

Police Brutality in Pakistan: Domestic and International Law Perspectives

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Abstract

Pakistan is a signatory to numerous international treaties and conventions, and has, thus, bound itself to be scrutinised under those international standards. It is with this in mind that the paper will look to analyse how Pakistan falls short of its international obligations to guarantee its citizens their human rights. The particular human right that will be focused on with reference to Pakistan is the right not to be subjected to 'torture and other cruel, inhuman or degrading treatment' in the context of police brutality. In this pursuit, this paper will refer to the numerous international treaties and conventions Pakistan is bound by, as well as the domestic legislation already in place to deal with the matter. The paper will then attempt to illustrate how Pakistan continuously violates the set standard, while also discussing the particular stance of each of the three branches of the state on the subject. Finally, it will be shown what measures Pakistan has taken, and is currently taking, to eradicate this form of torture, while also illustrating, through the lens of international law, what measures can be further adopted to achieve the same. It is the belief of the author that the one who sincerely loves his or her country, is also the one standing in the front line criticising its every shortfall. This is done, not to merely find faults in the country, but to make way for positive change so as to see her flourish.

Introduction

Pakistan is a signatory to numerous international treaties and conventions, and was among the states involved in the drafting of the Universal Declaration of Human Rights (UDHR).¹ Among the many treaties it has signed and ratified,² the ones of particular interest of this paper are the International Convention of Civil and Political Rights (ICCPR)³ and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁴ Given its active role in the development of numerous treaties and conventions looking to protect and promote human rights, it is a matter of grave concern that the state, within its own domestic sphere, has achieved neither the protection nor the promotion of human rights.

Although institutional human rights violations occur in numerous forms within Pakistan, it is pertinent to focus on one such form to illustrate Pakistan's culpability in failing to meet its obligations. The main human rights concern pertaining to the state of Pakistan that will thus be examined within its domestic and international context, will be the right not to be subjected to torture and other cruel, inhuman or degrading treatment. This will be done by looking at it in the context of police brutality.

This paper will, in its first part, expand upon the existing international standards that Pakistan is bound to observe with regard to torture, together with the provisions of the Constitution of Pakistan

¹ Peter Danchin, 'Preamble Section 7' (Columbia University) <http://ccnmtl.columbia.edu/projects/mmt/udhr/preamble_section_7/drafting_history_2.html> accessed 31 March 2019.

² Ministry of Foreign Affairs, Government of Pakistan <<http://www.mofa.gov.pk/contentlist.php>> accessed 30 March 2019.

³ International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999, p. 171.

⁴ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

that prohibit it, which will be used to illustrate to the reader how both these sets of standards are violated in the country. This will be done by noting the numerous reports and accounts of police brutality, as well as the case law available that has acknowledged their occurrence. In the second part, the paper will move on to discuss the domestic legislation already in place to tackle the issue, while also looking at recent legislative attempts to criminalise police brutality and custodial deaths. In particular, this paper will focus on the recent Torture and Custodial Death (Prevention and Punishment) Bill 2020,⁵ currently under scrutiny in the Pakistani Parliament. The third part will then discuss the problems that may arise when considering legislative solutions to the issue of torture at the hands of the police. Lastly, the paper will delve into the ways in which international law can be useful to the state of Pakistan in ridding itself of this perennial occurrence of human rights violation.

A. The Law Against Torture

Before expounding upon Pakistan's gross violation of the right not to be subjected to torture and other cruel, inhuman or degrading treatment, it is of particular importance to briefly state what is understood by the terms. The first section of this chapter will dwell on the internationally accepted definition of torture and the way international law has outlawed it.

1. International Legal Commitments of Pakistan on Torture

The ICCPR contains a clear prohibition of torture in Article 7, which states: 'No one shall be subjected to torture or to cruel,

⁵ Torture and Custodial Death (Prevention and Punishment) Bill, 2020 (Senate Secretariat, Senate Bill No. XII of 2020).

inhuman or degrading treatment or punishment. [...]’⁶ Pakistan has signed and ratified the ICPPR. However, the Government has issued a sweeping reservation against its Article 7,⁷ stating that it considers it binding only to the extent that it does not conflict with the provisions of its Constitution⁸ and the Sharia laws.⁹ The reservation did not probably aim to reject the prohibition of torture. The Government of Pakistan feared that the prohibition of ‘cruel and inhuman treatment’ contained in the same provision, might be used against those punishments that are allowed under Sharia laws but are considered to be cruel and inhuman under international standards such as death penalty, mutilation and stoning. ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [...]’

