

Torture and Custodial Death
(Prevention and Punishment)
Act 2022

Report 2022-03



Human Rights
Commission of Pakistan

Contents

01	Introduction	1
02	Overview	3
03	Analysis and specific recommendations	5
04	General recommendations and conclusion	9

Introduction

Custodial torture is endemic in Pakistan’s criminal justice system and commonly perceived as an unofficially sanctioned component of investigation. It is used routinely to extract evidence—despite this being prohibited under Article 14(2) of the Constitution—and as an alternative means of punishing individuals in custody. In Pakistan, public officials, including law enforcement agencies and security forces, are known to employ torture and other cruel, inhuman and degrading treatment or punishment against people in their custody, regardless of the victim’s age, gender or health.¹

Custodial torture takes many forms, but often includes the application of excessive force (physical torture), intimidation and threats (mental torture), sleep deprivation and humiliation. These not only constitute grave human rights violations, but also violate Pakistan’s obligations under various international treaties, particularly the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which the country signed in 2008 and ratified in 2010. The UNCAT clearly states the need for domestic legislation that formally criminalises torture. However, after five failed attempts to pass a bill, the Torture and Custodial Death (Prevention and Punishment) Act 2022 finally received presidential assent in November 2022.

This report aims to analyse this legislation and assess whether it fulfils Pakistan’s obligations under international law as well as how closely it complies with international human rights standards. A second aim of the report is to evaluate the effectiveness of the Act

¹ In one example from February 2019, an eight-year-old boy in Lahore was allegedly tortured in custody (after police detained him on suspicion of being a swindler’s accomplice) to the point that he could not sit or walk after being released. He alleged that the police had made him sit on a heater, hung him upside down and beat him to force him to confess to stealing a mobile phone. See: A. Chaudhry. (2019, February 20). Lahore police torture eight-year-old boy in custody. *Dawn*. <https://www.dawn.com/news/1464969>

in ending custodial torture in Pakistan and holding perpetrators accountable.

Before the passage of the Torture and Custodial Death (Prevention and Punishment) Act 2022, there have been multiple attempts to pass similar legislation to criminalise torture in Pakistan in line with the UNCAT. Unfortunately, none of them were successful. In 2014, a bill was tabled in the National Assembly by legislator Maiza Hameed, but it was not passed by the Senate. In 2015, former senator Farhatullah Babar presented a bill against custodial torture in the Senate that never made it to the lower house. In 2015, Senator Farooq Naek presented a similar bill that also failed to be enacted. Another attempt was made in 2018 when the federal government prepared the Torture and Custodial Death (Prevention and Punishment) Bill 2018; this was tabled much later in 2020 as the Torture and Custodial Death (Prevention and Punishment) Bill 2020 by Senator Sherry Rehman.

In all these cases, the bill in question was either not put to the vote or the stipulated 90-day deadline for the bill to proceed to the other house of Parliament elapsed, causing the bill to lapse.

With the latest iteration of this legislation, Pakistan has fulfilled its international obligation to define and criminalise custodial torture in domestic law. However, it is important to examine this Act to assess how potent and useful it may prove in ending custodial torture in Pakistan and holding perpetrators to account.

Overview

The Act applies to the whole of Pakistan and comprises 20 sections that cover subjects ranging from offences and their punishment to investigation, trial and departmental proceedings against public officials accused of torture. Most importantly, the Act defines 'torture' for the first time.

Jurisdiction to try offences of torture is vested with the court of sessions under Section 6. The Act also restricts unnecessary adjournments that may delay case disposal and states that no adjournment beyond 30 days shall be granted during trial cases.

The Act provides a complaint and investigation mechanism, under which complaints of custodial torture can be filed with the Federal Investigation Agency (FIA). Under Section 2, a 'complaint' refers to allegations made orally or in writing to the FIA to the effect that a public official or person working in an official capacity has committed an offence under this Act. Any person can file such a complaint. The Act defines a 'complainant' as any person (or their representative) filing a complaint based on reliable information that an offence has been committed.

Once a complaint is filed under the Act, the investigation has to be concluded within 30 days from the date of receipt of the complaint. A maximum extension of five days may be granted to conclude investigation in cases that need more time. The trial begins on submission of the investigation report in the court of sessions. The Act stipulates three weeks for the completion of a trial. Orders passed by the court of sessions may be appealed before the provincial high court within 30 days of receipt of the copy of the order passed by the court of sessions.

