Representing Individuals Facing The Death Penalty in Pakistan: A Best Practices Manual

By Justice Project Pakistan

Cornell Law School
Cornell Center on the Death Penalty Worldwide

JUSTICE PROJECT PAKISTAN

ACKNOWLEDGEMENTS

This Manual was originally published in 2013 by Death Penalty Worldwide (a Project directed by Professor Sandra Babbcock of the Center for International Human Rights, Northwestern University School of Law) and the law firm of Fredrikson & Byron P.A. Since that time, the Center for Death Penalty Worldwide has expanded and moved to Cornell Law School.

This edition of the manual is an update to support its application to the unique features of the Pakistani legal system. This manual aims to serve as a source for legal practitioners, civil society organisations, human rights activists, parliamentarians, law students, and media seeking to understand the applicable standards in capital trials and for strategic guidance and best practices in the defence of individuals facing the death penalty in Pakistan.

Much of the original manual, Representing Individuals Facing the Death Penalty: A Best Practices Manual, remains relevant, particularly in relation to the rights of the accused, the relationship between the lawyer and the individual they are defending, and international law.

Disclaimer: This manual has been produced with the financial assistance of the European Union. The contents of this document are the sole responsibility of the Justice Project Pakistan and Cornell University Law School and can under no circumstance be regarded as reflecting the positions of the European Union.

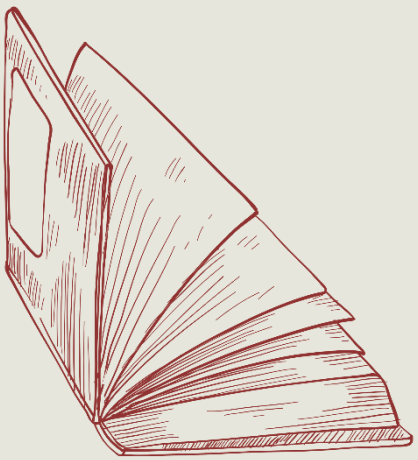
Cornell Law School
Cornell Center on the Death Penalty Worldwide

JUSTICE
PROJECT
PAKISTAN

TABLE OF CONTENTS

CHAPTER 1

How To Use This Manual



INTRODUCTION

This manual focuses on providing legal arguments and strategic guidance to lawyers in order to assist them in representing individuals facing the death penalty in Pakistan. It can be used as a resource by defence lawyers, civil society organisations, human rights activists, and law students exploring the applicable standards in capital trials. It sets forth the best practices in the defence of capital cases, based on the experiences of advocates around the world, international human rights principles, and the jurisprudence of both national courts and international tribunals.

This manual highly recommends the use of forensic experts, investigators and other resources that may help in resolving your case. For example, while we recommend consulting with an expert in every capital case, qualified experts are not always available. We are aware of the vast disparities in resources available to capital litigators. Wherever possible, we suggest creative strategies for overcoming resource constraints so that you can provide the best quality legal representation under the circumstances.

A. A Step-By-Step Guide To Defence In A Capital Case

Pakistan maintains the death penalty for at least 31 distinct offences, many of which do not meet the threshold of *"the most serious crimes"*[1] as mandated by international law and affirmed by the Supreme Court of Pakistan. Individuals accused of crimes punishable by death often find themselves among the most vulnerable within the criminal justice system, susceptible to severe human rights violations from the moment of arrest. Hence, in all cases involving capital punishment, defence lawyers assume a crucial role in safeguarding their clients' rights and often serve as the defendant's sole avenue for a fair trial and due process. Given the pivotal role of defence lawyers in the administration of justice, this manual aims to equip them with a comprehensive guide to uphold the best interests of their clients, ensuring that criminal proceedings strictly adhere to the standards established by Pakistan's Supreme Court.

As such, this manual will guide you through the stages expected in a case such as pretrial detention, initial and ongoing investigations, negotiations, trial, sentencing, and appeals to domestic and international bodies. It is a step-by-step guide for all the lawyers who want to know the best practices in capital case representation in Pakistan. You can find additional information on the application of the death penalty in Pakistan by checking the comprehensive database maintained by Justice Project Pakistan.[2]

B. The Law And Available Resources In Pakistan

This manual is meant to serve as a resource for lawyers and advocates representing individuals facing the death penalty in Pakistan. Nevertheless, many of the principles and strategies outlined in the chapters that follow are of universal application and can be used by lawyers and advocates from other jurisdictions. Not all the practices referred to in this manual are followed commonly in Pakistan. As such, you may also face some challenges in persuading your colleagues and the courts to adhere to the principles outlined here. However, these are tried and tested strategies from capital defence experts around the globe and their incorporation into your practice will ultimately benefit your clients.

[1] Article 6(2), International Covenant on Civil and Political Rights
[2] https://data.jpp.org.pk

C. What Is International Law

International law, as it is used in this manual, refers specifically to public international law. Public international law is the set of legal rules that govern international relations between public bodies that include states (i.e. Pakistan) and international organisations (i.e. the United Nations). The narrowest understanding of international law is that it reflects a set of obligations between and upon states. These obligations, by and large, are the direct result of consent by states through conventions, treaties, etc. [3]

There is no global governing body that creates international law. Generally, nations and inter-governmental organisations are the "primary players" in the creation of international law. Article 38 (1) of the Statute of the International Court of Justice identifies four sources of international law: treaties, customary international law, general principles of law recognised by civilised nations, and judicial decisions and the teachings of the most highly qualified experts of the various nations.

Treaties are the first and primary source of public international law. Treaties may be either bilateral (between two countries) or multilateral (between three or more countries). International agreements and treaties are binding only on the countries that elect to ratify them. The international human rights treaties that are most relevant to the defense of a capital case, and this manual, include: the **International Covenant on Civil and Political Rights** ("ICCPR"); the **Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment** ("CAT"); **the Convention on the Elimination of Racial Discrimination ("CERD"); and the Convention on the Rights of the Child** ("CRC").

The second source of international law is customary law. Customary law derives from the practice of nations over time. For a practice to become customary law, two requirements must be met. First, the custom must be common state practice. Second, the nations that adhere to the practice must do so out of a sense of legal obligation. Customary norms include peremptory norms or jus cogens, a category of norms from which there may be no derogation by treaty or other agreement. For example, prohibitions against slavery, genocide, and torture constitute jus cogens. Under no circumstances may a country argue that such practices are permissible.

[3] *International Law Benchbook for Pakistan*, rsilpak.org/wp-content/uploads/2019/01/International-Law-Benchbook-for-the-Judiciary-in-Pakistan.pdf.

The third source of international law consists of "general principles of law recognized by civilised nations." General principles include fair trial norms (such as the impartiality of judges) and principles of judicial process (such as res judicata). The fourth source of international law consists of judicial decisions and scholarly teachings. Past judicial decisions and scholarly teachings are considered by the International Court of Justice to be "subsidiary" or secondary sources of law. In other words, they are used only to interpret the three primary sources of international law. In practice, however, international Courts tend to give prior judicial decisions precedential value.

Pakistan has ratified most of the major human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination 1965 in 1966; the Convention on the Rights of the Child 1989 in 1990; the Convention on the Elimination of All Forms of Discrimination against Women 1979 in 1996; the International Covenant on Economic, Social and Cultural Rights 1966 in 2008; the ICCPR 1966 and the Convention against Torture 1984 in 2010; and the Convention on the Rights of Persons with Disabilities 2006 in 2011.

Understanding international law, and its application in Pakistan, is particularly important for capital defence lawyers. Pakistan's superior judiciary has affirmed that international human rights law must be considered in interpreting the rights of individuals. Human rights treaties and the decisions of international bodies can be exceedingly useful tools in advocating for restrictions on the application of the death penalty—and ultimately may help save the life of your client.

D. Application Of International Law In Pakistan

In recent years, there has been a marked increase in jurisprudence applying human rights standards contained in international human rights law, emanating from constitutional and appellate Courts in Pakistan. This has been coupled with the establishment of specialised Courts for the protection of the rights of various marginalised groups, such as the Gender-based Violence Courts, and Juvenile Courts, and Child Protection Courts.

- Reducing The Scope Of The Death Penalty

There has been a growing trend among Pakistan's Superior Courts towards overturning capital sentences and aligning Pakistan's jurisprudence with international law requirements for executing states, as per Article 6(2) of the ICCPR. By the end of 2022, the number of individuals sentenced to death in Pakistan decreased to 98 individuals, marking a decline from 129 persons sentenced in 2021, including women[4]. This decline can be attributed to various factors including growing awareness of international law human rights standards and the high rate at which Pakistan's Superior Courts overturn death sentences passed by trial Courts on appeal.[5] Of the 310 judgments reviewed between 2010 and 2018, the Supreme Court overturned death sentences in 78% of cases – either by acquitting the accused, commuting the sentence, or ordering a review.[6] Moreover it is noteworthy that no death sentences for drug offences were awarded in 310 cases from 2010 to 2018.[7]

The passage of the Control of Narcotics Substances (Amendment) Act, 2023 marks a significant milestone in Pakistan's journey towards death penalty reform. On the 25th of July 2023, a joint session of the Senate and National Assembly eliminated the death penalty for narcotics offences in the country.

Interestingly, Pakistan had not executed anyone for narcotics offences since a landmark judgment in *Ghulam Murtaza and Another vs. The State*.[8] This judgment, which was later affirmed by the Supreme Court, was authored by Justice Asif Saeed Khosa. In this judgment, Justice Khosa introduced comprehensive sentencing guidelines that categorised narcotics offences based on the type of narcotic involved, the specific quantity recovered, and provided clear instructions regarding appropriate imprisonment terms and fines for each category of offence.

This ruling played a pivotal role in streamlining the sentences awarded by all courts when trying cases related to narcotics. By doing so, it significantly

---

[4] Article 6(2) of ICCPR;

[5] The Pakistan Capital Punishment Study A Study of the Capital Jurisprudence of the Supreme Court of Pakistan, Reprieve & Foundation for Fundamental Rights; https://reprieve.org/wp-content/uploads/sites/2/2019/04/Pakistan-Capital-Punishment-Study.pdf

[6] The Pakistan Capital Punishment Study A Study of the Capital Jurisprudence of the Supreme Court of Pakistan, Reprieve & Foundation for Fundamental Rights; https://reprieve.org/wp-content/uploads/sites/2/2019/04/Pakistan-Capital-Punishment-Study.pdf

[7] The Pakistan Capital Punishment Study A Study of the Capital Jurisprudence of the Supreme Court of Pakistan, Reprieve & Foundation for Fundamental Rights; https://reprieve.org/wp-content/uploads/sites/2/2019/04/Pakistan-Capital-Punishment-Study.pdf

[8] PLD 2009 Lahore 362

reduced the number of death sentences handed down for such offences, aligning the legal framework more closely with international standards. In essence, the Control of Narcotics Substances (Amendment) Act 2023 merely formalises what had already been a practical reality in Pakistan's justice system, in which the death penalty for narcotics offences had effectively been phased out.

