

# Pakistan's National Legal Preventive Mechanism against Torture, International Law and *Shari'ah*

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\*Muhammad Waqas Javed

\*\*Samza Fatima

\*\*\*Muhammad Bilal

## Abstract

The study focuses on current national legal mechanism against torture in Pakistan. It analyzes international mechanism against torture and Islamic perspective about torture. In comparison, it envisages the various laws of Pakistan which indirectly provide procedural and substantive provisions to counter it. Meanwhile, the judicial precedents in Pakistan shows stern actions have been taken, in the form of sentences and convictions, against torture in many cases, but such sentences non-execution translates non-seriousness of executive in dealing with such cases. Further, we have deliberated arguments in favour of torture in extreme situations by conditionalists or counter arguments by abolitionists. The study concludes that Pakistan may follow abolitionist approach. This may be possible either through enacting effective law and its execution or ratification of Optional Protocol (OP) against torture by Pakistan despite in the post 9/11 situation both options would be hard nuts to crack for her in near future.

**Keywords:** Torture, Pakistan, National Preventive Mechanism, CAT, Islam

## Introduction:

In Pakistan, torture may be still prevalent due to lack of effective national mechanism against it; therefore, she should either at least enact legislation envisaging effective mechanism or ratify Optional Protocol (OP) to counter this menace.

Internationally, prohibition against torture is a pre-emptory norm<sup>1</sup> (Weissbrodt & Heilman, 2011) which was adopted in Universal Declaration of Human Rights, 1948. Later in 1966, prevention of torture was rendered as a substantial right in International Covenant on Civil and Political Rights<sup>2</sup> (ICCPR) which also provides that the derogation of it is not allowed to state parties either in a situation of emergency or normalcy<sup>3</sup>. This regime has been further reinforced through Convention Against Torture (CAT) 1984<sup>4</sup>. It defines the torture.<sup>5</sup> State parties under the CAT are bound to define and punish the torture.<sup>6</sup>

In Islam, there are three perspectives about the torture. It may not be wrong to say that no static or fixed opinion pertaining to torture is available as it depends upon *fiqh* or *syisa* in Islam. Nevertheless, the modern Islamic states under Cairo Declaration on

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\*Lecturer, Department of Law, Quaid-e-Azam University, Islamabad.

\*\* (Corresponding author), Assistant Professor of Law, University Gillani Law College, Bahauddin Zakariya University, Multan.

\*\*\* Assistant Professor of Law, University Gillani Law College, Bahauddin Zakariya University, Multan.

<sup>1</sup> Weissbrodt, David, and Cheryl Heilman. "Defining torture and cruel, inhuman, and degrading treatment." *Law & Ineq.* 29 (2011): 343.

<sup>2</sup> Article 4 ICCPR, 1966.

<sup>3</sup> Article 7 Ibid.

<sup>4</sup> Preamble Ibid.

<sup>5</sup> Article 1 Ibid

<sup>6</sup> Article 2 Ibid.

Human Rights and other human rights documents have considered torture as against human dignity and Islam.

Pakistan is also an Islamic state as per its Constitution, 1973.<sup>7</sup> She ratified CAT on 23<sup>rd</sup> of June 2010. However, she has not ratified the OP enunciating national and international mechanism against torture<sup>8</sup> (United Nations Treaty Collection, 2020). Nevertheless, prohibition of torture is provided of the Constitution of Pakistan, 1973 along with right of dignity considered as inviolable right.<sup>9</sup> Meanwhile, no one shall be detained illegally or improperly<sup>10</sup>. A person must have a right of fair trial<sup>11</sup>, and must be equally treated regardless of any caste, creed, or gender subject to certain exceptions<sup>12</sup>. Additionally, Pakistan's national substantive and procedural laws by hook or by crook prohibit and fix penal punishment against this menace.

Although, the courts of Pakistan have also sternly dealt with the cases of torture, no conviction has been executed in any case. Despite all this, commission of torture is still in practice. The real cause may be embedded in the fact that Pakistan has not yet legislated effective enactment envisaging impartial procedure of inquiry or investigation against it. It may also be because, Pakistan has not yet ratified the Optional Protocol. Making any new effective law or ratifying OP, may be a riddle for Pakistan in the light of post 9/11 terrorism situation in Pakistan. For better understanding of the research in hand, it is desirable to discuss the status of torture under the International law.

#### Research Questions:

- What is current international legal regime against torture?
- What is Islamic Perspective about torture?
- What is the perspective either of abolitionists or 'conditionalists as to torture?
- How do Pakistan's Constitutional and Criminal, either procedural or substantive, legal frameworks protect against torture?
- What is the stance of Apex and Higher Judiciary or Executive of Pakistan pertaining to torture?
- Whether it is suitable for Pakistan to enact new effective law against torture in compliance of CAT, and to ratify OP of CAT, in the post 9/11 situation in Pakistan?

#### Research Methodology:

The nature of work is qualitative, analytical, and comparative. An analytical approach is adopted to determine the answers to research questions while critically analyzing international human rights law regime against torture which includes International Covenants Against Torture along with OP, other United Nations treaties, Islamic injunctions available in Quran and Sunnah, and Constitution of Pakistan 1973, various criminal, procedural or substantive, enactments in Pakistan, case laws of Apex or Higher Judiciary in Pakistan, and views of the renowned scholarly writings and other secondary sources. The study also adopts comparative approach, to point out weaknesses in Pakistan's laws or administrative inactions in comparison of CAT or its OP.

