

Prohibitions on Torture in Pakistan

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Abstract

History has shown that for prolonged periods of time, humans were deprived from the right to live in dignity as they were frequently victims of torture at the hands of the very state which they enjoined, seeking protection from such abuses. Since the world has come to denounce torture as a practice which can be legally carried out by a state, Pakistan has also joined this initiative by becoming a signatory of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. However, little has been done to eliminate practices of torture from the criminal justice system in Pakistan. With national actors, the police in particular, relying heavily on torture, one comes to wonder what the structure in Pakistan, which denounces torture, look like. This paper will assess the current Pakistani legislations in place to combat torture and provide a comparative with other jurisdictions to adduce inferences which Pakistan can use to eliminate torture.

Introduction

Under section 3 of Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Act 2014 torture is defined as an act, executed by a public servant or a person with authority to unlawfully cause physical/mental pain, in order to extract a confession, to punish a suspect, to intimidate or coerce another individual, for any other discriminatory reason or to harass or molest a female. Since the practice violates the fundamental right to dignity of a person, which can be termed to be one of the foundation stones of the modern social contract, it is an important facet of a democratic society to prohibit torture.

Being an Islamic state, the Pakistani legal system safeguards its citizens from torture. This paper aims to qualitatively assess the provision and conveyance of this protection in Pakistan. References will be made to other jurisdictions to evaluate how they convey this protection and to serve as a comparative to that of the Pakistani legal system.

A. Historical Background

Torture was a practice commonly employed in ancient Greece and Rome to attain information and to coerce confessions. Torture was also a popular practice in the 5th to the 15th century as part of a trial to separate the innocent from the guilty. Without any limitations, the practice evolved over time as an important part of the criminal justice system and confessions by torture were termed to be ‘the queen of proofs’. But as the focus shifted from mere confessions to the attainment of justice, emphasis was added to the and maintenance of human rights throughout criminal trials. To this, torture, for obvious reasons posed a serious problem. This allowed for torture to be viewed in a different light and thus began the decline of the use of practices involving torture.

This did not, however, result in a global denouncement of torture. Humanity had to suffer much to reach that conclusion.

The horrors of World War II pressed upon the world, the need to work towards prohibiting torture. Instances like the Holocaust served as good impetus to fuel this initiative. Thus, came forth the Universal Declaration of Human Rights¹ which was the first international document supplementing this initiative and forbidding torture.² Following this, many states enacted national laws carrying the same prohibition.

The prohibition on torture has consequently been absorbed by national and international human rights treaties and has therefore received much denouncement by the international system of law. Plenty of ink and literature has been spent in ensuring that the world, led by international law, acts divorced from torture. This was the aim, regardless of ideas like national security, which many states have used as permission slips for the use of torture. The European Convention on Human Rights,³ the African Charter on Human and People's Rights,⁴ American Convention on Human Rights,⁵ United Nations Convention against Torture⁶ and the International Covenant on Civil and Political Rights⁷ are good examples of this.

These legislations have allowed for cases which serve as milestones in the denouncement of torture, to be decided. The case of Augusto Pinochet was one such instance, where a sitting head of state⁸ was denied immunity, traditionally given to heads of states present in other jurisdictions, on grounds of torture.⁹ Although he was returned later to Chile, as he was deemed unfit for trial owing to his poor health,¹⁰ the case serves as a precedent and as evidence for the determination with which the world had decided to pursue torture.

¹ Hereafter 'UDHR'.

² UDHR, art 5.

³ Hereafter 'ECHR'. ECHR, art 3.

⁴ Hereafter 'ACHPR'. ACHPR, art 5.

⁵ Hereafter 'ACHR'. ACHR, art 5.

⁶ Hereafter 'CAT'.

⁷ Hereafter 'ICCPR'. ICCPR, art 7.

⁸ The Chilean president.

⁹ He was accused of torturing Spanish citizens. *R (Pinochet Ugarte) v Bow St Metropolitan Stipendiary Magistrate* [2000] 1 AC 61.

¹⁰ Stacie Jonas, "The Ripple Effect of the Pinochet Case" (2004) 11(3) Human Rights Brief 36.

