

Torture Law and the Criminal Justice System in Pakistan

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I- Introduction

Theoretically, the law making should be responsive to the local and internal factors. Contrary to this, most often than not, the legislation in Pakistan aims at addressing the external issues. In not recent past, Pakistan amended its criminal laws related to terrorism and money laundering to exit grey list of the Financial Action Task Force (FATF). In similar spirit, on 22nd November, 2022, the Torture and Custodial Death (Prevention and Punishment) Act, 2022 was enacted in response to the conditions attached to inclusion of Pakistan on the Generalized Scheme of Preferences Plus (GSP Plus) list for the European Union (EU). This, however, does not mean that indigenous needs are not addressed by the legislature. There are instances when the law making has been done in response to purely local reasons. For example, the Zainab Alvert, Response and Recovery Act, 2019 was introduced to strengthen the system of information exchange, protection and prevention of offences against children. The purpose of this adumbration is to examine the latest torture law with special reference to its genesis, characteristics and the way it affects the criminal justice system.

II- Genesis of the Law

The genesis of the new law, as noted above, is in the EU's GSP Plus programme that Pakistan wanted to benefit from. In addition to this external consideration, the Constitution of Pakistan, 1973 requires that no one shall be subjected to torture for extracting evidence¹; this is stated as not a salutary principle, but as a justiciable fundamental right². Accordingly, Pakistan was obliged to criminalize torture as it had ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT) in 2010. Likewise, Pakistan was obliged to follow the law as it had undertaken many other international human rights laws including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). All these revert back to the Universal Declaration of Human Rights, 1948³ that also affected CAT.

¹ Article 14(2) of the Constitution of Pakistan, 1973

² Article 199 of the Constitution of Pakistan, 1973

³ Article 5 of the Universal Declaration of Human Right states: No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

III- Salient Features

The new law on torture has many significant salient features as it provides the substantial and procedural legislative framework; these are:

1. Wider Net of Applicability

Hitherto, there were no specific definitions of the terms ‘cruel’, ‘inhuman’, ‘degrading treatment’, ‘custodial death’ and ‘torture’. The law, for the first time, has defined these terms. Interestingly, the terms have been defined not in narrow, but in expansive manner; ergo, wider net of applicability. For example, the explanations to custodial death⁴ include ‘private’ medical premises. It also includes the ‘vehicle’ to cover cases during transportation.

2. New Offences

The law criminalizes many actions that were not *stricto sensu* offences within the meaning of offence⁵ under the criminal law. In this way, the new category of offences has actualized the fundamental right of not to be subjected to torture⁶. The new offences include:

- a. Using illegally obtained evidence has been criminalized⁷. Prior to this, there was a debate whether the metaphorical ‘fruits of poisonous tree could be eaten or not’ vis-à-vis use of evidence extracted out of torture, but with new penal section, there is hardly any debate left on the point whether illegally obtained evidence can be used in a criminal trial or not;
- b. Torture⁸, custodial death⁹ and custodial rape¹⁰ have been penalized by linking these to the general criminal law (i.e. as contained in the Pakistan Penal Code, 1860).

3. Gender-Responsive Legislation

The law in its present form is gender responsive. The procedural caveats contained in the Code of Criminal Procedure, 1898 and the Anti-Rape (Investigation and Trial) Act, 2021, specifically provide:

- a. No female to be held in custody by a male police officer, if required, there must be a female police officer present¹¹;

⁴ Section 2(1)(h) of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

⁵ Section 40 of the Pakistan Penal Code, 1860 defined offence as anything that is prohibited and punishable under the law. Due to the definitional problems, many offenders would escape action under the criminal law.

⁶ Article 14(2) of the Constitution of Pakistan, 1973.

⁷ Section 3 of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

⁸ Section 8 of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

⁹ Section 9 of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

¹⁰ Section 10 of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

¹¹ Section 4(2) of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

- b. No information to be extracted from a female¹²
- c. Separate and new offence of custodial rape has been introduced in the law¹³.

The legal provision obliges the police organizations in the country to make sure that during the investigation, or interrogation, there must be a female police officer; this is likely to encourage further the gender parity in the police organizations in Pakistan, which are already attracting female officers at all levels due to gender quota reserved at the time of recruitment.