In August 2022, Section 127 of the 1890 Railways Act underwent significant amendments, omitting the words "death or" from these sections. This critical amendment effectively replaced the death penalty with life imprisonment as the maximum penalty for violators of the law. This change not only symbolises Pakistan's evolving stance on capital punishment but also represents a broader recognition of the need to bring its legal system in conformity with international human rights principles.

The removal of the death penalty from these areas of the law underscores the country's commitment to ensuring that its criminal justice system adheres to the highest standards of fairness, proportionality, and respect for the right to life.

- Mental Illness and the Criminal Justice System

In February 2021 the Supreme Court of Pakistan delivered a landmark ruling in the case of *Safia Bano v. Home Department*[9], barring the execution of mentally ill defendants. The judgment established key safeguards and protections for defendants with psychosocial disabilities at every stage of the criminal justice system, and made numerous references to international human rights law.[10] Additionally, the Supreme Court directed the Federal and Provincial governments to amend existing legislation and align it with the recommendations provided in the judgment, as well as the Mental Health Acts of 2001.[11] The United Nations has released a statement welcoming the landmark judgment, which brings Pakistan in line with the recommendations of the United Nations Human Rights Committee.[12]

- Safeguards for Juvenile Offenders in the Criminal Justice System

While commuting the death sentence of Muhammad Iqbal, a juvenile offender on death row, to life imprisonment, the Lahore High Court explicitly recognized Pakistan's obligations as a signatory of the UN Convention on the Rights of Child and the ICCPR, whereby imposing the death penalty on minors is prohibited. Child Courts, also known as Juvenile Courts and Child Protection Courts, have been established throughout Pakistan under the Juvenile Justice System Act 2018, to improve the juvenile justice system for children in conflict or in contact with the law and to provide them with child-sensitive and fair justice. Additionally, capacity building programmes held with the Judiciary, government stakeholders and civil society have ensured the smooth and efficient functioning of these Courts.

- Protections for Victims of Gender-Based Violence

In 2021, the Lahore High Court held the use of the two-finger/hymen test to be illegal, unscientific, and contrary to the personal dignity of the female victim and therefore against the right to life and right to dignity enshrined in Articles 9 and 14 of the Constitution of Pakistan, 1973 ("the Constitution").[13] In its judgment, the Court referred to international law obligations stemming from the United Nations Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Convention on the Rights of the Child, and the International Covenant for Economic, Social and Cultural Rights. Gender-Based Violence (GBV) Courts are now operational across Pakistan, with the Lahore and Islamabad High Courts having set out guidelines for the operation of these Courts and how judges should proceed with GBV cases.

- Upholding Prisoners' Rights

In 2020, the Islamabad High Court held that the overcrowding of prisons, the failure to segregate prisoners, and inhuman and degrading treatment are unconstitutional and constitute a violation of the commitments of the State of Pakistan under the ratified conventions and constitutionally guaranteed rights, citing the ICCPR and the UN Standard

[9] PLD 2021 SC 488

[10] In its judgment, the Supreme Court made specific references to UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on Rights of Persons with Disabilities (CRPD), the latter two ratified by the Government of Pakistan.

[11] Punjab, Sindh and Peshawar have their own Mental Health Acts

[12] *Pakistan: UN Experts Welcome Death Penalty Ban for Individuals with Mental Health Conditions | OHCHR*, www.ohchr.org/en/press-releases/2021/02/pakistan-un-experts-welcome-death-penalty-ban-individuals-mental-health. Accessed 3 May 2024.

[13] WP No.13537 of 2020 Sadaf Aziz etc Versus Federation of Pakistan etc

Minimum Rules for the Treatment of Prisoners ("Nelson Mandela Rules").[14]

- Protecting Minority Rights

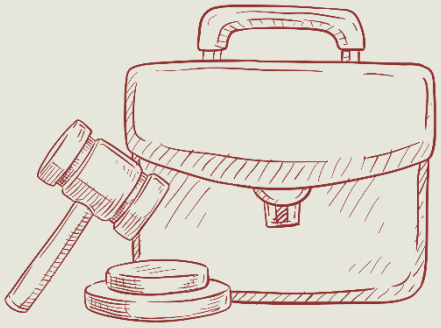
In 2014, the Supreme Court of Pakistan delivered a landmark ruling on the rights of religious minorities in Pakistan.[15] The judgment noted that desecration of places of worship of even a non-Muslim is an offence under the Pakistan Penal Code (PPC) 1860. The judgment also noted that the Supreme Court, being the apex Court in a liberal democracy, is mandated to protect and defend the Constitution which embodies the fundamental rights of its citizens.

[14] Khadim Hussain Vs Secretary, Ministry of Human Rights, Islamabad, etc

[15] PLD 2014 Supreme Court 699

CHAPTER 2

Upholding the duty to provide effective representation: what would a “good lawyer” do?



A. Why Do I Have A Duty To Represent My Client Effectively?

This chapter describes the scope of your duties, provides guidelines on the effective use of resources and personnel during your representation, and provides practical tools to help make you a better advocate. This chapter also aims to equip you with arguments you can make to the courts regarding your obligation to present a competent defence.

Firstly, as a capital defence lawyer, you have a duty to provide high-quality legal representation. This means:

- ➔ You must be independent and free to advocate zealously on behalf of your clients.
- ➔ You must have "experience and competence commensurate with the nature of the offence."[16]
- ➔ You should limit caseloads to a level at which you are able to provide high-quality representation.
- ➔ You should receive adequate resources to enable you to provide a competent defence.

This chapter describes the scope of your duties, provides guidelines on the effective use of resources and personnel during your representation, and provides practical tools to help make you a better advocate. This chapter also aims to equip you with arguments you can make to the courts regarding your obligation to present a competent defence.

B. Are My Duties To My Clients Different In Capital Cases?

In every criminal case your client has certain rights and as a lawyer you have duties corresponding to these rights. In a capital case, where your client's life is at stake, you have an added responsibility to ensure that you conduct a thorough investigation of the crime as well as your client's personal background in an effort to convince the decision-maker that your client – even if guilty – does not merit the death penalty.[17]

The United Nations Economic and Social Council (ECOSOC) has called on governments to provide "adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases."[18] Moreover, international law requires that in a capital case, the due process rights of the accused must be rigorously observed. It is your job as your client's advocate to ensure that the Courts respect and enforce these rights.

C. Scope Of Representation

Effective representation extends beyond the trial phase and encompasses various stages of legal proceedings. You should attempt to be present and engaged as your client's advocate at the earliest stage possible. This includes involvement in bail hearings, appeal stage, and engaging in compromise or settlements. The specifics of your duties during the pre-trial process are elaborated on in Chapter 3. You may also be required to initiate relevant legal actions on your client's behalf, such as bail applications and challenges related to detention conditions and communication restrictions. Moreover, your client has a well-established right to be assisted by counsel during the appeals process. Even if you do not serve as counsel during the appeal, you have an obligation to directly inform your client of all pertinent deadlines for seeking post-conviction relief and promptly convey the procedural status of the case to any succeeding counsel, including whether an appeal has been filed.

D. What Exactly Does The Right To A Lawyer Include?

The right to legal assistance is essential to a fair trial.[19] International law establishes that every person accused of a capital crime, even if indigent, is entitled to legal representation.[20] In addition, international law provides that the accused must be given adequate time and facilities for the preparation of his defence. At the very least, this requirement entails a right to effective legal representation.[21] States must also provide compensation to lawyers who are appointed

[16] U.N. Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990).
[17] Representing Individuals Facing the Death Penalty in Malaysia, A Best Practices Manual, ECPM

[18] Amnesty International (2014) Fair Trial Manual: Second Edition, Chapter 28, London: Amnesty International
[19] Article 10 A, The Constitution of Pakistan, 1973
[20] Article 14, International Covenant on Civil and Political Rights
[21] Ibid

to represent indigent defendants.[22] Lawyers have a corresponding duty to cooperate in the provision of these services. Finally, legal authorities, including but not limited to lawyers and judges, have a duty to ensure that legal assistance is effective.[23]

While the Constitution of Pakistan does not specifically mention a right to effective representation, the right can be derived from an accused's constitutional right to a fair trial.[24] This right has been further elaborated on in later sections of this manual.

The constitutional rights of defendants facing criminal charges stem from Articles 4, 9, 10, 10-A, 12, 13, 14 and 25. They include the right to a fair trial, the right to due process, the right to engage a counsel of their own choosing and to have their case tried within reasonable time and without delay. These rights have been well documented in Pakistan's jurisprudence and include:

- the right to a fair hearing[25],
- the presumption of innocence[26],
- freedom from compulsory self-incrimination[27],
- the right to know the charges,[28]
- adequate time and facilities to prepare a defence[29],
- the right to legal assistance[30],
- the right to examine witnesses[31],
- the right to an interpreter[32] and
- the right to appeal in criminal cases[33]

[22] Ibid

[23] Ibid

[24] Article 10 A, The Constitution of Pakistan, 1973

[25] 2020 PLD 334 SC, 2020 PCr. LJ 1486 Karachi, 2019 SCMR 1982 SC, 2019 PLD 68 Lahore, 2018 PLD 186 Peshawar

[26] 2019 PLD 64 SC, 2010 SCMR 1706 SC, 2004 PCr. LJ 265

[27] 2018 PLD 28 Lahore

[28] 2020 PLD 334 SC

[29] 2013 YLR 1311 Karachi, 2010 PCr. LJ 1253, 1986 PCr. LJ 59 Karachi

[30] 2019 YLRN 93 Karachi, 2010 PCr. LJ 812 Lahore, 2010 PCr. LJ 1253, 1975 SCMR 1 SC

[31] 2020 SCMR 293 SC, 2020 MLD 942 Karachi, 2017 PCr. LJ 582 Peshawar, 2017 PCr. LJ 1264 Lahore

[32] 2006 PLD 139 Karachi, 1987 MLD 1016 Lahore, 1984 PCr. LJ 1946 Lahore, 1979 PCr. LJ 1016 Lahore

[33] 2016 PLD 255 Lahore, 2005 PCr. LJ 1435, 1994 PCr. LJ 1973, 2013 YLR 1562 Lahore, 2009 PCr. LJ 26 Lahore, 2007 PLD 123 Lahore, PLD 2005 FSC 3, 2020 PLD 146 SC, PLD 1947 PC 103

The right to counsel, and counsel of one's own choice, would be meaningless without a corresponding right to legal aid. The Constitution of Pakistan 1973 guarantees legal representation to an arrested person as their fundamental right.[34] The State's duty to provide free legal aid to an accused facing criminal charges is encapsulated in Volume 3 of the High Court Rules and Orders (Lahore).[35] Part C of Chapter 24 provides guidelines for the appointment of a legal counsel at State expense where the accused is unrepresented by a private counsel at trial.[36]

This right also extends to proceedings before the appellate court. After the conclusion of trial, if the accused has been convicted of a capital offence and confirmation of the sentence has been referred by the Trial Court to the relevant High Court under Section 374 of the Code of Criminal Procedure,[37] the Court is required to appoint a legal counsel at the State's expense in accordance with Volume 5 of the High Court Rules and Orders (Lahore).[38] Similarly, the accused is entitled to legal representation where an appeal has been filed against the order of the Trial Court.[39]

Over the years, the Pakistani Courts have outlined several principles that the Court must uphold when appointing a defence counsel at the Government's expense.

