

A Critical Analysis of Fundamental Rights Under the Constitution of Pakistan, 1973

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ABSTRACT

In general sense the right is considered that source by using that a person is being entitled for all obligation intended to other persons as per the approved limitation of law. The legal right after its recognition takes power for its enforceability from the Constitution. Therefore, in order to alter a legal right, it needs amendments in the Constitution by legislature. The philosophy of human rights is as old as the establishment of mankind. The right to life is considered as the most important and basic human right and is the foundation of all other rights guaranteed by the Constitution. However, where there is right there is always some obligation to enjoy that right. The right of equality demands that all the people have same rights and self-respect as they are born as free and entitle for equal protection as per the Constitution without any discrimination. Generally, human rights are deliberated as a matter of right other than special favor and privilege and must be accepted with full regard not being constrained to the territorial limitations. Therefore, the focus of this study is to critically analyze the most important fundamental rights and how seriously the judiciary of Pakistan perceives these rights in the context of Constitution of Pakistan, 1973. The study may provide an opportunity to build a bridge between the judiciary and the executive for the proper implementation of fundamental rights in Pakistan.

Keywords: *Pakistan, Fundamental Rights, Human Rights, Declaration of Human Rights, Judiciary, High Court*

Introduction

The origin of these rights as generally understood with the history and development of basic human rights when the Magna Carta was introduced in 1215 AD through which an absolute monarch was made to concede that the subjects possessed certain rights, which could not be violated by sovereign. As concern to the international level, Human rights are among those vulnerable issues which are regularly discussed in the all modern society (Vizard, 2000).

The key intention of state is to ensure the all the measures for the security of life, freedom and property of the residents. The political foundations and social structure lay on the hypothesis that all men have certain directly of life, freedom and the quest for joy, which are unalienable, principal and intrinsic. When assurance is given by

the constitution for the protection of these principle rights then they are named as “*Fundamental Rights*”. After Constitutional certification the only way to suspend, shortened these rights by the amendments in the constitution.

Pakistan is an Islamic republic and the laws are founded on the beliefs of social tenets in Islam, as destined in the Holy Quran and Sunnah. Prophet, Muhammad ﷺ while evolving the model of human rights intensely denounce the violations of human rights and struggled for the self-respect of the people. While enforcing Islamic norms, Prophet Muhammad ﷺ emphasizes on the self-respect of manhood without any difference of faith, race, colour, age or sex of the individuals. In Islam, the right of life, freedom and safety is the basis of human rights and the right of confidentiality. The Constitution suggests autonomy from manipulation and the same opening to all in partiality to the benefits of the few and to empower Muslims to lead their lives as per Quran and Sunnah. The sufficient facilities have been provided to the minorities to confess and exercise their religious and social activities. The fundamental rights have been enumerated in Chapter 2, of the Constitution of Pakistan, 1973 (Ulfat and Chaudhry, 2007).

The principles of Policy assimilated in the Constitution of Pakistan from Article 9 to Article 40. These articles are associated with elevation of local government bodies, involvement of females in national life, security of family etc. safety of minorities, uplifting the social justice and abolition of social evils, Upgrading the communal and monetary welfare of the public, consolidation with Muslim Ummah and encouraging global peace. In addition to the guarantee of fundamental rights in the Constitution, Pakistan has endorsed many and signatory of almost all the International Conventions and Declarations on human rights. The defilements of Fundamental Rights may be the basis for common conflict and misguides to larger discrimination in the public. The executive on the initiative of global International organizations has introduced certain moves towards Human Rights to bring prosperity, social justice, democracy and justice to the nation. However, the higher judiciary protects the fundaments rights of the general public disrupted by the public bodies (Aziz, 2020).

This article is designed to critically analyze the fundamental rights, their importance and implementation as per the Constitution of Pakistan, 1973. The judiciary plays a vital role to enforce these rights under their constitutional jurisdiction. This study will identify those bottlenecks with a comparative analysis of fundamental rights in Pakistan and suggest the ways to remove them.

