

ISLAM SHARIA AND THE CONSTITUTIONAL PROHIBITION OF TORTURE IN PAKISTAN

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Abstract

The prohibition of torture has recently been discussed in detail amongst academicians, at governmental level and especially in legal circles around the world. The questions of the possible limits of the prohibition of torture, and whether torture is or should be allowed to ward off serious dangers in the war against terrorism, remained the center point. The present work contributes to this debate by looking at the topic from a new starting point focusing on Pakistan. In the case of Pakistan, the prohibition of torture has been discussed in the constitutional law of Pakistan and its relations with Islamic legal system, in the light of a historical process and examined in relation to the cultural understanding of human dignity. In this way, the jurisprudential question about the absoluteness of the ban on torture is placed in a wider context of cultural and legal-philosophical dimensions of Pakistan.

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I. Introduction

The term torture is applied to act/acts of severe pain, mental and physical suffering intentionally imposed on a person for the purpose of obtaining information or confession. Such punishment usually are carried out public official and inflicted on a person who has committed crime or suspected to having committed. It is systematic provision of physical pain or psychological distress by public official, for punishment or for the purpose of forcing a person - either a suspect or (less often) a witness - to make a statement or behavioral change.

The principle of torture may be as old as humankind and is still threatening today; however, the background of torture is often political. It has been used in judicial investigations as a tool to force confessions or testimonies from alleged offenders. Torture “can be physical, psychological, or sexual in nature. It is a deliberate and systematic infliction of severe pain or suffering by a public official, other persons acting in an official capacity (e.g. police, military, or security forces) or by parties a government is unwilling or unable to control (e.g. paramilitary organization or guerrilla armies).”¹ Because of their identities or political-religious affiliation individuals are usually torture. To create a climate of fear amongst the population, the government even tortured public, politician, leaders, students, and prisoners too.

Various forms of physical torture are beating-kicking, deprivation of water-food, stretching, submission, suffocation, electric shocks, and even burn, rape and sexual assault. Psychological tortures are threats to someone self or family, isolation, humiliation, mock amputations-executions and even witnessing the others during of torturing. The tortured person's death (bodily injury, exhaustion or suicide) is often accepted or even part of the process. Victims often disappear without a trace (i.e. tens of thousands of people disappeared during the security forces operation against terrorism inside Pakistan).² Even though torture is not institutionalized in any state today as a means of law-finding, it is still a widespread phenomenon, especially in totalitarian states, along with to some extent to the Pakistan as well where religious strictures and beliefs are taken to form its constitution.

In the medieval age until the 13th century torture was not expressly prohibited in Europe by church law. Then, however, one began to enact the law on high treason to heresy as crimes of violation of divine sovereignty apply. In the wake of the inquisition, Pope Innocent IV, influenced by Roman law, issued a decree allowing the court officials to torture the heresy accused. The tortures were used to make confessions either against themselves or against them to squeeze others out. Tools here were thumbscrews and Spanish boots that could squeeze fingers and calves, the torture chair with sharp nails, and winch and wheel. The perverse fantasy of the torturers also sprang from sexual abuse of all kinds. During the middle Ages, the influence of the Roman Catholic Church contributed to the fact that torture also became the instrument of state courts. The Italian municipalities took over the torture early; other European countries retreated, as France in the thirteen century legalized their use. After all, torture was part of the legal system of every European country except Sweden. The atrocities of the Inquisition ultimately led to the abolition of torture in Europe. Already in the 14th and 15th centuries, laws had been enacted in Italy restricting them. In addition, the legal system changed in the course of the

enlightenment, which no longer declared the confession the central decision-making element, and established circumstantial process, the torture lost importance. Subsequently torture had been abolished during the 18th and 19 century, but in the 20th century it again became very common.³

Systematic torture also takes place in war zones, although it has been outlawed by United Nations convention against torture.⁴ Almost 155 countries have ratified the UN convention against torture yet after 30 years half of the countries are still practicing torture. Amnesty International's annual reports provide information on the ongoing torture and the shockingly cruel methods and their victims, that more than half a million people are tortured each year in over 70 countries. The Universal Declaration of Human Rights of 1948 and the so-called Geneva Conventions of the International Red Cross of 1949 have internationally outlawed torture.⁵ Pakistan is signatory to the UN convention on torture.⁶

In this article an attempt has been made to examine the constitutional prohibition of torture in Pakistani context. First of all the meaning and explanation of the torture have been discussed in detail. Then the study has been focused on the ban on Torture in Islam and its connection with the constitutional and legal history of Pakistan, along with focus have been made to examine the current law of Pakistan where torture has been prohibited.

