



A Riddle of Balancing Responsibilities Under the Constitution of Pakistan and International Human Rights Law

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ABSTRACT

Pakistan refers Islam to be its state's religion. It is at the same time party to various human rights treaties adopted by the United Nations (UN) at different times. The stark and inherent incoherence between the doctrine of Islam as enunciated in its constitution and the principles of the UN sponsored International Human Rights Law have created a paradoxical situation where it ended up reserving parts of the conventions thereby blocking their implementation and enforcement as required by these instruments into their domestic jurisdictions. This doctrinal legal work is an effort to understand and highlight the Islamic constitutional framework of the Islamic Republic of Pakistan and its response towards adopting and adhering to the principles enunciated in the UN Human Rights treaties given the discourse that the ideological makeup between two systems is pole apart from one another in its substance thereby rendering the full implementation of these treaties in their letter and spirit impossible.

Keywords: Human Rights Treaties, Islamic Republic of Pakistan, United Nations

INTRODUCTION

International Human Rights Law (IHRL) not only offers rights embodied in a series of treaties but also provides the means and tools to realize those rights. Amongst them some are binding in nature such as 'Reporting Procedures' and some are mere Optional such as 'Individual Communication' mechanism. As a matter of fact and due to its optional nature and consequent non adoption or reservations on the respective provisions, individuals and groups are restricted to exercise their right of access to international justice. IHRL and all its enforcement tools are designed to put responsibilities over the shoulders of member states. The member states of the UN who are also parties to human rights treaties are legally bound to follow IHRL in its letter and spirit both through action and restriction.

It engages the states on multiple fronts for the fulfilment of the states' responsibilities under relevant treaties. It requires of the party states to respect and to "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized [under it] without distinction of any kind, for instance of colour, race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (International Covenant on Civil and Political Rights, 1966)." It also requires of the party States to take the necessary legislative measures in accordance with their constitutional processes and in accordance with what IHRL has to offer (International Covenant on Civil and Political Rights, 1966). The responsibilities of the party states also encompass the duty to provide adequate remedy, a proper judicial forum where the remedy could be sought and the enforcement of the measures to that end (International Covenant on Civil and Political Rights, 1966).

Same responsibilities have been imposed in all the other human rights conventions of the UN like the International Covenant on Economic, Social or Cultural Rights, 1966 (ICESCR), Convention on the Elimination of all forms of Discrimination against Women, 1979 (CEDAW), Convention on the Rights of the Child, 1989 (CRC) etc. The usual practices of the states towards these treaties are that they sign it, ratify it and in accordance with their own constitutional principles either apply this framework of international law directly on their territory or nationalize it in the form of statutes/enactments incorporating these international guarantees. Nonetheless, where these states consider that IHRL and their respective constitutional provisions are incompatible with their legal system; they recourse to reservations thereby impeding the application of IHRL. However, trends have emerged wherein the invocation of national law is no more considered valid when it comes to the implementation of IHRL after a state has duly signed and ratified a treaty (Robinson, 1950; Excuses for Failure to Perform, 1935).

Materials and Methods

The doctrinal legal research approach, which entails a thorough and organized examination of legal concepts, statutes and academic publications, serves as the foundation for this study. The study takes a qualitative approach, concentrating on gaining a thorough grasp of the legal issues. Both primary and

secondary sources are used in the study, including statutes, international legal agreements, constitutional provisions, books, journal articles, online legal databases and official websites. The study seeks to offer a thorough and critical analysis of the legal issues at hand by fusing scholarly interpretation with legal documents.

I. Constitutional Dynamics in the Muslim World

While most of the European, American, and other Western States have a consistent and uniform practice regarding UN sponsored human rights due to their ideological conformity with the principles and interests enshrined in these instruments, Islamic states have adopted a changed and inconsistent attitude.

The course of action taken by Islamic states is deeply inspired by the religious ideology they adhere to. It is not uncommon to see abundant references to religion and its sources as guiding tools for their national and international affairs in the constitutions of these states. It is these references to the religion and its principles being the core of their ideology which cause hindrance in the due implementation and enforcement of the rights enshrined under IHRL.