While many international treaties, declarations and conventions have prohibited torture, a definition for the practice was provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984¹¹. This convention defined torture to be any act by which physical or mental pain/suffering is inflicted on a person as a punishment or to obtain information or coerce a confession. Such an act would only qualify to be torture if it is carried out by the consent or acquiescence of a public official and does not include pain /suffering inherent to lawful sanctions.¹²

B. Prohibitions on Torture in Pakistan

There is no specific definition of torture in Pakistan, and the accompanying sanctions specific to torture are also absent. The definition cited above is taken from a legislation which has yet to come into effect. Therefore, prohibitions on torture are sourced from fundamental rights, as it is these very rights which are abused when an individual is subject to torture.

Fundamental rights which are preserved by the Constitution of Pakistan are under the purview of the judiciary which is tasked with defending them. The Supreme Court of Pakistan has the authority to take *Suo Moto* action¹³ by opening cases in the public's interest or where there might be a concern for violations of human rights to occur. In addition to this, High Courts in Pakistan also have the authority to take similar actions specifically to ensure the protection of fundamental rights.¹⁴

The practice of torture has been held to be an act violative of fundamental rights by the constitution and other legislations in Pakistan. Therefore provisions, constitutional and otherwise, have been enacted to

¹¹ Hereafter 'CAT 1984'.

¹² CAT 1984, art 1.

¹³ Under article 184(3) of the Constitution of Pakistan.

¹⁴ Constitution of Pakistan Article 184(3) & 199; Article 184(3) deals with Original Jurisdiction of Supreme Court while Article 199 deals with same Jurisdiction of High Court.

prohibit exploitation of individuals¹⁵ and right of individuals to be dealt with in accordance with law¹⁶. These provisions try to ensure that various forms of torture, both direct and indirect, are prohibited.

Fundamental rights, although a tenet sacred to democracies, must be restricted if the state is to carry out certain functions, especially those relevant to its criminal justice system. Life and liberty¹⁷ are restricted when an individual is accused or convicted by the state for a criminal act. But the value of these fundamental rights is also reflected in the balance the state creates when it provides safeguards to the individual whose fundamental freedoms are being restricted. These come in the form of mandating that the individual be told the reason for his arrest, presentation before a magistrate within 24 hours of an arrest and access to a legal representative of the prisoner's choice. In addition to this, retrospective punishments and double punishments for the same crime are prohibited. While such safeguards are necessary to protect the rights themselves, the need for these safeguards is added to by the fact that it is the abuse of fundamental rights which can be termed to be torture, something the state cannot sanction.

The jurisprudence of the courts of Pakistan has followed the legislation by holding violations of these rights to be illegal. Cases like *Muhammad Ibrahim vs. SHO Police Station, Sheikhpura*¹⁸ have deemed illegal inquires, especially those carried out without the permission of a magistrate to be unlawful, a manifestation of abuse of power and resembling torture.

A right which is impacted most by the practice of torture is the right to dignity. This right holds every individual to be inherently worthy of respect. Protected by the constitution of Pakistan,¹⁹ all forms of torture violate this right.

In addition to the constitution, other legislations also carry provisions prohibiting torture by non-state entities. The Pakistan Penal Code²⁰ prohibits

¹⁵ Constitution of Pakistan 1973, art 3.

¹⁶ Constitution of Pakistan, art 4.

¹⁷ Guaranteed by article 9 of the constitution.

¹⁸ *Muhammad Ibrahim vs. SHO Police Station, Sheikhpura*, 1990 PCrLJ 1717.

¹⁹ Constitution of Pakistan, art 14.

²⁰ Hereafter 'PPC'.

illegal detention or the conveyance of physical harm to another.²¹ These prohibitions by the legislation and congruent sanctions by the judiciary are reflective of the country's international obligations, especially those, abuse of which can be easily translated to torture. Pakistan is a signatory of the International Covenant on Civil and Political Rights²². Not only does this prohibit torture, it requires all to be treated equally before the law,²³ it also provides for compensation to victims of torture including those abused by government officials,²⁴ prohibits arbitrary arrest and detention,²⁵ torture and ill-treatment²⁶ and violations of right to life²⁷. Similar obligations to protect from torture have been imposed upon Pakistan by the Universal Declaration of Human Rights²⁸ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to both of which, Pakistan is a signatory.