II. The Prohibition of Torture in Islamic Sharia

The questions of prohibition of Torture in Islamic laws are debatable and currently one of the most important topics amongst the academicians. Although Islamic law is static and unalterable in its character and idea, it has undergone various interpretations, including the prohibition of confessional torture. According to classical Islamic law, the torture of the alleged offender was forbidden in order to obtain a confession. There was agreement that a confession must be voluntary and without pressure. A confession based only on coercion is void. This principle of voluntary confession was derived from various traditions in Sharia. There are also quotes from Sharia, which generally oppose torture. The Prophet Mohammed (Peace Be Upon Him) said: "God shall torture on the Day of Recompense those who inflict torture on people in life."⁷

Similarly, an incident is reported in which Khalif Omar ibn Abdul Aziz's is asked by one of his stewards whether to torture those who refused to pay taxes. There upon the Khalif is said to have replied in a letter: "I wonder at your will from God's wrath, and as my satisfaction will save you from God's anger... for torturing them."⁸

In addition, prophet should have given the general instruction to state employees, that they should show indulgence and not terrorize, convey well-being and not harass people. Finally, it is also known that Prophet Mohammed (Peace Be Upon Him) said: "A Muslim is unlawful to another Muslim, his blood, his wealth and his honor."⁹

There are various views on the legality of beating someone suspect criminal for obtaining confession in the pre-modern Muslim Sunni juristic discourse. The first views in this regard that prevailed in the early Islamic history tells that beating were never permissible. The supporters of this claim were included the eminent jurists of the times including Ibn Hazm (d1064), al-Ghazzali (d1111) of the Shafi School of

Law and the Zahiri school of law. This view is consistent with international human rights norms and regulations.

The second claim supports the beating of suspect for obtaining information regarding criminal's acts. Here the suspect who is beating for getting information is commonly known for relevant actions-priori wrongdoing and thus the "suspect's reputation provides sufficient circumstantial evidence of guilt of the new accusation to justify the beating." The supporters of this view are Ibn Taymiyya (d1328), Ibn Qayyim (d1351), Ibn Farhun (d1396) Maliki jurist, and al-Tarabulusi (d1440), the Hanafi jurist. The view is too familiar to students of international law where judicial torture was allowed in the medieval Europe upon half proof of suspect wrongdoing or guilt.¹⁰ The third claim that beating suspect during investigation is permitted to executive authorities including rulers, but forbidden to judge in the court of Islamic Law. The proponent of this claim was Mawardi (d1058) of the Shafi School of law.¹¹

Historically, torture was exercised in the Muslim countries to some degree in the early decades of Islam, though religion Islam doesn't allow it. In the 10th century a judge reported that "flogging suspects was a method of criminal investigation" in Baghdad. Such method of investigation was the criminal procedure of the Ottoman Empire reflected in the criminal code of the 16th century. However it must be noted that such practices was adopted at that time in every region of the world and was not only confined to the Muslim world. In the modern state of Saudi Arabia, in all major crimes including rape, murder, theft and drug crimes, the investigative beating were allowed. In Pakistan and Iran too tortures have been forbidden by its constitution¹² and statutes. The Islamic legal position on torture in the modern context has been remained a topic of investigation for many scholars, and the main sources outlined and extensively analyze such phenomena are: Oona Hathaway article of 2002 and Ted Stahnke and Robert C. Blitt work of 2005.¹³ The conclusion of these sources indicates that the question of torture and its relationship to Islamic Law in the Muslims majority countries are unclear.