The FIA has exclusive jurisdiction to carry out the functions of this Act, such as receiving and handling complaints, arrest, investigation and reporting to the appointing authority of the accused. The jurisdiction trial of offences covered under the Act is exercised by the court of sessions. The Act also states that the investigation

process for complaints shall be carried out under the supervision of the National Commission for Human Rights (NCHR).

Punishments for offences based on custodial torture—such as bodily harm, custodial death and custodial rape—are the same as punishments stipulated for injury, murder and rape under the Pakistan Penal Code (Table 1). However, it is worth questioning whether offences committed in ordinary circumstances can be equated in terms of punishment with those committed in the custody of public office bearers. Arguably, the latter category of offences places greater liability on the accused for having committed an abuse of power in addition to the actual offence.

Table 1: Punishments for offences based on custodial torture

<i>Section</i>	<i>Offence</i>	<i>Punishment</i>
8. Punishment for torture	Any public official who commits or abets or conspires to commit torture...	... shall be punished with the same punishment as prescribed for the type of harm provided in Chapter XVI of the Pakistan Penal Code.
9. Punishment for custodial death	Whoever commits or abets or conspires to commit the offence of custodial death...	... shall be punished with the same punishment as prescribed in section 302 of the Pakistan Penal Code.
10. Punishment for custodial rape	Whoever commits or abets the offence of custodial rape...	... shall be dealt with and punished under the law and procedure for rape, and the provisions of this Act shall also be applicable to the accused, <i>mutatis mutandis</i> .
11. Punishment for filing malafide complaint	Whoever files a malafide complaint...	... shall, after it is established that the complaint was malafide, be punished with the same punishment as is prescribed under section 8 for the perpetrators under this Act.

Under Section 18, the federal and provincial governments are expected to take all measures to ensure that the provisions of this Act are widely publicised in the media at regular intervals and that the relevant public officials are periodically sensitised through training sessions on the issues addressed by the Act.

Analysis and specific recommendations

Several provisions of the Act that warrant careful examination from a human rights perspective are analysed below.

The definition of torture

Torture is defined in Section 2(n) of the Act as follows:

‘Torture’ means an act committed by which severe physical pain or physical suffering, 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.

While this definition is fairly comprehensive, it does not expressly cover mental torture, which is commonly practiced in Pakistan in the form of intimidation, such as by forcing persons in custody to watch others being tortured.² As such, it also differs from the UNCAT’s definition of torture, which specifically mentions mental anguish. In excluding this from the definition, the Act ignores the incidence and scale of mental trauma and suffering that may be inflicted in the course of custodial torture and reflects a widely held disregard for mental health, not only in the penal system but also in the country at large.

² Human Rights Watch. (2022, August 23). Pakistan: Make torture a crime. <https://www.hrw.org/news/2022/08/23/pakistan-make-torture-crime>

Furthermore, the language used in the definition of torture is not gender-neutral and refers to survivors as 'him', which implies that torture is perpetrated only against male victims and survivors, whereas women, girls and transgender persons also remain at risk of custodial torture in Pakistan.

The role of the FIA

An earlier iteration of the Act granted the NCHR sole investigative authority in cases of custodial torture. However under Section 5, this entire process is now entrusted to the FIA. This represents a blatant conflict of interest whereby public officials are tasked with holding their fellow officers accountable. This constitutes a moral hazard that will jeopardise the scope for impartiality, leading to a lack of accountability across the board.

Moreover, the Act does not provide for any additional resources or funds that the FIA might require to perform this function. This lack of funding could cause serious problems in implementing this law.

Currently, the FIA does not have a dedicated wing to investigate and prosecute complaints of torture. Although the Act was passed on 4 November 2022, no custodial torture wing or branch has been established to specifically investigate offences under this legislation. This seems to imply that the implementation of the Act has either not begun or is not proceeding at a reasonable pace. Unless a special FIA wing is established under the Act to investigate offences underpinning custodial torture and appropriate funds allocated to the FIA for this purpose, it is difficult to expect the operation of the Act in letter and spirit.

It is encouraging to note that, according to the Federal Investigation Agency Act 1974, the jurisdiction of the FIA extends to all public servants, including judges, commissioned officers in the military, police force and other public office bearers. However, it is important to question whether high-ranking office bearers can really be held accountable when many of them constitute the system around custodial torture.