This is proven by the fact that when, on the same day,¹⁰ Pakistan ratified the CAT, the reservations issued were more specific. While the above-mentioned law simply alludes to the terms, the international pact on elimination of torture, CAT elaborates in detail on the same. Article 1(1) of CAT defines torture as being:

⁶ The full text reads: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’

⁷ Ministry of Foreign Affairs, Instrument of Ratification of the HR Convention (1 June 2010) <<http://www.molaw.gov.pk/molaw/userfiles1/file/Instrument%20of%20Ratification%20of%20HR%20Conventions.pdf>> (accessed 26 Mar 2020). See Democracy Reporting International, Pakistan’s Reservations to the International Covenant on Civil and Political Rights (4 July 2010) <http://democracy-reporting.org/wp-content/uploads/2016/02/dri_briefing_paper_4_-gop_reservations_on_iccpr.pdf> (accessed 26 Mar 2020), (for a critical assessment of the reservations from an international law perspective).

⁸ The Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as ‘the Constitution’ in the text of this article).

⁹ Constitution of Pakistan, Article 2 and 2A.

¹⁰ Both treaties were ratified by Pakistan on 23 June 2010.

For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

What emerges from the definition is that the infliction of pain must be objectively severe,¹¹ must be followed by the intent to cause it in order to achieve a certain purpose, and must contain within it state involvement. Although there is no clear difference drawn within the convention between torture and other acts that are cruel, inhuman or degrading, the difference seems to lie in the intent and purpose that constitutes torture.¹² Therefore, Article 16(1) of CAT states that all such acts that do not constitute torture, but being of a cruel, inhuman or degrading nature, must also be prevented by the state. Furthermore, the Human Rights Committee (HRC) has reiterated that the prohibition against torture or cruel, inhuman or degrading treatment

¹¹ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, (2nd edn, CUP, 2016) 358.

¹² International Committee of the Red Cross, ‘Torture and other forms of ill-treatment: The definitions used by the ICRC’ (*ICRC*, 01 Jan 2016) <<https://www.icrc.org/en/document/torture-and-other-forms-ill-treatment-definitions-used-icrc>> accessed 28 March 2020.

is an absolute right that may not be derogated from even in times of emergency.¹³

The definition of torture stands quite clear in the international legal domain. However, when it comes to Pakistan's domestic law, the same level of clarity does not seem to exist, as will be illustrated further in the paper.

2. Domestic Legal Standards on Torture

Pakistan's legislation does not contain within it a specific definition of torture. While Article 14(2) of the Constitution states that: 'No person shall be subjected to torture for the purpose of extracting evidence', no definition for what actions, or a lack thereof, would amount to torture, exists. The closest domestic legislation gets to criminalising torture, is with section 337-K of the Pakistan Penal Code (PPC), which penalises the infliction of hurt, however, without providing a definition for the same. A study by the Centre for Public Policy and Governance (CPPG) of Forman Christian College, authored by Rabia Chaudhry, explains how the Police Order 2002¹⁴ has been commended as attempting to foil the culture of impunity for torturous practice within the police.¹⁵ However, continues the author, it fails to address torture during investigations, which is common practice in the context of governmental efforts to counter terrorism and to enforce its de-radicalisation strategy.¹⁶ The study concludes that it is with the use of Article 14 and Article 9 of the Constitution, which protect the right to dignity, life and liberty, coupled with sections of the PPC and Police Order 2002, that a legal safeguard is

¹³ UN Human Rights Committee 'General Comment 29' in Concluding Observations of the Human Rights Committee Israel' (1998), CCPR/C/79 Add. 93.

¹⁴ The Police Order 2002, Chief Executive Order No.22 of 2002.

¹⁵ Rabia Chaudhry, *Policing, Custodial Torture and Human Rights: Designing a Policy Framework for Pakistan* (Centre for Public Policy and Governance Publications, 2013) 7.

¹⁶ *ibid.*

provided against torture.¹⁷ Nevertheless, police brutality continues to take place in the country in blatant violation of the Constitution and other domestic law, as will be shown in the next section.

3. Police Brutality and Custodial Killings in Pakistan: Is the Executive Turning a Blind Eye to Torture?

International reports show that Pakistan has systematically violated, and continues to violate, the right not to be subjected to torture and other cruel, inhuman and degrading treatment, particularly with reference to the way its police force treat persons in custody. The UN Committee against torture acknowledged that the ‘the police engage in the widespread practice of torture throughout the territory [...] with view to obtaining confessions from persons in custody’¹⁸ and urged Pakistan to incorporate within its legislation a specific definition of torture that can be applied without exception.¹⁹

Human Rights Watch has reported that the police force makes use of multiple violent ways of extracting confessions from its victims.²⁰ It reports that police practices included ‘custodial beatings by hands or by batons and *littars* (strips of leather), the stretching and crushing of detainees’ legs with *roola* (metal rods), sexual violence, prolonged sleep deprivation, and mental torture, including forcing detainees to witness the torture of others.’²¹ Furthermore, there has been a large body of reported cases illustrating torture and ill treatment at the hands of the police that has, more often than not,

¹⁷ *ibid* at 3.

¹⁸ ‘Widespread’ torture by police in Pakistan condemned by United Nations’ (*The Guardian*, 13 May 2017) <<https://www.theguardian.com/world/2017/may/13/widespread-torture-by-police-in-pakistan-condemned-by-united-nations>> accessed 31 March 2019.