4. Special Investigation Mechanism

The law provides that only the Federal Investigation Agency (FIA) shall have 'exclusive' jurisdiction to investigate cases under the new torture law¹⁴. There is, however, no legal provision in the legislation that obliges the police organizations to refer cases to the FIA as required by the law. Precisely, for this reason, there are writs pending adjudication before the Lahore High Court. In addition, the Magistrates have been enabled to notify cases to be sent to the FIA¹⁵.

5. Referral System

There is no specific provision obliging the provincial police organizations and other law enforcement agencies/investigation agencies to refer cases to the FIA under the law; therefore, there is need to amend the law to provide for the referral mechanism. The referral system is also important as the FIA does not register criminal cases in the first instance and owing to its procedural requirements, has to first carry out an inquiry into a case to ascertain whether the charging under the new torture law is made out or not. The area is too unimportant to be left to the investigation agencies as there is little or no incentive for them to take up these cases. The area needs to be streamlined through proper legislation, at least by covering it in the rules¹⁶ to be made under the law.

6. Senior Trial And Appellate Courts

Irrespective of the quantum of punishment of the offence of which an accused is charged, the law authorizes the Court of Sessions¹⁷ to try the cases and the appeal against conviction or acquittal may lie to the High Court¹⁸.

¹² Section 4(1) of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

¹³ Section 10 of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

¹⁴ Section 5(1) of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

¹⁵ Section 5(2) of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

¹⁶ Section 20 of the Torture and Custodial Death (Prevention and Punishment) Act, 2022 allows the concerned division (as against the Federal Government) to make the rules for the law.

¹⁷ Section 6 of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

¹⁸ Section 12 of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

7. Accountability

The law provides for suspension, transfer and departmental action against the delinquent public official (who may be, or may not be from police organization)¹⁹. This is an important provision and is likely to be used in future in high profile human rights' violation cases.

8. Time-Bound Investigation, Trial And Appeal

Time is of essence in criminal prosecutions in Pakistan. Unfortunately, no legal consequences flow from delay in meeting the deadlines/timelines. Anyhow, the law provides that investigation is to be completed within 30 days, the trial in 3 weeks and the appeal be decided in 30 days²⁰.

9. Special Protection

On the pattern of witness protection laws, the law provides for protection of victims and witnesses under the law²¹.

IV- Impact on the Criminal Justice System

The law is likely to impact lot of aspects of policing and the criminal justice system in Pakistan. The areas that are most likely to be affected are:

1. Crime Control

The dominant view in the police organizations is that controlling crime is a function of the use of force and that the criminal justice system guarantees especially those relating to due process²² and fair trial seriously undermine the deterrence of the law enforcement. This dominant view strongly argue that crime can only be controlled by taking extra-legal measures including extra-judicial killings to instil the fear of law in the hearts of criminals. There is no empirical evidence to support this viewpoint; however, the implementation of the new law is seen as a major disruption to the crime fighting.

2. Primacy of the Federal Government

Pakistan is a federation where the criminal law, the criminal procedure and the law of evidence are concurrent subjects²³ to be legislated upon by both the federation as well as the provinces. As most of the law enforcement work is done by the provincial police organizations, the new law, which is federal in nature, requires that the investigation of provincial police organizations' excesses shall be

¹⁹ Section 7 of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

²⁰ Section 13 of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

²¹ Section 14 of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.

²² Article 10-A of the Constitution of Pakistan, 1973 guarantees due process for criminal processes.

²³ Articles 142 and 143 of the Constitution of Pakistan, 1973.

‘exclusively’ done by the Federal Investigation Agency (FIA); his arrangement provides primacy to the federal government over the provincial governments.

3. Role of Prosecution

The prosecution departments have been established in all the four provinces and at the federal level. The law does not imagine any role for the prosecutors. There is a strong case to introduce a regulated referral system, in which, prosecutors can play an important role within the scheme of the law.

4. Compounding of Offences

The law does not touch upon the substantive law and to the criminal justice processes that affect the rights of police officers (who while dealing with entrenched and organized crime syndicates) have to face legal battles. To strike a balance, the law must provide the effect of compounding on the investigations and prosecutions under the new law.