The concept of sovereignty, the nature of state, the form of government, the sources of law making as referred to in their national legal systems all contribute to the impediments for the actualization of IHRL in these states. The work at hand studies and evaluates legal framework the Islamic Republic of Pakistan (hereinafter referred as Pakistan) since it refers to Islam explicitly at several locations in its legal framework and is the only state created in the name of religion wherein any law against Islamic precepts cannot be made as per its constitution. Pakistan is party to most of the conventions/covenants of IHRL, however, has reserved various provisions of these treaties in the name of Islam while at the same time providing the same rights and interests to their local populace in its legal framework in both qualified and unqualified terms.

This being the case, makes it necessary for a detailed overview to understand its ideological makeup to link and grasp its approach towards IHRL and its consequent effects on the signing, adoption, implementation and enforcement of the same. Since, the way states adhere to international treaties is dependent on their constitutional, legal and ideological frameworks.

II. Status of Law and Constitution Pakistan

Nature of the State and Sovereignty

Pakistan appeared on the map of the world on 14th of August 1947. It was made solely on the basis of Islam and the famous two nations ideology (Shah, 2006). The people struggled for the country because they believed that they were different from Hindus of the sub-continent in their culture, language, traditions, religion and all (National Assembly of Pakistan (Constitution-Making) Debates, 1972). The founder of the country Quaid-i-Azad Muhammad Ali Jinnah on multiple occasions reiterated that we wish to create Pakistan in order to fashion our lives according to the golden rules of Islam (رياض, 2010; شريعة اکیڈمی, 2005; Quaid's Philosophy in the Light of Quran, 2013).

It is therefore, that the first constituent assembly adopted Objectives Resolution to voice the sentiments of the people and depict how this state was to run.

Mere a cursory look at the constitution shows that it is replete with very strong and firm references to Islam as well as human rights. Despite the mentioning of Islam as state religion and laws to be in consonance with the Quran and the Sunnah we find provisions which are inconsistent with Islam hence subject to open criticism.¹

Following is a brief sketch of the constitutional framework of Pakistan based on the principles of Islam:

Objectives Resolution

The Preamble² states that the “sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust” (The Constitution of Islamic Republic of Pakistan, 1973). It then put limits on the “principles of democracy, freedom, equality, tolerance and social justice” as expressed by Islam to be observed fully. It then assures the masses for the conditions to be made so that people shall fashion their lives in accordance with the Islamic precepts.

It ensures that every citizen is guaranteed the right to freedom of speech, however subject to any restrictions imposed by law in the interest of inter alia the glory of Islam. It also ensures on the steps to be taken to get the Muslims of Pakistan who are in majority, to build their lives in accordance with the fundamental concepts and principles of Islam.

It requires the state to make the teachings of the Holy Quran obligatory, to publish the Holy Quran, to enable the masses for learning Arabic language. It also urges the state to see to the Islamic moral standards and also to ensure the proper arrangements for the administration of mosques and for zakat, ushr and auqaf (The Constitution of Islamic Republic of Pakistan, 1973).

Membership Qualifications

The constitution recommends qualifications for the membership of its Majlis-e-Shoora (Parliament) which requires inter-alia that a contestant “must be of good character [...] one who not violates Islamic Injunctions [...] have adequate knowledge of Islamic teachings [...] practices obligatory duties [...] and abstains from major sins [moreover] he must be righteous [...] non-profligate and honest and ameen”. (The Constitution of Islamic Republic of Pakistan, 1973)

The Federal Shariat Court

It creates The Federal Shariat Court (FSC) for the purposes of examining whether or not any law or provision is repugnant to the injunctions of the Holy Quran and the Sunnah of the Holy Prophet (Peace be upon Him). Where the FSC found a law or provision thereof against the injunctions of Islam, it recommends it to

¹ Islam prohibits Riba in categorical terms. (Al Imran, Verses 130-132 and Al Baqarah, Verses 275-281 - Al Quran); The same has yet not been eliminated fully from the economic system of the country. See Article 38 (f) of the Constitution.