These principles have been summarised by the Lahore High Court in *Naubhar alias Baharu v. The State* in the following words:

i. The facility of defence counsel is available to every accused person. However, in cases where the accused persons have defences which are not only different but are also opposed to each other, the Court should appoint a separate lawyer for every individual.

[34] Article 10 (1), The Constitution of Pakistan, 1973 – No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

[35] Volume 3 Part C of High Court Rules and Orders (Lahore): Providing an Accused Person with Legal Advice. https://www.lhc.gov.pk/system/files/volume3.pdf

[36] ibid.

[37] Section 374, Code of Criminal Procedure (Act V of 1898) - Sentence of death to be submitted by Court of Session: When the Court of Session passes sentence of death the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court http://www.fmu.gov.pk/docs/laws/Code_of_criminal_procedure_1898.pdf

[38] Rules and Orders of the Lahore High Court, Lahore - Volume 5, Chapter 4, Part-E, Rules 1 to 5: Rules regarding legal assistance to persons charged with capital offences in the High Court < https://www.lhc.gov.pk/system/files/volume5.pdf>

[39] ibid.

ii. The Court should ensure that the lawyer appointed to undertake the defence is competent enough to effectively and meaningfully represent the accused. The practice of appointing raw and junior advocates to defend the accused in capital sentence cases is disapproved.

iii. Once the Court appoints a counsel it should see that he performs his/her duty effectively and to its satisfaction.

iv. The appointment should be made well in time to enable the counsel to study the case. Even a counsel of high calibre cannot be expected to prepare defence in a murder case without sufficient time and necessary material. The practice of appointing a defence counsel on the day of the trial is deprecated.

v. If the accused has already engaged a private counsel, his absence on one occasion is no ground for appointment of a defence counsel at State expense. However, where that counsel is continuously not putting up an appearance, the Court must appoint a defence counsel.

vi. The State counsel must know the language of the accused whom he is to represent so that they may communicate with each other."[40] However, if you do not speak your client's language, do not let it deter you from defending them. You may engage an interpreter to communicate with your client.[41]

[40] 2019 LHC 2502
[41] *Id*. 32

Setting standards for Capital Defense

In *Rajab Ali vs The State (2019)*, the Sindh High Court held:

"Most accused persons were laymen who had little, if any, knowledge of the law and in the absence of a defence counsel they are unable to adequately defend themselves. For example, during the examination-in-chief of a prosecution witness, the accused would not know which questions he could object to and which documents he could oppose being exhibited. Such inability on the accused's part would lead to an unfair trial...Onus was on the Trial Court to ensure that an accused, in a trial of an offence carrying capital sentence, was represented by defence counsel throughout even if it was pauper counsel appointed by the Court at State expense in order to protect his rights and ensure that he received a fair trial.[42]"

[42] 2019 MLD 1713 KHC.

The UN Human Rights Committee specifies that states are required to ensure that capital defendants have adequate assistance of counsel at every stage of the proceedings "above and beyond" the protection afforded in non-capital cases.[43]

[43] Amnesty International (2014) Fair Trial Manual: Second Edition, chapter 28. London: Amnesty International.

A. Right To Fair Trial

As per the Constitution of Pakistan, your client has the right to a fair trial, including the principles of due process, a timely proceeding, and the avoidance of unwarranted delays. Article 10(1) of the Constitution of Pakistan ordains that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall they be denied the right to consult and be defended by a legal practitioner of their choice.[44]

> Article 10-A:
>
> **Right to fair trial:** For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

This constitutional mandate is given effect by Section 340(1) Code of Criminal Procedure 1898 which stipulates that "any person accused of an offence before a criminal court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader".[45]

Although the Constitution itself does not define what the right to a fair trial entails, reference to international human rights covenants, such as Article 9 of the International Covenant on Civil and Political Rights (ICCPR) mandates that individuals must be subjected to trial without undue delays, ensuring that justice is delivered expeditiously. Furthermore, Article 14(1) of the ICCPR underscores that 'All persons shall be equal before the Courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'[46] Expounding on Article 14, the Human Rights Committee asserted in its General Comment 36 that a violation of the rights set out in Article 14 resulting in a death sentence would amount to a violation of Article 6 i.e., the right to life. The General Comment also enlists fair trial violations, including the use of forced confessions; the inability of the accused to question relevant witnesses; lack of effective representation involving confidential attorney-client meetings during all stages of the criminal proceedings, including criminal interrogation, preliminary hearings, trial and appeal; failure to respect the presumption of innocence, which may manifest itself in the accused being handcuffed during the trial; lack of an effective right of appeal; lack of adequate time and facilities for the preparation of the defence, including the inability to access legal documents essential for conducting the legal defence or appeal, such as official prosecutorial applications to the Court, the Court's judgment or the trial transcript; lack of suitable interpretation; failure to provide accessible documents and procedural accommodation for persons with disabilities; excessive and unjustified delays in the trial or the appeal process; and general lack of fairness of the criminal process, or lack of independence or impartiality of the trial or appeal court.

B. How Can I Make Sure That I Have Adequate "Time And Facilities" To Prepare A Defence?

As per Article 14 of the ICCPR, defendants are entitled to have "adequate time and facilities" to prepare their defence, which is a right that directly extends to their defence lawyers.[47]

Your client's right to sufficient time to prepare a defence also applies to you, as capital defence counsel, not only during the trial but also during pretrial hearings, plea negotiations, post-trial appeals. It is your duty to vigorously assert these rights. For example, if you are appointed to defend a client facing capital charges only days or weeks before his trial is scheduled to begin, you will likely need to request that the trial be postponed so that you can interview your client, investigate any defence he may have, and prepare for trial. If the Court denies this request, then you should do everything possible to document the violation. This will include presenting a written motion or objection to the Court in which you document the amount of time you have had to prepare and describe the obligations that you have not been able to carry out as a result of time limitations. It is important to recall that even if you are unsuccessful in persuading the trial Court to grant your request, your efforts to document the violation of your client's rights could serve as the basis for a successful appeal. Documenting the violation of your client's rights is also a critical first step toward exhausting your domestic remedies in the event you are considering an appeal to an international body. The definition of "adequate time" varies according to the facts of each case, the complexity of the issues and

[44] Article 10, The Constitution of Pakistan, 1973

[45] Section 340(1), The Code of Criminal Procedure, 1898

[46] International Covenant on Civil and Political Rights | Ohchr, www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights. Accessed 3 May 2024.

[47] Article 14 of the ICCPR provides that "Everyone shall be entitled to ... adequate time and facilities for the preparation of his defence."

the availability of evidence.[48] The UN Human Rights Committee has found violations of the ICCPR in cases where a newly appointed lawyer was given only minutes or hours to prepare.[49] These same cases also hold that a lawyer's preparation for trial is "inadequate" where he meets with his client only briefly before trial.[50]

Domestically, the need for adequate time has been acknowledged by the Lahore High Court which held the "right to be defended by a pleader is a statutory right of the accused, particularly in a charge entailing capital punishment. Right cannot be abridged by appointment of a counsel a day or two before trial." It is important for you to remember that the right to sufficient time to prepare a defence also applies to the appeals process. As a capital defence lawyer you are entitled to have adequate time between the date of conviction and the date of execution in order to prepare and complete appeals, including petitions for clemency.

Capital defence lawyers are entitled to have adequate time between the date of a conviction and the date of an execution in order to prepare and complete a client's appeals.[51]

C. What Can I Do To Obtain Necessary Personnel And Resources?

Legal aid lawyers and court-appointed defence counsel may face significant challenges in carrying out their professional duty to provide quality representation. We address many of these obstacles in this manual, and we strongly encourage you to challenge the legal system when it fails to guarantee your client's rights to a fair trial. For example, if lawyers are commonly appointed to represent defendants on the day of trial, this is a situation that should be met with objections and arguments founded on the international legal authorities that we provide in this manual. Sometimes, you can use these obstacles as opportunities to educate others and to advocate for system-wide change.

---

[48] HRC, General Comment No. 13, Article 14 (Administration of Justice), para. 14, (1984): "What is 'adequate time' depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel"; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. (N)(3)(c), 2003: "Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence"; see also Pedersen & Baadsgaard v. Denmark, App. No. 49017/99, ECtHR, 17 December 2004.

[49] Smith v. Jamaica, Communication No. 282/1988, UN Doc. CCPR/C/47/D/282/1988, HRC, 31 March 1993; Reid v. Jamaica, Communication No. 355/1989, UN Doc. CCPR/C/51/D/355/1989, HRC, 8 July 1994 (the Committee concluded that since the accused only met with his lawyer for ten minutes before trial, this did not constitute adequate time to prepare).

[50] See also Chaparro Álvarez y Lapo Iñiguez v. Ecuador, IACtHR (Nov. 21, 2007); Gordillo, Raúl Hilario, Expte: G.445.XXI, Fallos: 310:1934, CSJN (Sept. 29, 1987) (Argentina Supreme Court); Goddi v. Italy, App. No. 8966/80, ECtHR (Apr. 9, 1984); Daud v. Portugal, App. No. 22600/93, ECtHR (Apr. 21, 1998); Bogumil v. Portugal, App. No. 35228/03, ECtHR (Oct. 7, 2008); Öcalan v. Turkey, App. No. 46221/99, ECtHR (Mar. 12, 2003, First Section), (May 5, 2005, Grand Chamber).

[51] See: Mr. Yahya Bakhtiar, Advocate v. The State through the Secretary, Ministry of Interior, Government of Pakistan, Islamabad (PLD 1983 SC 291), Niaz Ahmad v. The State (1984 PCr.LJ 1054), Shahsawar v. The State (1998 PCr.LJ 1758).

D. What Resources Do I Need

Experts and Investigators:

Effective representation requires consulting with investigators as well as experts such as psychologists and social workers. The American Bar Association emphasises the importance of creating a defence "team" that is composed of at least two lawyers, experts, investigators and "mitigation specialists."[52] This may not be feasible in all cases, but the concept of a team defence is critical. Capital case representation is challenging, and you should use all of the resources at your disposal. Where investigators are unavailable, paralegals, law students, or non-governmental organisations may be able to assist. Where psychiatrists are unavailable, academics, civil society experts, nurses and others with mental health training may be useful.

Interpreters:

The importance of ascertaining a client's native language and level of fluency in a particular language cannot be overestimated. Do not assume that your client speaks the language of the country in which they are accused. There are 77 established languages in Pakistan. Your client may appear to be fluent in a language that is not their native tongue when in fact they cannot fully comprehend nor fully express themselves in that language. As their lawyer, you have an obligation to uphold the principle that everyone has a right to be informed of the charges against them in a language that they understand, and to be assisted by an interpreter in Court.[53]

---

[52] ECOSOC Res. 1996/15 (adopted July 23, 1996) 35 See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1, "The Defense Team and Supporting Services" (Feb. 2003) at: http://www.lb9.uscourts.gov/webcites/10documents/Smith_guidelines.pdf.

