Harmonizing National Standards of Sentencing and Bails through International Conventions on Terrorism and Organised Crime

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Abstract

The UN sponsored international conventions on Counter-Terrorism and Organised Crime oblige the states parties to implement certain rules which are meant to harmonize national standards of Sentencing and Bails. The consistency of these standards is desirable to facilitate state cooperation in law enforcement. As the crimes stated by the conventions regarding Counter-Terrorism and Organised Crime transcend national frontiers, their suppression calls for state cooperation, and the same necessitates harmony in national laws. This paper looks into the question of the extent and the scope to which the rules laid down by the conventions bring about the desired harmony. It will be suggested that states parties have been authorised to modify the rules set forth by the relevant conventions in line with the entrenched principles of their domestic justice systems. Because of this, national standards are likely to remain diverse; nevertheless, this outcome underlies the very making of the conventions which defer to national legal systems in the matter of implementation.

Keywords: Sentencing, Bails, Paroles, State Cooperation, Extradition, Law Enforcement, International Conventions, Organised Crime, Terrorism

1.1) Harmonizing National Sentencing Practices

According to United Nations' Office on Drugs and Crimes (UNODC), a concerted global strategy is needed to combat the kind of criminality which transcends national frontiers. To evolve this strategy, it is important to harmonize national legal frameworks with the object to satisfy intrinsic requirements of law enforcement cooperation (UNODC, 2004).

In order to defeat territorially restricted national laws, the offenders involved in international Terrorism and Organised Crime spread their operations in more than one state. Accordingly, the prosecution and punishment for the said offenders calls for state cooperation in law enforcement, i.e. Forfeiture, Mutual Legal Assistance and Extradition. The laws of many states pertaining to different modalities of state cooperation require that if an individual is to be extradited or interrogated; the offence charged against him must be sufficiently serious, carrying a significant prison term in consonance with the laws of both the requesting and the requested state. For instance, under section 64 of the Extradition Act (2003) of UK, the conduct of an offender would constitute an extraditable offence; if the certificate issued by the requesting state shows that the conduct is punishable with imprisonment for a period of at least 12 months or a greater punishment. Some other provisions such as Article 64 (2) (c) of the Act require prison terms as higher as 3 years. To meet such type of requirement, it is desirable that Sentencing approaches must be sufficiently similar in the cooperating states. Whereas exact similarity might not be possible owing to diverse national legal systems, certain minimum level of uniformity can be achieved by providing model legislation at international level (UNODC'S Legislative Guide, 2004).

1.2-Nature of sentences

The international conventions on Counter-Terrorism and Organised Crime recommend states parties to make the offences punishable with all kinds of sanctions, including custodial and non-custodial administrative and civil sanctions and sanctions provided for crimes committed by legal entities (Nesi 2016).

(1.2.1)-Custodial sentences

UN Convention against Drugs (1988) in its Article 3(4) (a) recommends states parties to make the offences punishable with sanctions such as confiscation, pecuniary sanctions and deprivation of liberty. As regards non-custodial sanctions, Article 3 (4) (c) of the said Convention provides that in appropriate cases of less serious nature, states may provide education, aftercare and rehabilitation as alternatives to conviction or punishment. Likewise, the Convention vide Article 3(4) (d) furnishes that in offences relating to consumption, possession and purchase of drugs, parties may design as the substitute to punishment or conviction or in addition to them, measures such as education, rehabilitation or social reintegration and when the offender is a drug abuser, treatment and aftercare.

Besides Drugs Convention (1988), measures relating to reintegration of offenders also find their expression in Article 30 of the United Nations Convention against Corruption (UNCAC, 2003) .Moreover; these measures are laid down in United Nations Standard Minimum Rules for Non-custodial Measures. However, by virtue of The Tokyo Rules (1990) the UN give recognition to the fact that such measures are to be implemented by states in view of their economic and social conditions and national justice system of each country. Since each state has different capacity to adopt these measures, therefore, national implementation is bound to be inconsistent.

