
Equality Clause in Pakistan: A Need for Elevation to Supra Constitutional Status

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Ye DaagDaagUjala, ye ShabGazeedaSeher

Wu IntizarthaJiska, YehwuSehertuNahin

This tattered raiment of darkness

This sputtering of dawn.

This is not the dawn that we had hoped for.

This is not the dawn we had set out for.

AUGUST 1947

DAWN OF FREEDOM

FAIZ AHMAD FAIZ

ABSTRACT

Equality in all its manifestations is a notion that requires implementation in Pakistan in every facet being the premise idea for the founding of Pakistan. The purpose of this article is to highlight the importance of equality as the foundational feature of Pakistan and make out a case for its incorporation in the legal structure as supreme consideration. The methodology adopted is doctrinal and descriptive analysis of the issue in hand. The findings of research mandate revisions in constitution of Pakistan and legal paradigm of Pakistan with equality at the forefront. Such an analysis to authors knowledge has not been undertaken before.

1. INTRODUCTION

Equality clause in world constitutions implies two expressions i.e. equality before laws and equal protection of laws. The first expression equality before laws connotes absence of any special privilege in favor of any individual while equal protection of law is a guarantee of equal laws. (Khan et al., *Comparative constitutional law* 2014) The premise for writing of this article can best be understood from the verses of Urdu poet Faiz Ahmad Faiz quoted above and the short story titled ‘The New Constitution’ by Saadat Hassan Manto. In the aforesaid short story, Manto laments the new constitution after partition, of missing the desired promised change. (Hasan, *Bitter fruit - the very best of saadat hasan manto* 2008) It

is averred in this article that the averred change by our forefathers and founding fathers was of equality at all levels starting from the foremost constitution itself and encompassing the economics of our nation. Equality clause like many other constitutions of the world countries is also present in the Constitution of Pakistan, 1973 as in vogue. However, many of the provisions of the constitution itself are not tenable or inconsonance with the equality clause i.e. article 25 of the Constitution of Pakistan. Moreover, there is no specific provision on equality in economic terms. This article will deliberate all these issues in detail. The limitation of the study is comparative analysis from other countries due to limited scale of the research.

2. ANALYSIS

The speech of Quaid-e-Azam Muhammad Ali Jinnah wherein he said,

“You are free; you are free to go to your temples, you are free to go to your mosques or to any other places of worship in this State of Pakistan. You may belong to any religion or caste or creed — that has nothing to do with the business of the State (Hear, hear)”, (*Address of the Founder of Pakistan Quaid-e-Azam Muhammad Ali Jinnah on 11th August, 1947 to 1st Constituent Assembly*)

This speech is largely quoted out of context as in the whole above referred speech; the founder of Pakistan was only stressing equality for all people in the nation of Pakistan. Instead of focusing on equality, the speech was used for ulterior motives to make out a case for secular Pakistan rather than an envisioned Pakistan wherein equality of all citizens was to be guaranteed politically, economically and most important of all legally by the constituent makers in the future constitution, however, the promise was soon forgotten and despite objective resolution (grund norm of Constitution) and preamble to the present constitution stressing formulation of an egalitarian society, the same was a far cry in the legal structure of the constitution. To attest the fact of envisioned equality by the founding father, I quote from his same speech,

“If you change your past and work together in a spirit that every one of you, no matter to what community he belongs, no matter to what community he belongs, no matter what relations he had with you in the past, no matter what is his colour, caste or creed, is first, second and last a citizen of this State with equal rights, privileges and obligations there will be no end to the progress you will make”. (*Address of the Founder of Pakistan Quaid-e-Azam Muhammad Ali Jinnah on 11th August, 1947 to 1st Constituent Assembly*) This paper will deliberate the issue as to how this envisioned equality can be achieved constitutionally.

