

Gender Justice: The case of Pakistani legal system, from legislation to court rulings

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Abstract

This paper analyzes the legal framework, which would include the constitutional articles as well as constitutional amendments. Keeping in view the fact that the Pakistani constitution is a product of Islamic and western jurisprudence. It also discusses the interventions and role of courts as an institution of the state, and the non-state actors to promote the cause in society, and how far the cultural factor has influenced the debate at hand.

Keywords: Feminism, Gender, justice, Pakistan, Muslim Feminists

Introduction

The social fabric of Pakistan is intertwined with cultural affiliations that date back to some five thousand years long Indus valley civilization, side by side the religious commitments that laid its very foundation for independence from British colonialism in August of 1947. Therefore, the social and the legal structure is an amalgamation of sources of kinds, however, the constitution strictly stipulates striking down of any law repugnant to the injunctions of the Holy Quran and the *Sunnah* of the Holy Prophet upon whom be peace – the two primary sources in Islamic law, also identified as *Shari'ah* law. As identified that *Shari'ah* law is at the core of the constitution of Pakistan, similarly, the concept of justice is at the core of the Islamic code of conduct. The Arabic for justice is '*Adl*', is derived from the root word '*Adalah*', which is equivalent of words meaning, 'placing something in its rightful place', 'according to equal treatment to others', 'to balance', 'to match', 'to equalize' or 'reaching a state of equilibrium'.¹ This notion is enjoined in every aspect of the human dwelling in this world before passing on to the next one according to the major Islamic belief of life after death and resurrection. Earlier in the Pakistani context the citizens were

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identified either as male or female, but as of today, the law guarantees through the Transgender Persons (Protection of Rights) Act, 2018, citizens the right to express their gender as they wish, and to a gender identity that is defined as,

“a person’s innermost and individual sense of self as male, female or a blend of both, or neither; that can correspond or not to the sex assigned at birth”.²

It is important to mention that *Shari’ah* law considers all genders equally important and all subjects are equal in the eyes of the Lord Almighty, this is usually termed in the spiritual reference. While physically, the sexes are considered responsible as per their roles, specified to them.

The sociological analysis: breaking down the social problem

Human rights violations and discrimination based on gender identity are still prevalent and mount a big challenge for Pakistan. Violence against gender, and especially women, is a well-versed phenomenon around the world, and the same goes for Pakistan, just including transgenders as well. Some of the problems faced by women in Pakistan are domestic violence, honour killing, rape and abduction, marital rape, forced marriages, and induced abortions.³ The situation of women in Pakistan is not appreciable, there are quite a few only who are saved from the wrath of their intimate partner, prevalently male. Since the issue pertains to mostly their private life and is usually at home, about which the data collection is tough, rather next to impossible because this requires the sanctity of the relationship to be questioned. However, the other sources including the abuse at the workplace may be added to give a shocking number.⁴ The data suggests that the numbers are quite high and that every 2 women out of 3 have been subjected to such activity which falls into the category of violence as described by WHO.⁵

Pakistani women, unfortunately, have been culturally relegated to the low-priority section, especially in the case of female education and with social rewards in reproduction and domestic activities. We see a bleak picture when it comes to female education. The female literacy rate is 45 per cent, which is very low when it is compared with the male literacy rate which is 69 per cent.⁶ Illiteracy on the part of parents and misinterpretation of Islamic injunctions relating to women are the two major reasons behind this issue.

Males do have the dominating factor, which has lesser to do with religion and nearly everything to do with the socio-cultural fabric. Having said that, the news of the horrible instances of violence surface on the media now and then, however, back in 2012, a similar report surfaced in the newspapers but showing a flip side, here the men, in one of the provinces of Pakistan, were subjected to acid attacks.⁷ However, the frequency of such reports are low due to the integrity of the male gender in the patriarchal society⁸, one tends to not popularize such

instances, as compared to the reports by the women, which are far greater in number as well with the frequency it happens.

In Pakistan, transgender and other marginalized minorities are ostracized by society and sometimes disowned by their families. Transgender women live in groups for protection and survival. Due to widespread stigma and discrimination, many transgender women engage in sex work in extremely unsafe environments and circumstances.⁹

These abuses cause severe emotional distress and mental agony for many transgender women. To cope with these realities, many survivors start indulging in drugs and alcohol or resort to selfharm. It is pertinent to mention the atrocities at the international level, in one instance, Saudi Arabia banned transgenders to allow them to get the visa for a religious pilgrimage to Mecca. To this political move, the religious scholar, *Javed Ahmed Ghamidi* told the media that government has no right to prohibit transgender people from performing such activity.¹⁰

The social stigma attached to it and the sheer ignorance in society has never allowed the families to embrace the 'thirdgender' as a part of their own. It is a norm that, if such a baby is born, the baby would be handed over to the transgender communities, who live and festive on their own, and the baby won't ever know where it came from.