The importance of deprivation of liberty or custodial sentencing has been emphasised by the UNODC. According to UNODC's guide for the implementing the Corruption Convention (UNCAC, 2003) detention ensures presence of an offender for the purpose of legal assistance based on mutual cooperation and extradition. Thus, article 6 of the Hostages Convention (1979) provides, "any State Party in the territory of which the alleged offender is present shall, in accordance with its laws, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted."

Detention may as well be required to comply with the dual criminality requirement of extradition as extradition laws of many states require identical prison terms under the indigenous law of both the requesting and the requested state for the purposes of surrender (Deere, 1993).

However, since the conventions leave it up to the discretion of the states to decide the period of confinement, national laws differ with respect to maximum and minimum periods of detention. For instance, according to Article 10 of the Extradition Act (1965) of Ireland, an offence must be punishable with imprisonment of at least 12 months under the law of both Ireland as well as the requesting state for the purposes of extradition. On the other hand, under the Extradition Act (1999) of Canada, a person may be extradited from Canada, if the offence is punishable by the extradition partner with imprisonment of two years or more in respect of which extradition is sought. Likewise, Extradition Act (2003) of UK stipulates that the offence should be punishable with detention of 1 to 3 years. Hence, mere recommendation in the conventions to make the offences punishable with deprivation of liberty neither harmonizes national sentencing practices nor facilitates extradition proceedings.

(1.2.2) Administrative punishments:

Apart from custodial sanctions, some international conventions on Terrorism and Organised Crime require states parties to make the offences punishable with civil and administrative sanctions. For example, Article 30(6) of UNCAC (2003) requires states parties to consider establishing procedures through which a public official accused of an offence might be removed, suspended or re-assigned by the appropriate authority bearing in mind the principle of presumption of innocence.

However, Nesi (2016) stated that the relevant provisions of UNCAC (2003) unequivocally express that it was subject to national legal principles and required to be implemented only where the gravity of the offence so demands. Some of the national legal principles which may prevent the harmonious implementation of this provision are discussed hereunder.

1.3)-Immunity and jurisdictional privileges:

Domestic legal principles of some states draw a distinction between different categories of public officials. Some of these officials are immune from application of ordinary laws. Consequently, administrative penalties of suspension, removal and disqualification are not attracted in these cases.

According to national legal framework of Pakistan, Ahmed (2013) maintained that National Accountability Bureau (NAB) Ordinance 1999 of Pakistan includes penalties of removal, suspension and disqualification but it does not apply to superior judiciary, armed forces and the President of Pakistan. Section 5(m) (IV) of NAB Ordinance 1999 excludes the serving member of armed forces from the definition of the holder of public office to whom the Act applies. Similarly, Article 209 (7) of the Constitution of Pakistan 1973 provides that a Judge of Supreme Court or High Court shall not be removed from his office except under this Article. Thus the Article clearly protects the superior court judges from the application of NAB Ordinance (1999). The Article provides that whenever a serious allegation of corruption is levelled against a Superior Court judge, a reference will be sent by the President to Supreme Judicial Council which shall conduct the inquiry. However, the Article nowhere suggests that the accused judge will be suspended or removed during the course of inquiry. Likewise, President of Pakistan enjoys immunity from all criminal proceedings under Article 209 of the Constitution of Pakistan 1973. Hence, the domestic law of Pakistan excludes certain governmental functionaries from the application of the full range of administrative sanctions recommended by the UNCAC (2003).

By contrast, section 16 of the UK's Anti-Bribery Act (2010) provides that the Act applies to all individuals in the public service of the Crown. Similarly, Section 201, Chapter 11 of United States Code (U.S.C) defines the term public official as member of Congress, delegate or officer working on behalf of the US or any department, agency or any branch of the government. Section 201(b), Chapter 4 of 18 U.S.C provides that every convict shall be disqualified from holding any public office in addition to being subjected to punishment of fine and imprisonment. Thus, Anti- Bribery law of the US applies to every public official working on behalf of the US, irrespective of their rank.

