

Freedom of Expression and Justiciability in Pakistan

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ABSTRACT

This paper would discuss freedom of expression and restrictions on the freedom with particular reference to the provisions of International Covenant on Civil and Political Rights (ICCPR) and the ‘Justiciability Doctrine’ as enshrined in the European Convention of Human Rights (ECHR). The question whether the freedom of expression claims are justiciable or not, in third world countries like Pakistan and how it helps in the advancement of rule of law and good governance would be explored. The focus would be on the cultural relativism narrative developed ever since the adoption of the Universal Declaration of Human Rights (UDHR). The claims of ‘Universalism’ associated with human rights especially freedom of expression would be criticized with respect to the Margin of Appreciation Doctrine as reflected in the jurisprudence of the European Court of Human Rights (ECtHR) and adopted in other jurisdictions. Freedom of expression and the rights of minorities in Pakistan would be discussed with a special mention of proselytization and forced conversions. Lastly, the role of legislation and judiciary in Pakistan for the protection and advancement of the freedom of expression guarantee would be discussed.

Key Words: Human Rights, Freedom of Expression, Justiciability, Margin of Appreciation, Universalism, Cultural Relativism.

Introduction

“If liberty means anything at all”, remarked George Orwell, “it means the right to tell people what they do not want to hear”. Having a right is different from its exercise which results in important psychological and social consequences. The purpose of expressing ones ideas freely is to teach the people self-control for the things that they would like to control and suppress. Hearing to others patiently what one does not agree with means letting go of the preconceived notions that one has and it is an indication of maturity. The freedom, as a corollary, also includes the authorities’ neutrality on the question; whether to allow a particular expression or not? Freedom of Expression and its allied guarantees are essential in the removal of injustice from a society and in making it more tolerant. Thus, in this process, a society evolves to be more progressive and ethically coherent.

Tolerance is the essence for which freedom of expression is the guarantee. Without tolerance in a society, there cannot be effective freedom of expression. This is essentially important in the expression considered to be offensive and subversive by others. Like other virtues, tolerance is relativist and not universal. Every society has its own norms, which develop over the course of its evolution,

and the pace of development. Interference with the norms, by others, on the basis of universalism amounts to imperialist maneuvering which is the very denial of tolerance. If denial of free expression is relevant to the socio-legal discourse than it should also apply to things that make the expression unfree.

The First Amendment to the U.S Constitution, 1789, guarantees the right to freedom of speech and expression to the U.S citizens (The Bill of Rights, 1791). It only proposes freedom of speech and expression without imposing any restrictions on the citizens. The First Amendment right has been liberally interpreted by the U.S Supreme Court and over the course of time has inculcated an important normative value in the U.S Constitution. In contrast to this, Article 19 of the Constitution of Pakistan, 1973, provides the right to free speech and expression (Constitution of Pakistan, 1973). The restrictions attached with the right are far reaching and give the right dubious character and trump the very nature of the right itself.

Freedom of expression and justiciability

Freedom of expression is guaranteed in different international human rights instruments. It has been incorporated in Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). All the three regional human rights treaties viz., the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (ACHPR) guarantee the right to freedom of expression.

Article 19 of ICCPR

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) contains the right to freedom of speech and expression. It includes, "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." (ICCPR, 1966) Freedom of expression is closely connected with the enjoyment and protection of other rights viz., freedom of assembly and freedom of association etc. Inter alia, it is essential in ensuring transparency and accountability which are the hallmark of a pluralist society.

The European Court of Human Rights (ECtHR) had laid down the principle that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. It is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". (Selmadienis Ltd. V. Lithuania., 2018) John Stuart Mill

stated, the search for truth is advanced by confrontation even with egregiously false ideas.