<sup>7</sup> Article 2 of the Constitution of Pakistan, 1973

<sup>8</sup>United Nations Treaty Collection, 2020 available at:

[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-9&chapter=4&lang=en)  
(last accessed 10-07-2020)

<sup>9</sup> Article 14 Constitution of Pakistan.

<sup>10</sup> Article 10 Ibid.

<sup>11</sup> Article 10-A Ibid.

<sup>12</sup> Article 4 & 25 Ibid.

### **Torture and International Law:**

The world after the second world war realized the significance of human dignity and respect as inviolable. The upshot of this can be found in United Nations Declaration of Human Rights, (UDHR) 1948.

It envisages that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>13</sup> This provision is based upon the customary international law. It is well settled principle, no one shall be allowed in any way to commit torture against any other in any of the circumstances. It is essentially a pre-emptory norm recognized by the state practices whereby states consider it as an obligation not to allow torture in their states against any human being.<sup>14</sup> This norm is not only applicable in the time of peace, but also states are not allowed to violate it in the time of war against prisoners of war, detainees, civilian population, or *hor de combat*, combatants who are no longer taking part in the hostilities.<sup>15</sup> (Rouillard, 2005). In Geneva Convention III, it is declared;

“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”<sup>16</sup>

In addition, Under Geneva Convention IV<sup>17</sup> i.e., pertaining to the protection of the non-armed civilians, they shall not be murdered or tortured or punished in a manner that is against human rights. It states;

“This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.”

Vis-à-vis civil and political rights, UDHR is given the binding effect through ICCPR, 1966. The state parties have categorically forbidden torture. ICCPR 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.”<sup>18</sup> While framing ICCPR, state parties decided to constitute it as a non-derogatory right which shall not be taken away from the subjects regardless the nature of the situation prevailing in a state either in time of martial law, or any other natural emergency i.e., disaster, earthquake, or Covid-19.

Torture is in no manner allowed. These kinds of non-derogatory right are of paramount consideration over the other rights. If someone infringes them, international comity strongly reacts against it.<sup>19</sup> Being a *Jus Cogens* norm, whether a state has ratified or not

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<sup>13</sup> Article 5 UDHR, 1948.

<sup>14</sup> Rodley, Nigel S, “The definitions of Torture in International Law”, 55(1), (*Oxford University Press*, 2003).

<sup>15</sup> Rouillard, Louis-Philippe F, “Misinterpreting the Prohibition of Torture under International Law: The Office of Legal Counsel Memorandum”, *American University International Law Review*, 21(1), (2005); 9-41.

<sup>16</sup> Article 17.

<sup>17</sup> Article 32.

<sup>18</sup> Article 7 of ICCPR.

<sup>19</sup> Udeariry, Nneoma, “Is it True that All Human Rights Have Equal Status and Cannot Be Positioned in a Hierarchical Order?” (2011), available at SSRN: <https://ssrn.com/abstract=2052556>

human rights convention prohibiting torture either ICCPR, CAT, or any other human rights instrument, the norm is binding upon each state.<sup>20</sup>

### **Abolitionists or Conditionalists approach as to Torture:**

The same stance has also been emphasized by the abolitionist of torture. They claim whatever is the situation either peace or war, torture shall never be applied by the state or its functionaries. Their contention is based upon the fact that the ultimate results will not favor the social benefits overall to the society at large. In contrast, there are conditionalists who support commission of torture to avoid the time bomb situation. It may require inflicting torture to get required information relating to a fixed bomb in some thoroughfare full of innocent people, to save the lives of innocents. They consider use of harsh techniques to acquire urgent information from the person acquainted with it, are legally decent. These may not be judged as morally upright.

Abolitionists thrash this argument of conditionalizing the infliction of torture of few individuals could save the lives of many innocents, calling it impractical.<sup>21</sup> They argue; (i) Any information that is obtained from the victim of torture is highly untrustworthy as any person in pain will make any statement to evade the sufferings of torture and save his life. In case such person gives false information during investigation, it would cause false lead to it. (ii) When torture is allowed in an emergent situation, what happens next, it becomes a matter of routine and mistreatment becomes a culture. Officials may consider each situation as of catastrophe. (iii) The whole idea to resort to torture is wicked as it nullifies the basic purpose of the society i.e., create an environment of mutual respect and to provide a dignified life to all the people.<sup>22</sup>

There is also an intermediate approach between both schools of thoughts. The absolute ban on torture can be applied. However, it may be resorted only in exceptional cases wherein situation is extremely dangerous. It must not be as a matter of routine.<sup>23</sup> None of the approaches may be useful unless torture is defined. The same was the case with UDHR and ICCPR.

### **Torture and CAT, 1984:**

The shortcoming of UDHR and ICCPR was finally put to an end by adoption of CAT, 1984. CAT, 1984 defines torture as<sup>24</sup>;

“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.”

<sup>20</sup> Office of UN High Commissioner, “Human Rights Fact Sheet No. 4, Methods of combating torture” (2002): 3.