Research Questions

The study revolves around the following queries:

- 1- What are human rights and fundamental rights?
- 2- Is there any obligation binding on the executive to enforce the fundamental rights guaranteed in the Constitution of Pakistan?
- 3- What role played by the Judiciary to address violations of Fundamental Rights?

Basic Human Rights

The idea of essential human rights can be followed back to the Common law savants, for example, "Locke and Rousseau". The Characteristic law scholars philosophized over such intrinsic human rights and tried to safeguard these rights by propounding the hypothesis of 'Social Contract'. (Wraight, C. (2008). As indicated by John Locke, man is conceived "with a title to consummate opportunity and an uncontrolled happiness regarding every one of the rights and benefits of the Law of Nature." and he has ordinarily a power "to save his property that is, his life, freedom and domain against the wounds and endeavors of other men." (Internet Encyclopedia of Philosophy, 2018)

Human rights being a conventional term grasp social liberties, common freedoms, social, financial and social rights. It is hence hard to give an exact meaning of the term Human Rights. In that capacity, it tends to be said that the rights that all individuals have by righteousness of human presence are human rights. Since these rights had a place with them as a result of their very presence, they wind up agent with their introduction to the world. Human Rights being the inheritance are in this manner, inalienable in every one of the people, Irrespective of their standing, statement of faith, religion, sex, nationality. These rights are basic for every one of the people as they are consonant with their opportunity and poise and are conductive to physical, good, social and otherworldly welfare, they are likewise vital as they give reasonable conditions to the material and good elevate of the general population. As a result of their gigantic importance to people; Human Rights are likewise in some cases referred to basic rights, essential rights innate rights, regular rights and bequests (Agarwal, 2002).

Human Rights can be defined as those basic principles which are necessary to lead a distinction and impressiveness life as human beings. Human rights are the basis of liberty, integrity and peace. Human rights are those definite moral assurances that people of all nation and civilization society apparently entitled just for the reason of their humanity (Kalanauri, 2012).

The human rights are grouped into three ages of rights. The Western square affirmed the "original" rights – which incorporate ordinary and political rights for example directly to live, liberty, safety of individual, insurance against torment, directly of reasonable preliminary, directly of get together and affiliation, directly of discourse and development and such different rights though, the Communist Square worried for the "second era rights" which are financial, social and social in nature, for example, the directly to human services, training, sustenance, work, asylum and government managed savings and so on "third era" rights as of late rose, are group or gathering rights which incorporate directly to harmony, directly to self-assurance and directly of indigenous individuals. (International Judicial Conference, 2006)

Origin of the Human Rights

The term Human Rights for all intents and purposes means each one of those rights which are intrinsic in our tendency and without which we can't live as people. Human rights which are basically individual in character, for they are intended to be delighted in by people establish a social wonder by ideals of those for whom they are planned. (Karel, 2006)

The history of origin and improvement of Human Rights is exceptionally intriguing. The origin of human is followed by a few Researchers back to the seasons of ancient Greeks. The way that human rights were perceived as common privileges of man is delineated by a Greek play "Antigone". In Rationality, the improvement of the thought of the natural rights of man was contributed by stoic philosophers. They initially created common law hypothesis for the clarification of the idea of human rights. In generally, these are the rights which available to every human being for their existence. (Ezejeffor, 1964)

The possibility of regular privileges of individual was resuscitated in the 17th century. In 1679 an act is being implements named 'Habeas Corpus Act' for the security of the resident from illegal detainment (Khwaja, 2004).

Despite the fact that the set up certainty is that idea of "Human Rights" was existed, before the "Magna Carta" (Bill of Rights). However, Magna Carta appreciates the status of an achievement ever of rights. Henry-I, Stephen and Henry-II kept on promising that they will acknowledge this sanction yet they didn't stay faithful to their commitment. However, Lord John, who was otherwise called John, the Dictator as a result of his hard personality, marked this sanction. It is said that he bowed under the weight of Nobles. This charter was additionally issued in 1216, 1217 and 1325 in the wake of being altered and modified. (Khwaja, 2004)

