

REFORM OF RAPE LAW IN PAKISTAN: A TEMPORARY FIX OR NEW BEGINNINGS?

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ABSTRACT

The pervasiveness of the crime of rape in Pakistan is troublesome. The number of cases reported in the last six to seven years have been alarmingly high. It is argued that the number of unreported cases due to mistrust in the system and social pressures is even higher. This presents a bleak picture and raises legitimate claims of intelligible and sustainable changes in the rape laws of Pakistan. The government introduced two ordinances in 2020. One of the ordinances amended the meaning of rape, life imprisonment, and added the penalty of chemical castration. Furthermore, changes in the procedure of investigation and trial of rape cases were introduced. This article appraises the efficacy of these changes and their compatibility with rights enshrined in the Constitution of Pakistan. The article further explores whether these changes are violative of Pakistan's international obligations. The purpose is to highlight the need of changes which are sustainable and practical and do not owe their origin to political manoeuvrings.

INTRODUCTION

Lon Fuller understood the law as the ‘enterprise of subjecting human conduct to the guidance of rules.’¹ HLA Hart regarded the central feature of law as consisting of general rules capable of guiding the behaviour of legal subjects.² Joseph Raz interpreted the rule of law as a normative ideal capable of shaping the conduct of society.³ There is jurisprudential consensus that every civilised society ought to have rules against violence. Hart attributed this necessity contingent on the vulnerability of human existence.⁴ In guiding the behaviour of the subjects of law, criminal law proscribes conduct contrary to humanity’s values. Arguably, there can be nothing more heinous than a breach in the physical integrity and autonomy of a person. Rape is the gravest form of indecent physical and sexual assault by one person against another. It becomes quintessential for a functioning legal system to lay down rules which efficaciously punish any infractions of the prohibition on rape and related offences. The efficacy and intelligibility of rape laws directly relate to their deterrence effect. Unfortunately, the crime of rape in Pakistan has seen an exponential increase, both in frequency and ferocity.

Instances of violent paedophilia and gang rape have renewed focus on the deficiency of the law to deal with said instances.⁵ This article will focus on the substantive and procedural changes made in Pakistan’s rape laws through two ordinances promulgated by the government in 2020.⁶ In the first section, we shall look at the reasons

¹ Lon F Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969) 3.

² See generally HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1997).

³ See generally, Raz J, *The Authority of Law. Essays on Law and Morality* (2nd edn, OUP 2009).

⁴ HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1997) 193-199.

⁵ Abria Ashfaq, ‘What you need to know about Pakistan’s new Anti-Rape Bill’ (2015) <<https://www.dawn.com/news/1167324>> accessed 10 March 2021.

⁶ For Procedural changes see Anti-Rape Investigation and Trial Ordinance, 2020 <<http://www.mohr.gov.pk/Detail/YmYyMmExMTUtODA0MC00YWJmLTgzM DgtYmNkMDczMWZmYzUz>> accessed 10 March 2021; Criminal Law

behind the changes. In the second section, we shall adumbrate the major changes introduced by the ordinances. In the third section, we shall analyse these changes, especially the ones concerning the castration of rapists. We shall also appraise the utility of the procedural changes to the process of trial of rapists. This will lead us to a logical and coherent conclusion.

I. THE PROBLEM ILLUSTRATED

The instances of rape are pervasive in Pakistani society. The first two decades of the twenty-first century has seen an alarming rise in the number of reported cases of rape. This increase in numbers undoubtedly suggests an alarming upward trend. However, it will be fallacious to think of the frequency of rape in Pakistan as something contemporary. Rather the increase in reported cases can be rationalised on the greater number of avenues through which such cases come to light. The mushroom growth of electronic and social media has meant that the news of such cases cannot be conveniently brushed aside by the authorities.

The statistics collected by the Police, Law, and Justice Commission of Pakistan, Human Rights Commission of Pakistan, Women's Foundation, and provincial welfare agencies paint a grim picture. According to these figures, 11 rape cases are reported in Pakistan every day.⁷ The figures reveal that the crime of rape is systemic in Pakistan. The problem becomes exacerbated by the allegations of the state authorities' indifference or tacit shielding of

(Amendment) Ordinance, 2020
<<http://www.mohr.gov.pk/Detail/OWE4OTU4ZjltYzIzMi00ZTczLTgwMjltYmEwNjE0Yjk3NGUz>> accessed 10 March 2021.

⁷ Web Desk, '11 rape incidents reported in Pakistan every day, official statistics reveal' *The News* (13 November 2020) <<https://www.thenews.com.pk/latest/743328-about-11-rape-cases-reported-in-pakistan-every-day-official-statistics-reveal>> accessed 12 March 2021.

the powerful culprits. The gang rape of Mukhtaran Bibi brought domestic and international attention to the plight of vulnerable women in Pakistan.⁸ Mukhtaran Bibi was gang-raped in a convoluted arrangement that was given the guise of antiquated customs. Most of the accused in her case were acquitted by the superior courts of Pakistan.⁹ Notwithstanding the disgust one feels at such acquittals, it should be kept in mind that the court can only convict an alleged offender on the strength of the evidence. This speaks directly to the process of investigation and trial of the alleged rapists. The Anti-Rape Investigation and Trial Ordinance, 2020 purport to bridge some of the procedural gaps that may aid offenders in evading legal justice.