<sup>21</sup> Mayerfeld, Jamie. "In defense of the absolute prohibition of torture." *Public Affairs Quarterly* 22, no. 2 (2008): 109-128.

<sup>22</sup> Clapham, Andrew, “*Human Rights A Very Short Introduction*”, 2<sup>nd</sup> Ed. (Oxford University Press, 2015).

<sup>23</sup> Gross, Oren, “The Prohibition of torture and Limits of the Law”, (Oxford University Press, 2004).

<sup>24</sup> Article 1 of CAT, 1984.

This helps to figure out that the torture can be exercised in the following ways;

- (i) To intentionally causing severe pain or suffering that may be inflicted upon body or mind of any person to attain admission or information.
- (ii) To punish for anything done by the person himself or any other person or
- (iii) To coerce him or any other person for any other justification relying upon any bigotry.
- (iv) What is indispensable for torture, such pain or sufferings or intimidation must be exercised by or with consent of the public official while he was performing his official duties.
- (v) The punishments given under the due process of law are excepted from the application of the instant provision. However, such punishment must not be against dignity or human rights. This facet is controversial among the states. They differ as to what punishments are against human rights and dignity. Death penalty or any other corporal punishment is bone of contention.

The description depicts torture can be perpetrated merely by state or its officials in official capacity. Any other form shall not be considered as torture, instead it would fall within the scope of the violence. It may be a lacuna left by the framers of the CAT. Consequently, some states many a times practice torture through private military organizations hired for this purpose. They conduct undercover operations against state's own citizens or the subjects of the other states. It makes torture more perilous than the killing of a person. As these agencies could not be held responsible as their officials work secretly which needs to be halted.<sup>25</sup> To thwart it, the parties are obligated to take all necessary measures in all domains either its lawmaking, or executive or judicial. CAT regime further has been reinforced through its OP.

#### **Optional Protocol against Torture:**

OP provides international as well as national mechanism against torture. In international arena, it empowers the CAT committee to hold on site visits, and to hold impartial inquiry. Taking cognizance on torture complaints or information, committee can hold inquiry and determines the credentials of the complaint lodged.

On national level, it envisages national mechanism to impartially investigate against the torture and provides unrestricted access to detention centers.<sup>26</sup> These features may surely help to reduce torture. So far, only fifty-one states, majority belongs to of European Union states, have ratified it. African, Asian, USA and China are not party to it. Likewise, Pakistan is yet not a party to OP.<sup>27</sup>

#### **Torture and Islam:**

There may debate lie pertaining to infliction of torture in Islam. But situation of torture for purpose of extracting confessions from the accused persons, classical jurists viewed that Islam entirely forbid torture for such an object. There is consensus among them that no pressure must be asserted upon the offender to confess anything. Confession, in all cases, must be made with free consent and without any coercion, otherwise it would be void and against Islamic injunctions. Generally, certain hadiths in Islamic law forbid torture. The Holy

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<sup>25</sup> Piret, Jean Marc. "Torture as a Lesser Evil? Governing Security in Times of Terrorist Emergencies." *Governing Security in Times of Terrorist Emergencies (December 1, 2010)*. *Governing Security Under The Rule Of Law* (2010): 99-122.

<sup>26</sup> Article 12 of OP.

<sup>27</sup> United Nations Treaty Collection, *Supra* 12.

Prophet PBUH once said; “God shall torture on the Day of Recompense those who inflict torture on people in life”. Similarly, beating someone for obtaining any information is also forbidden in Islam. The view was supported by Ibn Hazam, Al-Ghazali of Shafi and Zari School of thoughts.<sup>28</sup> Contrary to this, some jurists support beating for extracting information from those criminals who are known for their suspected or suspicious character. They include Imam Maliki, and Imam Hanifi. The third view of Al-Madawi, Shafi Jurist, is that Judge cannot be allowed to inflict torture, but it may be imposed by the executive authorities or the rulers.<sup>29</sup> The view of Al-Madawai was given later in time; it might be for purpose of giving strength or stronghold of the Caliph or rulers. Previously, torture was not allowed to be inflicted by the state authorities in the view of Al-Ghazali and other jurists. It implies that Islamic jurisprudence on torture replies upon *siyasa* or *fiqh* i.e., not consistent.<sup>30</sup>

Nevertheless, the saying of Prophet PBUH on the last Khutba-i-Hajj gives us a general lesson on dignity of humankind. Prophet PBUH said; “O people, your blood, your wealth and your honour are sacred to you as the sanctity of this day of yours, in this month of yours, in this land of yours.” The implication of this hadith suggest that no one can take step against honour of another.<sup>31</sup> As far as inflictions of punishments i.e., stoning to death, amputation of hands or wiping after conviction a different view has been taken by the Islamic jurists and it may fall within the domain of cruel punishment.

In the recent era, under the Cario Declaration of Human Rights, Muslim countries have agreed not to inflict torture upon any person, and they considered it as against the human dignity and respect. It envisages;

“It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty, or indignity. Nor is it permitted to subject an individual to medical or scientific experiments without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.”<sup>32</sup>

Similar provisions can be found in Arab Charter or General Islamic Declaration on Human Rights. Thus, it may not be wrong to say that torture is treated against human dignity in Islamic States.