¹⁹ *ibid*.

²⁰ Human Rights Watch, ‘This Crooked System – police abuse and reform in Pakistan’ <<https://www.hrw.org/report/2016/09/26/crooked-system/police-abuse-and-reform-pakistan>> accessed 20 March 2019.

²¹ *ibid*.

resulted in the death of the victims either as a result of the torture,²² or as a result of death sentences handed over confessions extracted through such means.²³

Non-governmental organisations (NGO) such as Justice Project Pakistan (JPP) must also be credited for diligently carrying out research based on interviews, examination of official records and medico-legal reports to prepare formal-complaints against Police torture,²⁴ which, resultantly, the Pakistan's National Commission for Human Rights (NCHR) took up and prepared a detailed report over. What is shameful to note, however, is that while the police is generally seen to comply with the NCHR in its request to provide updates on its progress with reference to eliminating torture, the military controlled Anti-Narcotic Force (ANF), as well as the National Accountability Bureau (NAB) have been reported to not comply when the former is requested for such updates and the latter is sought to enter detention centres.²⁵ Pakistan's continuous violation of CAT is further made note of in a recent civil society report formulated by the Human Rights Commission of Pakistan (HRCP), the Society for the Protection of the Rights of the Child (SPARC) and the World Organisation Against Torture (OMCT)²⁶, who collectively

²² Patt, Martin, 'Torture by Police, Forced Disappearance & Other Ill Treatment in the Early Years of the 21st Century- Pakistan', <<http://gvnet.com/torture/Pakistan.html>> accessed 1 April 2019.

²³ JPP and OMCT, 'Economic, Social and Cultural Causes of the Death Penalty and Torture in Pakistan' (2016) <https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/PAK/INT_CESCR_ICO_PAK_25170_E.pdf> accessed 30 March 2019.

²⁴ Chaudhry, (n 15).

²⁵ Farhatullah Babar, 'Ending the culture of torture in Pakistan' *The Friday Times* (22 February 2019) <<https://www.thefridaytimes.com/ending-the-culture-of-torture-in-pakistan/>> accessed 29 March 2019.

²⁶ OMCT, 'Pakistan: NGO Joint Alternative Report Denounces Ongoing Torture in Pakistan Ahead of UN Review' (OMCT, 18 April 2017) <<http://www.omct.org/statements/pakistan/2017/04/d24301/>> accessed 30 March 2019

urged Pakistan to do more.

In an attempt to curb custodial abuse, the NCHR appointed human rights officers to prohibit and prevent torture in police stations in 2017, and nearly twenty-five officers of the Islamabad police were dismissed for their involvement in inflicting torture.²⁷

However, police brutality seems to be resistant to all such attempts at curbing it, and continues to be practiced within the country. The most recent case of custodial torture and killing is that of Salahuddin Ayubi, a mentally ill man taken into custody for attempting to steal an ATM machine. Conveniently, the police blamed his death on his illness, calling him a ‘mad man’ who suddenly fell unconscious and died.²⁸ The forensic medical report, however, proved that the deceased was tortured, having been beaten on his right arm and the left side of his stomach, which resultantly led to his death.²⁹ In the wake of this, the government of Punjab required every deputy superintendent of police (DSP) and district police officer (DPO) to submit an affidavit clearly mentioning that no torture had occurred under their watch.³⁰ Likewise, the Provincial government also proposed the setting up of a watchdog that would independently investigate any incidence of torture that would be reported.³¹

²⁷ *ibid.*

²⁸ Saroop Ijaz, ‘Another Unexplained Death in Pakistan Police Custody’ (*Human Rights Watch*, 2 Sep 2019) <<https://www.hrw.org/news/2019/09/02/another-unexplained-death-pakistan-police-custody>> accessed 19 Feb 2020.

²⁹ ‘Forensic Report Confirms ATM Thief Salahuddin Was Tortured Before Death’ *The News* (18 Sep 2019) <<https://www.thenews.com.pk/print/528338-forensic-report-confirms-atm-thief-salahuddin-was-tortured-before-death>> accessed 15 Feb 2020.

³⁰ ‘Police Officers to Be Asked to Submit Affidavit Proving No Torture Cell in Their Jurisdiction: Shahbaz Gill’ *Dawn* (11 Sep 2019) <<https://www.dawn.com/news/1504601>> accessed 24 Feb 2020.

³¹ *ibid.*

Notwithstanding this, much remains to be done to eliminate this persistent practice of torture by the police in Pakistan, as illustrated in this section. The law enforcement authorities are understood to make up part of the executive branch of the state, which includes the police force of the country, infamous for its practices involving torture. The executive branch of the state is thus in clear violation of the right of individuals living in Pakistan not to be subjected to torture: this right exists as a consequence of the accession of Pakistan to the CAT. Since the prohibition of torture is one of those norms that cannot be derogated from, not even in time of emergency, it is clear that individuals have an inviolable right not to be subjected to torture. Furthermore, the gross violation of human dignity by the police, which also amounts to torture, is confirmed through many judgments issued by the higher courts of Pakistan. These will be expounded upon next in the paper.

