

The Impact of International Law on Application of Capital Punishment Under Criminal Justice System of Pakistan

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ABSTRACT

International law has a profound impact on domestic criminal justice system and not negation of concept of sovereignty envisaged by the UN Charter. This article traces origin of the prohibition of capital punishment and its evolution as a norm in international Law. In fact, the question of legitimacy and implementation of international law in domestic jurisdiction has gained its rationale with the passage of time. This research paper identifies obligation of Pakistan under international treaties to implement capital punishment in its domestic jurisprudence. It underlines the responsibility of Pakistan as a state party regarding reducing scope of the death penalty and to observe super due process to minimize the risk of execution of an innocent. Despite prohibition of execution of juvenile and insane persons in domestic laws, the paper figures out reasons for criticism against Pakistan in its periodic review of treaty monitoring bodies. This research concludes with recommendations to respect international obligations on implementation of capital punishment. The prohibition of capital punishment is based on non-derogatory rights which are enshrined in the Constitution of Pakistan as fundamental rights.

1-The Impact of International Law on Domestic Jurisprudence

In the past, two divergent theories namely monism and dualism were prevalent on the relationship between international law and municipal law. Under the dualism theory, international law can be applied in the field of Municipal Law only when Municipal law either permits or adopts it specifically. It could be transformed through new legislation or Amendment at time of ratification. At the same time, treaty must receive parliamentary assent for their enforcement. In case of Pakistan, being a common law country, the Supreme Court of Pakistan in its Judgment declared that rights arising from treaty could not enforced through courts If provision of the treaty were not incorporated into the laws of the country through legislation.¹

With emergence of international human rights law and its nine core treaties, the theory of monism gained popularity. It means international law and municipal law overlap and complementary to each other. Under international law, states have no binding to act upon any treaty unless it ratifies or sign it. It means that legitimacy of a treaty is subject to ratification or party to it.² The principle of good faith is one of the cardinal principles of international law. It is based upon well established and recognized principle i.e. agreements must be respected.³ The Vienna Convention on the Law of Treaties reinforces that state party must adhere to provisions of treaty in “good faith”.⁴ Moreover a party to a treaty cannot invoke provisions of its domestic law to avoid to act upon any provision of treaty.⁵ The state party may register its reservation at the time of ratification but these reservation must not contradictory to the main substance of the treaty.⁶ At the same time, State party may not refuse to fulfil its treaty obligation by resorting to any provision of its municipal law. Thomas M. Franck reiterates in its treatise that ‘international laws and rules are not “enforced yet they are mostly obeyed”’.⁷ On the contrary to national laws, “the rules of the international community nevertheless elicit much compliance on the part of sovereign states” due to lack of coercive authority.⁸

2-Rise of The Abolition of The Sentence of Death as An International Norm

Both International and regional Human Rights treaties embraced the abolition of the death penalty because it is violation to right to life and prohibition of torture.⁹ The International Covenant on Civil and Political Rights (ICCPR) does not completely abolish capital punishment but it restricts its scope to most serious crimes. However, the Second Optional

Protocol to the International Covenant on Civil and Political Rights (ICCPR) advocates for a complete abolition of capital punishment.¹⁰ The Convention on the Rights of the Child declares eighteen years as cutoff age at the time of commission of offence and put an absolute bar on execution of a juvenile.¹¹

The last decade of the twentieth century witnesses the tendency of abolition of capital punishment in international criminal law. In exercise of power under Chapter VII of the Charter, Security Council created two ad hoc International tribunals to prosecute perpetrator of war crimes during the civil war in Yugoslavia and Rwanda respectively.¹² The statutes of International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) precluded the death penalty for the most heinous crime¹³ unlike the Nuremberg and Tokyo Military Tribunals. Consequently, the International Criminal Court, the Rome Statute, included imprisonment for life as a maximum punishment.¹⁴ Since 2007, the General Assembly has been passing resolution on international moratorium on capital punishment after every two years. On December 16, 2020, the UN General Assembly in its eighth Resolution once again call members states to stop execution of sentence of death. The aforesaid resolution was supported by 123 countries of the world. Pakistan is included in the list of those countries that voted against the UN General Assembly resolutions on the death penalty.