In 19th Century almost all civilized nation adopted the fundamental right as basic part of their constitution and efforts are being made for their implementation by each State. Today by far most of legitimate researchers and savants especially in the liberal West concur that each individual has, from a certain point of view, some fundamental rights. Without a doubt, aside from some basically segregated late nineteenth century and mid twentieth century shows of worldwide compassionate concern, the last half of the 20th century may reasonably be said to stamp the introduction of the global just as the general acknowledgment of human right. (Weston, 2014)

Universal Declaration of Human Rights

Islamic Nations, for example, Sudan, Pakistan, Iran, and Saudi Arabia have scrutinized Universal Declaration of Human Rights (UDHR) because of its apparent inability for social and religious setting of Islamic nations. It is considering a "common comprehension of the Judeo-Christian custom", which couldn't be actualized by Muslims as it being some sort of intrusion with in limitation of Islamic law. Later on, Muslim countries that are members of the Organization of the Islamic Conference are associated in Cairo Declaration on Human Rights in Islam, an elective record that says individuals have "opportunity to spend a majestic life as per the Islamic law". Notwithstanding, this archive doesn't perceive the opportunity to change religion, liken ladies as equivalents to men, or sustain objectivity when comparing religions.

Fundamental Rights Protected Under the Constitution of Pakistan, 1973

Fundamental Rights has been guaranteed by the Constitution of Pakistan, 1973 from Art. 8 to Art. 28 provided to the citizens of Pakistan. The few important fundamental rights will be discussed here.

Right to Life and Liberty

Under the Constitutional Warrantee Art-9 give indemnity to an individual for his right to live with emancipation as citizen of the state. Articles 4 and 9 of the Constitution of 1973 are in a way serious presentation for the security of life and freedom of the nationals of Pakistan as well as of the individuals who are until further notice inside Pakistan. The word "Law" signifies the rule that everyone must follow. A momentous refinement between Article 4 and 9 of the Constitution is that, the previous give more fundamental right than the last, in light of the fact that if there should be an occurrence of the Proclamation of Emergency, the task of Article-9 might be suspended though Article-4 stays in full power notwithstanding amid crisis.

The people whose life and freedom is undermined is hence qualified for require the individual trying to deny him of the right to live or move uninhibitedly to demonstrate the lawful expert under which he is implying to act (Khan & Rana, 2014). In "*Sakhi Daler Khan v. Superintendent, Recovery of Abducted Women (1957)*", the Lahore High Court set the petitioner at liberty as it found that respondent has captured and kept him in egregious infringement of the provision of the Pakistan (Recovery of Abducted Persons) Act, 1949. The High Court held that no expert can deny an individual whether resident or not, of his freedom infringing upon law, and the deficit liberty of the petitioner must be pronounced without legitimate specialist and of no lawful impact since it was not as per law (Khan & Rana, 2014).

Slavery is Non-Existing and Forbidden in Pakistan

The Constitution guarantees that subjugation in Pakistan is non-existent and illicit. Its presentation in any shape will always be discouraged and never permitted by any provision of law. It likewise forbids constrained and kid work in all structures and traffic in individuals. It exempts mandatory administration by people experiencing discipline for any offense. It controls the exclusion by the imperative stipulation that the obligatory administration will not be of a barbarous sort or contrary with human pride.

As per Article-3 of the Constitution of 1962 "no individual will be held in subjugation, and no law will allow in any capacity encourage the presentation into Pakistan of subjection in any frame. While Article-11 of the constitution expresses that "no individual will be held in subjugation and all types of constrained work are denied, however the state may require mandatory administration for public reason."

In a case titled "*Mst. Zahid Bano Vs. The Government of Punjab & others (1997)*", the grievance of the petitioner was that she was not paid her salary since 13.01.1993 though she has been rendering services to the respondents. The respondent submitted that the appointment of the petitioner was not in accordance with rules on the subject and her case has been sent to the Government of relaxation of the rules.

The Hon'ble Court upon hearing the parties held that it was not disputed by the respondent that the petitioner has been rendering services to them. It becomes bounden duty of those for whose benefit services are rendered to pay endowments due as otherwise that means to slavery and forced labour, which is prohibited by

Article 11 of the Constitution the petition was allowed and the respondents were directed to pay salary dot to the petitioner within one month.