It is indeed a matter of concern that even though Pakistan was instituted in the name of Islam and to practice Islam because the leaders believed that it was inevitable to live and practice Islam with the Hindus of the sub-continent. The real essence of Islam to not to judge people on any basis; caste, colour, creed, to name a few, but it is the Lord Almighty who is the master for the judgment. Therefore, it does not make sense to torture any gender physically or psychologically, building on the interpretations of the teachings of Islam rejected by the majority of the classical and modern scholarship alike.

Though the Global Gender Gap report of 2020 has placed Pakistan on 151 out of the total 153 countries the brighter side, from registering women voters to negotiating rights, women are redefining roles now in Pakistan with the help of what they considered against them once - the state, religious institutions, and other genders. In Pakistan, women have held high offices including that of the Prime Minister (the first-ever elected to head a Muslim country, during the election campaigns of the female, she voiced concerns over social issues of women, health, and discrimination against women. She also announced plans to set up women's police stations, courts, and women's development banks, later established in 1989 to cater to women's financial issues), Speaker of the National Assembly, Leader of the Opposition, as well as federal ministers, judges, and serving commissioned posts in the armed forces. Later on, *Asif Zardari*, the husband of the first female PM of Pakistan, when took oath as the president of the country, appointed a female member of parliament *Dr Fehmida Mirza* as the first female speaker in South Asia. During the tenure, Pakistan saw its first female foreign minister, *Hina Rabbani Khar*, first secretary of

defence, *Nargis Sethi*, deputy speaker of a province *Shehla Raza* and numerous female ministers, ambassadors, secretaries including *Farahnaz Ispahani*, Media Advisor to former President of Pakistan, *Sherry Rehman*, former ambassador of Pakistan to the US, *Fauzia Wahab*, *Firdous Ashiq Awan*, *Farzana Raja*, *Shazia Marri*, *Sharmila Faruqi* and others held prestigious positions within the administration. It was only made possible because 69 of 342 (20%) seats in the National Assembly are reserved and held by women only as their constitutional right.

Therefore, one can conclude that the situation may be not very well, but not depressing in terms of the progress made by the country towards empowering women as equal members of society with the right spirit of Islam.

The legal analysis: enacting a unified resolution

At the national level, initially, Pakistan undertook two commitments - the National Plan of Action for Women in 1998 and the National Policy on the Development and Empowerment of Women in 2002. There had always been a beacon of light for women and oppressed genders in the constitution of Pakistan, as the core foundation is laid on the principles of Islam. Having said that, one of the negative effects of the coup d'etats in the country had been the introduction of laws oppressing genders, especially women. Article 25(2) of the constitution guarantees that there shall not be discrimination based on sex alone, and Article 34 constitutes that relevant steps shall be taken to ensure the full participation of women in all spheres of national life.

Since it was established earlier that misconduct against women usually happens at home and specifically her role as wife, therefore, the Muslim Family law ordinance of 1961 provides remarkable value for the due rights of women. Under the Ordinance child marriage was banned and the husband's unilateral right to divorce was curtailed. And while a man could still contract four marriages at any given time, it became mandatory for him to seek the permission of his first wife or wife. Failure to do so could result in imprisonment and a fine but the validity of the second marriage remains legal.¹¹ Under the same laws, the procedure had been strict in favor of the woman, where now man cannot unilaterally dissolve the marriage, while the law provides for a reasonable time for 'reconciliation'.

Another instance of the legal system to introduce the long-forgotten tradition of having a father/guardian as the party to the conclusion of the marriage agreement, keeping in the spirit of *Shari'ah* law and societal structure that buffooned the sanctity of the women gender by playing all along. Moreover, the legal system, however, gives women the absolute right to dissolve the marriage by reaching the court by simply putting an application. The scholarly written judgment of the august Supreme Court in the *Khurshid Bibi* case, (PLD 196

7 SC 95) holds the field where it has been held that the Court can dissolve the marriage by way of *Khul'a* (Separation) in circumstances where exists extreme discord, hatred, and dislike between the spouses. The consent of the husband is not necessary in this regard. The woman, who is not in a position to maintain the limit prescribed by Allah, can approach the Court of competent jurisdiction, to get her marriage dissolve.

On the other hand, there are some serious lacunae in the legal system which are already in discussion, and if not remedied immediately will cripple the whole legal development of the system in favor of women.

First of all, the stunts and the pressure of the civil society to amend laws have given them victory, however, it brought them under the limelight for all the wrong reasons. It could certainly be true that the way they use is constitutional, however, it goes beyond the overall spirit of the constitution of Pakistan, which already establishes rights for women. Secondly, the main challenges to developing awareness and mobilizing for change are the unreliable political system and the misuse of religion by both traditional conservative forces and emerging political groups (i.e. religious) for their ends.¹²

Though Pakistan is a Muslim majority country, keeping in view the cultural multiplicity of the society in Pakistan, several laws are specially designed to incorporate the religious minorities to make them feel comfortable as part of the society. There have been times in Islamic history where the subject matter at hand was decided according to the chosen rules by the parties to avoid conflict of interest, therefore, keeping the spirit alive, to mention, in 2017 Hindu Marriage Act was introduced. The sole purpose is to provide for the solemnization of marriages by Hindu families and matters ancillary and incidental thereto.