### **Legal Mechanism against Torture in Pakistan: Constitution of Pakistan (COP), 1973 and Torture:**

Constitution of Pakistan guarantees right of life and liberty subject to certain exception<sup>33</sup>. Similarly, dignity of man is protected, and torture is prohibited.<sup>34</sup> It states as; “No person shall be subject to torture for the purpose of extracting evidence.” It implies that Torture amounts to violation of dignity. While dignity of man and right of life are intertwined. Any violation of dignity amounts to violation of right of life.

<sup>28</sup> Rabbi, Fazal, & Syed Naeem Badshah. "Islam Sharia And The Constitutional Prohibition Of Torture In Pakistan." *Al-Azhār*, 4(2); (2018).

<sup>29</sup> Sadiq, Raza, "Torture and Islamic Law", *Chicago Journal of International Law*, 8 (1); (2007), 21.

<sup>30</sup> Ibid.

<sup>31</sup> Yosri, Mohamed, "Torture in Islam: Political View Vs. Jurist's Authority", available at <https://raseef22.net/article/1074126-torture-in-islam-political-rule-vs-jurists-authority>.

<sup>32</sup> Article 20 of the Cario Declaration on Human Rights.

<sup>33</sup> Art. 9 Constitution of Pakistan, 1973.

<sup>34</sup> Art. 14 Ibid.

In a paramount significance case, Supreme Court (SC) of Pakistan held 'life' is not merely a vegetative or animal life rather it includes all necessities or amenities of life; it must include human dignity and respect. Thus, torture is basically against human dignity and right of life.<sup>35</sup>

Condemning torture, Lahore High Court held that the torture shall not be permitted against the humans. The state is under duty to protect its citizens. Time has changed and so are the laws.<sup>36</sup> Old inhumane practices<sup>37</sup> of treatment of the accused have been replaced with the new ways based upon humanity. Therefore, illegal detention or torture in any form is deplorable. Interpreting Article 14 directs that provisions of CAT are binding in Pakistan on all police investigations.

Taking strict actions against the torturers, the Supreme Court of Pakistan punished for contempt to the police officials who arrested some accused persons in a case against the court ordered not to arrest them. The police officials not only arrested the accused, but also committed torture against him. Such officers were punished for contempt; however, till the rising of the court. Apex Court directed that the case of such tortured inflicted accused be transferred from the court of Magistrate to High Court as an extra-ordinary measure against the torture.<sup>38</sup>

Despite punishment was given under contempt proceeding, and it was a very brief punishment. Nevertheless, for a public servant such conviction has negative consequence in term of dismal from service. Meanwhile, such a precedent directing transfer of the trial to the High Court, while judging the implication of the case, is very rare because High Court is generally not a trial court.

Furthermore, to prevent torture, it is pertinent to prohibit unlawful arrest or detention. The Constitution of Pakistan, 1973 states it is vital that no one shall be illegally arrested or detained.<sup>39</sup> However, this right is subject to certain exceptions. Meanwhile, a person must have a right of fair trial.<sup>40</sup> The right is further strengthened under Article 25 whereby all the persons must be equally treated regardless of any caste, creed, or gender subject to exceptions for protection of vulnerable classes of society. Thus, Constitution of Pakistan provides protection against torture. As far as other laws are concerned, to an extent, menace of torture may also be curbed through procedural and substantive laws in Pakistan.

**Criminal Procedural Laws against Torture:  
Matters pertaining to Arrest:**

The criminal procedural law comes into motion after lodging of First Information Report or complaint. The moment FIR is lodged in a cognizable case, police permitted to arrest the accused persons named in the FIR without warrant of arrest issued by Magistrate. Criminal Procedural law in Pakistan envisages the procedure to arrest any person without warrant.<sup>41</sup> Similarly, it also empowers police to arrest any person for not disclosing his

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<sup>35</sup> Shahla Zia v. WAPDA, Supreme Court of Pakistan, *Pakistan Law Digest*, (1994): 693.

<sup>36</sup> Mst. Khatoon Bibi v. The State, Lahore High Court, *Pakistan Law Digest*, (2020): 2463, also available at <https://svs.lhc.gov.pk/appjudgments/2020LHC2463.pdf>.

<sup>37</sup> Mayerfeld, *Supra* 21.

<sup>38</sup> Sher Ali v. Zahoor Ahmad, *Pakistan Law Digest*, Supreme Court of Pakistan, (1977): 545.

<sup>39</sup> Article 10 Constitution of Pakistan.

<sup>40</sup> Article 10-A, *Ibid*.

<sup>41</sup> Section 54 of Code of Criminal Procedure (Cr. PC), 1898.

particulars as to his identity and whereabouts.<sup>42</sup> While, any police official who considers any person as threat to security can arrest such person.<sup>43</sup>

These powers may be misused by police. Similarly, police have unbridled powers, they may encounter any person accused of the offense punishable with the capital punishment and the accused is escaping the arrest while overpowering the police or investigating agency<sup>44</sup> or under the garb of self-defense<sup>45</sup>. Most of the unlawful custodian deaths may have been caused because of these provisions.