The prohibition of confession torture in Islamic human rights declarations are also rich sources for researchers. The Islamic declarations of human rights, can nonetheless serve as further evidence that the confession of torture is being rejected in Islamic laws. In the General Islamic Declaration of Human Rights, the Cairo Declaration on Human Rights and the Arab Human Rights Charter - all three expressions of more conservative Islamic convictions - include a ban on torture. The General Islamic Declaration of Human Rights contains an explicit prohibition of torture in Right to Protection of Torture-Article VII, which states: "No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests."¹⁴

The Cairo Declaration on Human Rights also contains in Article 20, sentence 2, a prohibition of torture: "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.”¹⁵

In line with the wording of other international torture bans, Article 13 (a) of the Arab Human Rights Charter states: “The States parties shall protect every person in their territory from being subjected to physical or mental torture or cruel, inhuman or degrading treatment. They shall take effective measures to prevent such acts and shall regard the practice thereof, or participation therein, as a punishable offence.”¹⁶

III. Pakistan’s Constitution and Prohibition of Torture

a) Historical Version of the Constitution

The constitutions of 1956 and 1962 both contained no explicit protection of human dignity in the context of the protection of fundamental rights. In this regard, the inclusion of the protection of human dignity in the 1973 Constitution is remarkable, since it is not a mere takeover of a right. The 1973 constitution was created by Bhutto with his philosophy of Islamic socialism, but he was educated in US and UK and thus it seems likely that the inclusion of human dignity protection is due to the influence of Bhutto’s Western thought. In this sense, a historical interpretation could suggest that the inclusion of human dignity was based on the Western understanding of human rights, so that corporal punishment would be understood as an inadmissible interference with human dignity.¹⁷

In the context of the overall view of the constitution, the regulations strengthening Islamic law are also considered. The preamble expresses in its first sentence that sovereignty is not granted to the people of Pakistan, but to Allah Almighty. It follows that the legislative authority of the Pakistani Parliament is limited by the commandments of Allah. Article 1 of the constitution stipulates that the country to be known as “Islamic Republic of Pakistan”, a commitment to the Islamic sentiment and orientation of the state to Islamic conceptions of society.¹⁸

This is then reinforced and further elaborated by the Objectives Resolution incorporated with Art. 2 A of the constitution. This begins - in line with the preamble “whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust.”¹⁹ Thus according to the constitution of Pakistan, Allah comes to the highest authority in the supreme legal system of Pakistan.

There is currently no legal clarity on the answer to the question of how human dignity under Article 14 (1), of the Pakistan’s constitution is to be defined. Human dignity is in conflict with Western-inspired rights and Sharia law. The legal system of Pakistan is contradictory and unclear about the human dignity and its interpretation. How individual rules are interpreted or facts judged by law are sometimes unpredictable and highly dependent on the views of the respective judges. As “Caught in the grip of competing and unresolved normative conflicts, legally pluralistic jurisdictions such as Pakistan (and most countries constituting the Muslim world), find themselves in a hybrid legal system fraught with contradictions, duality and compromise. Nowhere is this conflict more apparent than Pakistan where Islamic law, English secular legal principles and customary norms interact to produce an amoebic, boundary-less set of regulatory norms.”²⁰ However, since the laws on the introduction of corporal punishment have not yet been rejected as unconstitutional, an interpretation appears, according to Article 14 (1). Although this is contrary to

corporal punishment, it is welcome from a human rights point of view, but very doubtful given the legal situation in Pakistan.²¹

b. Constitutional Prohibition of Torture for Evidence

The Pakistani Constitution expressly prohibits the use of torture against accused persons or witnesses in order to gain evidence. Article 14 (2) of the constitution of 1973 states: “No person shall be subjected to torture for the purpose of extracting evidence.” This Article is fully in line with Islamic law, which stated that torture for the purpose of obtaining evidence is prohibited. However, torture serving other purposes is not expressly prohibited by this Article.²²

c. Corporal punishment and protection of human dignity

In an Islamic country, the question arises whether the constitution prohibits Islamic corporal punishment. The protection of life and body guaranteed under Article 4 para. 2 (a) of the constitution noted that “no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law”. However the constitution is subject to simply legal reservation and therefore does not provide sufficient protection against corporal punishment. Furthermore, the prohibition of torture in Article 14 (2) of the constitution extends only to torture for evidence purposes, but not to the imposition of corporal punishment. However, one could consider a ban on corporal punishment from Article 14 (1) of the constitution derive the phrase that “the dignity of man and, subject to law, the privacy of home, shall be inviolable”. Again the constitution is silent that the clause regarding the dignity of man to be interpreted in the tradition of a British-Western understanding of human rights or understood by traditional Islamic standards.

