the use of torture, 'No person shall be subjected to torture for the purpose of extracting evidence.' This is a protection granted to Pakistani citizen as a fundamental right. However, these fundamental rights can be held in abeyance in states of emergency as per Article 8 of the Constitution of Pakistan, 1973.[7]

Where there is no legislation that deals with torture specifically, there is legislation that treats it as an ancillary matter. The Police Order 2002 has penalized custodial torture, with the offending officer getting up to five years in jail and a fine. The Order however fails to define torture and is left very vague and unenforceable.[8] Even within criminal law, sections of the Pakistan Penal Code which deal with offences related to hurt (physical harm) have to be relied upon as torture is not recognized as a separate criminal offense.

Looking at case law in Pakistan, due to the lack of legislation on custodial torture in Pakistan, the only recourse an ordinary citizen has is Article 14(2) of the Constitution, thus even though there is no reported case in which police or law enforcement authorities have been penalized for torturing an alleged offender, the Supreme Court and the High Courts have generally however, over many years, held any evidence or confession gained by the law enforcement authorities through torture or ill-treatment to be inadmissible.[9, 10]

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[7] Articles 8 of The Constitution of Pakistan 1973

[8] 'A Brief Report On Gap Analysis Of Existing Pakistani Criminal Laws In Compliance With United Nations Convention Against Torture', *Consultation on Gap Analysis of Existing Pakistani Criminal Laws in compliance with United Nations Convention against Torture* (WISE 2013) <http://www.wise.pk/webfiles/1/0/3/Report%20on%20Consultation%20on%20Gap%20Analysis%20of%20Existing%20Laws%20in%20compliance%20with%20UN-CAT.doc> accessed 7 March 2016.

[9] *Asfandyar Wali Khan v. State of Pakistan* [1978] PLD Peshawar 38 (Peshawar High Court).

[10] *Dr Yasin Zia v Government of Punjab* [2016] PLD Lahore 94 (Lahore High Court).

Still it is really no secret that custodial torture in Pakistan is a hard reality. It is systemic and widespread. One independent study estimates that 92% of detained men and 9% of women are physically tortured by the police while in custody.[11] Over all, in the lower judiciary there is greater deference given to police and district judges are not even bothered to check if the accused has been tortured or not and if the confessional statement was obtained through that duress or by free will.[12]

The need to find the root of the problem

Given the widespread nature of this problem, one wonders why such apathy exists in the electorate. Yes, the issue is debated by civil society activists and within the media as well and while there is no shortage of resources when researching this problem, there is also a lack of political will, not only among the politicians but according to this author even amongst the people as well.

Many cite the failure of the Legislature to pass effective anti-torture laws, thanna culture (corrupt and untrained police), the lack of police oversight, colonial structures in policing and the lack of training and competence of lower judiciary as being the root causes of the problem of Custodial torture in Pakistan.[13]

This paper however, while not denying those reasons and factors, wishes to investigate a much more worrying claim. This author wishes to investigate the idea that the right of all (citizens, illegals, criminals and terrorists alike) to be free from torture, no matter under what extenuating circumstances, is a substantive proposition that most people of Pakistan do not adhere to.

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[11] Rabia Chaudhry, 'Policing, Custodial Torture and Human Rights: Designing A Policy Framework For Pakistan' (Centre for Public Policy and Governance 2013) <http://cppg.fccollege.edu.pk/wp-content/uploads/2013/01/PB.pdf> accessed 5 March 2016.

[12] Ibid 67

[13] Justice Project Pakistan, 'A Report on Systematic Brutality and Torture by the Police in Faisalabad, Pakistan' (Allard K Lowenstein International Human Rights Clinic Yale Law School 2014) <http://jpp.org.pk/torture/wp-content/uploads/2014/07/JPP-Launch-Report_052314.pdf> accessed 4 March 2016.