In 2011, killing of Sarfraz Shah in Karachi is an eye-opening occurrence. The then Chief Justice of Pakistan took *suo muto* notice upon the extra-judicial killing. Later, Anti-Terrorism Court sentenced and convicted all the accused persons with death penalty. Pertinently, the sentence and conviction were upheld even by the Apex Court. However, in 2018, President of Pakistan, using his prerogative power under Article 45 of the Constitution pardoned them.<sup>46</sup>

### **Weak Criminal Justice System and Extra Judicial Killings:**

Regrettably, Criminal Justice System of Pakistan like many other colonized countries inherited from the British rule. After independence, no serious efforts were made to develop new laws fulfilling the requirement except a few amendments.<sup>47</sup> Most of the amendments were made by military rules. However, the purpose was to reinforce their regime and to attain legitimacy.<sup>48</sup> Infringement of fundamental rights of people became a matter of policy.<sup>49</sup>

At times, Police officials arrest the accused persons without properly investigating about the involvement of the accused in the occurrence of crime. Moreover, police are a widely feared institution in Pakistan. The reason rests in the fact that there is no effective accountability process available against them. Corruption is highly entrenched in the institution; it is a highly politized institution which need to be checked systematic

<sup>42</sup> Section 57 Ibid.

<sup>43</sup> Section 106, 107, 108 Ibid.

<sup>44</sup> Section 46 Ibid.

<sup>45</sup> Section 96 of Pakistan Penal Code (PPC).

<sup>46</sup> Israr, Shaikh, "Rangers men get presidential pardon over youth's killing", *The Express Tribune*, 7<sup>th</sup> January, (2018); retrieved 17-07-2020 from <https://tribune.com.pk/story/1602679/rangers-men-get-presidential-pardon-youths-killing>

<sup>47</sup> Imam, Kalim, "Police and the rule of law in Pakistan: A historical analysis", *Berkeley International Senior Seminar Visiting Experts Papers*, 8, (2011): 1-20. Also See, Kahlon, Tahir-ul- Mulk., "Policing the Police: A Democratic Exiguity in Pakistan", *ISSRA Papers* (12), (2020): 29-45 retrieved from <https://ndu.edu.pk/issra-papers/articles/issrapapers2020/03.POLICING-THE-POLICE.pdf>

<sup>48</sup> Riaz, Muhammad Khan. & Bibi, Sadia, "Turning around Pakistani Police: Need for a Comprehensive Training Need Assessment" *Conference Proceedings of 6th South International Conference, Islamabad*, (2014) retrieved from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2123886](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123886)

<sup>49</sup> International Crisis Group, "Reforming Criminal Justice System of Pakistan", Asia Reports N°196, (2010), retrieved 23-08-2020 from <https://www.crisisgroup.org/asia/south-asia/pakistan/reforming-pakistan-s-criminal-justice-system>, & also see Jackson, Jonathan, Muhammad Asif, Ben Bradford, and Muhammad Zakria Zakar. "Corruption and police legitimacy in Lahore, Pakistan." *British journal of criminology* 54, no. 6 (2014): 1067-1088.

accountability.<sup>50</sup> Meanwhile, some police officials are involved in extra-judicial killings and torture for sake of extracting confessions. Those who dare to lodge complaint against police officials, they face harassment for withdrawal of the cases.<sup>51</sup>

However, in a case Supreme Court (SC) of Pakistan held, extra-judicial killings or arrest and torture would not be permitted. These rights are inviolable. SC also defined the extra-judicial killings. Generally, in a criminal case, under Article 121 of *Qanun-e-Shahadat Order* (QSO), 1984 the onus to prove the guilt lies upon the prosecution. However, SC held, if a person dies while in detention or custody, onus to prove would lie on accused officials to prove that it was not an extra-judicial killing.<sup>52</sup>

Normally, onus of proof lies upon the prosecution, and not upon the accused during the criminal trial. However, SC held burden would lie on such police officials in whose custody torture was committed.

**Production of accused before Magistrate:**

Regarding other procedural laws under Cr. PC<sup>53</sup>, it is a duty of the police not to detain the person arrested longer than 24 hours, and to produced him before the area Magistrate. Despite this provision impose duty for production before Magistrate withing a limited time, it is also one of a provision that may be abused. The police may at times arrest accused persons without making any entry of arrest in police diaries.

In *supra* a case, SC also directed Inspector General of Punjab Police was directed to keep police diaries in accordance with procedure provided in Police Rules 1934. Any person arrest must be informed as to ground of his arrest with immediate effect.<sup>54</sup>

The reason of direction to keep the police record up-to date may imply that in many cases police arrest accused persons, and keep them in unlawful detention places, instead of police stations where arrested persons would be normally kept. But any detention at unknown, and unlawful centers implies no official arrest, under the law, have been made. Thus, it is compulsory no illegal detention of any accused is carried.

Additionally, last *supra* case envisages that an accused must be treated like other human beings. Police shall not be allowed to perpetrate acts of torture. During investigation, their sole duty is to gather the evidence as to commission of crime within the sanctioned time. If they find sufficient evidence, submit the challan report before the concerned Magistrate to try the accused instead of acting as a court and punishing the culprits themselves. It further adjudicated that it is inevitably determined that Article 14 of the Constitution of Pakistan and provision of CAT are against any sort of torture inflicted on any individual during unlawful detention by police. It is imperative that Court must not ignore such occurrences and must come forward with pragmatic approach.<sup>55</sup>

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<sup>50</sup> “Jackson” Ibid.