In short, international and regional treaties reflect and set trend of the movement for the abolition of the capital punishment. In this context, one of the significant developments is that sentence of death is not part of Rome Statute. Covenant of the League of Nations was silent on human rights. On the contrary, the UN Charter enumerates one of the pillars of the organization, alongside peace and development. It is pertinent to mention that promotion of human rights is one of the envisaged purposes of the UN in accordance with its Charter. Articles 56 and 55(c) of the Charter underlines that every member of the United Nations is obliged to cooperate with the organization for the promotion of human rights without any prejudice and discrimination.¹⁵

3- Obligations of Pakistan Under Iccpr and Uncrc

Under international law, Pakistan is not legally bound to adhere to adopt Charter of Fundamental Rights of the European Union. However, as State Party to international treaties and as a member of United Nations Organization, Pakistan must honor international conventions and the UN Charter. This section enumerates treaty obligation of Pakistan on the

subject of application of capital punishment in Pakistan. As a state party to ICCPR, Pakistan is obliged to take following measures: (a) minimize number of capital offences in conformity with the definition of “most serious crimes”; and (b) to observe super due process from arrest to execution. The UN Convention on the Rights of the Child prohibits award of sentence of death to the person who was below eighteen years of age at the time of commission of offence.¹⁶

3.1 Definition of the “Most Serious Crimes”

Article 6(2) of the ICCPR states that application of the death penalty should be exception and should observe the principle of “most serious crimes”.¹⁷ The Covenant itself does not explain the most serious crime. However, the Human Rights Committee, as human rights treaty body responsible to monitor the implementation of ICCPR.¹⁸ Since 1976, the UN Human rights bodies have attempted to interpret and refine the phrase “most serious crimes”.¹⁹ In 1982, the UN Human Rights Committee interpreted term “most serious crimes” in its General Comment 6 as capital punishment may be applied as an “exceptional measure”.²⁰ In 1984, the UN Economic and Social Council (ECOSOC) also elucidated the term “most serious crimes” as “intentional crimes with lethal or other extremely grave consequences”.²¹

In 1995, the UN Secretary General in it’s the fifth quinquennial report on capital punishment expressed the ‘most serious crime’ limited to the crime of murder.²² With the passage of time, the Human Rights Committee further refined ‘most serious crime’ in line with the safeguards and the comments of the Secretary General. Firstly, it categorically denied death sentence for the offence which do not result in loss of life.²³ The Human Rights Committee in its Communication in 2000 elaborated the term “most serious crime” as act of violence with intention that result in loss of life.²⁴ As a part of special procedure, the UN Special Rapporteur explained and summed up “most serious crimes” as offence of murder committed with intention.²⁵

3.2 Capital offences in vogue in Pakistan against definition of “Most Serious Crimes”

Contrary to definition of the term ‘most serious crimes’ by the Human Rights Committee, Pakistan Penal Code and other Special Acts contain offences which do not qualify the criteria explained by the Committee. In this regard, on May 9, 1980, the Supreme Court of India in *Bachan Singh v. State of Punjab* restricted the scope of capital punishment under the principle of ‘rarest of rare’ to some extent. On the other hand, there is no

case law or the report of Justice and Law Commission of Pakistan that deals with application of the death penalty in Pakistan.

The following table enumerates different categories of capital offences in vogue which are contradictory to definition of “most serious crimes” which is universally accepted and recognized by the treaty monitoring bodies:

Name of the Country	Offence related to Terrorism	Offences related to Narcotics	Offences related to sex	Offences related to military
Pakistan	(1) Airplane Hijacking/assisting hijacking attempt to harm (2) To destroy Railway track intentionally or to push any passenger while the train is running.	(1) Illegal drug trafficking more than one Kg	(1) Zina (non-marital sex) (2) Intentional display of woman body in a public place (3) abduction of a person to put under unnatural lust	(1) Abetting a successful mutiny. (2) Using military password. (3) Act of insubordination (4) To show cowardness during the war

The following chart demonstrates the total number of death row prisoners and their respective offences confined in various prisons in the Province of the Punjab, Pakistan. Out of 3601 death row prisoners 14 are charged with offence of non-fatal rape, 31 with drug trafficking and 22 with offence of blasphemy.

Sr. No.	Crime	Under Section	Prisoners
1	Murder	302 PPC	3463
2	Death by negligence	303/304/308/312/319/321/322 PPC	1
3	Kidnapping & Abduction	363/364/365/365-A /366/367/369 PPC	30
4	Rape	375/376 PPC	14
5	Robbery/Dacoity with Murder	392/394/395/396 PPC	8

6	Pakistan Army Act	59 PAA	32
7	Control of Narcotic Substance Act 1997	CNSA, 1997 9 (c)	31
8	Blasphemy	295C	22
Total			3601

3.3 Safeguards against Wrongful Conviction

Article 6(1) of the ICCPR recognizes right to life as an inherent right and prohibits arbitrary deprivation of life. According to Ramcharan, it means that most rigorous criteria must be observed without considering any geographical location or situation.²⁶ Treaty monitoring bodies has reinforced that application of capital punishment is tantamount to arbitrary if process of trial does conform to the standards of fair trial. In this regard, the standards of fair trial are enumerated in different treaties especially under ICCPR.²⁷ In 1990, the Human Rights Committee observed that award of capital punishment without meeting the standards of due process as contemplated by article 14 of ICCPR is a derogation of right to life.²⁸ In the following year, Human Rights Committee again laid emphasis on safeguards and standards of fair trial in cases of capital punishment.²⁹