4. The Judiciary's Response to Police Brutality

The Pakistani Courts have, on numerous occasions, recognised the existence of police brutality. *Mehmood Alam v Hidayatullah*³² may be taken as one such example. The point to be noted in this particular case is that made by Justice Shakeel Ahmad, where he acknowledged that often the accused absconds for years because they are afraid of being tortured at the hands of the police, and it is due to such reasons that abscondence cannot be made the sole basis for a conviction.³³

Similarly, torture at the hands of the police has been frequently used as a defence by the accused in multiple Pakistani cases. An example is the case of *Muhammad Pervez v The State*³⁴ where it was argued by the accused that he was subjected to torture, due to which he was forced to confess. Having gone over the

³² 2019 PCrLJ 1047.

³³ *ibid* para 20.

³⁴ 2007 SCMR 670.

arguments of both parties coupled with all evidence available, the Supreme Court of Pakistan held that the lower courts had erred in accepting an inculpatory confession as having been voluntarily given. An acknowledgment of the problem is, therefore, clear within the judiciary of Pakistan, who have also noted cases that have resulted in the deaths of the accused at the hands of the police. In *Muhammad Yousaf v The State*³⁵ the Supreme Court expressed a great sense of horror at such inhuman treatment of those in custody by the police. The case of *Sher Ali v Sheikh Zahoor Armed*³⁶ is another such example, in which the then Chief Justice of Pakistan, Muhammad Yaqub Ali, expressed his horror, stating,

[...] we are here faced with a situation where members of the law enforcing agency who are charged with the duty to protect the citizen, have themselves perpetrated upon the ward acts of inhuman torture. Words are not adequate to express our sense of horror at this outrage.³⁷

Although the stance of the judiciary seems fairly clear from the judgments produced above, there have been opposing views over the same that paints a grimmer picture. The aforementioned study of the CPPG, reports that perhaps the most shameful aspect of state action is the fact that the judiciary of Pakistan, too, has become desensitised when it comes to torture. JPP, for instance, notes in its report that the judiciary tends to harbour inherent bias against vulnerable groups and, therefore, does not ensure whether or not confessions from defendants belonging to those groups are made willingly and without coercion. Likewise, the CPPG study duly points out that it is due to such complacency by the judiciary that numerous

³⁵ 2000 SCMR 453.

³⁶ PLD 1977 Supreme Court 545.

³⁷ *ibid* para 12.

individuals have been allotted the death penalty, even at times when the accused themselves claimed to have been tortured.³⁸

It is clear that the executive and the judiciary are not doing enough to curb institutional torture. This may also be due to the lack of a law criminalising it. The next chapter will examine two legislative attempts made in recent years to introduce clear provisions incriminating torture to curb police brutality and custodial deaths.

B. Recent Legislative Attempts to Outlaw Torture in Pakistan

1. The Torture, Custodial Death and Custodial Rape (Prevention and Punishment) Bill, 2015

The first notable attempt by Pakistan to pass legislation in line with CAT is the Torture, Custodial Death and Custodial Rape (Prevention and Punishment) Bill, 2015.³⁹ The Bill, which the Senate of Pakistan had passed, defined torture in Section 3 as ‘an act committed by any person, including a public servant, or at the instigation of or with the acquiescence of any other person, with specific intent to inflict physical or mental pain or suffering [...]’. The words seem to mirror its CAT counterpart. However, the National Assembly did not pass the Bill. Soon after that, reports emerged stating that the HRC had recommended to the government to hold public debate on the proposed law, to no avail.⁴⁰ In 2018, human rights activists went on to hold a protest urging the civil society to reinstate the social debate and political discourse over the eradication

³⁸ Chaudhry (n 15).

³⁹ Waseem Ahmad Shah, ‘Pakistan yet to Enact Anti-torture Law’ *Dawn* (26 June 2017) <<https://www.dawn.com/news/1341873>> accessed March 31 2019.

⁴⁰ *ibid.*

of torture, pushing for the government of Pakistan to revisit the proposed law and ratify the Optional Protocol to the CAT.⁴¹

Although the ‘Torture, Custodial Death and Custodial Rape (Prevention and Punishment) Bill, 2015’, introduced by ex-senator Farhatullah Babar, failed to pass as law, attempts to curb and outlaw the practice of torture at the hands of the police are still being made, as will be shown in the next section.