The only article in the constitution of Pakistan, 1973 that prescribes economic principle for the whole of the country can be said to be article 3 which prescribes that the state of Pakistan shall ensure elimination of exploitation and the fulfillment of the principle to each according to his ability and work. (Mahmood, *Part 1, Article 3* 1996) This article 3 of the constitution of Pakistan, 1973 is wholly inconclusive as no significant pronouncement from superior judiciary has come upon it delineating the economic system for Pakistan. Any of The major economic systems as canvassed by the world today cannot be said with certainty is covered by virtue of the said article 3 of the constitution of Pakistan, 1973 and more so, the equality principle as stressed by the great Quaid-e-Azam of Pakistan. Equality as an idea captivated the minds of philosophers and thinkers in the last foregoing centuries and still continues to captivate. It motivated philosopher thinkers like Karl Marx from the olden time to present jurist of the like of John Rawls that are widely celebrated. The theories of jurist writing on equality have had much relevance but a successful model from developing

countries is still to arise particularly in South Asia. The founding forefathers of Pakistan as is clear from their verdicts and writings were much fascinated by the idea of equality but somehow it failed to translate into action by the later jurists. There is an equality clause in the constitution of Pakistan in the form of article 25 but it is insufficient as it doesn't enjoy a supra constitutional nature resulting in many provisions of the constitution that are inclined towards inequality. To ensure equality the foremost thing is economic emancipation of people so that their dignity is ensured which is directly dependant on money or financial condition of individuals. The state in order to ensure dignity of its citizens in Pakistan should provide for unemployment allowance as is the practice in many of the advanced nations of the world. Constitution of Pakistan should mandatorily provide for state caring for its citizens economically and any discriminatory laws in this regard may be amended suitably. One such instance of discrimination can be quoted that the government jobs require a person to be mentally fit for occupying a post. Such a provision has the effect of negatively impacting persons who may be suffering from some mental health issues and undergoing treatment. Besides, those who are permanently handicapped or unable to find employment should be mandatorily looked after by the state. This is only possible if state of Pakistan can provide subsistence allowance for its unemployed citizens in interest of dignity and equality. Economics is one of the driving factors for many of the illnesses in society and such ailments can be easily remedied if state of Pakistan provides for a subsistence allowance. This will also decrease the crime rate in the country. To this end for ensuring subsistence allowance in the interest of equality as conceived by founding father by envisioning a welfare state, the constitution must bind the state and allow it to do the needful in the form of imposing additional taxes on rich or whatever it feels like for securing the end of subsistence allowance.

The judiciary can also lend a helping hand in ensuring equality by elevating equality to supra constitutional status which it deserves as stated in the preamble to the constitution of Pakistan, 1973. This can be achieved by incorporating equality in the basic structure theory and making reforms in constitution on the basis of equality. Moreover, judiciary needs to play a vigilant role in enforcing the mandate of equality clause by discouraging the VIP culture which has encompassed the Pakistani society at all levels. The judiciary needs to set precedent in this regard too by discouraging unnecessary protocols which have been seen to be given to judiciary in the present times on the pretext of security and decorum etc. The envisioned dream of Quaid of equality can only be achieved if judiciary becomes guardian and protector of this dream and makes it mandate to enforce it properly initiating the case from itself and then to lawmakers who are flouting equality in today's times by use of unnecessary protocols which can be gleaned from their entourages and official convoys. Coming to the subject of reforms in Constitution of Pakistan on the touchstone of equality, the following reforms are inter-alia being proposed for making Pakistan an egalitarian society as conceived by the forefathers who carved this land of the pure with their blood.

- i) Article 248 of the constitution of Pakistan provides protection to President, governors and ministers etc, protection against legal proceedings for any act done in furtherance of their purported powers under law and complete immunity to president and governor from criminal proceedings during their term of office. (Constitution of Islamic Republic of Pakistan, 1973). This article is relic of British Raj and doesn't find justification in the present Constitution based on equality principle and egalitarian society as conceived by the founding fathers. This article 248 is exception to the principle of equality before laws of every individual in the country and requires doing away with in interest of equality and Islamic polity as thought of by our founding fathers and expounded from time to time by different