² Article 2-A states that Objectives Resolution (incorporating the words in the Preamble) to be an effective part of the constitution and added it in the Annex to the Constitution.

the concerned federal or provincial forum from where the law originated to amend or repeal the law (as the case may be) within 60 days, failing which the recommendation or any other proclamation of the FSC becomes law itself. The FSC has exercised its jurisdiction on several occasions, particularly recently when it declared certain provisions of the Protection of Women Act, 2006 to be inconsistent to Islam (Dawn, 2010).

Islamic Provisions

The constitution categorically requires that “no law shall be made which is repugnant to the injunctions of the Holy Quran and the Sunnah and all laws shall be made in conformity with them” (The Constitution of Islamic Republic of Pakistan, 1973).

It creates a Council of Islamic Ideology (CII) (The Constitution of Islamic Republic of Pakistan, 1973) to offer recommendations to the Parliament, the Provincial Assemblies etc., on the methods to encourage and enable the Muslim citizens of Pakistan to pass their lives as per the precepts of Islam. The council is also empowered to refer to the organs mentioned above about the vires of any existing or proposed law being within the ambit of Islam or not. However, CII’s jurisdiction and powers are very limited in scope. Its findings are of advisory nature and have no substantial effects when compared with the findings and recommendations of the FSC.

Oath of Allegiance

The constitution, specifically in the Third Schedule concerning Oaths of Office for positions such as the President etc., mandates that members of Parliament, provincial Governors, and members of Provincial Assemblies must swear an oath of allegiance. This oath, which begins with the same words for Muslim officeholders, affirms that the individual is a Muslim who believes in the Unity and Oneness of Almighty Allah, acknowledges the Books of Allah with the Holy Quran as the final one, recognizes the Prophethood of Muhammad (peace be upon Him) as the last Prophet, and asserts that no Prophet will come after Him. Additionally, it includes belief in the Day of Judgment and adherence to all the teachings and requirements of the Holy Quran and Sunnah.

Muslim Defined

Pakistan’s constitution is unique in this dimension from rest of the constitutions of the Muslim world as it defines a Muslim and a non-Muslim. The provisions to that effect have been criticized in the name of IHRL from within and outside Pakistan and UN Committees including one on ICCPR which demanded its amendment or repeal (Concluding Observations on the initial Report of Pakistan, 2017). It has been criticized that there are certain key positions reserved only for the Muslims and to the exclusion of all other minorities living in the state. For instance, only a Muslim could be the President of the state. Same is the case with the Prime Minister (The Constitution of Islamic Republic of Pakistan, 1973).

Fundamental Rights

If we carefully look at the present constitution of Pakistan. It does not seem totally devoid of the modern outlook and concepts, rather it is a blend of traditional, orthodox and modern thoughts. As a matter of fact, Pakistan was amongst the first Muslim states which signed and supported the UDHR when many others outrightly rejected it in 1948 (Sait & Lim, 2006).

The constitution dedicates a full Chapter incorporating 23 fundamental rights closely in line with that of International Bill of Rights. The rights include inter-alia security of person, safeguards as to arrest and detention, right to fair trial, prohibition of slavery and forced labour, protection against retrospective punishment. It secures freedoms of movement, assembly, association, trade, profession, speech. It provides rights to information, religion, property, education. It outlaws' discrimination in several places on the grounds of race, language, sex, religion and declares equality of citizens. It also includes rights providing for the preservation of script, language and culture. Above all it states in Article 8 that "Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this chapter, shall, to the extent of such inconsistency, be void." (The Constitution of Islamic Republic of Pakistan, 1973)

Nonetheless, the Constitution's religious provisions particularly the Objectives Resolution and Article 227 which are the operative parts of the constitution, starkly limits the scope and extent of these freedoms. It subjects all the rights available under the constitution to the religious law. The constitution provides for the right to equality but only a Muslim can be the President of the Islamic Republic thereby excluding all the other factions from the presidency race. There is plethora of laws like Muslim Family Laws Ordinance, 1961, Dissolution of Muslim Marriages Act, 1939, Hudud Ordinances, 1979 which are directly in clash with IHRL norms, and the self-contradictory Articles of the Constitution create an obscure and vague image of the principles through which the otherwise irreconcilable traditional and modern values are reconciled.