2. The Torture and Custodial Death (Prevention and Punishment) Bill, 2020

In 2019, the ‘Torture and Custodial Death (Prevention and Punishment) Bill, 2020’ was introduced in the Senate and is currently under consideration in the National Assembly.⁴² This Bill, in its ‘Statement of Objects and Reasons’, explicitly mentions the state’s obligation under not only the Constitution, but also under the CAT and ICCPR to prevent and punish all acts of torture.⁴³ This attempt to consciously take note of the same, while also taking steps to fall in line with the Constitution and International law must be appreciated. A quick reading of the Bill showcases an attempt to not only outlaw custodial torture and killings, but also to legislate over custodial sexual violence and rape that is much too often seen as a torturing tool.⁴⁴ It is the opinion of the author of this paper that the Bill takes a

⁴¹ ‘Pakistan Lacks Data, Comprehensive Legislation on Torture’ *Dawn* (27 June 2018) <<https://www.dawn.com/news/1416282>> accessed March 31 2019.

⁴² Hereinafter referred to as the ‘Bill’ in the text of this article. Saroop Ijaz, ‘Pakistan Could Make Torture a Crime’ (*Human Rights Watch*, 10 Oct 2020) <<https://www.hrw.org/news/2019/10/10/pakistan-could-make-torture-crime>> accessed 19 Feb 2020.

⁴³ ‘Torture and Custodial Death (Prevention and Punishment) Bill, 2020’, <http://www.senate.gov.pk/uploads/documents/1582706236_509.pdf>

⁴⁴ ‘Policing as Torture: Data Analysis of Punjab’s Use of Unlawful Torture’, (*Justice Project Pakistan*, 13 Feb 2019) <https://www.jpp.org.pk/wp-content/uploads/2019/02/2019_01_13_PUB_Policing_as_Torture.pdf> accessed 28 Feb 2020.

very hard-line approach to the issue; an approach that is much needed. For instance, the Bill establishes punishment for the offence of custodial death or sexual violence with life imprisonment and with fine up to three million rupees, for those who commit, abet, or even *conspire* to commit the offence.⁴⁵ Likewise, the Bill defines custodial death as: ‘death of a person, directly or indirectly [...] while in custody or after his release [...] includes death occurring in [...] private.’⁴⁶ The above noted law broadens the horizons so as to not limit it to deaths occurring specifically in custody while in the premises of the police station. This places an even heavier burden upon the police officers to take added measures in ensuring no torture or deaths occur under their watch whether within or outside the station premises.

Perhaps the most important aspect of this Bill, other than its strict punishment, is its attempt under Section 22 to place the duty upon the government to publicize its contents and to provide awareness training to the public officials.⁴⁷ This is essential because it not only gives necessary training to the executive branch of state, but also consistently raises awareness among the civil society so as to empower them in order to keep the state in check. Legislation, although only a means for change *if* implemented, is nevertheless vital for it is the *basis* for such change. It is only if such language is present as law, that it may be applied and implemented to become a vehicle for change.

The next chapter will examine two crucial legal problems connected with the passing of the torture Bill, both related to the need

⁴⁵ Torture and Custodial Death (Prevention and Punishment) Bill, 2020, Section 4(1).

⁴⁶ *ibid* Section 2(1)(g).

⁴⁷ *Ibid* Section 22: ‘The government shall take all measures to ensure that: (a) The provisions of this Act are given wide publicity through media at regular intervals; and (b) The relevant public officials are given periodic sensitization and awareness training on the issues addressed in this Act.’

to make it consistent with general principles of law with regard to criminal legislation.

C. Problems to Consider in Passing Legislation Against Torture

1. The Bill versus the Penal Code

As discussed in the previous chapter, the Torture and Custodial Death (Prevention and Punishment) Act, 2020 if enacted, would be a positive step forward in tackling the problem of custodial torture and death. Given that the main contents of the Bill have been discussed, it is vital to next consider whether it may possibly be in conflict with other laws of Pakistan, which may delay its enactment. This consideration echoes objections that were raised in the Senate while the Bill was under discussion.

It is important to note that the PPC provides for numerous offences and their respective punishments. Perhaps among the most important provisions to be considered for the purpose of this paper are those of Section 300, termed '*Qatl-e-amd*', and Section 302, which provides for its punishment. The PPC defines *qatl-e-amd* as follows:

Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit *qatl-e-amd*.

Likewise, Section 302 reads:

Whoever commits *qatl-e-amd* shall [...] be (a) punished with death as *qisas*; (b) punished with imprisonment for life as *ta'zir* [...] if the proof in either forms specified in section 304 is not available; (c) punished with imprisonment of either description for a term which may extend to 25 years, where [...] punishment of *qisas* is not applicable.

A simple reading of the above provisions illustrates to the reader that the punishment for the causing of intentional death (that is, *qatl-e-amd*) is either death itself, or imprisonment of the specified term provided for. However, in accordance with the principles of Islam, the PPC provides for other recourse that may be taken for *qatl-e-amd*. Section 308 of PPC, for instance, provides for the payment of *diyat* instead of *qisas*, while Section 309 allots the *wali* (that is, the heirs of the victim, or the government if there is no heir)⁴⁸ of the victim the power to waive the above punishments. Likewise, the PPC also provides for punishments for the act of rape, as per section 375.