Unlike Pakistan, the laws of the US and the UK implementing UNCAC (2003) make no exception with respect to different categories of public officials. Nonetheless, Pakistan's divergence from UNCAC (2003) can be explained on the ground that by virtue of Article 30(6), 30(7) & 65(1), the convention allows states parties to implement it to the extent permissible under national law. Notably, in 2012, Indian Civil Society launched a campaign against non- application of Prevention of Corruption Act (POCA) 1988 to certain high ranking public officials including President and the Army Chief. The campaign required the government to pass a new law bringing all public officials into the net of Anti- Corruption law irrespective of their rank (Biswas, 2011). In a nutshell, it can be argued that the UNCAC (2003) gives enough liberty to the state parties to amend its provisions in line with specific requirements of their indigenous legal systems. This leads to inconsistent application of the penalties recommended by the convention.

(1.4)-Sanctions for legal entities

There are four international conventions on Terrorism and Organised Crime which contain provisions that require states parties to establish criminal liability of legal entities independent of liability of their directors, employees, agents and officers. These provisions include Article 5 of UN Convention against Financing of Terrorism (UNCFT) 1999, Article 10 of UN Convention against Transnational Organized Crime (UNTOC) 2000, Article 26 of UNCAC (2003) and Article 4 of Beijing Convention on Civil Aviation (BCCA) 2010. Apart from these, establishment of such liability has also been recommended by the United Nations Security Council Resolution.

UNSCR 1373/2001 by virtue of Paragraph 1(b) prohibit their national or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons .The requirement responds to increasing concern of the international community that legal entities are frequently used as vehicles to commit Terror Financing and Money Laundering. Hence, the conventions require states parties to make these entities subject to effective, dissuasive and proportionate sanctions for their participation in commission of the crimes. The punishments can be civil, criminal or administrative and they shall be without prejudice to punishments of natural persons responsible for these crimes. Evidently, the conventions do not prescribe any specific punishment rather they encourage states parties to award any sentence to a legal entity found to be involved in the commission of a crime. The only requirement is to make legal entities independently liable for the crimes committed by their employees or agents (UNODC'S Legislative Guide, 2004).

On account of the non-specific nature of this requirement, national rules on sentencing of legal entities reflect considerable variation. For example, under the law of India, a legal entity can only be subjected to sentence of fine. The liability of legal entities in India finds its expression under Section 305 of Indian Criminal Procedure Code (1973). Nonetheless, the statute does not provide any mode of determining liability and method of punishment. Bhalla (2016) referred to the decision of Indian Supreme Court in *(Standard Chartered Bank and Others v. Directorate of Enforcement 2005)* wherein Standard Chartered Bank was being prosecuted for violation of certain provisions of Indian Foreign Exchange Regulation Act (1973). In this case, it was held that that a corporation could be prosecuted and punished at least with fine regardless of mandatory imprisonment requirement of the respective statute.

By contrast, under the Section 4, 33(2) and Section 37 of the Money Laundering Act (2010) of Pakistan, in addition to fine, a legal entity can also be subjected to penalties such as revocation of licence and cancellation of government contracts. Nonetheless, with respect to implementation, it was revealed in mutual evaluation report of Asia pacific group on Money Laundering that in Pakistan, liability of the legal person consists mainly of the liability of the officers of the entity. There is no established practice of prosecuting legal entities directly for the offences committed on their behalf (Asia Pacific Group, 2009).

Conversely, under Section 14 of Anti-Bribery Act (2010) of UK, in addition to above penalties, a legal entity can also be subjected to sanctions such as forfeiture of property and payment of damages to the victims of crimes. Stocker (2009) referred to *Maybe & Jhonson* that became the first British Company to be convicted in the UK for the crime of Overseas Corruption and it was ordered to pay £6.6 million in fines and compensation to victim states. Considering the foregoing, it can be argued that the provisions of Counter-Terrorism and Organised Crime conventions relating to punishments have deliberately been kept non-binding and open ended in order to accommodate diversity of national legal systems of states parties. Hence, it is unlikely that the provisions will bring about harmony in national sentencing approaches.

2.1)-Release of the accused on Bail

The unlawful activities, in which the organised criminals engage, tend to generate huge profits. As a result, substantial money is available with the accused to post Bail and Parole applications. However, release of the accused on Bail runs the risk of his escape from jurisdiction of the state which is likely to prosecute him. The prospect of offender's flight becomes even more serious where the law enforcement authorities of the prosecuting state have not been able to freeze or confiscate the proceeds of the crime or the property used in the commission of crime. Release of accused also carries the hazard of the accused coming into position to intimidate prosecution witnesses and interfere with the prosecution evidence (UNODC'S Technical Guide, 2003). To address these concerns, international conventions on Organised Crime oblige states parties to introduce stricter regimes for Bail pending trial or Release after conviction in cases involving Drug Trafficking, Corruption, Human Trafficking, Arms Smuggling and Human Smuggling.