Protection Against Retrospective Punishment

ARTICLE 12 protects a citizen from a punishment of any wrongful deed or omission, which was not punishable, when it was committed or an omission made. Further the greater penalty cannot be awarded than approved by law at the time when the omission was made or act was committed.

In a case The Hon'ble Division Bench of Sindh High Court was pleased to hold that the sentence being part of the substantive law any amendment in law relating to it does not affect any penalty or punishment already incurred. (Abdul Majid Vs. The State [1994])

In above said case, the sentence of "*Transportation for life*" was imposed instead of "imprisonment for life", as under Article 11 of the Interim Constitution, the law cannot authorize the punishment which was not in presence at the season of the demonstration or offense and since at the time of offence, murder was punishable with transportation for life and not imprisonment for life. The Law Reforms Ordinance, Article 129 does not expressly or by implication apply retrospectively. The question of sentence is part of the substantive law and does not fall under procedure law as such the amendment has not retrospective effect.

In another case titled "*Abdul Rehman Vs. The State (1978)*", the Hon'ble Supreme Court of Pakistan was pleased to hold that transportation of life was 20-years and imprisonment for life was 25-years and no law could authorize penalty greater than penalty prescribed by law, therefore, the life imprisonment was converted into the punishment for transportation of Life.

Protection Against Double Punishment & Self-Incrimination

Article-13 portrays that No individual will be indicted or penalized for a similar offense more than once; or punished for a similar offense more than once; and accused cannot be compelled to be a witness against himself.

This article is new one and did not discover put in the Constitution of 1956 or in that of 1962. The right anchored under Article-13 is grounded on the custom-based law "Nobody will be twice vexed for a similar offense". This provision was embedded for sureness that once an individual has been arraigned and the issue is concluded in any way the section is shut. This additionally gives that an individual will not be constrained to be a witness against himself. In that circumstance if a blamed individual is constrained to give proof and such proof will tend specifically or by implication, to act naturally incriminatory.

The Hon'ble Lahore High Court for a case titled "*Muhammad Akram Vs. the Government of Punjab and another (1979)*" was satisfied to hold that "Where an act or omission establishes an offense under at least two sanctioning, at that point the wrongdoer will be at risk to be indicted and rebuffed under either or any of those institutions, yet will not be obligated to be rebuffed twice for a similar offense. Whenever blamed is absolved for the offense, he can't be retried on a similar offense.

For another case titled "*Muhammad Ashiq Vs. The State (1997)*", it was held that no individual will be arraigned or chastised for a similar offense more than once.

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This cherishes major directly against twofold danger to any individual. It is a reiteration of legal Maxims. No one ought to be twice punished if it be proved to the Court that it is for one and the same cause.

Freedom of Movement, Etc.

The right to enter and move uninhibitedly all through Pakistan and to live anywhere therein, unlike the American Constitution, explicitly conceded by Constitution of Pakistan. This right is absolute and unqualified. (Khan & Rana, 2014)

In a leading case the Supreme Court of Pakistan held that “*the right to remain in the country*” does not afford protection against their extradition, of Pakistan nationals who are accused of committing serious crimes in other countries. Therefore, the Extradition Act, 1997 allowing the extradition of Pakistan nationals is not inconsistent with fundamental right to remain in Pakistan as embodied in Article 15. I was further held that this would be in consonance with the provisions of Objective Resolution (Nasrullah Khan v. Government of Pakistan, [1994]).

In another Case titled “*Fazal Ahmed Ayyubi Vs. West Pakistan (1957)*”, the petitioners were proclaimed 'goondas' under the Punjab Control of Goondas Act, 1951 and their developments were limited on the ground that their exercises were against social. The confinement were in the idea of preventive detainment yet the law in so far as it allowed the likelihood of prohibition of a legitimate barrier through insight and keeping of a mystery record was not in consonance with the standards of regular equity and, in this manner forced preposterous limitation. (Khan & Rana, 2014)

Freedom of Speech and Press, Etc.