As discussed previously, although section 4(1) of the Bill provides for harsh punishment for custodial death or sexual violence it seems to limit the extensive detail provided for by the PPC. For instance, it is possible that custodial death does not fall within the ambit of *qatl-e-amd*, and rather falls within the ambit of *qatl-e-khata* (provided for within section 318) or *qatl-bis-sabab* (provided for within section 321), both of which carry different and lesser punishments for the ingredient of 'intention' is absent in the same. Although section 4(2) of the Bill expands upon acts of torture done without the intention to cause the same, the PPC takes into account a much larger and expansive approach to the same by allotting multiple sections to the issue of *qatl* which attempt to provide adequate legal measures to deal with this offence, especially since custodial death and custodial sexual violence are very serious allegations which carry equally serious penalties and therefore must be handled carefully.

⁴⁸ Section 305, Pakistan Penal Code.

Specifics provided for within the PPC relating to acts that encompass those of the Bill, which seem to be absent from the same, *must* therefore, in the opinion of this writer, be taken into account. This is perhaps why the Senate called for the revision of Section 4(1) of the Bill,⁴⁹ having it amended so as to read as follows: ‘Whoever commits or conspires to commit the offence of custodial death or custodial sexual violence shall be punished as per law.’⁵⁰

The reading of the amended provision clearly illustrates that it is done so as to retain the expansiveness of the provisions contained within the PPC. However, it poses a problem: are new crimes being created without a specific sanction attached to them, thus violating the principle of *nulla poena sine lege*? This will be analysed in the following section.

2. The Bill versus ‘*nulla poena sine lege*’

Another aspect of the Bill that must be briefly expanded upon is whether it is in conflict with the legal maxim of ‘*nullum crimen sine lege, nulla poena sine lege*’ (‘no crime without law, no punishment without law’).⁵¹ The maxim essentially prohibits retroactive application of criminal laws, and looks to assert that legislation, which is specific and unambiguous, should already be in place criminalising an act *before* the act is committed.⁵²

⁴⁹ Jamal Shahid, ‘Senate body supports bill proposing criminalisation of custodial torture’ *Dawn* (29 Feb 2020), <<https://www.dawn.com/news/1537236/senate-body-supports-bill-proposing-criminalisation-of-custodial-torture>> accessed 1 March 2020.

⁵⁰ *ibid.*

⁵¹ Beth Van Schaack, ‘*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals’ (2008) 97 *The Georgetown Law Journal* 119, 119.

⁵² *ibid* at 121.

It must be noted that the Constitution of Pakistan prohibits any law from being passed that is given retroactive effective. Likewise, Article 12 of the Constitution states:

- (1) No law shall authorize the punishment of a person –
 - (a) for an act or omission that was not punishable by law at the time of the act or omission; or
 - (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

It must be noted that nowhere in the Bill is it mentioned that the law will have retroactive effect. Section 1 (4) of the short title of the Act states; ‘it shall come into force at one.’ This, however, does not indicate retroactive effect but rather indicates an application of the same moving forward in time.

However, a point perhaps of greater weight, is the question of whether the Bill, as amended by the Senate, contains incriminating norms that are specific enough to be consistent with the principle of *nulla poena sine lege*. The Bill clearly introduces new crimes, which is the whole point of legislating to outlaw torture, custodial deaths and custodial sexual abuse once and for all.

However, the Bill as amended seems to be *lacking* in the greater specificities seen in other laws like that in the PPC. In particular, the amended version of Section 4(1): ‘Whoever commits or conspires to commit the offence of custodial death or custodial sexual violence shall be punished as per law’ seems to confer excessive discretion on the judge who will be called to decide which punishment the law ascribes to the newly created crimes. Apparently, the problem here is that new crimes are being created, but the punishment is not specified. The judiciary will be forced to find the punishment by way of interpretation.

Other sections within the Bill do not present such problems. For instance, torture is punished in Section 3, with ‘a term not less than three years, which may extend to ten years and with fine [...]’⁵³ This, in the opinion of this writer, falls in line with section 337-K of the PPC, which prescribes the punishment of *qisas* or ‘imprisonment of either description for a term which may extend to ten years as *ta’zir*’.⁵⁴ Likewise, Section 3(2) of the Bill goes on to punish any public servant that negligently or intentionally fails to prevent the commission of torture with imprisonment that ‘may extend to five years with a fine’. This too seems to fall in line with provisions of the PPC, particularly Section 119 of the same, as well as the provision on hurt already mentioned previously.

It is clear then that, particular to its subject matter, the Torture and Custodial Death (Prevention and Punishment) Act, 2020 is not in conflict with the legislation already in place in the state. However, although there is no conflict, the Bill does have gaps within its contents that legislation such as the Penal Code fills, as was shown previously. The only problem seems to rest with the amendment made to Section 4(1). As per the opinion of the Senate, the amendment has made it fall in line with existing law. However, it remains to be seen whether the amount of discretion granted to the judge in choosing the

⁵³ ‘Whoever commits, or abets or conspires to commit torture shall be punished with imprisonment for a term, not less than three years, which may extend to ten years and with fine, which may extend to two million Rupees.