According to official figures, 22,000 cases of rape were reported to the police from 2015-2020. Out of these 22,000, only 18% of the cases reached the prosecution stage, and 77 offenders were convicted. This means that the conviction rate in reported rape cases stands at 0.3%. An investigation conducted by *Geo News* revealed that loopholes in the legal system and the social pressures and stigma culminates in only 41% of the total occurrences getting reported in the first place. The police officials claim that the said pressures and loopholes may mean that only half of the cases are reported, and the actual number of the cases in the timeline of 2015-2020 can be as high as 60,000.¹⁰

The aforementioned numbers present a picture of a broken system in need of urgent reform. However, the issue becomes even graver with the allegations that the practice of rape is institutionalised in

⁸ Aamer Ahmed Khan, 'Pakistan's real problem with rape' *BBC News* (September 2005) <http://news.bbc.co.uk/2/hi/south_asia/4223436.stm> accessed 12 March 2021.

⁹ 'SC acquits five in Mukhtaran Mai case' (April 2011) <<https://www.thenews.com.pk/archive/print/613312-sc-acquits-five-in-mukhtaran-mai-case>> accessed 12 March 2021.

¹⁰ Web Desk, '11 rape incidents reported in Pakistan every day, official statistics reveal' *The News* (13 November 2020) <<https://www.thenews.com.pk/latest/743328-about-11-rape-cases-reported-in-pakistan-every-day-official-statistics-reveal>> accessed 12 March 2021.

Pakistan, and the state authorities condone the practice tacitly or at times explicitly. According to a Women's Action Forum report, around 72% of the women in custody are physically and sexually abused.¹¹ This factual information alone should warrant a change in the law that addresses the deficiencies in the system. Still, to illustrate the problem further, we will briefly outline two heinous recent instances of rape that catalysed the changes brought forward by the Anti-Rape Investigation and Trial Ordinance, 2020 and Criminal Law (Amendment) Ordinance, 2020.

Zainab Amin Ansari was a seven-year-old resident of the Kasur District of Punjab. She left home to take a Quran recitation class and was abducted on 4 January 2018. She was repeatedly raped and tortured, and her body was found near Lahore on 9 January 2018. The barbaric and violent manner of the offence caused an uproar in civil society resulting in protests around the country.¹² This prompted the authorities to take action, and the culprit, Imran Ali, was apprehended on 24 January 2018. The DNA analysis showed him to be a serial killer and rapist. He was sentenced, *inter alia*, to death by hanging, which was executed on 17 October 2018.¹³

In September 2020, a woman was gang-raped on the Lahore-Sialkot motorway after getting stranded due to a fuel shortage. The gang rape occurred in the presence of her young children.¹⁴ The news of the incident witnessed an outrage in the social and electronic media, and calls for quick apprehension of the accused were made.

¹¹ Jan Goodwin, *Price of Honor: Muslim Women Lift the Veil of Silence on the Islamic World* (revised edn, Plume 2003) 51.

¹² M Ilyas, 'Pakistan Zainab murder: New law aims to catch child abusers' *BBC News* (March 2020) < <https://www.bbc.com/news/world-asia-51852381> > accessed 12 March 2021.

¹³ Nauman Liaquat, 'Zainab's rapist, murderer Imran Ali hanged at Kot Lakhpat Jail' *Dawn* (October 2018) < <https://www.dawn.com/news/1439400/zainabs-rapist-murderer-imran-ali-hanged-at-kot-lakhpat-jail> > accessed 20 March 2021.

¹⁴ Rana Yasif, 'Both accused in motorway gang-rape sentenced to death' *The Express Tribune* (March 2021) < <https://tribune.com.pk/story/2290463/both-accused-in-motorway-gang-rape-sentenced-to-death> > accessed 25 March 2021.

The two accused were apprehended in October 2020 and were sentenced to death by an Anti-Terrorism Court in March 2021.¹⁵

Prima facie, the aforementioned incidents may give an impression of a swift response of the criminal justice system of Pakistan, which punished the offenders within a matter of months. This, however, is fallacious and masks the real issue. The Kasur District, before the Zainab case, had witnessed a number of child abduction and abuse cases, including the recovery of a large cache of videos depicting children forced to perform sexual acts.¹⁶ There were allegations of powerful elements from the area being involved in the scandal, but the government inquiry found no such organised activity and no action was taken. Similarly, one of the offenders in the gang-rape case, Abid Mahi, was a known rapist and convict who had evaded the clutches of the system conveniently for over ten years. Both these incidents are only a small indicator of the exponential number of reported rape cases across Pakistan.