- leaders of Pakistan movement and particularly in the Lahore Resolution wherein idea of Pakistan was initially conceived claiming parity with Hindu majority. After the passing of the 18th amendment, the major concerns of smaller provinces have been addressed on the parity principle, however, a lot also still needs to be done in this regard for ensuring equality and preventing a mishap like that of Bangladesh e.g. more autonomy on their resources in oil, gas and electricity.
- ii) Article 45 of the Constitution of Pakistan, 1973 grants the president of Islamic Republic of Pakistan power to remit or pardon any sentence. (Constitution of Islamic Republic of Pakistan, 1973) This constitutional article is manifestly against the equality principle e.g. in a murder case the president may pardon an accused who has not been forgiven by the relatives of the murdered victim person thus superseding the right of relatives of victim and more so, murdered deceased who has been innocently murdered. It can also be argued that right of kindred to forgive convict vis a vis victim is against the equality principle as the murdered person right has been violated who may not have forgiven the convict. This is particularly important in today's times as crime of murder has increased manifold and many cases of murder have been pardoned by the kindred in Pakistan on monetary considerations ignoring the plight of victim. Raymond Davis an American was pardoned by the families of murdered victim after the American citizen gunned down two Pakistanis in broad daylight. (Tribune, *Raymond Davis pardon documents* 2011) Similarly family gunned down by policemen on suspicion in front of children did not meet justice when their kindred compromised the matter with the state. (Dawn.com, *Family members of man killed in Sahiwal 'encounter' end protest after talks with police* 2019) This matter inter-alia confronts the law makers when seen in the light of justice situation in the country and particularly when Pakistan was conceived as a modern Muslim State by the founding fathers predominantly Allama Iqbal who preferred an interpretation of shariah that would give weight to space and time. (Iqbal, *Chapter 5, Chapter 6* 2017)
- iii). Article 62 of the constitution of Pakistan can be described as 'piety clause' for the law makers. It makes it mandatory for the lawmakers to be pious people. (Constitution of Islamic Republic of Pakistan, 1973) This is a far cry from reality as practically every kind of dacoit is occupying the position of a law maker. Judiciary has been unable to stop unscrupulous from occupying the office of lawmaker. In this scenario it is far better if the article 62 is deleted from the constitution of Pakistan paving way for an egalitarian society and ignoring utopia leaving the question of deciding the credentials of lawmakers to the people of the country which are the supposedly ultimate authority in a democracy. It is also averred that laws should be promulgated in Islamic Republic of Pakistan in interest of equality that limit spending by potential candidates for peoples assemblies to a minimum so that candidates from all walks of life can participate in general elections and such elections are not overrun by influential candidates.
- iv). Freedom of speech in Islamic Republic of Pakistan is regulated by virtue of article 19 of the Constitution and subjects the same to reasonable restrictions that may be imposed by law in interest of glory of Islam, defense and morality etc. (Constitution of Islamic Republic of Pakistan, 1973) Such restrictions have the effect of negatively effecting this right of Freedom of Speech as masses can be indicted on the basis of loosely used language in the constitution of Pakistan. It is proposed that law imposing limitations on freedom of speech should be carefully

worded with relevant explanations so that genuine freedom of speech in interest of the country and research purposes is not hindered e.g. Pakistan penal code relevant provisions on blasphemy may be supplied with relevant explanations so that research can be freely undertaken on religious issues.

- v). Immunity provisions in favor of army and judiciary may be suitably amended as provided by virtue of article 199 of constitution of Pakistan so that writ for enforcement of fundamental rights can be brought against these two institutions. It may happen that judicial staff is being discriminated within the judicial setup and have no recourse to courts for enforcement of their fundamental rights. To avoid such a scenario the provisions of article 199 require reasonable amendments.

3. CONCLUSION

Amendments in interest of equality are the need of the hour as this was the sole premise on which this country was founded. Quaid-e-Azam speech to the constituent assembly on 11th September, 1948 is ample evidence of the fact and attests the thesis that Pakistan was conceived as an egalitarian society with equality at its foundation. True purpose of Pakistan cannot be evinced unless equality in all its manifestation finds its footsteps in the legal structure of Pakistan. Judiciary requires waking up to the situation by making equality as part of the basic structure theory nullifying constitutional provisions that militate against equality.

4. REFERENCES:

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