The provisions relating to Bail and Parole are found in three Organised Crime conventions namely UNCAC (2003) in its Article 30(4) and 30(5), UNTOC (2000) under Article 11(3) and UN Convention against Drugs (UNCD) 1988 vide Article 3(7). Apart from these, Security Council traces a strong nexus between Terrorism and Organised crime. Paragraph 4 of UNSCR 1373/2001 stated that "the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, sub regional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security." Accordingly, states have been vehemently obliged to apply these provisions in their national laws on Terrorism and Organised Crime.

2.2)-Provisions of Organised Crime Conventions relating to Bails and Early Release

With respect to Bails pending trial and appeal, the Organised Crime conventions require states parties to ensure that conditions imposed on Bail take into account subsequent presence of the accused in trial proceedings. For example, article 11 (3) of the UNTOC (2000) provides: "each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings". The provision has been reproduced in Article 30(4) of (UNCAC) 2003.

The Conventions further oblige states parties to bear in mind gravity of the offence while considering the eventuality of Early Release or Release on Parole of a convicted person. For example, Article 11(4) of the UNTOC (2000) provides "Each State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences". Identical provisions can be seen in the UNCD (1988) and the UNCAC (2003).

2.2.1)-Deference to national law

The use of the word 'shall' in Article 11(4) of UNTOC (2000) gives the impression that the provisions of the conventions pertaining to Bails and Early Release are mandatory. However, Article 11 (3) UNTOC (2000) dispels this impression. It unequivocally provides that states parties shall take these measures in accordance with national law. Moreover, Article 30(4) of UNCAC (2003) expressed that the states parties are required to take the relevant steps in accordance with their domestic law. Arguably, the drafters of the conventions never intended to encroach upon the discretion of national authorities with respect to implementation. The assumption further draws support from Article 11(6) of the UNTOC 2000 which provides that the offences shall be prosecuted and punished in accordance with national law. Thus, it is clear that the conventions concede primacy of national law with respect to determining exact nature of the measures required to be taken by the states to implement the provisions relating to release of the offenders on Bails & Paroles.

2.2.2)-Domestic implementation of the obligation pertaining to Bails & Early Release

According to Black's Law Dictionary Bail means to procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and to submit him/herself to the jurisdiction and judgment of the court. In relation to Bails, Article 11(3) of UNTOC (2000) requires states parties to ensure in the first place that conditions imposed on Bail take into account the need to ensure reappearance of the offender.

The domestic law of many states regard likelihood of the abscondence as one of the major grounds for refusal of bail. For instance, under the US law, Section 3142(f) of Chapter 18 of U.S.C, an offender who poses serious risk of flight can be subjected to detention without Bail. Similarly, Schedule 1 of the Bails Act (1976) of UK makes possibility of abscondence one of the key considerations for refusing Bail. Likewise, Pakistan's law of Bail which is mainly based on judicial precedents provides that courts may refuse to grant Bail where there is a likelihood of abscondence.

According to the landmark judgment of the Supreme Court of Pakistan in *(Tariq Bashir V. The State, 1995),* grounds for refusing bail include abscondence of the accused, tampering with prosecution evidence and the fact of accused being a previous convict. Moreover, Section 496-502 of Code of Criminal Procedure (CRPC) 1898 Pakistan doesn't close the eyes to the chances of the abscondence of the accused.