As noted by the Committee against Torture, despite popular knowledge of the torture carried out by the police, there is no viable specialised legislation in place to criminalise or combat this.²⁹ The PPC, the primary criminal law legislation in the country, does not acknowledge or denounce torture. In fact, the word torture has not been used anywhere in the penal code. The Police Order 2002 makes certain stipulations where it prohibits such practices by the police and provides punishments for instances of violations,³⁰ but all this falls prey to the lack of enforcement of such provisions.

Being a signatory to the United Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment the National Assembly passed the Torture, Custodial Death and Custodial Rape (Prevention & Punishment) Act 2014. While this legislation is specifically designed to target abusive practices of the police, it has yet to be enacted as legislation.

²¹ PPC, s 100.

²² Hereafter 'ICCPR'.

²³ ICCPR, art 26.

²⁴ ICCPR, art 2(3).

²⁵ ICCPR, art 9.

²⁶ ICCPR, art 7.

²⁷ ICCPR, art 6.

²⁸ Hereafter 'UDHR'.

²⁹ *State of Human Rights in 2017* (HRCP 2018) 63.

³⁰ Police Order of 2002, s 156.

C. The Situation in Pakistan

While the constitution, the penal code and other legislations, both national and international do seem to attempt to protect fundamental rights and prohibit torture within Pakistan, this protection rarely materialises outside of theory or paper. There are a lot of examples of human rights violations, many of which have been classified as torture. These include extra-judicial killings, domestic abuse, bonded labourers working in brick kilns and abuse of religious minorities.

The system of policing is one of the most important tools of the institution of criminal justice. The criminal justice system of any state is built on the performance, conduct and behaviour of police. It is this institute which directs the trust and confidence of the public in the system of justice. In Pakistan the perceptions of police, its efficacy as an institution and its quality of work are quite poor.

One of the most pressing concerns for the country, especially with regards to torture, are the practices of the police, well known to harbour and breed torture. The police are known to physically abuse detainees to coerce confessions and the existing prohibition against these³¹ have proven to be ineffective so far, largely due to the lack of enforcement.

Detainees are tortured regularly in police custody. The practices involved include custodial beatings by hand or strips of leather, crushing of the prisoner's legs with metal rods, sexual violence and mental torture.³² Many prisoners have been impaired physically or have died, as a result this. Inmates are also prevented from having a fair trial as a result of being subject to torture, as many are convicted on the basis of coerced confessions.

The Human Rights Commission Pakistan³³ has in its annual reports, repeatedly reported there to be severe injuries or deaths resulting as a consequence of torture by the police. According to the HRCP media monitoring in 2017, a total of 47 cases³⁴ of violence and torture occurred in Pakistani jails, in which 32 men lost their lives, and one woman and 21 men

³¹ PPC, s 337-K13.

³² *This Crooked System* (HRCP 2006).

³³ Hereafter 'HRCP'.

³⁴ A number subject to underreporting.

were tortured.³⁵ In June 2017, a death row prisoner was allegedly tortured by prison officials and in November 2017, Sher Afzal died in Bannu Jail, with signs of torture clearly visible on his body.³⁶ He had allegedly been tortured by the jail officials and his neck and ribs were fractured. He had been arrested five days earlier by the Parachinar, Kurram agency on charges of carrying narcotics and was shifted to Bannu Jail. His mother and doctors confirmed the marks of violence on his body. The KP Governor ordered an inquiry when this issue was raised on the floor of the National Assembly but nothing further was done pursuant to this case.

This is not the first or only example of the impunity provided to the police. Wazir Leghari, an inmate was tortured to the extent that both of his legs had to be amputated below the knee. He had been "severely beaten and maltreated" in Dadu District Jail and beaten again after his transfer to Hyderabad Central Jail. On admission to hospital "he had been beaten so severely that both his feet had badly swollen" and had had to be amputated. The investigation led to two prison officers being charged with causing grievous harm and suspended from service. However, the officers were subsequently reinstated without being brought to trial.³⁷

During Pakistan's review by the Committee against Torture, the country informed the Committee that disciplinary measures had been taken against more than 7,500 police officers in the Punjab and Khyber Pakhtunkhwa for involvement in torture, death in custody, misuse of power, misbehaviour, and illegal confinement, but no information was shared about what criminal proceedings were initiated against any of those police officers.³⁸ Pakistan shared only 13 cases where perpetrators were criminally charged with alleged extrajudicial killings and torture but there was no evidence shared by Pakistan that a single perpetrator was penalised.³⁹

Examples of other countries will be used to see how they have tried to combat problems of torture by officers of law. As these might carry useful inferences for the problem in Pakistan, these systems will be perused to see

³⁵ *State of Human Rights in 2017* (n 29).