The purpose of highlighting the core religious provisions from the constitution is to make this clear that any state with the above-mentioned provisions in its grund norm is very less likely to concede to certain norms IHRL insists it to follow. Although there is bulk of area which is compatible in both the systems, but the essence and the core differs drastically.

IV. Responses to International Human Rights Law

Pakistan has been signatory to most of the IHRL treaties. The issue is that it has blocked the implementation of the provisions of these treaties by not adhering to the specific provisions as well as Optional Protocols enabling individuals to access the Human Rights Committees established thereunder for the enforcement of those rights. In the same way it has also put reservations and declarations over these treaties thereby curbing their implementation to great extent in the domestic sphere.

ICCPR, for example, a significant treaty covering up the civil and political rights was adopted by the UN in 1966. It became effective after ten years i.e., March 23, 1976. Pakistan signed it on April 17, 2008 (forty-two years since it was first adopted and ratified the same on June 23rd, 2010. Pakistan is yet not party to the optional protocol to the ICCPR that allows individuals to access international justice by approaching the respective human rights committee established under the treaty.

Pakistan is under legal obligation from the date of ratification of ICCPR to take positive meaningful steps to ensure that the rights in the covenant are enforced domestically and to change its present laws where they go against the same.

Since the treaty has been ratified, it puts Pakistan under an International obligation and responsibility to take all requisite steps necessary to put treaty provisions in place including all the legislative and other measures without any discrimination on account on race, religion, gender, opinions etc (International Covenant on Civil and Political Rights, 1966).

Pakistan initially reserved many provisions such as Articles 3 (equality between men and women), Article 6 (abolition of death penalty) Article 7 (capital punishment and torture), Article 18 (freedom to choice of religion and non-coercion), 19 (freedom of expression) and Article 25 (equal rights for all the citizens in the public services and vote) (United Nations Treaty Collection, 2020). Most of the reservations were religiously inspired. For instance, Government of Islamic Republic of Pakistan declared that the provisions of Article 3 of the ICCPR shall be applied in a way that conforms with the national law particularly the personal law of the citizens and the Qanun-e-Shahadat Order (a law regulating evidence related matters in Pakistan as per Islamic injunctions) (United Nations Treaty Collection, 2020). The government regarding the application of Article 25 stated that the same shall be subject to the principles referred to in the constitution i.e., Article 41(2) and Article 91(3) of the Constitution (United Nations Treaty Collection, 2020).³

Later, Pakistan decided to partially withdraw the reservations from some of the articles but insisted retaining it on the others. It stated that "The Islamic Republic of Pakistan declares that the provisions of Articles 3,6,7,18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and Sharia laws" (Reply to List of issues in relation to the initial report of Pakistan, 2025). The Committee in its Concluding observations rendered on August 23, 2017 welcomed Pakistan for narrowing down its total reservations to articles 3 and 25, however, urged it to withdraw the same since these "limit the application of these articles only to the extent that they are in conformity with Muslim personal law and the Law on evidence [as well as with] some provisions of the constitution..." (Concluding observations on the initial report of Pakistan, 2025).

³ Article 41 (2) incorporates one of the conditions for a candidate to be the eligible for becoming the President of the Republic. It states that a person who is not a Muslim is not qualified to go for the elections of the President of Pakistan; Article 91 (3) of the Constitution similarly states that the National Assembly after it elects the Speaker and the Deputy Speaker of the National Assembly shall proceed to elect one of its *Muslim* members to be the Prime Minister of Pakistan.