Pakistan’s reservation on the corporal punishment of the UN shows that it give due standard to its constitution as well as care the Islamic Laws. Corporal penalties are part of the torture term according to Article 1 para. 1 sentence 1 of the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment.²³ Interestingly Pakistan is signatory to the UN convention of torture but it also noted that at the time of ratification of the convention that “Pakistan reserves its right to attach appropriate reservations, make declarations and state its understanding in respect of various provisions of the Convention.” Later one on the UN Convention of torture, Pakistan raised its reservation and especially regarding articles 4, 6, 12, 13 and 16 of the convention, the Government of Pakistan declared that these provision shall be applied so to the extent that these are not repugnant to the Sharia Laws and provisions of its constitution. The reservation of Pakistan on the UN convention of torture was debated in the UN General Assembly and many members’ states raised objections on Pakistan’s reservations that it “may contribute to undermining the bases of international human rights treaties” and an “an uncertainty which is unacceptable, especially in the context of treaties related to human rights”. It also raised doubts amongst the members’ states that to what extent Pakistan is considering itself to be bound by the commitment of the treaty itself.²⁴

c. Security Torture

The torture to save lives is not covered by the prohibition of torture in Article 14 (2) of the 1973 constitution. The prohibition on torture extends only to torture intended to gather evidence. However, the threat torture is not about obtaining

evidence to convict a criminal. Information that serves to prosecute the offender is at best an unintended side effect of the security torture. Article 14 (2) of the constitution only prohibits torture to the extent that the interrogator is interested in gathering evidence against the perpetrator through torture.

The protection of human dignity according to Article 14, Para 1 of the constitution may include protection against security torture. As already stated, the scope of protection under this Article of Para 1 is difficult to determine. Since human dignity is probably not even understood as protection against corporal punishment, it cannot be argued that any torture violates the human dignity of Article 14 Para 1.²⁵ The Islamic law, which according to traditional voices could be used here, does not clearly forbid the security torture, but does not even order it.

A constitutional ban on security torture cannot be accepted or rejected with certainty at present.

In conservative Islamic understanding, there is no dedicated protection of human dignity. "Honor" plays the central role, while the concept of "dignity" - if mentioned at all - is filled with content other than in the Western-Christian legal system. Corporal punishment is explicitly prescribed by Sharia law and therefore cannot violate an Islamic-understood human dignity.

The 1973 constitution of Pakistan has clearly noted that there shall be no authorization basis for the security torture. Article 4 of the constitution states that state power is bound by law:

“(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Wherever he may be, and of every other person for the time being within Pakistan. (2) In particular—(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law; (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and (c) no person shall be compelled to do that which the law does not required him to do.”²⁶

The principle of the lawfulness of state action standardized in Article 4 para 1 of the constitution and is clarified by subsections means that the executive has no inherent power to interfere with private rights; it has no power except what vests in it by law.²⁷ Thus, the security torture requires a legal basis; however, such an authorization basis has not been created so far. Even the controversial Anti-Terrorism Act (1997) did not provide any legal basis for the use of torture. Nevertheless, it has promoted the use of torture in practice. That torture acts cannot be prosecuted as long as the civil servant demonstrates that he has acted in good faith. This is, as it were, an indirect request to crack down on terrorists, with a limit to torture.²⁸

Conclusion

Torture has been exclusively prohibited in Islam. Prophet Mohammed (Peace Be Upon Him) have given the general instruction to state employees, that they should show indulgence and not terrorize, convey well-being and not harass people. There are various views on the legality of beating or torturing someone suspect criminal for obtaining confession in the Muslim Sunni juristic discourse. Conclusion from the various sources indicates that the question of torture and its relationship to Islamic Law in the Muslims majority countries including Pakistan are unclear, debatable and undergone various interpretations. However, in the General Islamic

Declaration of Human Rights, the Cairo Declaration on Human Rights and the Arab Human Rights Charter - all three expressions of more conservative Islamic convictions - include a ban on torture.

The constitutions of 1956 and 1962 both contained no explicit protection of human dignity in the context of the protection of fundamental rights. In this regard, the inclusion of the protection of human dignity in the 1973 Constitution is remarkable, since it is not a mere takeover of a right. The protection of human dignity does not lead to a comprehensive prohibition of torture, as the understanding of human dignity in Pakistani constitution is in conflict with Western-inspired rights and Sharia law. Thus the legal system of Pakistan is contradictory and unclear about the human dignity and its interpretation. However, the Pakistani Constitution expressly prohibits the use of torture against accused persons or witnesses in order to gain evidence which is fully in line with Islamic law; however, torture serving other purposes is not constitutionally prohibited or at least not clearly proscribed where further research work is suggested. Even Pakistan's reservation on the corporal punishment of the United Nations shows that it give due standard to its constitution as well as care the Islamic Laws.