[53] ICCPR Art. 14(3)(f). Article 6(3)(e) of the ECHR, Article 8(2)(a) of the ACHR, and Articles 20(4)(f) and 21(4)(f) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia provide for the right to free assistance of an interpreter for the accused where he does not understand or speak the language of the court.

Overcoming Barriers

What can I do if I do not speak the same language as my client?

Try to find an interpreter who speaks the language your client is most comfortable with, rather than just a language that your client knows. Much of the information you need may be difficult enough for your client to express in their native tongue. Adding a language barrier makes it more difficult for them to express themselves and to understand your advice, and can lead to misunderstandings with adverse consequences. If an official interpreter is not available, try to find someone who speaks your client's language fluently. Never use a family member or witness as an interpreter, since they have an intrinsic bias that may affect the quality and objectivity of their interpretation.

Practice Tip

Meeting your client

What if the prison authorities won't let me see my client?

Try to stay calm and maintain an even tone. It is usually a poor strategy to yell or berate an employee who has the discretion to help you. First, try to reason with them. **Make sure you are carrying the Power of Attorney from your client.** Rather than placing the blame on the prison official ("why won't you let me see my client?"), try to separate the person from your problem ("I know it's not your fault, but I'm having a lot of trouble trying to see my client.") If that does not work, ask to speak to their senior. If a senior is not available, write down the person's name and contact information, and leave peacefully. Be sure to note the date and time of your visit, and the name and contact information of anyone that you spoke with. If you can wait until there is a shift change, you may have better luck with a different employee. If you are still unable to speak with your client, consider getting permission from the Prison Authorities or a Court order or contacting a legal services organisation for help. As a last resort, you may be able to file a complaint locally.

The Lawyer-Client relationship

You must develop and maintain an effective lawyer-client relationship in order to provide quality representation. This is especially critical in death penalty cases.[54] You may find that establishing a good working relationship with a defendant in a capital case is a challenge. Oftentimes defendants in capital cases are kept isolated from other prisoners and from their family and friends, so you may be the defendant's only link to the outside world. Under these circumstances, you may find it difficult to gain your client's trust. But if you communicate with your client regularly,

[54] Bradley A. Maclean, Effective Capital Defense Representation and the Difficult Client, 76 TENNESSEE LAW REVIEW 661, 674 (2009) ("In a capital case, where the client's life is on trial, there are additional reasons why a close and trusting lawyer-client relationship is critical.").

treat them with respect and professionalism, and are a zealous advocate for their rights, you will develop a better and more productive working relationship.

In Pakistan's legal context, cultural sensitivity is paramount, considering the diversity of values and norms across regions and communities. Understanding customary practices, including those in rural areas, and the implications of Islamic law, particularly in family and personal matters, is crucial for comprehensive legal counsel. Recognizing the influence of community and family dynamics, and respecting clients' religious beliefs, particularly in cases involving inheritance, marriage, or family disputes, is vital. Familiarity with local dispute resolution mechanisms is also beneficial.

When meeting your client or their family for the first time, emphasising the importance of attorney-client privilege and maintaining client confidentiality builds trust. Encouraging clients to provide feedback on legal services and effectively managing their expectations regarding the legal process and potential outcomes ensures a collaborative and informed lawyer-client relationship.

Success Story

The Case of Ahmed Khan

• Ahmed (not his real name) was charged with blasphemy, a capital crime, in Pakistan. When we were first assigned to his case, the first thing we did was arrange a jail visit to meet him. Although this should be a regular legal/investigative practice, it is quite uncommon to visit your client in jail in Pakistan. A simple visit put us in touch with the jail superintendent, who has now become a close ally of our chamber. We are now granted unfettered access to our client and can meet him unmonitored on any given day for any length of time; also unusual in Pakistan.

• Meeting our client in jail on a regular basis has helped us in two ways:

1. We discovered he had long been suffering from mental illnesses that had never been properly diagnosed and would never be evident to someone who met him once or twice.
2. We were allowed to bring in our own international medical expert to the jail to evaluate our client. This evaluation was then presented in Court and endorsed by local doctors.

• Based on our investigations into Ahmed's family, we were able to piece together his social history and tell a story of his mental illness.

• Ahmed's case has taught us how far using the simplest of practices can take us. We now have international and local experts testifying that our client is mentally ill, which will, of course, go a long way in proving our client is not guilty of the charges.

- How can I establish a meaningful and trusting relationship with my clients?

In order to build a successful relationship with your client, it is important to be consistent in your communications and to keep your client informed of the substantive developments and procedural posture of the case. You should schedule regular visits with your client. Respecting a client's right to confidentiality and avoiding conflicts of interest are particularly important. Assure them that everything they tell you will remain confidential unless they agree to disclose the information as part of your trial strategy. You should also be sure to respond to correspondence in a timely manner and communicate with their family and friends as you see fit. As the case progresses, your client may become increasingly frustrated. This is a normal reaction to the delays inherent in many legal proceedings. If you find yourself unable to meet with your client as often as you would like, consider recruiting a qualified individual to maintain regular communication with them. Your discussions with your client will be more productive if you have established a trusting relationship with them. Your client will only disclose personal and painful facts that are necessary to craft an effective defence for the trial (such as their role in the crime) if they trust you.

Trust is also essential to uncovering facts that are relevant to the sentencing phase of a capital case, where it is your job as a defence lawyer to humanise your client by presenting mitigating evidence. Mitigating evidence can include evidence of a "defendant's impulsivity, impaired judgment, youth and impressionability, mental and developmental impairment or retardation, history of childhood sexual and physical abuse, substance addiction, and manageability in prison."[55] Defendants frequently hesitate to reveal certain details to their lawyers especially as mental illness remains a cultural taboo in many societies. Gathering mitigating evidence takes time, persistence, and cultural sensitivity.

You may have a more difficult time developing a relationship with some clients than with others. When you represent a challenging client, it is important to keep in mind that the qualities that make

[55] Leona D. Jochnowitz, Missed Mitigation: Counsel's Evolving Duty to Assess and Present Mitigation at Death Penalty, 43 No. 1 CRIMINAL LAW BULLETIN Art. 5 (2007).

a client difficult often serve as mitigating factors. For example, if your client has a mental illness, their ability to cooperate with you may be impaired. It is crucial that you spend sufficient time with your client to understand when this is the case, and to obtain expert assistance to evaluate your client's mental status. As explained in more detail in subsequent chapters, the accused's mental illness may serve to explain their conduct at the time of the crime – even if they were not legally "insane" at the time of the offence. This can be powerful evidence in mitigation, but most lawyers do not have a sufficient grasp of the signs and symptoms of mental illness to make use of this evidence in the absence of expert assistance. You will first need to educate yourself about the scope of your client's mental disabilities before you can argue to judge or jury that those disabilities should serve as grounds for a lesser penalty.

Overcoming Barriers

What should I do if I think my client may have literacy difficulties?

• It is important to ascertain early in your relationship whether your client is literate. In some countries, illiteracy may be so common that your client readily admits their inability to read or write. In countries where literacy rates are high, your client may feel deep shame because of their illiteracy. Be gentle in your approach, and if you suspect your client may be overstating their reading skills, take measures that will allow you to assess their capacity to comprehend written documents. This is particularly important in cases in which your client has allegedly signed a confession.

• Offer to read documents to your client. Ask your client to explain information that was contained in documents that they claim to have read, so that you can gauge their level of comprehension.

• Consider whether this raises any competency or other legal issues.

I think my client is lying to me. What should I do?

Clients sometimes tell their lawyers less than the complete truth. Rather than be offended, it is often better to consider their motives.

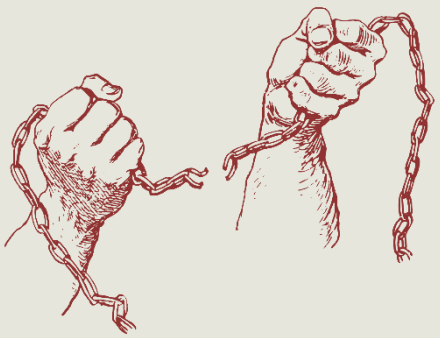
First, do not assume that your client lied on purpose-it might have been a simple misunderstanding. And even if your client lied intentionally, he may not have had malicious intent. He may have lied to protect someone else, or to avoid embarrassment. It takes time for clients to trust their lawyers, and sometimes clients will lie when they do not have faith in their lawyer's willingness to work hard on their behalf. Many clients believe that their lawyer will only help them if they are innocent.

If you think your client lied about something relevant to his case, ask for clarification without making it sound like an accusation. Before posing your question, explain that it is important to his case, and reassure him that you will continue to fight for him regardless of what he tells you. Express empathy for his situation (for example, tell him that you know it's not easy to be completely forthcoming with information that causes him pain and sadness).

This reiterates the importance of building a relationship before asking your client about the facts of their case. Ideally, you should meet with your client on a number of occasions before you ask sensitive questions about his potential role in any offence he is accused of committing. Build rapport by getting to know your client, chatting with him about his family, work, and hobbies. Build trust by taking the time to explain what he can expect regarding the proceedings in his case.

CHAPTER 3

Pre-Trial Detention and Bail



According to international legal standards, pre-trial detention can be exercised or employed only as a last resort in criminal proceedings. Article 9(3) of the ICCPR states that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". The Human Rights Committee has asserted that pre-trial detention is an exception rather than a rule.[56] Moreover, it urges states to develop or adopt alternative measures to imprisonment, especially at pre-trial stage.[57]

[56] UN Human Rights Committee, General Comment No. 35, paragraph 38

[57] See rules 1.5, 6.1 and 6.2 of Tokyo Rules 1990

A. Police Remand

According to the Constitution of Pakistan, the police may hold a person in custody without a warrant for up to 24 hours to complete the investigation before they have to present the detainee before a magistrate. The magistrate may extend the remand to 15 days.[58]

The period of police remand is critical both for the investigation officers and you, as the defence lawyer. Whether your client's defence is ultimately successful or not, if they are held in detention until trial, they will experience the mental and physical hardships of being in detention, they will have less access to you, and those that depend on your client for support may experience hardships as well. Your advocacy at this stage is crucial. You have a duty to protect your client's rights by resisting pretrial detention and by advocating for their release with the least restrictive conditions possible.

PRODUCTION BEFORE A MAGISTRATE

Under Article 10(2) of the Constitution, your client is entitled to a hearing before a magistrate within 24 hours of arrest. It is important that you adequately prepare your client's case in advance of the pretrial detention hearing. You will need to obtain access to your client. You should first assess whether there is enough evidence that your client committed the crime. In the absence of such evidence, your client cannot be kept in detention. In order to make this assessment, you should make use of your right to access the FIR.