Without sustained media attention, these cases fall through the cracks allowing rapists like Imran Ali and Abid Mahi to roam free and inflict unimaginable harm on the victims. After all, this can be the only logical deduction from the 0.3% conviction rate of the alleged offenders. If the test of the system resides in its capacity to build an effective deterrence, then the rape laws in Pakistan arguably fail this test. Furthermore, the system falls short of even punishing the so-called Holmesian bad man on the quoted statistics.¹⁷ If nothing else, then the discussion thus far warrants a fresh take on the law's response to the victims of rape. The response came in the form of reforms made to the Pakistan Penal Code and the Code of Criminal Procedure through Anti-Rape Investigation and Trial Ordinance, 2020 and Criminal Law (Amendment) Ordinance, 2020. Whether this response

¹⁵ Ibid.

¹⁶ Editorial, 'Kasur's Tragedy' *Dawn* (December 2018) <<https://www.dawn.com/news/1448914>> accessed 20 March 2021.

¹⁷ For bad man perspective of law see Oliver Wendell Jr. Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 458-460.

is intelligible and sufficient to plug the systemic loopholes will be analysed below.

II. AMENDMENTS IN RAPE LAWS¹⁸

SUBSTANTIVE CHANGES

Criminal Law (Amendment) Ordinance, 2020 has brought about important changes by amending Pakistan Penal Code (hereinafter PPC). The definition of rape given in Section 375 of PPC has been amended to reflect the contemporary reality of the different manners in which the crime of rape can be perpetrated. The definition of penetration and insertion has been broadened to incorporate a number of different ways in which said penetration and insertion could be established.¹⁹ Furthermore, the factors which can vitiate the consent of the victim have also been increased and appropriately explained.²⁰

Section 375A has been inserted, which deals exclusively with the crime of gang rape. The newly inserted section reads²¹

Where a person is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be guilty of the offence of gang rape and shall be punished with death or for imprisonment for the remainder period of natural life or imprisonment for life and fine.

¹⁸ The focus of this article is only on the amendments brought by the Anti-Rape Investigation and Trial Ordinance, 2020 and Criminal Law (Amendment) Ordinance, 2020.

¹⁹ Criminal Law (Amendment) Ordinance, 2020, s 2.

²⁰ Ibid.

²¹ Ibid s 3, *see also* Pakistan Penal Code, 1860 (Act XLV of 1860), s 375A.

The punishment of the crime of rape is given in section 376 of PPC. Previously the convicted rapist could have given a death penalty or imprisonment lasting no less than ten years and no more than twenty-five years. This section has now been amended, and the imprisonment can last up to the remainder of the natural life of the convict.²²

Importantly, the ordinance introduces a new section 376B in the PPC.²³ Section 376B reads

Whoever is convicted of an offence under sections 375, 375A and 376 may be subjected to chemical castration through a court order, irrespective of the applicable punishment:-

- (i) in exceptional circumstances in respect of the first reported offence of section 375; or
- (ii) (ii) in case of a repeat convict of an offence under section 375.

The act further explains chemical castration as:

[a] process, duly notified by Rules framed by the Prime Minister, whereby a person is rendered incapable of performing sexual intercourse for any period of his life, as may be determined by the court, through administration of drugs which shall be conducted through a notified medical board.

To sum up, the ordinance has widened the definition of the crime of rape by envisaging different manners in which the said crime can be committed. Gang rape, despite being a variation of the crime of rape, finds an exclusive provision. The time ceiling on life imprisonment has been omitted, and it can last up to the remaining natural life of the convicted rapist. Importantly, the rapist can be chemically castrated for an exceptional first-time offence or for a

²² Criminal Law (Amendment) Ordinance, 2020, s 4.

²³ Ibid s 5.

repeated offence. It must be explicitly stated here that the new law does not require the consent of the rapist for the chemical castration procedure. Instead, the discretion is left to the court to decide in which cases the mechanism should be applied in accordance with section 376B. The modalities of the procedure are to be finalised by the Prime Minister.

PROCEDURAL CHANGES

The Anti-Rape Investigation and Trial Ordinance, 2020, introduced a number of significant changes to the investigation and trial of rape and related offences. The ordinance set up special courts for the trial of offences given in the schedule of the ordinance, which includes rape.²⁴ The judges appointed to these special courts are given security of tenure subject only to the successful claim of misconduct.²⁵ Special courts will not just hear rape case in special circumstances, but rather the trial will ordinarily be conducted in the special courts.²⁶

The ordinance empowers the Prime Minister to set up anti-rape crisis cells. These cells will work to facilitate the prompt medical and forensic examination of the victims of rape and related offences.²⁷ The cell will also ensure that a First Information Report (FIR) is registered by the Police without any delay. The Legal Aid and Justice Authority established under the Legal Aid and Justice Authority Act, 2020²⁸ has been empowered by the ordinance to facilitate legal assistance to the victims of rape from the fund established under the ordinance and the Legal Aid and Justice Authority Act 2020.²⁹

Furthermore, the ordinance mandates the establishment of a victim and witness protection system. The idea is that the victims of

²⁴ Anti-Rape Investigation and Trial Ordinance 2020, s 3.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid s 4.