Pakistan has also not signed the Convention on the Rights of Persons with Disabilities, 2006 in addition to Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 1966 and the Optional Protocol-III of the Convention on the Rights of Child, 1989 (Optional Protocol III to Convention on the Rights of Child, 1989). Nonetheless it later joined Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2002, and Optional Protocol to the Convention on the Rights of the child on the involvement of children in armed conflict, 2002, respectively in 2011 and 2016.

Although Pakistan is party to many of these human rights treaties, the reservations it has recourse to and not joining the optional protocols to some of these treaties has undermined the significance of its provisions and consequent application. The committees therefore have consistently pressed it to withdraw from its reservations and to join additional protocols attached with the treaties so that the provisions could be made applicable effectively.

The only Conventions which are signed and ratified by Pakistan that also provide for the enforcement of their provisions through right to file communication/petition are International Convention on the Elimination of All Forms of Racial Discrimination (1965) and Convention against Torture & other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Convention on the Elimination of all forms of Racial Discrimination, 1965 (CERD) was signed by Pakistan on September 19, 1966, & immediately ratified on September 21, 1966.

Pakistan signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (UNCAT) on April 17, 2008 & ratified on June 23, 2010. It has reserved many of its provisions. Particularly, it denies the competence of the Committee formed under UNCAT for any confidential inquiries regarding torture in the state (UN's Treaty Body Database, 2020).

CEDAW was adopted by the UN on December 18, 1979. Pakistan acceded to the convention after sixteen years on March 12, 1996, with a declaration and a reservation. It declared that "The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan." It reserved Article 29 (1) of the convention which contains a mechanism to render any dispute regarding the interpretation of the convention to the International Court of Justice (ICJ). The Committee under CEDAW while rendering its concluding observations on the fifth periodic report of Pakistan showed its concern on its general declaration on the convention and urged its expeditious withdrawal (Concluding observations on 4th periodic report of Pakistan, 2020).

Pakistan has not gone for the reservation over the Convention of the Elimination of Racial Discrimination, 1965 and the Convention against Torture, 1984 respecting right of individuals to access international justice through communication procedure. Pakistan is not party to International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,

2003, and International Convention for the Protection of all Persons from Enforced Disappearance, 2010.

V. **Pakistan before the Human Rights Committees (ICCPR, ICESCR)**

The response of the Committee constituted under the ICCPR on Pakistan's first report highlights the differences between the way religion and human rights are understood at the UN. The Committee while evaluating Pakistan's periodic report felt "concerned that the rights enshrined in the Covenant are not given full effect in the domestic legal order..." (Concluding observations on the initial report of Pakistan (ICCPR), 2020) and regretted the fact that "the State party maintains its reservations to articles 3 and 25, which limit the application of these articles only to the extent that they are in conformity with Muslim personal law and the Law on evidence, and with some provisions of the Constitution, respectively" (Concluding observations on the initial report of Pakistan (ICCPR), 2020). The Committee also showed concern (Concluding observations on the initial report of Pakistan (ICCPR), 2020) that the non-discrimination laws of the state including Articles 25 to 27 of the Constitution "do not afford protection against discrimination on all the grounds prohibited under the Covenant. [and] that same-sex relations between consenting adults are criminalized."⁴ The Committee then regretted that 'effective measures to prevent and punish all forms of discriminations against lesbian, gay, bisexual, transgender and intersex persons' are not taken.

In addition to the abovementioned the Committee required the decriminalizing of the same-sex relationships amid consenting adults. It also recommended the Islamic Republic on other places, to abolish death penalty and accede to the second OP to the Covenant in this regard, to abolish all the blasphemy laws and set minimum age for marriage to 18 (Concluding observations on the initial report of Pakistan (ICCPR), 2020).