⁵⁴ ‘Whoever causes hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of any offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the Sufferer, to restore, or to cause the restoration of, any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property, or valuable security shall, in addition to the punishment of *qisas*, *arsh* or *daman*, as the case may be, provided for the kind of hurt caused, be punished, having regard to the nature of the hurt caused, with imprisonment of either description for a term which may extend to ten years as *ta’zir*.’

sanction is legally sound. Overall, the Bill, does not seem in conflict with the latin maxim '*nulla poena sine lege*'.

Given this conclusion, and the one reached above,⁵⁵ nothing prevents the Torture Bill from being passed, provided that the phrase 'shall be punished as per law' in Section 4(1) is rendered more specific.

D. Analysing Pakistan's Approach to the Right Not to Be Subjected to Torture under International Law

Although Pakistan signed and ratified CAT, it made a few reservations upon ratification that included, under Article 28, the non-recognition of the competence of the committee against torture.⁵⁶ Furthermore, although CAT itself sets out an individual complaint procedure in Article 22, Pakistan has declared the committee's non-competence.⁵⁷ This implies that the committee cannot hear and decide on individual complaints. This is problematic as it makes it far easier for the state party to violate the right of individuals not to be subjected to torture with impunity. Given that the CAT itself allowed such a reservation under Article 28, other state parties, on reviewing Pakistan's reservations, did not comment on the potential dangers of this particular reservation, choosing instead to focus on other reservations Pakistan had made.

It must be noted that international law has provided for special procedures that are set up to 'scrutinize and/or investigate specific countries where acute human rights violations are alleged to have

⁵⁵ Chapter C, Section 1 of this paper.

⁵⁶ Hereinafter referred to as 'the committee' in the text of this article.

⁵⁷ United Nations Treaty Collection, under Declarations and Reservations <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en> accessed 29 March 2019

taken place.’⁵⁸ Under resolution 1985/33, the UN Commission on Human Rights decided to appoint a special rapporteur to examine questions of torture, covering all states irrespective of whether they had ratified the CAT.⁵⁹ A special rapporteur, on invitation by the Government of Pakistan, undertook a mission to the country in 1994. During the mission, the rapporteur visited detention centres and met with several non-governmental human rights organisations, reporting numerous human rights violations pertaining to torture, and cruel, inhuman or degrading treatment or punishment particularly within jails carried out by the police.⁶⁰ No further invitations were handed out by Pakistan for such special visits particularly in context of torture and cruel, inhuman or degrading treatment to date. Although such special procedures must be commended for their effort to bring to light gross human rights violations, their weakness lies in the fact that they are dependent on voluntary state party access, as no state is ‘obliged to provide access to special rapporteurs [...] and country visits are only possible following a standing invitation or an ad hoc invitation issued by the requesting nation.’⁶¹ With respect to Pakistan, over twenty years after the rapporteurs visit, the violation of the right not to be subjected to torture, and cruel, inhuman or degrading treatment continues to persist, signalling clearly that the report produced by the special rapporteur was not given due consideration, thereby showcasing its weakness.

The Universal Periodic Review (UPR), born out of the UN General Assembly Resolution 60/251,⁶² serves as an important mechanism provided by international law to question and review

⁵⁸ Bantekas (n 11) 173.

⁵⁹ United Nations Human Rights OHCHR <<https://www.ohchr.org/en/issu es/torture/srtorture/pages/srtortureindex.aspx>> accessed 29 March 2019.

⁶⁰ U.N. Commission on Human Rights, ‘Report of the Special Rapporteur on torture, and cruel, inhuman or degrading treatment or punishment’ (1996), E/CN.4/1997/7/Add.2.

⁶¹ Bantekas (n 11) 176.

⁶² UN General Assembly, Human Rights Council: Resolution/Adopted by the General Assembly, 3 April 2006, A/RES/60/251.

State practice when it comes to human rights. In 2017, the UPR presented by Pakistan was reviewed by the Human Rights Council (HRCoun), and during the interactive dialogue, States such as Slovakia made note of its concerns about alleged torture and the death penalty within Pakistan.⁶³ Likewise, within its recommendations to Pakistan, numerous states such as Portugal, Denmark, Poland, Canada, Slovakia and so forth, urged Pakistan to ratify the Optional Protocol to the CAT.⁶⁴ It must be briefly noted that such recommendations serve as a compelling tool to pressurize a state into taking the necessary steps; a tool provided for by international law that *should* be made use of more tactfully. It must also briefly be mentioned that similar to the UPR, under Article 19 of CAT, state parties are obligated to submit reports to the Committee on measures they have taken to give effect to their obligations under the Convention, after which the Committee examines the report. Although Pakistan was due to provide its initial report in 2011, it did so almost five years late on the 4th of January 2016.⁶⁵ However, such measures to examine and provide recommendations to state parties do well to serve a similar purpose as the UPR in pressurising the state to do better.