²⁸ (Act XVI of 2020).

²⁹ Anti-Rape Investigation and Trial Ordinance 2020, s 6.

the rape and the witnesses can freely and safely participate in the trial proceedings to ensure convictions. This includes, *inter alia*, provision of security arrangements for the victim and witness, concealment of their identities, their relocation, and financial compensation to their legal heirs.³⁰ The already enacted security mechanism for victims and witnesses under Witness Protection, Security and Benefit Act, 2017³¹ are applicable to the victims and witnesses of the rape until such time the system envisaged under the ordinance comes into operation.³²

The investigation of the rape shall be carried out by a designated senior police officer, and a Joint Investigative Team (JIT) can be formed where necessary.³³ On the determination of the anti-rape crisis cell, an independent support advisor shall accompany the rape victim to court proceedings in order to “reduce the risk of duress, victimisation of any nature, or any adversity afflicted or likely to be afflicted upon the victim.”³⁴ The independent support advisor can be a member of the civil society or a non-governmental organisation and will be appointed in consultation with the Ministry of Human Rights. Moreover, the ordinance states that the trial of scheduled offences, including rape, will be held in-camera and, where appropriate, can be held through a video link to protect victims and witnesses.³⁵ A special committee is to be set up by the Ministry of Law for the purpose of effectual compliance with the ordinance.³⁶ The trial is to be conducted expeditiously and preferably shall be decided within four months.³⁷ The High Court will have jurisdiction to hear an appeal from the special court.³⁸

³⁰ Ibid s 8.

³¹ (Act XXI of 2017).

³² Anti-Rape Investigation and Trial Ordinance 2020, s 8.

³³ Ibid s 9.

³⁴ Ibid s 11.

³⁵ Ibid s 12.

³⁶ Ibid s 15.

³⁷ Ibid s 16.

³⁸ Ibid s 18.

III. AMENDMENTS IN RAPE LAW: A CRITICAL APPRAISAL

The social practice of law maintains relevance as a guiding force of society by evolving to cater to emerging challenges. The reforms highlighted in the previous section of this article strike to satisfy this essential quality of law. A critical appraisal is warranted to evaluate whether the said changes are sufficient to uproot the systemic issues which underscore the area of rape law. We shall look in reasonable detail at some of the crucial reforms.

THE LEGALITY AND UTILITY OF CHEMICAL CASTRATION

Chemical castration is a process that includes the administering of an anaphrodisiac drug that aids to lower testosterone levels, which is the dominating sex hormone in men, thus, inhibiting their sexual drive. The mechanism envisages ‘long-term pharmacological treatment involving massive doses of a synthetic female hormone called medroxyprogesterone acetate (MPA).’³⁹ The process is called chemical castration because its effect resembles that of surgical castration through the elimination of ‘almost all testosterone from the male offender’s system.’⁴⁰ The idea is that consistent exposure to MPA will result in alteration of the brain and body function of the male offender, and the substantial reduction in testosterone level will significantly diminish the said offender’s sexual desire and capacity to engage in sexual activity.⁴¹

The introduction of the mechanism of chemical castration as a possible punishment for the crime of rape has attracted criticism from academics and human right activists. The nub of the criticism resides

³⁹ See, e.g., Fabian M. Saleh and Fred S. Berlin, “Sex Hormones, Neurotransmitters, and Psychopharmacological Treatments in Men with Paraphilic Disorders” (2003) 12 J. Child Sexual Abuse 233, 240.

⁴⁰ Ibid.

⁴¹ R.K. Hanson and M.T. Bussiere, “Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies” (1998) 66 J. Consulting and Clinical Psychology 348.

in the stipulation that the said procedure violates fundamental rights enshrined in the constitution of Pakistan in addition to violative of Pakistan's international law obligations. Article 14 of the Constitution of Pakistan states that 'the dignity of a man shall be inviolable.'⁴² Furthermore, critics point to Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which states: "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."⁴³ Moreover, it is arguable that the procedure may be tantamount to torture and breach the absolute prohibition on torture under customary international law and the Convention on Torture.⁴⁴

The threshold required to establish the infringement of the prohibition on torture is considerably high.⁴⁵ It is a commonplace that the mechanism of chemical castration does not constitute torture under the Torture Convention. This, however, does not rule out the lesser threshold of cruel, inhumane, or degrading treatment being met by the procedure of chemical castration. Increasingly, the dignity of a human is linked with cruel, inhumane, or degrading treatment.⁴⁶ Therefore, the breach of the former will arguably constitute a breach of the latter.