The limitations placed in the enjoyment of the right to express oneself freely are of general nature. The grounds, on which the right can be restricted by a state party, are provided but these limitations are based on non-discrimination and based on the principle of universality of human rights. Article 26 of the ICCPR lays down the principles of equality and non-discrimination in the application of law. Article 5 of the ICCPR clearly states the objective of dispensing with the overbroad restrictions on the freedoms conferred and the necessity of narrowly construing these restrictions. It lays down, “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant”. (ICCPR, 1966)

Human Rights Committee General Comment No. 34 mentions the legitimate restrictions on the enjoyment of rights that the restrictions must be provided by law with sufficient precision and should not be overbroad. The limitations placed on the abridgement of human rights must be proportionate to the violation complained of and necessary for the sustenance of democratic values. The Vienna Convention on the Law of Treaties, 1969, stipulates that a treaty is to be interpreted in good faith. (VCLT, 1969) Limitations on the enjoyment of the right should be an exception and not the norm.

Freedom of expression, justiciability and cultural relativism

The universality of human rights is grounded on the principle that all human beings are born free and equal and it entail that humans are same regardless of the cultural differences. These principles are expressed in International Bill of Rights viz., Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights et al. Cultural relativists argue that the concept of human rights is a western liberal idea with little relevance outside the west.

The main aim of any legal system is the promotion of social justice in a society and in a particular social context. In this, the universal application to the values of system is not applicable as the systems are only qualified and relative to only those societies where they originated and thus universal application is not justifiable. It is also not justifiable to implement and enforce the social justice originated from any other society as every society have the distinct norms and values system. To impose western liberal ideals on non-western society is in itself illiberal and is imperialist in nature.

Justiciability concerns with the jurisdiction of a court of law to adjudicate upon a matter in accordance with legal norms. “It deals with the boundaries of law and adjudication.” (Bendor, 1996) In freedom of expression claims, the question of justiciability is of paramount importance and determined at the preliminary stage

to establish the veracity of the human rights claims. As is reflected in ICCPR, ECHR and other regional human rights treaties, the case either proceeds to regular hearing on merits and consequentially, adjudication or is dismissed.

The issue of justiciability of human rights claims is not universal around the world. Though, freedom of expression as a right is universal but its exercise and protection in each state depends to a large extent on the underlying moral values and socio-legal norms in a society.

As reflected in the jurisprudence of the European Court of Human Rights (ECtHR) developed in a well-known case of *Handyside v. UK* in 1976 (*Handyside v United Kingdom*, 1976), each state is allowed a Margin of Appreciation (MoA), to do things in their way, in the protection and enforcement of human rights commitments within its territory. In the case, the Court was called upon to examine and argue on the issue that how much the national authorities are vindicated to set boundaries for the freedom of expression for safeguarding the morals of the society. The court was of the point that,

It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place which is characterized by a rapid and far-reaching evolution of opinions on the subject. (*Handyside v United Kingdom*, 1976)

Every state has to make such laws or bring already existing laws in conformity with her international obligations. "Human Rights violations reflect the lack or weakness of cultural legitimacy of international standards in a society." (An-Na'im, 1990)

The doctrine of Margin of Appreciation (MoA) was developed looking at the diversity of socio-legal orders in different countries and the relativity of norms. The doctrine is an effective check on the absolutism or imperialism in the imposition of rights. It recognizes cultural relativism and the diversity of norms. The 'proportionality test', an offshoot of the Margin of Appreciation doctrine (MoA), requires that the punishment should be proportional to the violation. The test aims at balancing the doctrine and its consequent proportionality test make sure that human rights are not exclusionary or imperialist but inclusive.

Pakistan, with religion having made inroads in her polity, is often found at a crossroads when it comes to meeting her international obligations. Islam, being the predominant religion, finds a special place in the social and political lives of the citizens of Pakistan. Islamic religious law, commonly known as Shari'a, enshrines a universal system of ethical norms and moral law which purports to govern every aspect of public and private life of individuals. It is essential for every citizen of Pakistan to obey and follow the shari'a and Islamic principles. In other words, Shari'a aims at behavioral change in the lives of its followers. Shari'a law was

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developed, as interpreted by different Islamic jurists and scholars according to the social, political and economic circumstances of their time, contains more obligations than rights. As Mill remarked, “Men are not more zealous for truth than they often are for error”. (Mill, 1966)

As an underdeveloped nation and once a colony, Pakistan has lagged behind in her socio-historical evolution and like other colonizing states was not a member of the United Nations (U.N) at the time of drafting of the *Universal Declaration of Human Rights (UDHR)*. Hence, for most citizens of Pakistan, the rights enshrined in UDHR are considered to have a tinge of western imperialist ambitions. This coupled with the extremist narrative developed in Muslim societies which view human rights and democracy as west’s viewpoint furtherance of western agenda of imperialism.