<sup>51</sup> Human Rights Watch, “This Crooked System, Police Abuse and Reform in Pakistan”, (2016) retrieved 23-08-2020 from:

[https://www.hrw.org/sites/default/files/report\\_pdf/pakistan0916\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/pakistan0916_web.pdf),

<sup>52</sup> Banazir Buttho v. President of Pakistan, Supreme Court of Pakistan, *Pakistan Law Digest*, (1998): 388.

<sup>53</sup> Section 61

<sup>54</sup> *Supra* 35

<sup>55</sup> Ibid.

**Remand:**

That is why, when the accused's person is required for further time to investigate, permission from the Magistrate is indispensable. The maximum period of such remand is 15 days (as a whole) which shall not be allowed at once, but time to time.<sup>56</sup> During remand hearing, opportunity to the accused or his lawyer to give his version must be granted. Similarly, Lahore High Court, in *Gulam Sarwar* case, decided that Magistrates must be very watchful in grant of remand. They cannot play with the liberty of the people rather they are answerable under the law. The case lays down various tenets for grant of remand which must not be ignored while dealing with the custody of the accused persons.<sup>57</sup>

They may direct for medical test if they find, torture is exercised. They must also not grant unnecessary and excessive custody to the police. These provisions may result in lesser possibility of illegal detention or torture for extracting confessions or information.

**Extra-Judicial Confession:**

During investigation, police must not illegally extract confession from the accused. Confessional statement must only be recorded before Judicial Magistrate in accordance with the procedural requirement.<sup>58</sup> Meanwhile, rules of evidence state that in case confession is obtained through inducement or force by any person in authority, it shall not have any value as evidence<sup>59</sup>, subject to its corroborative value. In *Tahir Javed* case<sup>60</sup>, the Supreme Court of Pakistan also held that extra-judicial confession must only be used as a corroborative piece of evidence.

However, about discovery of facts by accused, any recovery on disclosure of the accused while leading police officials and recovering the weapon or subject of offence shall be credited. Even the recovery on disclosure may be caused due to the inducement, torture, or force.<sup>61</sup> In the meantime, witnessing the terrorist activities in Pakistan, superseding effect has been given to the Anti-Terrorism Act (ATA), 1997 over the other laws in Pakistan. Certain provisions of ATA may be a matter of concern. The first provision<sup>62</sup> is about recognition and crediting of evidentiary value of any confessional statement of the accused recorded before police official (DSP). The second<sup>63</sup> stipulates remand period extending up to thirty days. Although stringent nature of ATA laws might have played a very useful role in curbing terrorism or extremism in Pakistan, such kind of laws may also have repercussion upon human rights; it may result in various abuses.

**Bill against Torture and Custodial Deaths 2019:**

To counter these abuses of torture, in 2019, a bill "Torture and Custodial Deaths (Prevention and Punishment) Act, 2019" was moved in the Senate. The bill contains provisions as defining the torture and providing effective national preventive mechanism against torture. It may be useful tool if the bill is passed by the parliament. However, bill is still in abeyance.<sup>64</sup> This bill if enacted may be useful to curb torture, but there is a dire need

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<sup>56</sup> Section 167 Cr.PC.

<sup>57</sup> *Gulam Sarwar v. The State*, *Pakistan Criminal Law Journal*, (1984): 2588.

<sup>58</sup> Section 164, 364 & 540-A Cr.PC.

<sup>59</sup> Article 37 and 38 of QSO, 1984.

<sup>60</sup> *Tahir Javed v. The State*, Supreme Court of Pakistan, *Supreme Court Monthly Review*, (2009): 166.

<sup>61</sup> Article 40 of QSO, 1984.

<sup>62</sup> Section 21-H ATA.

<sup>63</sup> Section 21-E Ibid.

<sup>64</sup> The Dawn, "Torture Legislation", (2019, November 10), retrieved from: <https://www.dawn.com/news/1515934>.

that an independent inquiry or trial procedure into such matters is to be adopted in it. Until the law enacts, what an aggrieved person of torture should do for escaping himself from such callous abuse? It is true that law is yet to be enacted, but it is imperative that such person may challenge the abuse committed against himself or family through some indirect remedies provided in various laws of Pakistan.

**Remedies against Unlawful or Improper Detention:**

Unlawful or improper detention may also lead to torture or likewise practices. It may not be wrong to say that a curb on such detention would operate a bottleneck on torture. Thus, anti-illegal detention remedies should be overlooked while dealing with such cases. In Pakistan, any person who is subjected to illegal or improper custody may file a *heabus* petition before Sessions Court<sup>65</sup> or High Court<sup>66</sup>. In a case pertaining to the question of *locus standi* it was held that *heabus* remedy may be availed by the aggrieved person himself or any other person on behalf of such an aggrieved person.<sup>67</sup> It is pertinent, the matter of custody is not only limited to illegal custody, but also it includes improper custody. Improper custody means prevailing conditions under which a person is detained may not comply with basic human rights.