The term inhuman, cruel or degrading punishment is not defined within the ICCPR to provide flexible boundaries to the concept. Still, guidance can be gleaned from domestic and international courts. First, it must be noted that the terms inhuman and cruel are treated as

⁴² The Constitution of the Islamic Republic of Pakistan, 1973.

⁴³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.

⁴⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 1, 2.

⁴⁵ Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd edn, Oxford University Press 2009) 86.

⁴⁶ *Atkins v Virginia* (2002) 536 U.S. 304, 311-312.

synonymous.⁴⁷ The European Court of Human Rights (ECtHR) has held that only conduct which goes beyond the inevitable element of suffering or humiliation from a legitimate treatment or punishment can come under the ambit of inhuman or degrading treatment.⁴⁸ The inquiry entails objective and subjective considerations. The age, sex, health of the alleged victim of the said treatment or punishment will be relevant alongside the nature, severity and duration of the conduct.⁴⁹ ECtHR has further stated that any conduct which has a real or serious humiliating effect or serious outrage upon human dignity can be classified as inhuman or degrading treatment.⁵⁰ This includes treatment that grossly humiliates an individual in front of others or ‘or drives the individual to act against his will or conscience.’ Importantly though, ECtHR case law makes clear that only conduct which, under the circumstances, causes ‘*unjustifiable*’ severe mental or physical suffering can be termed as inhuman, degrading or cruel treatment or punishment.⁵¹ This leaves open the possibility that in some circumstances, even severe mental or physical suffering can be justified as a lawful response. The idea is that some discomfort is inevitable in criminal sanctions. However, care should be exercised to delineate between lawful sanction and conduct which causes excessive harm or humiliation to an individual. In the words of Special Rapporteur on Torture and Cruel, Degrading, or Inhuman Treatment: the simple fact of (lawful) procedural promulgation of

⁴⁷ Louisa E. Heathcote, “Chemical Castration in Indonesia: Limiting an Absolute Human Right” (2020) 3 The Indonesian Journal of Southeast Asian Studies 201-216.

⁴⁸ *Ilaşcu v Moldova & Russia* (2004) App. No. 48787/99, 40 Eur. H.R. Rep.1030, 1071, 1073, 1082.

⁴⁹ *Prosecutor v. Brđjanin* (Trial Chamber Judgment 2004), IT-99-36-T, International Criminal Tribunal for the former Yugoslavia (ICTY) para 484.

⁵⁰ *Greek Case* (1969) App. Nos. 3321/67, 3322/67, 3323/67 & 3344/67, Y.B. Eur. Conv. on H.R. at 186 (Eur. Comm'n on H.R.).

⁵¹ *Ibid.*

cruel, inhuman or degrading punishment cannot make the said punishment acceptable as a matter of international law.⁵²

The United States Supreme Court has, on numerous occasions, interpreted the meaning of inherently cruel (or degrading) punishment. It has highlighted a number of factors that may determine whether punishment can be classified as cruel, inhuman or degrading. Essentially, punishments that violate the dignity of man⁵³ are those which go against evolving standards of decency,⁵⁴ involve unnecessary or wanton infliction of pain – both physical and mental, can be termed as inhuman or cruel punishments.⁵⁵ There is authority to suggest that human dignity is synonymous with (evolving) standards of human decency. Furthermore, the US Supreme court has held that punishments ‘that assault the personhood of the defendant or inflict harm for harm’s sake are inherently cruel and unusual.’⁵⁶ It is arguable that any punishment or course of treatment which takes away an individual’s free will, capacity to think, desire, and make choices may be taken as an assault on the personhood of the said individual.⁵⁷

In a similar vein, the Supreme Court of Pakistan in *Malik Ubaidullah v Govt. Of Punjab*, elaborated on the purpose of the right to human dignity.⁵⁸ The honourable court stated:

⁵² UNCHR, ‘Special Rapporteur on Torture, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (1997) UN Doc E/CN.411997/7 para. 8.

⁵³ *Roper v. Simmons* (2005) 543 U.S. 551, 560.

⁵⁴ *Trop v Dulles* (1958) 356 U.S. 86, 101 (plurality opinion).

⁵⁵ *Weems v United States* (1910) 217 U.S. 349, 377 (citing castration as an example of inherently cruel punishment).

⁵⁶ *Ibid.*

⁵⁷ John F. Stinneford, “Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment, And The Denial of Human Dignity” (2006) University of St. Thomas School of Law Legal Studies Research Paper No. 06-25 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=918271> accessed 20 March 2021.

⁵⁸ *Malik Ubaidullah v Govt. Of Punjab* PLD (2020) SC 599.