References

¹ Center for Survivors of Torture (CST), <http://cst.aaci.org/faq/>

² Human Rights Commission of Pakistan, *Enforced Disappearances in Pakistan: UN Working Group is preliminary report & recommendations*, 2012. <http://hrcp-web.org/hrcpweb/wp-content/pdf/ff/27.pdf>. Also see Amnesty International, "Musharraf is gone, but still no sign of the disappeared", September 2, 2008. <https://www.amnesty.org/en/latest/news/2008/09/musharraf-gone-still-no-sign-disappeared-20080902/>

³ For detail see Christopher J. Einolf, "The Fall and Rise of Torture: A Comparative and Historical Analysis", *Sociological Theory* (June 2007), pp. 101-122

⁴ United Nations Treaty Series, No. 24841, *Convention against torture and other cruel, inhuman or degrading treatment or punishment*. Adopted by the General Assembly of the United Nations on 10 December 1984, p. 114, <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf>

⁵ World without Torture, <https://worldwithouttorture.org/tag/torture-statistics/>

⁶ Waseem Ahmad Shah, "Pakistan yet to enact anti-torture law", *Dawn*, June 26, 2017.

⁷ Richard J. Temill, *World Criminal Justice Systems: A Comparative Survey* (Routledge: Anderson Publishers, 2012), p. 576.

⁸ For detail see Mashood A. Baderin, *International Human Rights and Islam* (New York: Oxford University Press, 2003), p. 76, and M. Cherif Bassiouni, *The Islamic Criminal Justice System* (New York: Oceana Publications, 1982), p. 55.

⁹ Hadith No: 6541 <https://ahadith.net/muslim/book/45/chapter/9/hadith/6537>

¹⁰ Sadiq Reza, “torture and Islamic Law”, *Chicago Journal of International Law*, Vol. 8, no. 1 (2007), p. 24: Available at:

<http://chicagounbound.uchicago.edu/cjil/vol8/iss1/4>

¹¹ Ibid. p. 25.

¹² Ibid. pp. 28-29.

¹³ Tad Stahnke and Robert C. Blitt, “The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries” *Georgetown Journal of International Law*, Vol. 36, 2005. Available at: <https://ssrn.com/abstract=761746> and Oona A. Hathaway, “Do Human Rights Treaties Make a Difference?”, 111 *Yale L J* 1935, 1969-72 (2002).

¹⁴ *Universal Islamic Declaration of Human Rights*, available at:

<http://www.alhewar.com/ISLAMDECL.html>

¹⁵ *Cairo Declaration on Human Rights in Islam*, Aug. 5, 1990,

http://www.bahaistudies.net/neurelitem/library/Cairo_Declaration_on_Human_Rights_in_Islam.pdf

¹⁶ *Arab Charter on Human Rights*, <http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf>

¹⁷ Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2009), p. 434.

¹⁸ Government of Pakistan, *The Constitution of the Islamic Republic of Pakistan* [As modified up to 21st Amendment, 2015], p. 3

¹⁹ Ibid, p. 74

²⁰ Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law* (Boston: Kluwer Law International, 2000), p. 92.

²¹ *The Constitution of the Islamic Republic of Pakistan*, p. 10

²² Ibid, p. 3

²³ United Nations Treaty Series, No. 24841, *Convention against torture and other cruel, inhuman or degrading treatment or punishment*. Adopted by the General Assembly of the United Nations on 10 December 1984, p. 114, <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf>

²⁴ For detail see United Nations, *Convention against torture and other cruel, inhuman or degrading treatment or punishment: Declarations and Reservations*, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf>

²⁵ *The Constitution of the Islamic Republic of Pakistan*, p. 10

²⁶ Ibid, p. 4

²⁷ Ahmer Fazeel, *The Constitution of the Islamic Republic of Pakistan* (Islamabad: Pakistan Law House, 1997), p. 29.

²⁸ The National Assembly of Pakistan, *Anti-Terrorism (Amendment) Act 1999*, http://www.na.gov.pk/uploads/documents/1448430675_343.pdf. Also see Government of Pakistan, *Anti-Terrorism (Second Amendment) Act 2014*, http://www.finance.gov.pk/Anti_terrorism_Second%20Amendment_Act_%202014.pdf