Where the Constitution of Pakistan does outlaw the use of torture, it does so in a very limiting fashion. It does not allow any person to be tortured for the purposes of extracting evidence. Why is that so?

Furthermore, the Legislature in Pakistan has never legislated laws to out rightly ban custodial torture or criminalize the act in such a manner so as to make it an effective deterrent for police authorities. In fact, given the current social-political climate of the country, with Pakistan being enveloped in a lengthy and bloody insurgency for the past 13 or so years[14], the Legislature has actually passed laws such as the Pakistan Protection Ordinance, which gives police authorities even less oversight, more powers and greater discretions.

Even though the Pakistan Supreme Court has held evidence against torture to be inadmissible, a more thorough and fine analysis reveals that apart from the few reported cases by the Upper Judiciary in which the court rejects any evidence obtained through inhumane treatment and torture of the accused, there are thousands upon thousands of cases in the lower district level court, where not only are evidence and confessions obtained by the police or law enforcement authorities through torture admissible, but according to many commentators, this is relied upon as primary evidence;

'Custodial torture in Pakistan is treated as an inevitable and vital part of crime investigation. Investigators adhere to the notion that if enough pressure is applied, the accused will confess. Nepotism, corruption, torture, misuse of power, and illegal detention form the crux of what is the criminal justice system in Pakistan. Torture is often used to extract self-implicating confessional statements from suspects who are often innocent. In the absence of modern forensic tools, the Judiciary and the prosecution rely upon confessional statements. These

[14] International Crisis Group, 'Revisiting Counter-Terrorism Strategies In Pakistan: Opportunities And Pitfalls' (International Crisis Group 2016) <http://www.crisisgroup.org/~/media/Files/asia/south-asia/pakistan/271-revisiting-counter-terrorism-strategies-in-pakistan-opportunities-and-pitfalls.pdf> accessed 4 March 2016.

statements are never crosschecked against available circumstantial evidence, resulting in making torture the only tool available to the police. The criminal justice system in the country is therefore not adequate to seek justice; for many it is a labyrinth from where there is no escape.'[15]

This paper does not suggest that people of Pakistan do not believe that custodial torture is an abhorrent practice and do not believe that a person should be protected from it, this paper only seeks to investigate if that the people of Pakistan believe in absolute protection from custodial torture as is envisioned by UNCAT and ICCPR or do they imagine a more nuanced (and thus more limited) protection? To investigate this idea, the paper will make use of the philosophical tool of a ticking time bomb situation[16] to frame the subsequent arguments.

However, before that, it remains to be established if by proving that the people of Pakistan would not support a terrorist's or a child kidnapper's right to protection from torture in the hands of the authorities (who are torturing them in custody for the sake of saving lives) would translate into a rejection of the absolute prohibition of custodial torture as a substantive right proposition.

Adherence to a principle stance can only be accepted as true, if that adherence remains in even the most extreme of circumstances. Where one can argue that the law is more nuanced than that, International Law has operated on this principle as far as torture has been concerned. Or at least that is what legal formalists would like us to

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[15] Javeria Younus, 'Half Fry Full Fry – A New Torture Technique Used By Pakistani Police' <http://courtingthelaw.com/2016/01/18/commentary/half-fry-full-fry-a-new-torture-technique-used-by-pakistani-police/> accessed 7 March 2016.

[16] "Suppose that a person with knowledge of an imminent terrorist attack, that will kill many people, is in the hands of the authorities and that he will disclose the information needed to prevent the attack only if he is tortured. Should he be tortured?" Joseph Spino and Denise Dellarosa Cummins, 'The Ticking Time Bomb: When The Use Of Torture Is And Is Not Endorsed' (2014) 5 Review of Philosophy and Psychology.

believe.[17] So we'll use this opportunity to introduce the doctrine of critique which we will be using to expose the truth.