B. Right to Bail

A person accused of a bailable offence has the right to be released on bail. Bailable offences are enumerated in the second schedule of the CrPC, while non-bailable offences are enumerated in the first schedule and defined in section 4(b) of the CrPC. Section 496 of the CrPC stipulates that in cases where an accused is apprehended or detained without a warrant by a police officer for a bailable offence, they are entitled to be released on bail upon furnishing surety, with the amount of surety to be determined by the Court.[59]

It is possible that your client may not always be entitled to bail, and a Court has some discretion in determining whether your client will be released or detained pending trial.

---

[58] *Constitution of the Islamic Republic of Pakistan*, 10 April 1973, https://www.refworld.org/legal/legislation/natlegbod/1973/en/102484

[59] Section 496 of the Criminal Procedure Code, 1898

Unfortunately, the majority of capital crimes in Pakistan are considered non-bailable offences where the Court has the discretion and power to decide whether to grant you bail. However, you must seek bail for your client since, under established case law, grant of bail is a rule and its refusal is an exception.[60] Moreover, CrPC contains 3 exceptions in cases of non-bailable offences, i.e., when the accused is:

a) a woman

b) under 16 years of age

c) sick or infirm person

[60] 2002 SCMR 442

Bailable Offences	Non-Bailable Offences
In case of bailable offence, your client has the indefeasible right to bail, subject to sureties	In non-bailable offences, bail is granted as a matter of concession.
Conditions: In non-bailable offences, no conditions can be imposed except the demanding of security with sureties	**Condition**: Bail in cases falling in this category will be declined only in extraordinary and exception cases: - Where there is likelihood of abscondence of accused; - Whether there is apprehension of the accused tampering with the prosecution evidence; - Where there is danger of the offence being repeated if the accused is released on bail; and - Where the accused is a previous convict. Offences falling within the prohibitory clause Offences punishable with a) Death, b) imprisonment for life or c) Imprisonment for ten years. As a general rule, bail shall not be granted in such cases.
Who can grant bail in bailable cases: In addition to the magistrate, the officer in charge of a police station holds the authority to grant bail in bailable offences.	**Exceptions to rejection of bail:** - Minors - Women - Sick or infirm person
	The Court must consider several factors before deciding on bail: - The nature of the offence. - The seriousness of the offence. - The likelihood of the accused appearing for trial and the risk of evidence tampering - The potential punishment involved.[61]

[61] Ibid

Pre-arrest bail may be granted for bailable, non-bailable, and non-cognizable offences.[62] An application for pre-arrest bail should be made to the Sessions Judge.[63]

PRE-ARREST BAIL	POST-ARREST BAIL
To secure pre-arrest bail under Section 498 of the Criminal Procedure Code (CrPC) of 1898, the following conditions must be met: 1. There must be a genuine fear of imminent arrest imposing a virtual constraint on the petitioner. 2. The petitioner must physically surrender to the Court. 3. There should be reasonable apprehension of harassment due to ulterior motives, especially on the part of law enforcement. 4. The case must merit the exercise of discretion in favour of granting bail, taking into account the provisions of Section 497 of the CrPC. 5. Unless there is a reasonable explanation, the petitioner should have previously sought similar relief from the Sessions Court under Section 498 of the Cr.PC[64]	Post-arrest bail is granted to an individual after their arrest, regardless of whether the offence they are accused of is bailable or non-bailable. This type of bail can be awarded under Section 497 of the CrPC. Several essential conditions govern post-arrest bail under Section 497 of the Criminal Procedure Code. 1. Post-arrest bail cannot be granted if there are reasonable grounds to believe that the petitioner is guilty of an offence punishable by death, life imprisonment, or imprisonment for ten years. 2. Another condition for post-arrest bail is that there should be no reasonable grounds for believing that the accused has committed a non-bailable offence. However, if the matter requires further inquiry, post-arrest bail may still be granted under such circumstances.

[62] (PLJ 1973 Lah. 524)

[63] Section 498 of the Criminal Procedure Code, 1898

[64] PLD 1973 Lah. 256.

C. Client's Health And Welfare

If your client is detained pretrial, multiple consequential hardships may arise from this, mainly physical and mental, due to the isolation from support networks, as well as possible abuse from fellow prisoners or even authorities in prison. It is your obligation to protect your client's rights, those being:

- The right to be secure in one's person and to be free from torture or cruel, inhuman or degrading treatment, including prolonged solitary confinement;[65]
- The right to be held separate from convicted persons;[66]
- The right to be held separate from detainees of the opposite sex;[67]
- If a minor, the right to be held separate from adults;[68]
- The right to proper living quarters, including sleeping and bathroom facilities;[69]
- The right to proper working conditions;[70]
- The right to adequate recreational facilities;[71]
- The right to necessary medical care;[72]
- The right to food with nutritional value, and prepared in such a way as to obtain and/or maintain mental and physical health;[73]
- The right to be free from discrimination of all types, including the freedom to practise religion;[74]
- The right to have contact with family members and/or friends;[75]
- The right to have confidential contacts with legal counsel.[76]

D. Food and Medicine

Insufficient medication or food may affect your client's competence and ability to communicate with you. If your client is being deprived of sufficient medication or food, you should make a record of this situation with the Court, which may include a complaint about general conditions of detention facilities.

The prison authorities owe a duty of care to death row prisoners as wards of the state in which they grossly failed. This fundamental principle is elaborated by Hon'ble Chief Justice Athar Minallah in the case titled *Khadim Hussain vs Secretary Ministry of Human Rights* as:

"A prisoner, whether convicted or not convicted, has to place reliance for his right to life and medical needs solely on the authorities holding him/her in custody. This reliance gives rise to a duty of care on the part of the State and its functionaries."[77]

E. Cruel, Inhuman Or Degrading Treatment And Torture

If your client is being subjected to inhumane treatment or torture, your first step is to identify who has the authority to address the problem and what evidence you need to have the issue addressed. The Torture and Custodial Death (Prevention and Punishment) Act, 2022 empowers the Federal Investigation Agency to receive and investigate complaints of torture. Additionally, the National Commission for Human Rights is also empowered to look into complaints of torture. As a lawyer, it is your duty to protect your client against ill treatment and torture and devise an effective strategy to seek recourse, in case they are subjected to ill-treatment and torture. This would also entail you must be prepared to have confession, if any, or other evidence

---

[65] HRC, General Cmt. 15; U.N. General Assembly Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 23 (Dec. 9, 1988), http://www.un.org/documents/ga/res/43/a43r173.htm; U.N. General Assembly Code of Conduct for Law Enforcement Officials, Art. 5 (Dec. 17, 1979), available at: http://www2.ohchr.org/english/law/codeofconduct.htm; Constitution of Peru, Art. 2, 24(h).

[66] European Prison Rules, Rule 18.8(a), Recommendation of the Committee of Ministers to Member States No. 2006(2) (Jan. 11, 2006).

[67] European Prison Rules, Rule 18.8(b).

[68] European Prison Rules, Rule 18.8(c)

[69] European Prison Rules, Rule 18.

[70] European Prison Rules, Rule 26.

[71] U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 21 (May 13, 1977), available at http://www2.ohchr.org/english/law/treatmentprisoners.htm; European Prison Rules, Rule 27.

[72] European Prison Rules, Rules 39-48; Constitution of Peru, Art. 2, 24(h); Constitution of Uganda, Ch. 4, Art. 23(5)(b)-(c).

[73] European Prison Rules, Rule 22

[74] U.N. Standard Minimum Rules for the Treatment of Prisoners, Rules 6(1), 41, 42; U.N. General Assembly Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, Principle (5)1; European Prison Rules, Rules 13, 29.

[75] U.N. Standard Minimum Rules for the Treatment of Prisoners, Rules 6(1), 41, 42; U.N. General Assembly Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, Principle (5)1; European Prison Rules, Rules 13, 29

[76] U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 93; U.N. General Assembly Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, Principle 18; European Prison Rules, Rule 23.4; Rules of Detention of the Yugoslavia Tribunal, Rule 67(D); Constitution of Uganda, Ch. 4, Art. 23(5)(b).

[77] PLD 2020 Islamabad 268

extracted through torture discarded at the earliest opportunity.

CHAPTER 4

Investigation and Other Pre-Trial Preparation

One of your most fundamental obligations as counsel in a capital case is to investigate the facts of the alleged crime and the background of the accused. Lawyers who fail to conduct a thorough investigation are more likely to lose at trial, and their clients are more likely to be sentenced to death. As we explain in more detail below, investigation frequently reveals weaknesses in the prosecution's case and enables defence counsel to present a winning defence at trial. Investigation is also critical when you are seeking to avoid a death sentence, as you will need to gather mitigating evidence well before trial that will help you persuade the judge to spare your client's life. Finally, investigation will be necessary to determine whether your client may be ineligible for the death penalty—a possibility we explain later in this chapter.

Investigation and presentation of mitigating evidence is a crucial component of capital defence work. It offers defence lawyers an opportunity to provide the Court with evidence that may be weighed against aggravating factors. Mitigating evidence normally includes any information about a defendant's character and record that may be helpful in persuading a Court that the accused should not be sentenced to death. This can include evidence of a "defendant's impulsivity, impaired judgement, youth and impressionability, mental and developmental impairment or retardation, history of childhood sexual and physical abuse, substance addiction, and manageability in prison."[78] You can facilitate the information-gathering process by developing a trusting relationship with your client. Defendants are often hesitant to disclose certain information to their lawyers, even if it has the potential to be used as mitigating evidence. For example, defendants may be defensive or ashamed when it comes to mental or physical abuse by family members.[79] Many defendants, however, will divulge painful information in response to their lawyers' continuous efforts to build meaningful relationships with them.[80]

Conducting a defence-led investigation in a capital case is a crucial component of providing effective representation to your client. In such investigations, your aim is not only to gather facts pertaining to your client's potential guilt for a specific crime but also to build a case that can potentially avoid a conviction or argue for a reduced sentence.

In this context, there are two primary aspects to your pre-trial investigation in capital cases. Firstly, it's vital to assess whether your client falls into any **categories of individuals exempt from the death penalty or execution, this situation is described at length in Chapter 5.** This investigation is of utmost importance as it may entirely remove the death penalty as a sentencing option.

The second key component of your pre-trial investigation involves **mitigation, which is what this chapter deals with.** In the context of Pakistan, where trial proceedings do not segregate conviction and sentencing hearings, you must aim to present mitigating evidence and factors that could potentially prevent your client from receiving a death sentence or facing execution before the judge determines their guilt. To achieve this, it's imperative to initiate your investigation well in advance of the trial, as valuable evidence may become inaccessible if delayed. Additionally, gathering mitigating evidence related to the accused's background, even prior to trial, is essential. This evidence encompasses both the details of the committed crime and the social history of your client.[81]

[78] Leona D. Jochnowitz, Missed Mitigation: Counsel's Evolving Duty to Assess and Present Mitigation at Death Penalty, 43 No. 1 CRIMINAL LAW BULLETIN Art. 5 (2007).

[79] Bradley A. Maclean, Effective Capital Defense Representation and the Difficult Client, 76 TENNESSEE LAW REVIEW 661, 670 (2009).