The purpose of the constitutional right to human dignity is to realise the constitutional value of human dignity, to realise a person's humanity, his free will, the freedom to shape his life and fulfil himself. It is a person's freedom to write his life story.⁵⁹

The opponents of the mechanism of chemical castration take the view that the process infringes the domestic and international prohibition on cruel, inhuman, or degrading punishment. Their argument is that chemical castration goes beyond the usual discomfort, humiliation and harm, which stems from the consequence of punishment. It is reported that long-term use of MPA can cause severe depletion in the bone mineral density of the offender, which can result in osteoporosis and multiple bone fractures.⁶⁰ Some of the pharmacological side effects are likely to be severe, painful, disabling, and possibly fatal.⁶¹ Some of these side effects include diabetes mellitus, pulmonary embolism and depression.⁶² The pain and suffering caused to the offender are excessive and inhumane. Relatedly, it can be seen as serious humiliation and an assault on the personhood of the offender to the extent it takes away his free will, choice and capacity to think. This, argue the critics, violate the inviolable right of the dignity of the offender.

The opponents of the law may argue that human dignity is not just a constitutional right, but an idea entrenched in the concept of humanity or, as Aristotle puts it: 'personhood.'⁶³ The statement Abasic

⁵⁹ Ibid, see also Aharon Barack, *Human Dignity- The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 144.

⁶⁰ John F. Stinneford, "Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment, And The Denial of Human Dignity" (2006) University of St. Thomas School of Law Legal Studies Research Paper No. 06-25 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=918271> accessed 20 March 2021.

⁶¹ Ariel Rösler and Eliezer Witztum, "Pharmacotherapy of Paraphilias in the Next Millenium" (2000) 18 Behavioral Sci .Law. 43, 45.

⁶² Ibid.

⁶³ Summa Theologica (Secunda Secundae Partis) 64:2; See also Michael J. Perry, "Capital Punishment and the Morality of Human Rights" (2005) 44 J. Cath. Legal Stud. 1, 15.

form of it ought to be always available to a human. Expanding further, one can argue that the law's measured response separates a legal system from mere retribution of the masses. Anything which takes the free will of a human being intrinsically falls foul of this conception of dignity. We may punish people, but we do not take away their dignity or impose such measures where the cure itself becomes tantamount to an aversion of dignity or even goes beyond it to a form of torture, literally understood.

The proponents of the law can counter the aforementioned Aristotelian view and the populist contemporary rights approach by referring to the conception propounded by Thomas Aquinas. Aquinas view of the dignity of man is sensitive to the surrounding circumstances. It contends that anyone who stoops this low gives up the notion of humanity and dignity and comes down to the level of an animal.⁶⁴ The idea is that the said person can be treated more strictly than a person possessed of dignity. This syncs well with a more nuanced understanding of human rights. On this view, human rights are not free-standing but correspond to obligations.⁶⁵ If someone infringes the duties imposed upon them, then the corresponding right stands waived.⁶⁶

The act of rape may have a fixed temporal element, but its consequences perpetuate much longer. Sexual violence burdens its victims with many short-term and long-term costs, both tangible and intangible. Tangible costs of sexual violence include medical care, mental health services, loss of economic productivity, insurance administration costs, police investigations, criminal prosecutions, and

⁶⁴ John F. Stinneford, "Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment, And The Denial of Human Dignity" (2006) University of St. Thomas School of Law Legal Studies Research Paper No. 06-25 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=918271> accessed 20 March 2021.

⁶⁵ Louisa E. Heathcote, "Chemical Castration in Indonesia: Limiting an Absolute Human Right" (2020) 3 The Indonesian Journal of Southeast Asian Studies 201-216.

⁶⁶ Ibid.

costs associated with the correctional system. The intangible costs of sexual violence encompass psychological pain, fear of victimisation, feelings of powerlessness, impaired focus, lowered self-esteem, depression, and the development of phobias.⁶⁷ The lasting and severe harm inflicted on the dignity of the victim by the rapist negates any claim of the corresponding right by the rapist.

It is open to the opponent of the chemical castration to point to the above-quoted judgment of the Supreme Court of Pakistan. Human dignity is entailed in the realisation of a person's humanity and free will. This can be countered by stating that despite the lack of the need to take the offender's consent for chemical castration, the said castration, in fact, does not violate the free will of the offender. This is because the mechanism should only be applied after a careful psychological evaluation of the rapist. This evaluation may reveal that the rapist suffers from a disease and cannot control his impulses.

Consequently, he has no free will to start with; therefore, the mechanism is not taking anything away. Instead, it is arguably giving a choice back to the rapist insofar as the person can choose to become a productive part of the society to which he belongs. Furthermore, as the US jurisprudence makes clear, that the concept of dignity is directly proportional to the societal conception of decency. The overarching theme underpinned by this line of reasoning is that the understanding of dignity is predicated upon society's morality and its views regarding the same. The proponents of chemical castration can argue that there is acceptance or desire for such procedures in Pakistani society; hence there is no violation of dignity adequately understood. The lack of consent of the offender for the procedure doesn't necessarily violate his right of choice. One can draw an analogy with forced hospitalisations and therapy of people with a mental health condition who may be a danger to themselves and

⁶⁷ LA Post, NJ Mezey, C Maxwell and WN Wibert, "The rape tax: Tangible and intangible costs of sexual violence" (2002) 17 *Journal of Interpersonal Violence* 773-782.

others. In both cases, the idea is that the overriding interest of the society mandates such a treatment.