After the 18th Amendment in the constitution of Pakistan, provinces were granted autonomy where now they would be able to legislate and prioritize regionally their matters, and therefore, apart from the national legislation we just went through, there are several provincial substantive and procedural laws to safeguard the interests and rights of women. In this regard, indeed, the government of Punjab province has been really effective. The province of Punjab is the largest province population-wise and with the introduction of Punjab Women Development Policy 2018, it has put together an important piece of regulation with the following goal,

To eliminate and systematically eradicate all manifestations of explicit and implicit gender discrimination across all spheres of society including governance and livelihood.¹³

Under this elaborated development plan, there are several initiatives lined up for women ranging from politics, health, education, gender-based violence, vulnerability and amelioration, climate change, economic empowerment, and so and so forth. These all and more agendas under this development plan ensure legal protection for women under the provincial and constitutional

level not just for themselves but also for their families. In addition to this, in the province of Sindh in 2019 with the support of UN Women Pakistan, titled Sindh Commission on the Status of Women

(SCSW), for the sole purpose of reviewing Sindh's laws, rules, regulations, policies, and programs from a gender perspective, actions to end violence against women and girls, and institutional capacity building of the SCSW. Similar initiatives can be found in other provinces as well.

Conclusion

The state of Pakistan is a member of the UN and is a party to the Universal Declaration of Human rights 1948. Pakistan recognizes and endorses several international initiatives and treaties which have shown interest in working for the empowerment of women, to mention, Pakistan is a signatory of the ICPD, ICESCR, and ICCPR, where these international agendas contain important clauses concerning gender equality. In 1993, Pakistan recognized that "women's rights are human rights" in the Vienna Declaration and Program of Action and became a signatory of the Beijing Declaration and Platform for Action in 1995. Therefore, being the signatory of almost all major treaties endorsing and working for the cause of gender justice gives it the support and relevant tools to better off the oppressed gender and bring the due constitutional equality for all genders with respect and honour. Therefore, Pakistan has accomplished a lot in the last 2 decades in terms of women empowerment, not just in the field of fiery politics, but also in health, education, leadership & entrepreneurship, and ameliorating the situation of domestic violence because of the moderation of thought in the society.

Pakistan lies in the bottom 3 of the Gender gap index of 2020, however, the report suggests that new countries entered with better scores pushing Pakistan down and Pakistan has improved, but not sufficient. With such a pace of political, civil, and legal action towards the cause of gender justice, soon Pakistan would be a game-changer in South Asia.

References

¹ Musa Usman Abubakar, "Gender Justice in Islamic Law," in *Homicide and Bodily Injuries* (Hart Publishing, 2018), <https://doi.org/10.5040/9781509915118.ch-001>.

² Asad Hashim, "Pakistan Passes Landmark Transgender Rights Law | News | Al Jazeera," n.d., <https://www.aljazeera.com/news/2018/05/pakistan-passes-landmark-transgender-rights-law-180509095207950.html>.

³ Mian Rauf, "Women's Plight in Pakistan," accessed November 1, 2020, <https://nation.com.pk/23-Apr-2020/women-s-plight-in-pakistan>.

⁴ Sidra Pervez et al., "Working Women in Pakistan: Analysis of Issues and Problems," *Pakistan Journal of Social Sciences (PJSS)* 35, no. 2 (2015): 997–1011.

⁵ Parveen Azam Ali and Maria Irma Bustamante Gavino, "Violence against Women in Pakistan: A Framework for Analysis," *Journal of the Pakistan Medical Association* 58, no. 4 (2008): 198–203.

⁶ Rauf, "Women's Plight in Pakistan."

⁷ Faiza Mirza, "The Flip Side of Domestic Violence - Pakistan - DAWN.COM," accessed November 1, 2020, <https://www.dawn.com/news/720187/the-flip-side-of-domestic-violence>.

⁸ Shadbehr Shahid et al., "Physical and Psychological Violence against Married Men in District Dir (Lower), Khyber," *COJ Nursing & Healthcare* 3, no. 2 (2018): 237–48, <https://doi.org/10.31031/COJNH.2018.03.000556>.

⁹ "Violence against Transgender People in Pakistan," accessed November 1, 2020, <https://www.civicus.org/index.php/media-resources/news/blog/4674-violence-against-transgender-people-in-pakistan>.

¹⁰ Kamran Saddique and Intikhab Ahmad, "Transgender Issues in Pakistani Community," *European Academic Research* 4, no. 10 (2017): 9048–57.

¹¹ Farhat Naz Rahman and Kiran Sami Memon, "Gender and Access to Justice : A Pakistan Case," no. April 2014 (2018).

¹² Rahman and Memon.

¹³ Government of Punjab, "Punjab Women Development Policy 2018," 2018, https://pcsw.punjab.gov.pk/system/files/RM_Final_Punjab_Women_Dev_Policy_2018_submitted_to_CM_dated_29.8.2017.pdf.