In 2007, the human right committee commented and repeated its stance on paramount importance of fair trial in recognition of sanctity of right to life.³⁰ Moreover, the committee elucidates term of arbitrariness in context of application of capital punishment. The concept of “arbitrariness” is not to be identified with “against the law”, but must be construed to embrace major components of due process of law.³¹ To minimize the risk of arbitrary deprivation of life, the UN Economic and Social Council (ECOSOC) promulgated safeguards regarding the application of the death penalty. Safeguard 5 contemplates that capital punishment be awarded after observing guarantees of fair trials enshrined in article 14 of ICCPR.³²

In the case of Pakistan, the argument based on law of procedure is very much relevant. The human rights monitoring mechanism for implementation of the nine core human rights treaties has pointed out flaws in different stages of trial including investigation. The universal periodic review of Pakistan also highlights the flaws and deficiencies in its criminal justice system. Against this back drop, the probability of implication of innocent person is higher. To sum up, international law permits application of the death penalty in exceptional circumstances but observing all requisite guarantees of fair trial. The entire edifice based upon the argument of sanctity of life and to protect innocent. It is obvious that once sentence of death is implemented it cannot be revoked. Different

jurisdictions in the world has launched innocent project that has traced the cases of miscarriage of justice due to flaws in process of murder trial.

3.4 Prohibition of Capital Punishment to Juveniles

UN Convention on the Rights of the Child contemplates an absolute prohibition of execution of a person below the age of eighteen.³³ According to report of Amnesty International during the year 2019 only two countries namely Iran and South Sudan in the world executed juvenile.³⁴ Pakistan also promulgated Juvenile justice system ordinance 2000 to implement its international obligation. The make the retrospective application of law, the President of Pakistan by exercising its powers under Article 45 granted total remission to those death row prisoners who were juvenile at the time of commission of offence. Despite this comprehensive legislative measure, some cases have been reported wherein juvenile faced capital punishment. That is why Pakistan has to defend the concerns raised by different countries in its periodic review of treaty monitoring bodies.

In this regard, in May 2016, the UN Committee on the Rights of the Child showed its serious concerns that many death row prisoners were juvenile at the time of commission of offence but could not raise their plea for juvenility in respective trial courts due to their limited resources and unawareness from the law. In this regard, the Committee made reference of the cases like Abdu-ur-Rehman, of Moinuddin and of Muhammad Anwar. It is pertinent to mention that, on March, 2021, the larger bench of the Supreme Court of Pakistan rectified the mistake by accepting the plea for juvenility and commuted sentence of death awarded to Muhammad Anwer into life imprisonment. But Muhammad Anwer had already spent 28 years in jail at time of announcement of the judgment.

Pakistan promulgated Juvenile Justice System Ordinance 2000 to fulfill its international obligation. Since 2005, the law remained under severe criticism. On December 6, 2004, the Lahore High Court strike down Juvenile Justice System Ordinance 2000 and declared it as ultra vires on the ground that law does not match with the social realities.³⁵ The very next year, aforesaid order of the Lahore High Court was suspended by the Supreme Court of but it imparted an element of uncertainty to the law. During the period of eighteen years, the law remained enforced in provinces except FATA. To dispel the ambiguities associated with law, the parliament enacted it as Juvenile Justice System Act 2018 by removing its deficiencies.

It is worth mentioning that the Juvenile Justice System Act 2018 adopted the definition of juvenile a person below 18 years of age in consonance with UNCRC. Moreover, the act envisages to abolish capital punishment for the juvenile. It is appreciable that Parliament has made a significant development for the improvement of juvenile justice in Pakistan. At the same time, this paper suggests three measures to streamline juvenile justice system: Firstly, transparent mechanism to determine age; Secondly, establishment of juvenile courts at every district with exclusive jurisdiction; thirdly, provision of free legal aid to indigent juveniles.

An implementation of the Act is a big challenge specially to bring transparency in determining the actual age of the juvenile accused. The Section 8 of Juvenile Justice System Act 2018 empowers investigating officer to ascertain the age of juvenile accused by perusing all relevant documents. Even the investigating officer may resort to medical examination of accused to ascertain the actual age. The implementation of law faces many challenges. In most of cases, Police submits challan without exhausting all the available resources to determine the age of juvenile accused. This negligence of investigating officers lead to complications in trial as well in execution.