Article 19 of the Pakistan Constitution, 1973 provides that every citizen shall have the right to freedom of speech and expression. (Khan & Rana, 2014, p-584)

In “*Khwaja Mohammad Safdar Vs. D.C. Lahore (1964)*”, it was held that the use of loudspeaker finds no mention in the Article, and the use of loudspeaker is necessary to indispensable instrument of efficient public speech. The denial of permission to use a loudspeaker means a denial of the right to communicate one's thought even to those who want to hear them.

In another case titled “*Hakam Qureshi Vs. Judges of Lahore High Court (1976)*”, it was held that the right to speak freely ensured by this Article is liable to sensible limitations forced by law in connection to Contempt of Court.

Equality of Citizens

Quran Pak says, “*Deal justly, that is nearer to your duty.*” The Holy Prophet (P.B.U.H) proclaimed, “*People are all equal as the teeth of a comb.*” In the Constitution of Pakistan, the legislature observed the philosophy of Islam by giving the equal protection to the citizens of Pakistan. Further it describes there shall be no inequity on the basis of sex. This article also imposes some obligation on state in regard to ensure the protection of ladies and kids.

“*Mst. Fazal Jan Vs. Roshan Din (1990)*”, provided the services of a Civil Lawyer at State Expenses invoking the provisions of Art. 25(3) of the Constitution which provides that, "nothing shall prevent the State from making any special provision

for the protection of women and children", holding that though the word "State" used in Article 25(3) and as defined in Article 7 of the Constitution does not include "Judiciary", yet in the peculiar context of Article 25(3), the word "State" would also include the judicial functionaries".

In another case titled "*Mohammad Usman Vs. The State (1965)*", it was held that Frontier Crimes Regulations gives discretion to Commissioner, not only to select cases, but also particular accused persons, to be tried by a Jirga-procedure. This is discriminatory and hence violative of the fundamental right of equality before law.

In "*Nawabzada Nasrullah Khan's (1965)*" it was held that Maintenance of Public Order is applicable to all and makes no discrimination amongst the citizens, hence, not violative of equality before law, although violative of other rights.

Conclusion

Fundamental rights assume an extremely critical job in the life of a citizen. These rights can safeguard amid the season of multifaceted nature and trouble and help us develop into a decent person. There is no right which has no parallel obligations.

One critical capacity of the judicature is to go about as an unbiased and fair-minded mediator in all respectful and criminal issues. Another is the Constitutional commitment to authorize the basic privileges of the subjects. These rights are put on a high platform. When the rupture of these rights is built up before us, there ought to be no component of watchfulness left with the court to reject their implementation. In fact, I trust that the courts are obliged and compelled by a sense of honor to authorize these rights. Despite the fact that each and every privilege revered in the Constitution is primordial yet they begin from three characteristic rights for example the rights with context to persons, the right to live and the last one right against property. The right to person means the right to life. This incorporates directly a quality life and has a nearby nexus to social insurance and the essential training framework in the nation.

The predominant legal executive has been consulted with additional conventional locale for the safeguarding, insurance and requirement of these rights. Article 199(1)(c) of the Constitution enables the High Court to pass fitting requests and offer headings to any individual, specialist or the legislature for the authorization of these rights. Article 199(2) however subject to alternate arrangements of the Constitution in clear terms orders that the directly to approach the High Court for the requirement of these key rights will not be shortened. Further, Article 184(3) gives an extra ordinary jurisdiction to this Court for the implementation of principal rights where the issue is of open significance. This Court has never avoided its obligation to pass proper requests while practicing its purview in such manner. Cases, for example, Shehla Zia, Darshan Masih and the Eunuchs case are great instances of the activity of this ward. While practicing this jurisdiction the Court regularly analyzes the official activities of State functionaries and passes successful requests. On occasion the administrative activities of Parliament, including subordinate enactment, have been inspected and announced to be ultra vires. This is an imperative job of the legal executive which has been performed previously and will Insha ALLAH be sought after with more prominent enthusiasm and cautiousness in the occasions ahead.

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