When considering the Optional Protocol to CAT, one must commend such a step taken by the UN Committee Against Torture in its endeavour to safeguard the right not to be subjected to torture, and other cruel, inhuman or degrading treatment. The Optional Protocol is argued to achieve what neither the committee nor its special rapporteurs have the power to do; that is, to freely visit and inspect states without the requirement of being granted either permission or invitation first. Pakistan, however, has thus far refrained from signing and ratifying the Protocol. Pakistan *must* proceed with this ratification

⁶³ U.N. Human Rights Council, 'Report of the Working Group on the Universal Periodic Review' (2017), A/HR/C/37/13.

⁶⁴ *ibid.*

⁶⁵ Convention against Torture 1984, 'Initial reports of State parties due in 2011 Pakistan' (2016), CAT/C/PAK/1.

for it is only a step forward in achieving the protection of the right itself.

What is interesting is the fact that the prohibition against torture has evolved into a peremptory norm or *jus cogens*, 'that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules'⁶⁶ subsequently meaning that it cannot be 'derogated from by states through international treaties or local or special customs or even general customary rules [...]'.⁶⁷ International law has thus clearly established its stance against the violation of the right not to be subjected to torture. The right itself, what it means and when it is violated, is further solidified by the immense body of case law, including cases brought before the CAT committee, and by regional international conventions and treaties. Such treaties and conventions include the European Convention for the Prevention of Torture, and the Inter-American Convention to Prevent and Punish Torture, as well as international humanitarian law, which has collectively allotted torture the status of being an 'international crime subject to universal jurisdiction'⁶⁸. All such regional instruments and their corresponding courts have established a vast body of literature that 'provide valuable evidence of the status and content of norms through their interpretation'⁶⁹, which can be looked to for guidance by states such as Pakistan, in order to develop its on domestic law for the same.

⁶⁶ *Prosecutor v Anto Furundzija* (Judgment) ICTY-98-IT-95-17/1-T (10 December 1998).

⁶⁷ *ibid.*

⁶⁸ Bantekas and Oette, (n 11) 355.

⁶⁹ *ibid* at 63

Conclusion

This paper has thus far established that Pakistan is in clear violation of the specific right under question and has established the positions of relevant key international and domestic actors. The paper has also shown the tremendous potential within international law to impact the situation thus far highlighted within the state of Pakistan.

The situation, however, with particular focus on torture, or cruel, inhuman or degrading treatment, is too dire and, thus, begs the question: What more can be to eradicate the same? With what has already been made mentioned to within this paper with respect to what international law can do further, one must take into account that no state would voluntarily allow, by way of international law, external interference into its own internal matters and violate its sovereign nature. Thus, what international law has the capability to do is only that which it is allowed to do, and likewise, what it is allowed to do is fairly limited. However, it is pertinent to state that not only must greater international pressure be placed on Pakistan to allow the CAT Committee competence to hear matters pertaining to torture, but international law must also lower its pre-requisites in allowing individuals to bring forth claims before the Committee without being hindered by too many hurdles.

Furthermore, placing the responsibility to punish the perpetrator within the hands of the perpetrator himself seems entirely paradoxical. International law must, therefore, find better ways to achieve implementation of treaties within States, and one such way may be to 'enable domestic actors, particularly civil society, to use the process as an advocacy tool to improve the human rights situation in the country concerned.'⁷⁰

Although the paper has discussed what international law can do at a wider scale to help rid States of the problem of torture, it is,

⁷⁰ Bantekas and Oette, (n 11) 208.

however, essential for the state itself to take matters into its own hands to do the same. It is vital for the state of Pakistan to take seriously the matter of eradicating the systematic violation of the right not to be subjected to torture within its territory. All three branches of the state must work effectively not only to pass legislation that looks to curb the violation, but must ensure the same is implemented in all concerned avenues. Hence, the law must clearly define torture and what elements constitute the same, so as to ensure that there exists no ambiguity.

Likewise, greater checks and balances must be placed upon the police officers in-charge of the police stations all over Pakistan, mirroring those proposed by the Punjab government. It is also essential for the proposed bill titled ‘Torture and Custodial Death (Prevention and Punishment), Bill 2020’ to be passed by the National Assembly, so as to have specific legislation dealing with the matter. Similarly, special committees and watchdogs must be established that will look to ensure the implementation of all such legislation.

It is the opinion of the writer of this paper, however, that what is perhaps the most crucial, is for Pakistan’s civil society to be actively aware of the power they hold. The civil society must ensure that its State eradicates the gross human rights violation by pressuring it to uphold the law it itself legislates. Likewise, it must compel the State to grant it access to the international arena so as to ensure it stays within the bounds of international law which the state has sworn itself to uphold. It is only when the state and society work in consonance with one another, that change may truly be seen and the problem of torture may finally be eradicated.

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