Apart from these, domestic laws of some states subscribe to the concept of Conditional Bail. According to this concept, various conditions can be attached to a Bail which the offender is required to fulfil, otherwise his Bail shall stand cancelled. These conditions may include, DNA testing,. For instance, Section 438 of Indian Code of Criminal Procedure (CRPC) 1973 allows the Court to impose conditions with respect to bail before arrest. These include, accused person to make himself available for police interrogations, accused to refrain from threatening witnesses and accused to stay in India while on bail. Likewise, Section 3(6) of the Bails Act 1976 of UK provides for various conditions such as travel restrictions, supervised release, obligation not to contact named witnesses, obligation to report to investigating authorities on regular basis. Similarly, US law, Section 3142 Chapter 207 of 18 U.S.C imposes the conditions like cooperation on the part of accused in DNA testing, electronic monitoring and execution of agreement to forfeit property in default of appearance.

However, the domestic laws of some states do not recognize the concept of Conditional Bail. For example, under the law of Pakistan vide Section 496-502 CRPC (1898) the only condition that can be attached to Bail is the submission of surety bond. It is the discretion of the court to settle the amount of bond no matter how serious is the crime. Thus, when the Supreme Court of Pakistan released on Bail a notorious terror suspect involved in 44 cases of terrorism including a deadly attack on cricketing team of Sri Lanka, the only condition imposed was submission of surety bonds worth US $ 22,500 or £ 7200 (Telegraph, July 14, 2011). The suspect was neither required to report to investigating agencies nor surrender his travel documents as there was no such requirement under the law of Pakistan. Upon this, one US commentator remarked:*'if it was up to the US, the accused would not have been granted bail, but if he was, we would have hoped for at least $ 1,000,000 Bail bond*' (Redwoodcity, July 18,2011). Clearly therefore every state has its own standards of ensuring reappearance of the offenders.

2.2.3) - Domestic implementation of the obligation to view gravity of the offence

The second requirement of the conventions with respect to granting Bail by virtue of Article 11(4) UNTOC (2000), Article 30(5) UNCAC (2003) and Article 3(7) UNDP (1988) is that states must take into account gravity of offence while considering the eventuality of Early Release or Release on Parole of the offenders.

To the extent of offences relating to Drug Trafficking and Terrorism, national laws appear to have been impacted by the obligation to consider gravity of crime while granting Bail. Accordingly, Drug Trafficking law of Pakistan, Section 51 Control of Narcotics Substance Act (CNSA) 1997 provides that there can be no right to Bail in cases of Drug Trafficking when the offence is punishable with death. Under this law the offences punishable with death include import and export of huge quantity of narcotics drugs and use of violence during trafficking of drug.

Likewise under the Counter-Terrorism laws of India vide section 49(6) & 49(7) of Indian Prevention of Terrorism Act (POTA) 2002 and Pakistan by virtue of Section 30(4) Anti-Terrorism Act 1997, Bail can only be granted on a prima facie finding of the court that accused is not guilty. Similarly, US law in Section 3142(f) Chapter 207 of 18 U.S.C provides that certain categories of offenders are subject to detention without Bail which include offenders involved in Drug offences attracting 10 years imprisonment and those involved in violent crimes attracting death sentence or life imprisonment.

Conclusions

According to Guymon (2000), all of the pursuits of international criminals have in common their transcendence of national boundaries and inability of any single state to effectively combat them alone. Thus, the most effective way to combat such criminality is state cooperation. However, state cooperation may not be materialized unless the domestic laws of the requesting and the requested state reflect sufficient degree of similarity.

To produce harmony, international Counter-Terrorism and Organised Crime conventions lay down certain rules of procedure. These rules relate to matters such as Sentencing, Bails, Early Releases and Parole. Bearing in mind the diversity of national legal systems, the drafters of the conventions have authorised the parties to implement the rules to the extent permissible under their national laws.

When a treaty rule enters into national legal system, it gets blended with all attending rules of domestic procedural law. Furthermore, it is impacted by the attitude of lawyers, litigants, judges and prosecutors (Zagaris & kingma,1991). Therefore, it is hardly surprising that the rules set forth by Counter-Terrorism and Organised Crime Conventions have not been implemented harmoniously. To do so, it would be necessary for the conventions to provide mechanism for their consistent implementation. Since this appears to be impracticable at this stage of the development of international law, the monitoring bodies should come forward and provide uniform interpretations of the rules set forth by the conventions and state compliance should be adjudged on the basis of these interpretations. In this way, at least bare minimum harmonization could be reached which might prove sufficient to facilitate state cooperation.

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