[80] Id. at 671

[81] Manual for Capital Defence Lawyers in Pakistan, www.capitaldefencemanualpk.com/approaches-to-defence-led-investigation/. Accessed 4 May 202

A. Defence-Led Investigation

1. Know the witnesses inside out

When investigating the case, it is imperative for you to go to the greatest extent allowed under the law to scrutinise the witnesses to understand the case in the best possible way. During the investigation of the witnesses, you might want to consider these questions.

- Do they have any relationship with the defendant? If so, did their statements show bias?
- Were they under pressure from law enforcement authorities?
- Were they given any financial or other benefits to speak against the defendant?

It is imperative that as a lawyer you visit the scene of the crime and ask around the local community about the details. During the interactions, your main focus should be to find out details such as the character of the witness and their reputation in the area. By getting to know these details you will be able to formulate a case against the statements of the witness.

In Pakistan, criminal trials primarily rely on the examination of witnesses presented by the prosecution. The main purpose of witness examination is to corroborate facts with other witnesses and to present supporting evidence. The witness is first examined by the party that produced them, during what is known as the examination-in-chief. The opposing party has the right to cross-examine the witness. If new facts are introduced during cross-examination, the witness may be re-examined. Detailed provisions are outlined in Chapter X of the Qanoon-e-Shahadat Order, 1984.

Section 342 of the CrPC allows for the examination of the accused. This examination is termed the "Statement of the Accused" and is recorded without oath at any stage during the trial. The prosecution has no right to cross-examine the accused on their statement under Section 342 Cr.P.C, as the accused is entitled to refuse to give a self-incriminating answer.

It is important to prepare the defendant thoroughly so that he sticks to the theory of your case that you prepared and does not give information that could harm the defence. You may also be opening your client to aggressive examination by the prosecution, possibly re-opening existing trauma and risking the revelation of incriminating evidence against them. If your client is not adequately prepared, or is incapable of staying true to the theory of the case, allowing their examination may do more harm than good.

2. Use of forensic evidence

In Pakistan, historically there has been a lack of acceptance of forensic evidence in the Courts but in recent years there has been a significant change in Courts' willingness to accept scientific evidence.[82] You need to scrutinise in detail the forensic reports presented by the prosecution and the experts who produced them. Prosecution experts can be biased or have irrelevant or insufficient credentials.

Articles 59 and 164 of Qanoon- e- Shahadat Order, 1984 (QSO) are the relevant statutory provisions that deal with forensic evidence. Article 59 of QSO, 1984 specifically deals with expert opinion in the case when a Court wants to form an opinion regarding a point of science/or art, foreign law, to identify the handwriting or fingerprints, etc. Article 164 of QSO deals with the admissibility of forensic evidence and allows for evidence stemming from new technology to be admissible before the Courts.

Interestingly, in Pakistan, there is no specific legislation regarding the use of DNA as evidence.[83] DNA evidence is evaluated in the context of Articles 59 and 164 of the Qanun-e-Shahadat Order 1984. The former provision states that expert opinion on matters such as science and art falls within the ambit of 'relevant evidence', whereas the latter provision provides grounds for admissibility of various modes of proof made available due to advancements in science and technology. This empowers the Court to accept further evidence, so as a lawyer you must always urge the Court to investigate the DNA report in full detail.

3. Events surrounding the arrest

Frequently, individuals accused of crimes give statements to the police upon their arrest. It is your job to determine whether your client's statement was given freely and voluntarily, and in compliance with applicable laws, including constitutional provisions, statutes and international human rights law. In Pakistan, most criminal cases see confessions under

[82] Sadaf Ajmal, 'Effectiveness of Forensic Science in Pakistan Criminal Justice System' [2022] SSRN Electronic Journal.

[83] Rao Munir, Rana Zamin Abbas and Noman Arshed, 'DNA Profiling and Databasing: An Analysis of Issues and Challenges in the Criminal Justice System of Pakistan' [2020] Medicine, Science and the Law

police custody, this is a direct result of widely employed practice of torture and coercion.

Be prepared to challenge evidence that is "tainted" because it was obtained in violation of the defendant's rights. In Pakistan, confessions obtained through torture are prohibited and inadmissible under the Constitution of Pakistan, the Qanoon e Shahdat Order, 1984, and the Torture and Custodial Death (Prevention and Punishment) Act, 2022.[84]

Be particularly alert to the possibility that your client's statements were coerced or less than fully voluntary. If your client signed a statement, make sure that he actually knew what it said. Was he given time to read the statement? Did he have sufficient education to genuinely understand it? Was it in his native language? If a defendant has a mental disability or other vulnerability, he may have been susceptible to the influence of others and may have been more likely to confess to a crime. Studies show that individuals with intellectual disabilities are particularly prone to giving false confessions. Such individuals may not understand their right not to answer questions or to ask for a lawyer. Police can easily lead them through each step of the crime and suggest answers that would inculpate them. Reviewing transcripts of police interviews may reveal that your client was simply repeating the information given to him by the police. A confession may also have been extracted under duress. This could involve physical abuse, heavy pressure, or threats. If you suspect your client was abused while in custody, you may need to request a medical examination to help establish that he was beaten or tortured. The accused could also have been in a weakened state and unable to resist police pressure if he was denied food or needed medication, or he may have feared for his own safety or that of his family. Statements taken under such conditions are not voluntary and must be challenged.

4. Possible affirmative defences

As a defence lawyer, you have an obligation to investigate any possible defences your client may have. Defences to liability may include self-defence, grave and sudden provocation, insanity, or diminished capacity. Generally, a person who fears for their own safety or that of another person is entitled to use force against an assailant. If your client claims to have killed in self-defence, you must endeavour to prove that their fear was reasonable. Carefully review with your client why they believed they were in danger. Chapter IV of the PPC lays out the general exceptions to what amounts to an offence. Attempt to find witnesses who can verify your client's account. You may also be able to introduce evidence that the alleged victim had a reputation for violence, which will help to demonstrate that the defendant's fear was justified.

Requirements for the insanity defence, are articulated in S. 84 of the PPC, which states that '[n]othing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.' A lawyer must prove not just that their client was mentally ill, but that at the time of the crime, they were incapable of distinguishing between right and wrong or were incapable of controlling their behaviour. Even if the accused does not suffer from permanent mental illness, they may have been temporarily delusional, or they may have acted under the influence of an intoxicating substance administered involuntarily.

While a successful insanity defence is fairly rare, you may also be able to argue that the defendant committed the crime in a state of diminished capacity. This is usually not a complete defence, but it can be employed as a mitigating factor. If presented convincingly, the charges may be reduced to a lesser offence, or the sentence may be more lenient.

You should investigate a number of possible ways in which your client's capacity may have been diminished at the time of the crime. Mental illness or mental disabilities can affect a client's judgement and behaviour, even when they do not meet the legal definition of "insanity." Finally, you may be able to argue that your client was less responsible for their actions because they were provoked, were under extreme stress or were experiencing a strong emotion or despair at the time of the crime.

B. Eligibility For The Death Penalty

Your investigation should ensure that your client does not belong to any category that would make him ineligible for the death penalty. For example, persons under the age of 18 are ineligible for the death penalty. In many cultures, however, individuals do not have birth certificates and may not know their own age. Determining your client's age may require speaking with his parents, siblings, teachers, and others who could remember the month and year of his birth in relation to other current events, such as a particularly severe drought, the election of a leader, or

[84] Section 3 of The Torture and Custodial Death (Prevention and Punishment) Act, 2022

the death of a prominent figure. For more information, see Chapter 5. Counsel may also argue that conditions such as pregnancy or old age should make a client ineligible for a death sentence.

C. Mitigating Factors

Mitigating factors are circumstances under which the sentence served to your client can be reduced. The main purpose of mitigating factors is to humanise your client before the Court.

In presenting such evidence, your goal is not to excuse your client's crime, but rather to elicit sympathy, to show that he is less culpable and deserves a reduced punishment. Mitigating evidence can include any aspect of the defendant's character or background that would call for a sentence less than death, such as his mental frailty, capacity for redemption, lack of future dangerousness, and positive acts or qualities. Because it is such a critical part of a capital defence, Chapter 5 addresses the use and presentation of mitigating evidence in greater detail.

The Supreme Court of Pakistan has placed great importance on the mitigating factors, stating that all Courts in any capital case have a duty to consider them.[85] The Supreme Court of Pakistan has also adopted the 'balance-sheet' approach used by the Supreme Court of India to weigh mitigating factors against aggravating factors in capital cases.[86] This means that Courts are bound to draw up a list of mitigating factors and aggravating factors, and ensure that aggravating factors clearly overshadow mitigating factors before a death sentence can be awarded. However, it is important to keep in mind that the 'balance-sheet' approach is not a mere numerical exercise. The death penalty is not the appropriate punishment just because the judge is able to identify a greater number of aggravating factors. On the contrary, the judge is bound to exercise great caution against awarding the death penalty even in cases where only a single mitigating factor can be identified. It is therefore crucial to conduct a thorough mitigation investigation on behalf of your client even if you assess prima facie that he does not have a robust mitigation story. The most effective way to present mitigation is by telling your client's life story–their mitigation story–rather than presenting a list of mitigating factors.

[85] 2009 PLD 709
[86] Ibid

Practice Tip

Common Mitigating Factors recognized by the Courts of Pakistan:

- Age at the Time of the Offence
- Minor Role in Offence
- Lack of Premeditation
- Sudden Provocation
- Self-defence
- Intoxication
- Defendant's Mental Condition
- Self-Defence in Rape
- Compromise Between Parties
- Good Behaviour in Prison - Remissions
- Sole Bread Earner of the Family
- Capacity to be Rehabilitated and Integrated back into Society

Note that this is not a comprehensive list. Your client's life may include other forms of mitigation not presented here.

Success Story

The case of Shabbir Saib (Pakistan)

➢ Shabbir Zaib was a British-Pakistani national charged with murdering his wife in 2009. Shabbir's wife was killed during a home invasion by a criminal gang (known as "dacoity" in Pakistan). The robbers entered their house, tied up shabbir and his family, and when his wife refused to stay quiet, shot her in the head and killed her. Soon after the incident, shabbir's mother-in-law changed her initial statement to the police (at the behest of her sons) and accused shabbir of shooting his wife.

➢ as a dual national, shabbir was considered quite wealthy in his village and, like most foreign nationals of Pakistani origin with no strong ties to the community or the police, was a prime target for extortion. By framing shabbir for the murder of his wife, his in-laws sought to gain control over his property.

➢ by actively investigating the case and meeting each and every person associated with it, we were able to mount considerable pressure on the complainant. With each trip that our investigators made into his village, the word spread that shabbir's defence team was asking questions. Soon, the prosecution's witnesses became so nervous about the truth coming out that they opted to withdraw their statements accusing shabbir of the murder and to settle the case under shariah law

➢ this case demonstrates how rigorous investigation can reverse the power dynamics in favour of a defendant and eventually lead to his acquittal.