The proponents of the amendment can plausibly argue that chemical castration may play a crucial role in the rehabilitation of certain offenders. In this light, the procedure is less a punishment and more a way to ensure the safe integration of a serious offender in society. The mechanism may shield the offender from the application of severest discretion on the sliding scale of applicable penalties. By undergoing the treatment, the offender can have the opportunity to receive the least amount of imprisonment time allowed for the offence of rape. This understanding will be compatible with retributive and utilitarian theories of punishment. Retribution obtains through the penalty imposed, and utility lies in enhancing the greater happiness of the greater number, i.e., society becomes safe from the menace of the potential future rape(s). The offender can start his or her life over. This way of reasoning will also negate the argument that castration is no punishment since it takes away the sensation of doing anything like rape. In the absence of any sensation or impulse, intentional control becomes unnecessary and redundant, therefore no real punishment. However, if castration is viewed not as a punishment but rather as a method of rehabilitation, then this critique may be neutralised.

Finally, the proponents of the amendment can point to the fact that the mechanism of chemical castration is implemented to varying degrees in a considerable number of countries like the United States, Australia, Russia, United Kingdom, Denmark, South Korea, and Indonesia.⁶⁸ Although opinions differ on the legality and utility of the procedure,⁶⁹ studies have shown that long-term application of the

⁶⁸ Louisa E. Heathcote, "Chemical Castration in Indonesia: Limiting an Absolute Human Right" (2020) 3 *The Indonesian Journal of Southeast Asian Studies* 201-216, 202.

⁶⁹ Kay-Frances Brody, "A Constitutional Analysis of California's Chemical Castration Statute" (1997) 7 *Temp. Pol. & Civ. Rts. L. Rev.* 141; Caroline M. Wong, "Chemical Castration: Oregon's Innovative Approach to Sex Offender

procedure reduces recidivism in rape offenders.⁷⁰ Even if one acknowledges this utility of chemical castration and stipulates its legality, three issues remain.

First, the need to prevent re-offending by the rapist at the heart of the procedure will only obtain through long-term exposure of the offender to the requisite drugs. This will undoubtedly culminate in serious physical and psychological side effects and may potentially make the treatment cruel, inhuman, or degrading. Second, if the crux of the chemical castration lies in rehabilitation of the offender and arresting the otherwise uncontrollable urges of the mentally sick offenders. Then, these salutary goals can only be achieved by a system possessing the capacity to provide comprehensive psychological services to the offenders without any bias. Unfortunately, the criminal justice system in Pakistan does not currently possess the capacity or the resources. This point has been succinctly articulated by Nabila Bhatti, who states, “*in countries where chemical castration is opted, systematic psychological counselling is also provided to the offenders. Otherwise, the offender can become more dangerous for the society after chemical castration.*”⁷¹

Third and most importantly, even if one concedes unequivocally, in principle, to the legality and utility of chemical castration, the way in which it finds expression in the amended law makes its application superfluous and ultimately redundant. The order of chemical castration will be made at the discretion of the court and in line with the rules promulgated by the Prime Minister. However, the law makes clear that the order shall only be made for exceptional first-time

Rehabilitation, or Unconstitutional Punishment?” (2001) 80 Or. L. Rev. 267; Lisa Keesling, “Practicing Medicine without a License: Legislative Attempts to Mandate Chemical Castration for Repeat Sex Offenders” (1999) 32 J. Marshall L. Rev. 381.

⁷⁰ R. Karl Hanson and Kelly E. Morton-Bourgon, “The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies” (2005) 73 J. Consulting and Clinical Psychology 1154.

⁷¹ Nabila Feroz Bhatti, “Law: Will The New Law Stop Rapes? *Dawn* (January 2021) < <https://www.dawn.com/news/1600733>> accessed 10 March 2021.

offenders or repeat offenders. Arguably, exceptional first-time offenders may include paedophiles, or where the rape accompanies further physical torture or murder, or the rape itself is done in a gruesome manner, or an occurrence of gang rape. It stands to reason that these instances of rape may warrant the application of the treatment of chemical castration. However, the gravity of these instances would likely result in the death penalty or life imprisonment of the remaining natural life of the offender. In both instances, there will remain no need for the offender to undergo chemical castration. Any rape of relatively less severity may not be classified as exceptional, thus not activating the court's discretion to order chemical castration. In light of this, one may be perplexed to contemplate any real use of the treatment of chemical castration. The same will apply to repeated offenders.