On July 20, 2017, the Committee constituted under the ICESCR rendered its concluding observations on the initial report of Pakistan. The Committee recommended Pakistan to revise Article 25 of the constitution because it is narrower in scope and extent, and prohibits discrimination on "colour, language, political or other opinion, national or social origin, property, disability, sexual orientation, gender identity or other status" (Concluding observations on the initial report of Pakistan (ICESCR), 2020). It also recommended Pakistan to decriminalise same sex relations between consenting adults (Concluding observations on the initial report of Pakistan (ICESCR), 2020). It found several domestic laws highly discriminating such as The West Pakistan Muslim Personal Law (Shariat) Act, 1962 (which permits polygamy and grants half of as much son's share to daughters and The Qanun-e-Shahadat Order, 1984 (which makes testimony of a female witness half that of a male witness). It therefore recommended Pakistan to review all these discriminatory laws and bring them in line with the provisions of ICESCR (Concluding observations on the initial report of Pakistan (ICESCR), 2020).

⁴ Article 25A (Equality of Citizens), Article 25 (Right to Education), Article 26 (Non-discrimination in respect of access to public places), Article 27 (Safeguard against discrimination in services)

The observations of the Committees under ICCPR and ICESCR question Pakistan's commitment to these treaties. The reason Pakistan is unable to abide by all the suggestions and recommendations by the Committee is due to the ideological connotations of its constitution which strictly prohibits making of any such laws which contradict the provisions of Islam. Provisions pertaining to the abolition of death penalty, legitimizing consensual sexual relationships between same genders, Hudood Laws and the likes are therefore unlikely to be introduced, amended or repealed since Islam explicitly prescribes its injunctions on these matters which leave no room for any step in this regard.

Earlier, Pakistan while submitting its replies before the Committee under ICESCR explained that its laws are in line with the spirit of the Convention. It stated that "Most of the rights embodied in the International Covenant on Economic, Social and Cultural Rights [...] as well in other international human rights instruments ratified by [it] have always been part of the substantive law of the country" (Replies of Pakistan to the list of issues (ICESCR), 2020). It also stated that the "Constitution of Pakistan is in line with provisions of the Covenant and [...] various domestic laws, including Pakistan Penal Code [...], Criminal Procedure Code, as well as various domestic laws and regulations [...] are in line with [...] international human rights obligations and are not discriminatory in any matter." It however admitted that "the constitution as well as all other laws are in line with the Shariah law and laws relating to land, property and inheritance are in consonance with Islamic provisions" (Replies of Pakistan to the list of issues (ICESCR), 2020). The respective human rights committees, nevertheless, do not seem to agree over it as shown from their reports quoted hereinabove.

CONCLUSION AND RECOMMENDATIONS

The interaction of the constitution and the international human rights standards show conflict amongst both the systems. This is due to the reason that the ideological basis of both the systems is not based on the same principles. One system believes in the superiority of reason and intellect to the exclusion of revelation whereas the other system while greatly encouraging the use of reason and intellect subjects the same to the divine will. One believes that the sovereignty lies with the people and people alone whereas the other vests the sovereignty not only in any state but the entire universe with Allah. An Islamic state in this sense can never be sovereign. It cannot make to do away with laws as it wishes without taking into consideration the divine law.

The insistence on the interpretation or understanding of human rights norms as per secular construct and evasion from considering the narratives of others has also been a contributing factor. The situation of human rights and its principles are not necessarily grim as portrayed in jurisdictions based on divine law, on the contrary, there are many areas where the divine law and its principles pertaining to human rights simply are far better than the UN based human rights system.

Besides, the existence of inequality and feeble structural realities within the UN system weakens the complete adherence to the lofty principles enshrined under these treaties. The principle of free consent, the optional nature of the treaties, lack of executive authority for the enforcement of the opinions of the respective human rights committees and non-appreciation of ideas and counter-narratives outside the west are also the contributory factors for the failure of full adherence to these principles.

It is therefore suggested that the UN must either apply the doctrine of margin of appreciation as applied in the European Human Rights system or accommodate the norms from other civilizations of the world in its principal treaties both to justify the claims of their universality and to secure the confidence and greater participation of states in the UN based human rights system wherein religions or like orientations play a significant role and regulate inter-alia the legal, social, political and economic affairs of millions of people.

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