F. THE PROCESS OF INVESTIGATION

WHEN SHOULD INVESTIGATION BEGIN?

You should begin your investigation as soon as possible, ideally shortly after the accused is arrested. Valuable evidence may become unavailable if investigation is delayed. You should also immediately begin to gather mitigating evidence relating to the accused's background.

WHO IS RESPONSIBLE FOR INVESTIGATION?

In common law countries, the defence lawyer or defence team is responsible for thoroughly investigating both the crime and the defendant's circumstances. Counsel has a duty to independently investigate the facts provided both by the client and by the prosecution and police.

SOURCES OF INFORMATION

1. The Client's Role in the Investigation

Your client will likely be the starting point in your investigation and may help you identify additional witnesses and sources of exculpatory or mitigating evidence. As explained in Chapter 2, you will need to develop a relationship of trust with the client. Developing rapport with a client in a capital case can be difficult. It can be particularly difficult to gather potential mitigating information from a client. Many capital defendants suffer from anxiety, depression, mental illnesses, personality disorders, or cognitive impairments that hinder communication and trust. Psychiatric disorders, for example, may seem embarrassing to him—he may be reluctant to share information that makes him seem "crazy." Clients may be similarly reluctant to share information about childhood or spousal abuse. You may have to meet with a client multiple times before they feel comfortable sharing some of the information that could constitute critical mitigating evidence. Because your client may be reluctant to volunteer information, you should not rely on him to volunteer evidence of past abuse, but should instead ask him a number of factual questions that will help you determine some of your mitigation themes. Be alert to clues of mental disabilities, such as when a client seems to have a poor comprehension of his situation or has difficulty communicating details.

Be careful not to rely solely on information provided by your client. You should instead investigate all facts independently of what the defendant tells you. Even if a defendant wants to plead guilty, you must conduct a thorough investigation. Without such an investigation, you cannot be sure that he is competent and able to make an informed decision about his case.[87]

A client with limited mental capacity may not be able to communicate his life story to counsel. Keep in mind, also, that a client may pretend to understand things when he does not. Because of these limitations, you will likely have to seek answers to some questions about your client's history from family members, school and medical records, or persons who knew the client and his family.

2. The Family

A proper investigation will usually involve multiple interviews with the family of the accused. The family may also be an important source of mitigating evidence. You may have to pay multiple visits to family members to convince them that the private family history they reveal will not shift blame to them, but rather may help to save the defendant's life.[88]

3. Other Acquaintances and Professionals

You should also interview friends, neighbours, traditional leaders, teachers, clergy, sports coaches, employers, co-workers, physicians, social workers, and therapists. These people may be able to help complete the account of a defendant's life or may know details the family and defendant have been unwilling to volunteer. They may be able to share details about past trauma or hardship or events that demonstrate that the client is a compassionate, helpful, and caring individual.

4. Documentary Evidence

You should always seek documents that corroborate mitigation themes such as limited mental capacity and good character.

5. Prison Staff

Interviews with prison staff may provide valuable information about an offender's behaviour in prison, including any education or training or treatment he has pursued.

---

[87] See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, § 10.7, "Investigation" (Feb. 2003), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guid elines.authcheckdam.pdf.

[88] Daniel Payne, Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right, 16 CAPITAL DEFENSE JOURNAL 43 (2003).

7. Psychiatric Evaluations

In all cases, you should consider retaining a mental health expert to assess your client's mental health through testing and a clinical interview.

8. Expert Witnesses

In most cases it is important to identify and retain experts in the investigation phase of the case. The expert may provide testimony to the court or may be a consulting expert not called to testify.

Overcoming Barriers

What should I do if courts in my jurisdiction don't typically allow expert testimony?

➢ Do not assume that the court will not allow it in your case—there is a first time for everything. Navkiran Singh, a human rights lawyer from India, reported that he worked on a case where, despite the odds, the court allowed him to present expert testimony concerning the suicidal tendencies of his client's wife, who his client was accused of killing.

➢ Similarly, in Malawi, introduction of expert testimony – particularly with respect to an offender's mental health – has now become accepted practice where before it was rarely, if ever, used. Since the introduction of such evidence, several judges have incorporated information gleaned from expert reports into their sentencing judgments.

➢ In the *Safia Bano Case,*[89] the court appointed a mental health expert as an Amicus Curiae to help the court understand the bearing of mental illness on the actions of the defendants, and the degree to which they would understand the rationale of the sentence being handed against them.

[89] 2021 PLD 488

CHAPTER 5

Defending Vulnerable Populations

DEFENDING VULNERABLE CLIENTS

Over the years, international law has highlighted several categories of defendants that require special protection in the criminal justice system. It is likely that over the course of your career, you will represent defendants who fall into one or more of these categories. It is important that you are familiar with each of these categories and the special rights they provide for your client, as defined and protected under international law. In some cases, international law prohibits the execution of an entire category of defendants: individuals who were under 18 years of age at the time the crime in question was committed, pregnant women[90], older adults[91], mothers having dependent infants,[92] mothers of young children[93] and the mentally disabled[94]. In other cases, international law entitles certain categories of defendants to special legal procedures, such as in the case of foreign nationals. In still other situations, certain categories of defendants possess characteristics, such as mental disabilities, that are widely recognized as critical mitigating evidence during the sentencing process. This chapter discusses each of these classes of defendants. It is designed to help you understand the parameters of the categories, to lead you through the rights to which your client is entitled if they fall within those categories, and to suggest useful methods you might apply to best protect those rights.

[90] ICCPR Art. 6 5
[91] ACHR Art.5§4
[92] African Charter on the Rights and Welfare of the Child, Art. 30(e); Arab Charter on Human Rights, Art. 12.
[93] ICCPR Art. 6 5.
[94] UN Human Rights Council, Report of the Special Rapporteur to the Commission of Human Rights, S. Amos Wako, 6 February, 1989, E/CN.4/1989/25, para 279-283.

A. Pregnant or Nursing Women

What does it mean for my client if she is pregnant?

If your client is a person who can give birth, one factor to consider when devising a legal strategy is to employ defences that may be available to them by virtue of their special circumstances. As noted by the Cornell Center on the Death Penalty Worldwide, in almost every country in the world, it is illegal to execute a pregnant woman.[95] Hence, if your client is pregnant, you should present this fact to the Court and argue that their execution would be in violation of international and domestic law.

Under Pakistan's law, if a woman sentenced to death is found to be pregnant, the High Court is bound to postpone the execution, and at its discretion may commute the sentence to imprisonment for life.[96]

What Does It Mean for My Client If She Is Nursing Or Has Recently Given Birth?

Similarly, it is important that you determine the parental status of any clients who are women. If your client has just given birth or is still nursing, it may affect her fitness for execution. The execution may be postponed for up to two years after the child is born.[97] As a lawyer it is your responsibility to stay updated on your client's postnatal status and present it before Court to ensure they get the concessions that they deserve under domestic and international law.

B. Juveniles and the Elderly

Why is the age of my client important?

The age of your client—either currently or at the time the crime in question was

committed—may qualify them to be exempt from the death penalty altogether. It's your responsibility to thoroughly investigate and verify your client's age through official documents such as birth certificates, identification cards, school records, or any other relevant records. If such documents are unavailable, you may need to gather evidence from witnesses or other sources to establish their age. Additionally, emphasising your client's age and life experiences can also humanise them in the eyes of the court and potentially garner sympathy from the judge. By portraying your client as a vulnerable individual who has either lived a long life or has their whole life ahead of them, you may be able to evoke compassion, which could influence the outcome of the case.

Juveniles

If your client is or was a juvenile at the time of commission of the offence, a host of international standards as well as domestic legal safeguards exist to guide you in representing them.

Under international law, the age of majority, or age under which your client is considered a juvenile, is 18. In 2006, the Committee for the Rights of the Child raised serious concerns around Pakistan executing individuals who were minors at the time of commission of the offence.[98]

Pakistan's Juvenile Justice System Act, 2018 (JJSA) sets the age of minority at 18 in line with the international standard. Moreover, the JJSA provides that juvenile offenders have the right of legal assistance at the State's expense, along with the right to be informed of their rights by a legal practitioner within twenty-four hours of being taken into custody.[99]

When representing a juvenile client, you must invoke the rights available to them under Pakistan's law. If the juvenile client was deprived of their rights, you must bring this to the Court's notice.

You must also ensure that your client is not subject to practices such as pre-trial detention. If a Court determines that pre-trial detention is necessary, you should make sure that your client is detained in facilities designated solely for juveniles, or at the very least that he is not detained together with adults.

Juveniles may also not understand their rights as clearly as adults. You should take care to explain to them the procedures and protections provided to them by law. Because juvenile clients may not understand their right to communicate with counsel, you should make regular efforts to reach out to such clients regularly and frequently.

In Pakistani jurisprudence, a plea of juvenility is only held to be admissible if raised at the time of investigation and trial. It is therefore critical to raise it

---

[95] See Nigel Rodley, The Treatment of Prisoners Under International Law, 322, 324 (Oxford Univ. Press 2008).

[96] Code of Criminal Procedure (ACT V OF 1898), § 382 https://www.fmu.gov.pk/docs/laws/Code_of_criminal_procedure_1898.pdf

[97] *Pakistan - The Death Penalty*, Amnesty International 1996, https://www.amnesty.org/en/wp-content/uploads/2021/06/asa330101996en.pdf

[98] Concluding Observations on the fifth periodic report of Pakistan, CRC/C/PAK/CO/5, https://digitallibrary.un.org/record/835009?ln=en&v=pdf#files

[99] ıile Justice System Act 2018, S 3, https://sja.gos.pk/assets/library/acts/jjsa2018.pdf

as soon as you can. However, if you are taking up the case at a later stage, there is also jurisprudence that dictates that even after leave has been denied to appeal to the Supreme Court, a proper judicial enquiry must determine the age of a person alleging to be a juvenile.

Overcoming Barriers

What should I do if it's difficult to determine my client's precise age?

Typically, the age of your client at the time the crime is easily determined. Countries are obligated under international law to provide effective birth registration systems,[100] and the production of a birth certificate should provide adequate documentation of your client's age.

Often, however, developing countries or countries recently emerging from conflict are unable to provide adequate birth registration systems. In situations where the age of a child involved in the justice system is unknown, the UN Economic and Social Council has mandated that countries take measures to ensure that the "true age of a child is ascertained by an independent and objective assessment." Furthermore, international standards suggest that once there is a possibility that your client may be a juvenile, the state must prove he is not before he can be treated as an adult in the criminal justice system. Nevertheless, as your client's advocate, you should make every effort possible to prove that your client is a juvenile if you believe him to be one. There are a number of different steps that you can take to determine the age of your client when official state records are unavailable.

Local community mechanisms that are in place to record births can be useful in providing documentation of your client's age. You should begin by interviewing the family to determine whether the family has NADRA records or school records in the case of your client.