EFFICACY OF THE PROCEDURAL CHANGES IN INVESTIGATION AND TRIAL OF RAPE

The changes brought in the procedure of the investigation and rape trials has much to commend for. The provision of special courts can potentially go a long way in ensuring a speedy trial. Judges with expertise in this area can be nominated and this will enhance the quality of the trials and leave less room for acquittal of offenders on appeal to superior courts. Similarly, the anti-rape cell can ensure that necessary medico-legal procedures are conducted in a timely fashion. The expedited collection and processing of the forensic evidence will aid the investigative and prosecuting authorities. The handling of the investigation by a senior officer or a JIT can ensure a check on the investigation at the appropriate level. Many rape cases fall through the cracks due to insufficient resources and legal assistance available to the victims. The provisions regarding financial and legal assistance to the rape victims will provide them with much needed help. Competent legal representation has the potential of mitigating some inequality between the parties. The envisaged security arrangements for the victims and witnesses of rape are arguably the most important

reform. Considerable number of trails are manipulated by the offenders through intimidation of the victim and witnesses. This results in insufficient evidence presented to the court which has no option but to acquit the offenders.

Witness protection programme is the central feature of developed criminal justice systems. The same required in Pakistan, especially in grave crimes like rape. The possibility of in-camera trials is another way to protect the victims of the crime of rape from unwarranted social scrutiny. The expedited justice in the form of speedy trial is an essential way to provide quick redress to the victims of rape and restore their confidence in the criminal justice system. However, this is a double-edged sword, and it is imperative that the speedy trial satisfies all elements of the right of fair trial. Any contrary assertion by the offender may result in his acquittal and can violate the presumption of innocence which forms the core of modern criminal justice system. Independent Support Advisers (IPS) is a novel idea in the legal system of Pakistan, albeit a much needed one. Professionals like doctors, lawyers, psychologists, health workers, and social workers may have the expertise to provide crucial support system to the victims of rape during immensely stressful period of their lives.

The previous paragraphs have rightly emphasised the salutary nature of the changes made to the investigative and trial stages of the rape cases. However, a word of caution is warranted here. The utility of the legal theory can only be borne out by its compatibility with practical reality. Fullerian jurisprudence perfectly narrates that even the most benevolent law giver will fail if there is not a strict congruence between the given law and the applied law.⁷² Law provides its subjects a baseline for self-regulated conduct only when the law subjects can rely on strict administration of law in accordance with promulgated rules. The victims of rape may legitimately build expectations of speedy trials, legal assistance, support and security arrangements, and facilitative investigation among other things. The

⁷² Lon F Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969).

denial of these expectations in practice may lead to complete abolition of any remaining trust of the victims in the criminal justice system of Pakistan. Unfortunately, experience tells us that laws which are commendable on paper remain elusive in practice. In current situation, the criminal justice system of Pakistan lacks capacity and resources to effectively run reasonable number of special courts, provide security to victims and witnesses, provide legal and financial assistance to victims, and to free the investigative part of the case free from undesirable hassles and indifference. The ordinance envisages the formation of a special committee to keep a check on compliance with the changes. Unfortunately, not much has been done to date.

CONCLUDING REMARKS

Rape is a pervasive issue in Pakistan. The official statistics tells us that in last 6 to 7 years over 22,000 cases of rape have been reported. It is common knowledge that the number of unreported cases is almost two times the reported case. The instances of paedophilia often resulting in murder of the victim remain alarmingly high. The state authorities seemingly react swiftly only if there is enough media coverage of the incident. Majority of the cases are neglected, and the victims are left without legal justice. The Anti-Rape Investigation and Trial Ordinance 2020, and Criminal Law (Amendment) Ordinance 2020 introduced important changes to the rape laws. The definition of the crime of rape has rightly been adjusted to bring it in line with the contemporary realities. Life imprisonment for the remaining period of the natural life of the offender is a significant change to strengthen the available punishments. Importantly, the treatment of chemical castration for the offender has been introduced which will be applied at the discretion of the court and in line with the rules enacted by the Prime Minister.

Even if the procedure satisfies the test of constitutional legality and falls in line with Pakistan's obligations under international law problems remain. In the presence of life imprisonment for the whole of natural life of the offender and death penalty the cases of chemical castration will be rare. The changes made to the investigative and trial stages of the rape cases are comprehensive and in principle emphasise maximum facilitation to the victims of the rape. However, these commendable legal changes set ambitious standards which the criminal justice system of Pakistan may not be able to satisfy under prevailing conditions. Seen in this way, the changes may arguably be politically motivated. The outcry after the Lahore-Sialkot Motorway gang rape may have quickened the promulgation of the ordinances without completing the necessary groundwork. Rape is one of the most heinous crimes and a pervasive effort will need to be made by the official infrastructure to ensure that the changes are implemented in the practice. Most of the rape cases suffer from tacit or explicit neglect by the state authorities. Mending ways of the concerned departments seems like the best possible way to start the journey of implementing the said changes. Otherwise, there is a real risk of these changes remaining a temporary fix as opposed to much needed new beginnings.

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