The *Gafgen* decision by the ECHR, has been heavily criticized due to the hypocrisy of the Court in not realizing that the prosecution's evidence and the second statement of guilt of the accused (the one obtained without coercion) on which the ECHR concluded the German domestic courts relied the conviction upon, are all a product of the initial threat of torture made to *Gafgen* by the German authorities. By laying out the rule that allowed the coerced statement to be submitted (as long as if it was not relied upon by the court for indictment) and allowed the evidence that was collected due to the coerced initial confession to be admissible for the purpose of prosecution, the ECHR has apologised custodial torture. The absoluteness of the ban on torture has been forever damaged in the International legal regime.

One of the six dissenting judges of the judgment brilliantly elucidated the problems, "From the moment of arrest to the handing down of sentence, criminal proceedings form an organic and inter-connected whole. An event that occurs at one stage may influence and, at times, determine what transpires at another. When that event involves breaching, at the investigation stage, a suspect's absolute right not to be subjected to inhuman or degrading treatment, the demands of justice require, in our view, that the adverse effects that flow from such a breach be eradicated entirely from the proceedings."[18]

So where the International legal system seems to be absolutely against the idea of torture, reality is very different. A realistic look at the current state of affairs would expose that torture is actually a very prevalent

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[17] Anthony J. Marsella, 'The "Ticking Bomb" Scenario: Immoral Excuse, Legal Ruse, And Propaganda Abuse.' (2008) 53 PsycCRITIQUES.

[18] 'Gäfgen V. Germany: Threat of Torture to Save a Life?' <http://strasbourgobservers.com/2010/07/06/389/> accessed 11 March 2016.

problem in the international world, according to one UN Special Rapporteur on torture, 90% of countries exercise custodial torture.[19] Critiques from within the Legal Realist doctrines seek to expose this hypocrisy, in the effort to ensure that laws can become more reflective of society's needs and are thus more effective.[20]

Some would argue that laws, especially International laws are meant to be better than just truthful reflections of society's needs. And this author would agree, however, this author would also humbly suggest that a Realist critique aims not to make headway for amoral laws but only aims to expose the truth of existing processes in the legal framework so as to ensure the relevancy of laws remain and if anything, that critique does not wish to take morality out of the process of law making but only aims to see if the arguments of morality being claimed are being met in the first place. If they are not, the critique will allow the society to inject that morality in a much more efficient and enforceable manner into the legal system.[21]

Thus, seeing that the absolute prohibition on custodial torture across the world is a farce, using our realist critique, let us investigate now if the ban on custodial torture in Pakistan is also a false construct. To recount, we have already argued that to test a principle stance, we must check if it holds true at the extremes. And before

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[19] 'Not Much Has Changed In Pakistan on Torture' <http://archives.dailytimes.com.pk/national/11-Nov-2011/not-much-has-changed-in-pakistan-on-torture> accessed 11 March 2016.

[20] 'Standards of conduct tailored to saints have no place in war and peace—or any other human endeavor for that matter.' J. Peter Pham, 'Law, Human Rights, Realism And the "War on Terror"' (2004) Volume 4 Human Rights & Human Welfare p.103 <https://www.du.edu/korbel/hrhw/volumes/2004/pham-2004.pdf> accessed 8 March 2016.

[21] "…if it is to successfully steer the realistic middle course between an absolutist human rights/civil liberties position that does not accept that rights violations can ever be justified, and an equally purist consequentialist position that judges actions solely on their effectiveness, this process must be driven by truth rather than lies, openness rather than denial." Ibid 104

that, we have also established that the tool we will be using to do that would be the philosophical ticking time bomb problem. And lastly, due to the widespread nature of custodial torture in the country, our argument is that all other factors aside, the main cause for this 'human rights violation' is the fact that the people of Pakistan do not support the substantive right of all people to be free from torture as is envisioned by International legal regimes (by legal formalists at least).