³⁶ *State of Human Rights in 2017* (n 29).

³⁷ *Amnesty International Report 1990* (Amnesty International Publications 1990) 183.

³⁸ *State of Human Rights in 2017* (n 29) 64.

³⁹ *State of Human Rights in 2017* (n 29) 64.

how, if at all Pakistan can incorporate elements from them, into its own criminal justice system.

D. United States of America

The constitution of the United States of America, like the Pakistani constitution, carries many provisions which prohibit torture. The 8th amendment protects against cruel and unusual punishment, the 14th amendment ensures due process and the 15th protects from self-incrimination. According to 18 U.S.C. section 2340-A, torture is not only prohibited but penalised by up to twenty years in prison.⁴⁰ All these provisions ensure that practices involving torture are not employed by making such practices illegal and by making evidence or statements gathered from procedures involving torture, to be inadmissible in court. The Supreme Court of USA, in 1890 prohibited the award of punishments which involve torture.⁴¹ Not only does this reflect national law but also, the international law obligations of the country, as it is a signatory to CAT and the ICCPR.

Despite these laws prohibiting torture, a study in the early 2000s found there to be around 1 million prisoners who had been raped in American prisons in the past 20 years. For this, specialised legislation dealing with sexual violence within prisons was enacted. The Prison Rape Elimination Act of 2003 prohibits and protects from all forms of sexual abuse within prisons.

The US military was known for practices involving torture. The use of these practices was defended by cloaking them in terms like 'enhanced interrogation techniques'. In 2005, following revelations of torture by US forces at the Abu Ghraib prison in Iraq, congress passed the Detainee Treatment Act 2005, expressly barring the use of cruel, inhuman, or degrading treatment or punishment against any detainee in US custody and requiring Defence Department personnel to follow the Interrogation Manual for all interrogations. Given the international and local repudiation of these practices, the military decided to adopt non-legal means of eschewing torture in 2006. All military manuals were updated and punishments such as keeping

⁴⁰ Federal Law 18 U.S.C. Section 2340A(a).

⁴¹ *Re Kemmler*, 136 U.S. 436 (1890).

prisoners naked in freezing temperatures, forcing them to perform sexual acts upon themselves or others, burning or electrocuting them were all prohibited.⁴²

In October 2006 the Military Commission Act 2006 was enacted. Pursuant to this legislation, the president was given the authority to instate military tribunals for members of enemy troops, to detain them without any form of judicial review and evidence attained by torture was admissible in proceedings of such courts. A legislation barring the use of torture by the officials of the Central Intelligence Agency was proposed in 2008, by the incumbent president, George W. Bush vetoed this reasoning that he wanted the intelligence community to have complete authority where concerns of national security were involved.⁴³

While torture has been made illegal by various legislations in the USA, there are still a plethora of cases recorded by local media networks showing people of colour and ethnic minorities to receive harsher treatment and severe physical abuse by officers of the law. But torture resembling what is carried out by officers of the law in Pakistan is relatively unseen in USA. This is largely owing to the strict legal provisions and the reverence with which they are enforced and upheld by the justice system. The torture practices of the intelligence agencies of the country are still adhered to. Prisons like Guantanamo Bay are good examples of this. However, the focus of this paper is on the local law enforcement agencies and the use of torture within prisons. This does not seem to be a problem, the likes of which the justice system in Pakistan faces. Therefore, the use of specialised legislation and specific provisions prohibiting torture can be incorporated into the legal system in Pakistan to combat problems of torture by the police. This will also require the aid of effective enforcement, to allow such provisions to be of some use.

⁴² FM 2-22.3 (FM 34-52) Human Intelligence Collector Operations, 6 September 2016. 5-20.