Apart from, a Magistrate of first class is empowered if he receives any information, any person is detained in such circumstances that amount to confinement punishable under PPC, he shall issue search warrants to recover such person.<sup>68</sup> Significantly, Supreme Court of Pakistan may take the *suo motu* notice in case it finds any fundamental right's violation when the matter is also of public importance.<sup>69</sup> These remedies may be utilized by any person who suffers severe mental, physical torture or suffering in any illegal or improper custody.

**Substantive Laws against Torture:**

Interestingly, apart from the remedies against torture, any police official who wrongfully confines anyone shall be charged with misconduct as to his duties<sup>70</sup> and for commission of torture or violence<sup>71</sup>, they may be punished with imprisonment up to five years with fine respectively. At times, illegal custody, or detention by investigating agencies causes extraction of confession. To curb it, penal punishment is also provided.<sup>72</sup> It prohibits use of hurt to extort confession, and it shall be punishable with imprisonment for a period up to ten years and it shall be in addition to the punishment envisaged for the kind of hurt caused. The term "hurt" has been comprehensively defined in penal law,<sup>73</sup> and various penalties according to the kind of hurt are given.

It makes crystal clear that torture is punishable in Pakistan, and the maximum punishment of five years and fine may not be a less stringent while additional punishment for kind of hurt caused to aggrieved may also inflicted. But it is still in practice. The reason of it may lie into executive or judicial policies.

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<sup>65</sup> Section 491 Cr.PC.

<sup>66</sup> Article 199 the Constitution 1973.

<sup>67</sup> Muhammad Younas Gujjar v. DPO, *Yearly Law Review*, (2016): 307.

<sup>68</sup> Section 100 Cr. PC.

<sup>69</sup> Article 184 (3) the Constitution, 1973.

<sup>70</sup> Article 157 of Chief Executive Order 22, Police Order (PO) 2002.

<sup>71</sup> Article 156 Ibid.

<sup>72</sup> Section 337-K PPC.

<sup>73</sup> Section 332 Ibid.

### **Judiciary Recent Stance against Torture in Pakistan:**

Judiciary can play its role to suppress this menace. Today, no judge would like to allow torture or to rationalize it in any manner<sup>74</sup>. It must be taken seriously realizing their duty to follow international law. Judiciary of Pakistan may not have frequently, but time to time held against torture. In 2019, in a recent case, the police officials Islamabad abducted and kept into illegal custody two children, aged 12 to 14 years, of the petitioner. These officials illegally demanded the elder brother to be handed over to get minor boys free. Being aggrieved, Tasleem filed writ petition. Islamabad High Court after determining the merits took stern action and in compliance of High Court order, both the police officials were arrested. A case was registered against culprits under Section 328-A/344/506 PPC, and Article 156 PO, 2002. Meanwhile, police officials were suspended. DIG operations got recovered the abductees. The court also issued directions for fair investigation of the case against the officials.<sup>75</sup> This case is an ample instance of mal practices of police resorting torture or illegal detention for getting information from the innocent persons.

Similarly, in another case, the police officials raided the flat of Mst. Saeeda Bagum (widow) in Karachi. Despite they were not required to be arrested in any of the FIR, the officials on gun point abducted her son and three of their servants. Being aggrieved, she approached the Court of Additional District Judge Karachi who ordered to conduct a raid by area Magistrate to recover the detenus. FIR was lodged against the delinquent police officials. They applied bail petition before Karachi High Court, but the same was refused.<sup>76</sup>

Likewise, Karachi High Court held that allegations on public functionaries of maltreatment, unlawful confinement and torture against citizen could not be taken as minor offence, but the same should be taken seriously. Therefore, bail applications of the functionaries were refused.<sup>77</sup>

All these cases may highlight that judiciary in Pakistan is seriously dictating against torture and illegal detention. A many times, sentences and convictions against torture have been announced. It may depict a zero-tolerance policy against torture by the judiciary. However, there are cases; such sentences have not been enforced rather pardoned by the executive under its amnesty policy which may be proved to be a weak link to curb menace of torture in Pakistan. While among other reasons, ongoing terrorism after 9/11 may also be a cause of torture in Pakistan.

### **Post 9/11 situation & Torture in Pakistan:**

At times, investigating agencies use harsh techniques to get the required information or confessions from the accused persons or persons acquainted with the information. Their claim is supported by conditionalist.<sup>78</sup> After the 9/11, Pakistan suffered the bent of being one of allies to United States of America (USA) in the war against terrorism. In unfathomable terrorists' attacks, thousands of innocent people died and lost their limbs. This is be one of the foremost reasons that these practices may be applied, in some cases, by the some of the officials under view that the extreme situation may require extreme steps. Justifications for torture are profusely averred. Like it is vindicated to some extent for Pakistan in the backdrop of 9/11 when a country like USA is using counter terrorism techniques including harsh

<sup>74</sup> Clapham, *Supra* 26.

<sup>75</sup> Tasleem Bibi v. SSP Islamabad, Islamabad High Court, *Pakistan Law Digest*, (2019): 524.

<sup>76</sup> Shadab Akthar v. The State, *Monthly Law Digest*, (2012): 353.

<sup>77</sup> Muhammad Amin v. The State, *Pakistan Criminal Law Journal*, (2007): 1303.