As a result, the execution of Aftab Masih attracted criticism of National international criticism. It was alleged that Aftab was 15 years of age at the commission of offence and he was convicted by the court on confession extracted by torture. Besides he could not do his defence by engaging a competent lawyer. On August 4, 2015, execution of Shafqat Hussain also gained lime light across the globe. It is worth mentioning that on June 5, 2015, the UN experts on human rights monitoring mechanism requested Pakistan to review the decisions of execution of Shafqat Hussain. Amnesty International showed deep concerns for the inherent flaws in the criminal justice system of Pakistan.³⁶

The defence council of Muhammad Iqbal also known as Bali, death row prisoner, pleaded juvenility in the trial court. The Anti-Terrorism Court, Gujranwala, conducted ossification test to assess the age of accused. The medical report endorsed the plea of juvenility. Despite this, the court awarded the sentence of death on the ground that he committed a grave offence. Both the Lahore High Court and Supreme court discussed appellant' plea for juvenility but dismissed on basis of gravity of offence. In March 2020, the Lahore High Court in Writ Petition Muhammad Iqbal vs Province of Punjab rectified the error of judgments by commuting

sentence of death into life imprisonment on the basis of plea for juvenility.³⁷

3.5 Prohibition of Capital Punishment to Insane Persons

Contrary to the prohibition of the execution of insane persons under international human rights law, individuals suffering from mental illness, intellectual disability or mental retardation are sentenced to death in Pakistan.³⁸ The UN Safeguards on capital punishment categorically prohibits the execution of 'insane' persons.³⁹ The UN Economic and Social Council further prohibits to award capital punishment to the accused who are insane at the time of commission of offence and execution of person who becomes insane after the conviction.⁴⁰

There are two main factors which may cause violation of international safeguards in Pakistan. Firstly, protection provided under the Pakistan Penal Code 1860 and the Code of Criminal Procedure 1897 to 'mentally unsound' accused during the process of investigation and trial is limited in its scope.⁴¹ Section 465 of the Code of Criminal Procedure 1897 empowers the trial judge to order a medical or psychological examination of the accused to test his or her plea of insanity. In the absence of a standard test and clear definition of 'unsound mind' under the prevailing penal laws of Pakistan, each trial court uses its discretion to assess the accused's mental health before referring the person to the medical board for further investigation. Owing to a lack of general awareness about mental health issues, many accused are unable to refer to their illness during investigation or the process of trial. The indigent accused are unable to plead insanity because they cannot afford to engage competent legal counsel. Even if the courts entertain doubts about the accused's state of mind, any medical examination is carried out by state-appointed medical professionals who are inclined to toe the line of prosecutors.

Secondly, there is no explicit provision under Pakistan Penal laws prohibiting the execution of a person who has suffered a mental illness after conviction or on death row. However, the Prisons Rules 1978 provide safeguards for the safety and security of death row prisoners suffering from mental illness. Under Rule 440, the Superintendent of Prison is empowered to transfer 'criminal mental patients' to mental hospital instead of keeping them in prison.⁴² In practice, the prisons administration in Pakistan seldom transfer death row prisoners to Institute for mental health as preemptive measure escape of prisoner.⁴³ Consequently, mentally sick or psychological ill death row prisoners are confined in overcrowded prisons

cells and exposed to physical and mental torture from other death row prisoners.

To fix these gapes, the five members bench of Supreme Court of Pakistan under its review jurisdiction passed judgment on February, 10, 2021 commuted the death sentences of two death row prisoners suffering from mental illness into life imprisonment and made recommendation to federal and Provincial Government to make amendment in Code of Criminal Procedure, Pakistan Prisons Rules to minimize the risk of execution of those who suffers from mental disorder.⁴⁴

CONCLUSION

Under international law Pakistan is not to abolish capital punishment but to restrict its scope in terms of capital offences. The paper identifies four major domains of the criminal justice systems to fulfil its treaty obligations. Firstly, Pakistan is obliged to reduce number of capital offences in line with Article 6(2) of ICCPR. Capital punishment may be implemented for offence of murder with intention as most serious crime. On the contrary, the penal laws of Pakistan include capital offences which do not involve any loss of life. Pakistan must rationalize is capital crimes in consonance with the definition of most serious crimes as defined by treaty monitoring bodies.

Secondly, a juvenile may be exempted from the sentence of death in conformity with article 37 of the UNCRC. Thirdly, to minimize risk of execution of the innocent, the criminal justice system must observe super due process in implementing the death penalty under the provisions of its domestic constitution that guarantee right to life and fair trial. At the same time, Pakistan must improve its system of crime investigation, protection of witnesses and provision of free legal aid to minimize the risk of implicating an innocent. Fourthly, both the Provincial and the Federal Government of Pakistan must make amendments in Code of Criminal Procedure to provide protection to those who perpetrated crime in a fit of insanity and Pakistan Prisons Rules to protect insane death row prisoners in line with Judgment of Supreme Court of Pakistan passed by a larger bench dated 11-02-2021



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