As is the case with the Human Rights, Shari’a law is also considered universal in its application. The problem with universalism is that it does not respect historical, social, political and economic contexts of different cultures. The current schism in Human Rights and Shari’a law can be resolved by finding a middle path between Human Rights and the Shari’a law. As most of the Human Rights are derived from religious scriptures and texts, Shari’a law should be made consonant to current trends of human rights by interpreting Quran and Sunnah, the primary and secondary sources of Islamic law, in current social, economic and political contexts rather than putting outdated interpretations on current human rights situation.

As discussed above, Freedom of Expression also entails hearing to opinions one does not agree with. Being a traditional society, any dissenting voices, against the established norms, are branded as heretical, in Pakistan, without testing their veracity. Truth comes out of the interplay of competing opinions and ideas grounded. Consultation was an essential ingredient of early Islamic society. There is no right and wrong position, just different points of view and interpretations, according to Ronald Dworkin. The task of the jurists’ and governments is to balance these competing claims for the good of people.

Freedom of expression in religious sphere

Opinions and observations are imperceptible before they have been communicated and persuasions are only appreciated if anyone is free to express them. Similarly one cannot enjoy religious freedom without exercising ones freedom of expression. Every religion has a central dogma which needs to be expressed in different forms e.g. specific rituals, beliefs and religious discussions. This religious liberty cannot be acquired without freedom of expression. Wider term, Freedom of Expression also includes the right to hold any opinion or belief and the liberty to express such opinion publicly. Though these are two distinct rights but in every human rights document these rights are proximate to one another. One of the foundations for the social activities both religious and political is Freedom of Expression. Almost 200 years ago, the founding fathers of USA constitution

placed the right of religion and freedom of speech in one category. They are both very important for the development of society and individuals as freedom of expression is quite essential to hold, practice and share one's religious beliefs. Freedom of expression holds a very significant position in religious sphere, it is not possible to enable the society with the freedom of speech without provision of the freedom of expression as they are directly proportional to each other.

All the human rights instruments recognize the close relationship between freedom of expression and religious liberties. From the 1st amendment of the USA Constitution to the United Nations Human Rights regime (Article 18 and 19 of both UDHR and ICCPR, Articles 9 and 10 of ECHR) places these two liberties in proximity. This morphological proximity is not incidental but it shows a profound relationship between them. So it is rightly stated by Mill that "liberty of thought and conscience is a crucial precondition for any other liberty."

Religious intolerance: a threat to freedom of expression

The very essence of freedom of expression is tolerance. Freedom of expression encompasses a twofold meaning. Firstly, it is the liberty to hold any opinion, thought or belief and the right to put that thought and beliefs into action, the other aspect of freedom of expression is to respect the opinions of others. Historical evidences provided the information that the freedom of speech and freedom of expression has been materialized with the passage of time through the debate concerning religious toleration. In contemporary multicultural society with plurality of religions there are several threats to the freedom of expression but one of the major challenges is religious intolerance.

Current jurisprudence on the fundamental liberties of humans suggests that no person should suffer on grounds of religion or ethnicity and imposes a duty on the states accordingly. Several international documents e.g. religious identities of any individual of the society who belongs to any minority group is protected and promoted as per Declaration on the Right of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities. (United Nation, 1992) important aspects of the freedom of expression is religious tolerance. State policy and legislation play a vital role in the determination of tolerance level in a particular society. In states having a state religion, most of the legislation is pro religion and the followers of that religion hold a privileged position against the other religious minorities within the jurisdiction. This behavior of one religious group in a society gives rise to religious extremism and intolerance. Pew Research Center, an American think-tank, published a report on "The Rising Tide of Restrictions on Religion" in 2012. This report identifies that at global level there is a significant increase in religious intolerance. Portraying a "rising tide" of narrow mindedness and government limitations on religious issues, the report refers to evidences like "crimes, malicious acts and violence motivated by religious hatred or bias, as well as increased government interference with worship or other religious practices".