<sup>78</sup> "Gross" *Supra* 27.

practices i.e., torture, or indefinite detention to curb terrorism.<sup>79</sup> After World Trade Centre terrorist attacks, USA Department of Justice tried to narrow down the definition of the torture. According to its policy suggest that fundamental rights protection envisaged in its constitution against torture is not available to rival combatants and it can disregard international law.<sup>80</sup> This rhetoric may also find justification for torture in Pakistan. Relying it, Pakistan may have taken various steps to counter terrorism in Pakistan including significantly legislative measures.

Parliament of Pakistan enacted Protection of Pakistan Act (PPA), 2014 whereby military courts were established, and preventive detention was allowed. These courts were given the direct access to try citizen involved in terrorism which was the function of ATA courts. The Act recognized the extra-judicial confessional statement as suffice to prove guilt of the accused. Ironically, the principle of reasonable evidence standard against the accused was recognized contrary to rule of evidence beyond the shadow of doubt. It may be a good step considering the point of view of conditionalist to counter the terrorists with speedy and immediate trials and punishments.

However, abolitionists viewed it as paradigm surrender by parliament, and it shows its weaknesses. It is reported that 98% of the verdicts were based upon the confessional statement.<sup>81</sup> It may not be true as mere confessional statement cannot be made a mere reason for convictions. Other circumstantial evidence would also be required for pronouncing any guilty in those cases. Meanwhile, conditionalists stance is rejected by the abolitionists.<sup>82</sup> Torture or other cruel punishments cannot be made a reason to applied even in the time of war. Under Geneva Convection III regime torture even cannot be imposed upon the prisoners of war for obtaining any information. Thus, any argument that seeks infliction of such measure would not have any legal or moral footing.<sup>83</sup>

### **Conclusion:**

International Law clearly prohibits torture considering it an international norm, jus cogens. In comparison, In Islam, among classic jurists there was no consensus among the jurists about infliction of torture. Imam Ghazali (RA) and Zawari (RA) Jurists forbid torture. Whereas Al Madawai (RA) allowed torture to exercise by the rulers only. Meanwhile, Imam Hanifi (RA) and Maliki (RA) disallowed the torture in general, but they allowed it to be conflicted on persons of suspicious character. Thus, it reveals it is something depend upon the interpretation or *fiqh* varying it, status may change. However, modern Islamic states have prohibited torture under Cairo Declaration on Human Rights and other documents.

The Constitution of Pakistan, 1973 prohibits torture in clear terms and regarded it against human dignity and against right of life.<sup>84</sup> Pakistan is a party to CAT, but it has yet not ratified its OP.<sup>85</sup> In terms of implementation of CAT, Pakistan has yet not legislated any specific efficient law against it, permitting impartial inquiry or investigation by any of its

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<sup>79</sup> Aziz, S. F., "The Authoritarianization of U.S. Counterterrorism", *Wash. & Lee L. Rev.*, 75 (2018): 1573.

<sup>80</sup> Clapham *Supra* 26.

<sup>81</sup>Qamar, Reema, "Yet another extension", *The Dawn Newspaper*, 2018, retrieved from <https://www.dawn.com/news/1455544> (last accessed 11-08-2020).

<sup>82</sup> Clapham *Supra* 26.

<sup>83</sup> Allhoff, F., "*Terrorism, ticking time-bombs, and torture: A philosophical analysis*", (Chicago: University Press, 2012).

<sup>84</sup> Article 14.

<sup>85</sup> *Supra* 8.

independent institutions. However, some legal remedies are available against torture under various legislations in Pakistan.

As far as courts of Pakistan are concerned, they have time to time reprimanded such anomalies in a few cases against torture. The recent Tasleem Bibi *supra* case of Islamabad High Court is very vital in this regard wherein police officials faced stringent actions. To the contrary, attitude of executive, at times, favours the convicts. In a *supra* case against rangers, President of Pakistan exercised his prerogative of pardoning the convicts of extra-judicial killings. Such a practice may give rise to impunity in Pakistan, a harsh truth. For the moment, Pakistan has not yet ratified Optional Protocol which provides national and international mechanism against torture. Either ratifying OP or making new effective law entailing impartial inquiry procedure may be the quite complex options for Pakistan in the light of prevailing circumstances after the 9/11 and terrorists' attacks in Pakistan.

It transpires from that fact that in 2019, a bill "Torture and Custodial Deaths (Prevention and Punishment) Act, 2019" was moved in the Senate, but it is still in abeyance ("Torture Legislation", 2019).<sup>86</sup>

However, it is recommended to ratify OP or to enact new legislation entailing effective legal mechanism against torture as infliction of torture on war prisoners is by no stretch of legality is allowed even during war. Thus, any law if made, it should be enacted through detailed debate in the parliament and among the masses, to be effective. Without deliberation on the menace, new enactment may not give desired results to fulfil the obligations of Pakistan under the international covenants UDHR, ICCPR, and CAT. Meanwhile, it is equally imperative that there must be no tolerance policy against torture by any the organs of the state as Article 14 of Constitution of Pakistan 1973 itself prohibits torture or degrading punishment as a fundamental right. As any new law against such policy may also result into failure or non-implementation of such new law; hence, continuance of torture with freedom.

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<sup>86</sup> *Supra* 23.