The role of the NCHR

As an independent statutory body, the NCHR is best suited to investigate cases of alleged torture, but lacks the infrastructure to

do so. Section 5 of the Act stipulates that the FIA's investigation process shall be carried out under the supervision of the NCHR. However, it does not make abundantly clear how this supervision will take place nor does it provide for any additional funds or resources for the NCHR to carry out this supervisory role.

Furthermore, the territorial jurisdiction of the NCHR is limited to Islamabad Capital Territory. Such supervision cannot therefore be carried out in cases of torture that occur outside this area.

Proceedings against officials accused of torture

Once the investigation process has been initiated and the accused official is taken into custody, the FIA is bound to inform their appointing authority of the nature of the proceedings against the official in question. The Act also designates torture as a nonbailable offence and makes any evidence gained through it inadmissible in court.

Section 7 provides that public officials accused of torture shall either be suspended or transferred after conducting a departmental enquiry, which has to be concluded within seven days. Subsequent to the enquiry, if a credible case of torture is made against the public official, they shall not continue their service in the same department or at all, as the case may be.

Of concern is the fact that the Act does not establish standalone punishments. Rather, it falls back on the existing penal code to prescribe them. As a result, this does not recognise the unique nature of custodial torture, even prescribing the death penalty under Section 302, which could present a conundrum in terms of Pakistan's chequered use of capital punishment and failure to uphold the standard of reserving the death penalty for the 'most serious crimes'. Indeed, the Human Rights Commission of Pakistan has stated that the death penalty is incompatible with Pakistan's international obligation to prohibit torture and the use of cruel, inhuman and degrading punishment in the first instance.

Openness to manipulation

Certain provisions of the Act, such as Section 11, contain room for manipulation of the law, which could create invisible barriers to implementing the Act. Section 11 states that 'Whoever files a

malafide complaint shall, after it is established that the complaint was malafide, be punished with the same punishment as is prescribed under section 8 for the perpetrator under this Act.' This provides a legal means to coerce and harass complainants in a system of skewed power, leaving the process open to manipulation by public officials. In view of other prevailing issues such as corruption, abuse of power, discrimination and bad governance in public office, this section is a needless addition.

General recommendations and conclusion

In many respects, the Torture and Custodial Death (Prevention and Punishment) Act 2022 is a progressive piece of legislation in that it defines torture and makes it a cognisable, noncompoundable and nonbailable offence. However, concerns relating to implementation, accountability and enforcement remain.

Some recommendations that would make the Act more effective from a human rights perspective are outlined below:

- Task and empower an independent body such as the NCHR to investigate complaints of torture.
- Establish standalone punishments for custodial torture in the Act, rather than relying on the existing penal code.
- Remove the punishment for mala fide complaints.
- Empower the provincial human rights commissions to supervise the investigation and trial process carried out by the FIA in their respective jurisdictions.
- Replace the word ‘victim’ with ‘survivor’ in Section 2(1)(o) to shift the societal and legal narrative surrounding victims’ perceived lack of agency.
- The definition of torture must expressly cover mental anguish and trauma.
- Introduce independent police reforms to upgrade the system of policing and crime control to facilitate implementation of the Act.
- Ensure that public officials undergo rigorous training, awareness and sensitisation to issues related to custodial torture. Efforts should be made to change political practices and social behaviours that covertly sustain or encourage custodial torture.

- Procedural lacunas, delayed prosecution, the backlog of cases and lack of public trust in the criminal justice system should also be addressed to minimise room for manipulation of the law and to achieve greater purpose of the Act in terms of protecting citizens' right to freedom from torture.

HRCP Legislation Watch Cell

Instituted in 2022, the Legislation Watch Cell is an initiative of the Human Rights Commission of Pakistan (HRCP). The Cell aims to monitor and analyse legislation, rules and procedures in the form of draft bills and amendments introduced by the federal and provincial assemblies each year that warrant attention from a human rights perspective, especially with respect to women, transgender persons, vulnerable labour groups, religious minorities, and the incarcerated population.

The Cell comprises HRCP staff members, an independent legal consultant, and an advisory committee composed of legislators, lawyers and other members of civil society. HRCP seeks to publish quarterly reports through this exercise that encompass the analysis, findings and recommendations of the Cell.



**Funded by the
European Union**

Disclaimer: This document has been produced with the financial assistance of the European Union. The contents of this document are the sole responsibility of the Human Rights Commission of Pakistan and can under no circumstances be regarded as reflecting the position of the European Union.