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Governmental policies, unnecessary limitations and interference with the fundamental rights of minorities are the major factors that contribute in religious intolerance which results in religious crimes e.g. proselytization or forced conversions and punishments on the ground of blasphemy laws. This increase in curbing religious freedom poses serious intimidations to the freedom of expression and also questions like inference of right of free speech and expression in religious sphere arose.

Freedom of expression in Pakistan

In Pakistan, Article 19 of Constitution of Pakistan 1973 guarantees freedom of speech and expression to all the citizens of Pakistan. In this section, the focus would be on the freedom of expression in Pakistan with special reference to religious liberty. Article 19 of Constitution of Pakistan, reads as following:

“Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of] or incitement to an offence.”

The Article provides for right to free speech, expression and the press albeit with some restrictions that include glory of Islam, security of state and situation of law and order. Since the inception of this Article in the Constitution we have witnessed that these bans and limits have been oppressed against various clusters of society specifically for the religious minorities.

As it is discussed before that freedom of expression and speech not only comprises of the right to raise voice and speak up but also the right to choose and practice a religion of one's own choice. In this way freedom of religion is a part of freedom of expression, but under the existing political and legislative scenario these rights are not practicable in true spirit. States have a right to impose some limitations on the rights of citizens to regulate them but the rights should not be restricted or prohibited by imposing unnecessary limitations. A bare study of the text of Article 19 reveals that there is a long list of limitations provided by the legislature, first limitation among them is glory of Islam (That is state religion of Pakistan). On one hand majority religious groups and religious clerics often misuse this right of freedom of speech to promote hate speech and forced conversions while on the other hand they curb the right of minorities by accusing them of being involved in the acts of blasphemy.

Religious intolerance and its effect on freedom of expression

Legislative bodies play an important role in decision making as their actions directly influence the behavior and opinion of general public. However in Pakistan parliamentarians are doing little to improve the human rights situation since government gives priority to national security and defense issues, rather than investing in people. This behavior of authorities along with traditional and social norms, foreign influence and state legislation e.g. anti-blasphemy laws and limitations imposed in article 19 gives way to religious intolerance in Pakistan. Religious intolerance has become a serious problem in Pakistan which is evident from the rising cases of proselytization and blasphemy cases in the recent years. Anyone can file a blasphemy case against any other without any proof and evidence. There is no proper procedure of investigation and any standard of evidence provided by law over the blasphemy matters which results in the misuse of these laws. Most of the time blasphemy cases are based on personal and political motives as in the case of Junaid Hafeez a university lecturer is behind the bars on blasphemy charges. His lawyer Rashid Rehman was also gunned down in his office. In this case respondents claimed that there was no blasphemy committed but the case was based on professional rivalry. There are many other cases in which people are set up falsely for committing blasphemy to secure the personal interest of groups. The extent of desecration of liberty and freedom of expression can be gauged from the evidence that even whenever any officials talk about restructuring the blasphemy law, they are cut off from the society or even sometimes killed. This proves that how these laws are being used to serve people's personal, economic and political motives.

Another violent form of religious extremism that is a constant threat to the freedom of expression, thought and belief in Pakistan is forced conversions or proselytization. In 2015 a report on "Conflict Dynamics in Sindh" was published according to which almost 90% of Sindhi respondents were of the view that their province is now on the verge of religious extremism. Most recent example of this intolerance and religious extremism is of 16 years old Hindu girl Ravita Meghwar, her parents claimed that she was kidnapped by an influential man of Muslim community who forcibly converted her to Islam and then she was forced to marry one of his kidnapers. According to a NGO, South Asia Partnership Pakistan, at least 1000 girls mostly Hindus are forcibly converted to Islam every year.

In Pakistan issue is more complicated due to involvement of multiple actors and factors in the freedom of expression related existing state affairs. Despite the fact that this right is provided in the constitution there are many hurdles in its implication. Mainly it is restricted by narrow legislation, weak administration of justice and suppressing free thought and religious opinion.

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