5. Police Laws

There was no provision prohibiting torture in the colonial Police Act, 1861. In 2002, the Police Order was promulgated for the whole country. The law criminalized police excesses including torture, unlawful and vexatious arrests²⁴. It may be noted that at that time Pakistan had not ratified CAT, but owing to internal necessities, the law was made to put the police on professional lines. After the Eighteenth Constitutional Amendment, in the name of provincialization of the police laws, each province enacted its own law, while the Punjab retained the Police Order, 2002. On the pattern of the Police Order, 2002, the KP Police Act, 2017 and the Sindh Police Act, 2019 also criminalized torture and other police excesses²⁵. In addition, the Sindh Police Act, 2019²⁶ provided for oversight mechanism outside the police hierarchy to check the cases of police excesses including torture.

6. Comparative Perspectives

In India, in absence of robust statutory law on the subject efforts were made to introduce ‘custody jurisprudence’²⁷. Draft Prevention of Torture Bill²⁸ was written in 2008 and is pending consideration of the legislature. It may be noted that India

²⁴ Article 156 of the Police Order, 2002.

²⁵ Section 119 of the KP Police Act, 2017 and Section 156 of the Sindh (Repeal Of The Police Act, 1861 And Revival Of Police Order, 2002) (Amendment) Act, 2019.

²⁶ Section 36 of the the Sindh (Repeal Of The Police Act, 1861 And Revival Of Police Order, 2002) (Amendment) Act, 2019 allowing the Superintendent of Police to refer cases to the Public Safety and Police Complaints Commission.

²⁷ Sri D. K . Basu vs. the State of West Bengal (AIR 1997 Supreme Court 610)

²⁸ http://notorture.ahrchk.net/profile/india/Prevention_of_Torture_Bill_India_2008.pdf

has yet to ratify the CAT. In the UK, there is a long history of the subject. It is arguable whether the Privy Council ever issued the torture warrant²⁹, but one thing is certain that after Felton's Case in 1628, no torture warrant was issued. There is long history of common law declaring torture as illegal. Finally, in 1988, torture was criminalized through a statute in the UK³⁰. The US Constitution criminalized torture in 1791³¹. Even the International Humanitarian Law (the law of war) prohibits torture³². In the recent past, in order to prevent the acts of terrorism, some scholars (like the Harvard Law School Professor Allan M. Dershowitz) argued in favour of legalizing torture warrants on the pattern of arrest and search warrants³³.

Concluding Remarks

Rights to life³⁴, to be treated in accordance with law³⁵ and to be treated with dignity³⁶ are some of the fundamental rights form the core of the constitutional criminal law in Pakistan requiring that the criminal justice system must be reformed and should not be broken. The new torture law is an opportunity to change the direction of the law enforcement towards *the rule of law* instead of towards *the rule by law*.

²⁹ [https://en.wikipedia.org/wiki/John_Felton_\(assassin\)](https://en.wikipedia.org/wiki/John_Felton_(assassin))

³⁰ Section 134 of the Criminal Justice Act, 1988 of the UK.

³¹ The Eighth Amendment to the US Constitution.

³² The main International Humanitarian Law instruments that prohibit torture and other forms of ill-treatment include: the 1907 Hague Regulations respecting the Laws and Customs of War on Land (Art. 4); the four Geneva Conventions of 1949 (GC I, Art. 12; GC II, Art. 12; GC III, Arts 13, 17 and 87; GC IV, Arts 27 and 32; GC I-IV common article 3 and arts 50, 51, 130 and 147 respectively; Additional Protocol I of 1977 (Art. 75(2)(a)(ii)); and Additional Protocol II of 1977 (Art. 4(2)(a)). All available at: <https://www.icrc.org/en/doc/resources/documents/faq/torture-law-2011-06-24.htm>

³³ https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1204&context=nyls_law_review

³⁴ Article 9 of the Constitution of Pakistan, 1973.

³⁵ Article 4 of the Constitution of Pakistan, 1973.

³⁶ Article 14 of the Constitution of Pakistan, 1973.