⁴³ Kevin M. Carlsmith and Avani Mehta Sood, 'The fine line between interrogation and retribution' (2008) 45 *Journal of Experimental Social Psychology* 191.

E. United Kingdom

The base of fundamental rights and democracy was set in 1215 in UK with the enactment of Magna Carta and later, the Bill of Rights 1689 was introduced for the protection of Human Rights in UK. UK is also a party to European Convention of Human Rights⁴⁴ and other international treaties which prohibit the torture.⁴⁵ In addition to this, the Criminal Justice Act 1988⁴⁶ specifically prohibits torture, especially that which is carried out by a state official.⁴⁷ Prisoners are to be taken care of physically and mentally, as provided by the Criminal Evidence Act 1984.

Cases involving torture with British Official present have nonetheless, been found in the UK. *A and others v Secretary of State for the Home Department (No 2)*,⁴⁸ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*⁴⁹ and *C (A Minor) v Secretary of State for Justice*⁵⁰ are good examples of this. However, nothing resembling the abuse following torture practices found in Pakistan by law enforcement officers can be found.

Unlike the USA, there is no specialised legislation in the UK which criminalises torture by the state officials. However, the existing legislations, mentioned above do sufficiently deal with the practice in the country. This can be attributed to the fact that codes of practice are strictly adhered to by law enforcement authorities and these include strict prohibitions on torture. In addition to this, the existing legislation is stringently adhered to and enforced, which excludes the need for any additional legal text on the matter.

⁴⁴ Hereafter 'ECHR'.

⁴⁵ ECHR, art 3; CAT, ICCPR.

⁴⁶ Hereafter 'CJA 1988'.

⁴⁷ CJA 1988, s 134.

⁴⁸ *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.

⁴⁹ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* (2008) EWCH 2048 (Admin).

⁵⁰ *C (A Minor) v Secretary of State for Justice* [2008] EWHC 171 (Admin).

F. Recommendations

In light of the discussion above, the following recommendations are made, to deal with the problem of torture in Pakistan.

There is no Pakistani Law definition of torture. For a problem not within control of the criminal justice system, there is no specialised legislation which deals with it. This needs to be rectified as local definitions as opposed to international ones carry more legitimacy and approval of the locals and are therefore more likely to be enforced. The country should enact specialised legislation criminalising and prohibiting torture, or in the very least, enact the Custodial Torture and Rape prevention Act. Criminal sanction is likely to encourage litigation in this area and act as a deterrent for the use of torture by police officers.

From the data available, it seems that the primary body employing and propagating torture is the police in Pakistan. Police officers lack training which sensitises them to the people in their custody and are unaware of their obligations and responsibilities as officers of the law. The traditions of prisons in Pakistan carry with them a deep reverence and approval for torture. All officers, regardless of their rank engage in such practices and there is hardly any litigation which criminalises such acts or makes such officers accountable for their behaviour. Therefore, an effective oversight and method of accountability needs to be established, which punishes those police officers who engage in torture. All police officers must be put through formal training schools or academies which teach them the boundaries of physical engagement with those in their custody.

Evidence collected by torture or coerced by threatening torture needs to be made inadmissible in courts of Pakistan. Practices involving torture are the most popular method by which the police extricate confessions or evidence from the accused. If such evidence is deemed inadmissible, there would then be a need to ensure that no practice of torture is involved in the process before the accused is sentenced and would thus act as a good deterrent for such practices.

Conclusion

The system of Criminal Justice is a device which cannot act effectively without the effective participation of all its actors, especially the police. Involved in criminal acts and gravely harming those within their custody, the police are ineffective as an institute of the executive of Pakistan. Use of practices involving torture is a huge part of this problem. Torture not only violates the right to be free from torture but it also violates other rights such as the right to life and dignity. This, in of itself is a criminal harm which is being conveyed in the state's name, on the state's behalf, using the state's authority. Since the state criminalises such behaviour, it cannot itself, be part of any enterprise perpetrating it. Also, since the state is the only protector of the rights the constitution deems fundamental, it cannot therefore, violate these rights itself. Torture as a practice and as a tool at the police's disposal needs to be dispensed with. Not only would this uphold the guarantees of the Constitution of Pakistan but also, help the country meet its international law obligations to eliminate torture.

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