In regards to this, we must turn towards surveys and our own primary research. Less than 15% of people in Pakistan feel that the US torture methods against suspected terrorists after 9/11 were justified, yet 50% find that if Pakistan were under threat, they would find it justified for the government to use those same torture tactics to find information about the attacks.[22] A more detailed survey of random 25 Pakistani university students was undertaken by this author, the results of which mostly fall in line with our hypothesis; where majority of the participants believed that police should not be able to torture criminals for evidence and believed it was not an effective method of torture. However 56% of the participants agreed that the right to be protected from torture should be circumstantial and not absolute.

When confronted with a ticking time bomb situation[23] the opinion became divided with almost 50% on each side on whether the criminal can be prosecuted for the evidence obtained through custodial torture and on whether the police officer should be punished for his/her

[22] Pew Research Centre, 'Views About Torture By U.S. Government Track With Opinions About Potential Use Of Torture By Own Government' (Pew Research Centre 2016) <http://www.pewresearch.org/fact-tank/2016/02/09/global-opinion-use-of-torture/pg_16-02-08_torturescatter/> accessed 4 March 2016.

[23] Question: If a child kidnapper is arrested and tortured for information by the police, which leads him into admitting to murdering the child and revealing the location of the body, should the evidence acquired through torture be used to prosecute the criminal?

conduct. However, when confronted with a classical ticking time bomb situation regarding a terrorist and impending threat, there was an 88% approval of the LEAs torturing the said individual.

Conclusion: How can the reality of custodial torture in Pakistan be countered?

It is now clear that the people of Pakistan do not believe in an absolute right to be free from torture. Even though the International Legal regime itself can be critiqued for harming the absolute nature of the ban (as per our earlier criticism of *Gafgen*) but even if it is accepted as legal formalists present it (as an absolute prohibition), Jack Donelly's overlapping consensus theory does not apply to this particular human right: the people of this country do not support this right, not only in its form but also in its substantive nature. For it does not hold up in face of the ticking time bomb situation.

Noor Alam Khan, member of Khyber Pakhtunkhwa Bar Council and Executive of the Supreme Court Bar Association as well as Chairman, Voice of Prisoners further solidifies our argument, lamenting that, 'It seems that torture is part and parcel of our society.'[24] Custodial torture is tolerated as a social norm in Pakistan[25] and needs to be recognized as so. Thus it is this author's belief that the right of all to be free from custodial torture in Pakistan is a farce: it is not upheld as a substantive value by the people of this country.

If that is the truth, then if one wishes to combat this trend, solutions have to go much deeper than the legal top-down approaches that are recommended by many NGOs and Legal Research Institutes. An effective policy needs to be drawn up that challenges the roots of this problem. This paper, will attempt to recommend such actions by first highlighting what this paper has already achieved and then what is needed further.

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[24] Noor Alam Khan, 'Freedom From Torture' <http://www.pljlawsite.com/2015art13.htm> accessed 11 March 2016.

[25] Javeria Younus, 'Pakistan Custodial Torture, The Ramifications And Failure Of Institutions' (Asian Human Rights Commission 2016).

It is argued that laws are to be made for the betterment of society, it is this author's belief however that in order to do so, the process needs to be more transparent and efficient, rather than cloaked in a curtain of convenient excuses. This critique aimed not to defend the State of Pakistan's right to carry out custodial torture, rather it aimed to remove the 'curtain of convenient excuses'. Convenient excuses which will actually impair the process of making laws that better society. Only by accepting the reality, for what it is, can we truly bring about change. The curtain makes solutions seem easier and more palatable however in the long term they impede our objective.

It should be clear now, that to end custodial torture absolutely in Pakistan, a social change needs to be carried about. Re-education of society and a shift in substantive values need to take place for any future anti-torture laws to be successful. Either that or our aim needs to change and be more reflective of what the people of Pakistan demand. If the people do not believe in an absolute ban on custodial torture (especially in relations to ticking time bomb situations), then our laws in a democratic society should reflect those needs and solve the dilemma of civil liberties and human rights by advocating for openness and accountability of these enhanced interrogation techniques.

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