If you cannot obtain documentation of your client's age through such traditional mechanisms, you can also seek the assistance of a physician.[101] Physicians are sometimes able to approximate age through an ossification test. It is important to be careful if you decide to seek such assistance, however: these methods can only estimate age. As a result, you must take care to emphasize the speculative nature of such procedures and ensure that an overbroad approximation does not disqualify your client from protections he might otherwise receive as a minor.[102]

Finally, you may be able to approximate the age of your client on your own by speaking to his family members. Many families are able to connect the birth of your client with a historically significant event, such as an earthquake or warfare, even when they can't remember an exact date. This should give you a general sense for your client's age.[103]

The Elderly

If your client is of an unusually advanced age, it may have similar implications for his criminal liability. Unfortunately, the international community is just beginning to address the situation of the elderly in the criminal justice system, so it does not offer as much guidance as it does for juveniles. Nevertheless, in a resolution on implementation of the Safeguards, ECOSOC has called for the setting of a maximum age limit.[104]

It is still important that you raise your client's age in order to disqualify him from the death penalty on compassionate grounds. This can also be raised in the post-appeal stage i.e. in a mercy petition.

[100] See ICCPR Art. 24(2), CRC Art. 7.
[101] Guidelines of Action on Children in the Criminal Justice System, ECOSOC Res. 1997/30, 12 (July 23, 1996).
[102] CRC, General Cmt. 10 ¶¶ 31, 39.
[103] UNICEF, Innocenti Insight: Birth Registration and Armed Conflict (2007), http://www.unicef.at/fileadmin/medien/pdf/birth_registration_and_armed_conflict.pdf
[104] Rodley, The Treatment of Prisoners Under International Law, p. 325.

Overcoming Barriers

What should I do if it's difficult to determine my client's precise age?

Countries are obliged to provide an effective birth registration system under international law.[105] In Pakistan, lack of birth documentation is a huge issue: documents are either never filed, or simply lost. In this case, you may attempt to investigate your client's age by asking questions about their life history (key dates, age during notable events), unofficial corroborating documents (letters from friends/family, newspaper articles, statements by community members). If your client is unsure, you should carry out a social investigation, interviewing their family, friends, neighbours, and other community members to determine their age.

However, in a situation where the individual's age is unknown, the UN Economic and Social Council mandates that States take measures to ensure that the ''true age of a child is ascertained by an independent and objective assessment''. Where there is no documentation, you should seek out a physician to determine your client's age.

The JJSA sets out the procedure for age determination of juveniles under section 8.

Determination of age. ---(1) Where a person alleged to have committed an offence physically appears or claims to be a juvenile for the purpose of this Act, the officer-in-charge of the police station or the investigation officer shall make an inquiry to determine the age of such person on the basis of his birth certificate, educational certificates or any other pertinent documents. In absence of such documents, the age of such accused person may be determined on the basis of a medical examination report by a medical officer.

(2) When an accused person who physically appears to be a juvenile for the purpose of this Act is brought before a Court under section 167 of the Code, the Court before granting further detention shall record its findings regarding age on the basis of available record including the report submitted by the police or medical examination report by a medical officer.

[105] International Convention on Civil and Political Rights, Article 24, Paragraph 2

C. Individuals with Mental Disabilities

What does a mental disability mean for my client?

Your client's mental disability, depending on the type, will serve as a mitigating factor in sentencing, disqualify him from death penalty eligibility and/or relieve him of criminal liability. In order to be fit to stand trial, your client must be fully capable of understanding what is happening and why they are on trial.

On 10 February 2021, in the *Safia Bano* case, the Supreme Court of Pakistan examined in detail the issue of mentally ill defendants on Pakistan's death row. The Honourable Judges deliberated on numerous questions of importance, particularly the effects of mental illness on a person's capacity and mens rea, how to determine the competency of a defendant to stand trial, whether a trial judge can determine a defendant's state of mind without consulting a mental health expert, whether mercy petitions that fail to disclose the prisoner's mental illness are subject to judicial review, whether convicts with mental illness can be executed, and the applicability of the prohibition on executing mentally ill persons in international law. Furthermore, the Court also recommended changing the legal language related to mentally ill persons.[106]

The Apex Court commuted the death sentences of two severely mentally ill defendants, Kanizan Bibi and Imdad Ali, to life imprisonment.[107] The Court also stayed the execution of mentally ill prisoner Ghulam Abbas and directed that a fresh mercy petition, including his plea of mental illness, be filed on his behalf along with copies of his entire medical record and copies of the report of the Medical Board constituted by the Court.

In its deliberations on the execution of mentally ill defendants, the Supreme Court held that "if a condemned prisoner, due to mental illness, is found to be unable to comprehend the rationale and reason behind his/her punishment, then carrying out the death sentence will not meet the ends of justice."[108]

What kinds of mental disabilities are relevant in capital proceedings?

The term "mental disability" refers to a broad range of possible conditions. Mental disabilities may play a huge role in the outcome of your case. If you can determine that your client had a mental disability at the time of the commission of offence, you may be able to eliminate criminal responsibility altogether by invoking section 84 of the PPC. If your client is mentally incompetent, you will have one of the strongest defences against the application of the death penalty. Persons with mental disabilities are ineligible for the application of the death penalty, as both international law and domestic law proscribe the execution of individuals with such conditions. Even if your client's mental illness is not severe enough to make him ineligible for the death penalty, it may serve as a critical piece of mitigating evidence during the sentencing procedures and may be used to obtain a less harsh sentence.

[106] 2021 PLD 488 Supreme Court
[107] Ibid.
[108] Ibid.

Practice Tip

It is imperative that you dedicate a considerable amount of time to meeting with your client on a regular basis, as this will make it easier to identify if there are any symptoms of mental illness.

When your client is undergoing a professional mental evaluation or treatment, you must work closely with the person conducting the assessments. The reason for this is that you may have gathered a considerable amount of critical information on your client's background through conversing with him, possibly picking up on cues that directly relate to his mental health status. If you have established a trusting relationship, your client may be less compliant when speaking to a mental health professional than when speaking with you and be less willing to disclose information. The lack of information given may lead the consultant to draw incorrect conclusions, further harming your client and his defence.

Categories of Mental Disability

It is crucial to at least have a general understanding of the categories of a mental disability and how they come to be. They may arise due to mental disorders, intellectual disabilities or brain damage. Below is a general description of the three:

Mental disorders: a mental disorder is characterised by a clinically significant disturbance in an individual's cognition, emotional regulation, or behaviour - usually associated with distress or impairment in important areas of functioning (WHO). They can be caused by an array of factors such as chemical imbalance in the brain, genetics, and mainly traumatic events in early childhood (or any stage of life). Mental disorders include Anxiety disorders (generalised anxiety disorder, panic disorder, social anxiety disorder, separation anxiety disorder), Depression (major depressive disorder), Bipolar Disorder, Post-Traumatic Stress Disorder (PTSD), Schizophrenia, Dissociative Disorder, Attention Deficit Hyperactivity Disorder (ADHD). Additionally, personality disorders are crucial and must be taken into consideration. They fall under the following categories. Cluster A (pattern of thinking/behaving in a manner that reflects suspicion and lack of interest in others), which includes Paranoid personality disorder, Schizoid personality disorder and Schizotypal personality disorder. Cluster B (consistent dysfunctional pattern of overly dramatic and emotional behaviour as well as highly unpredictable thinking) includes Borderline personality disorder, Histrionic personality disorder, Narcissistic personality disorder and Antisocial personality disorder. Cluster C (dysfunctional patterns of anxious thinking/behaviour) includes Avoidant personality disorder, Dependent personality disorder and Obsessive Compulsive personality disorder. Although it may seem less relevant to you, you should make an effort to look into the listed disorders since, as previously mentioned, there may come a time where the mental health professional allotted to your client may not be equipped with the proper knowledge or context of your client and their mental wellbeing. In that case, having even the most generalised knowledge on these disorders may be highly useful in your defence.

Intellectual Disability: intellectual disability involves issues with intellectual functioning (learning, judgement, problem solving abilities) and adaptive functioning (daily life activities, communication, independent living) that arise before the age of 18. This disability is assessed through psychometric sounds of intelligence. The causes of intellectual disabilities include genetic syndromes, severe head trauma, brain malformation, and maternal disease. The three adaptive areas of functioning are considered to be conceptual (language, reading, maths, reasoning, knowledge, memory), social (empathy, social judgement, communication skills, relationship maintenance, ability to understand/follow directions), and practical (independence in personal care, job responsibilities, organisation). If your client possesses an intellectual disability, it is more than likely that they lack the ability to understand why they are under trial (unfit to plead) or why they committed the crime in question; therefore it is essential that you have a general understanding of these disabilities, as they may serve as mitigating factors in your case.

Brain damage: brain injury and mental health are often regarded as entirely different diagnoses. However, there are multiple instances in which brain injury can lead to the development of mental illness and/or intellectual disability. Additionally, if there is a pre-existing mental illness, it may be further deepened post brain injury. Mental illness due to brain injury is often overlooked, therefore you should always investigate any incidents in your client's life that involve concussion or injuries to the head. Obtain your client's medical records and ask them directly if they have ever suffered head trauma. If they have, seek out a clinical psychologist, neuropsychologist, or neuropsychiatrist to assist you in the investigation and assessment of your client.[109]

Trauma: Traumatic experiences such as physical abuse, sexual abuse, neglect, or witnessing violence can have profound effects on an individual's psychological well-being. Trauma can lead to the development of conditions such as post-traumatic stress disorder (PTSD), depression, anxiety disorders, and substance abuse disorders. Trauma can also impair emotional regulation and decision-making abilities

PRACTICE TIP

Detecting mental impairments

How can you find out whether your client suffers from a mental illness?

The questions you ask will vary, depending on the cultural context and your client's educational level.

Here are some questions that lawyers have found useful to ask their clients:

1. Have they ever suffered a head injury?
2. Have they ever been in an accident?
3. Have they ever lost consciousness?
4. Have they ever been admitted to the hospital?
5. Have they ever seen a traditional healer for any reason?
6. Have they ever been prescribed traditional remedies for an illness of any sort?
7. Have they ever suffered from seizures?
8. Have they ever had periods where they lost track of time and "woke up" at a later time?
9. Have they ever had inexplicable rages?
10. Do they ever feel like they are possessed or "bewitched?"
11. Does anyone in their family have mental problems?
12. Have they ever been prescribed medication for any sort of mental problem?

It is very important to note that your client may be mentally impaired without this being noticeable over the course of an ordinary conversation. This is why it is so important to meet with your client at length and to seek the guidance of a mental health expert.

[109] "Mental Disorders." *World Health Organization*, World Health Organization, 8 June 2022, www.who.int/news-room/fact-sheets/detail/mental-disorders/?gclid=CjwKCAjwv-2pBhB-EiwAtsQZFDHLWtOd6wSRfKNqgYLMCHwLQcaCphoY6nlSPtWcxl46J5EXfkVUsxoCEWIQAvD_BwE

The importance of a mental health assessment

The most reliable and credible form of evidence you must acquire to support your client's claim of mental illness is an assessment by a mental health expert. You should therefore make it a priority to ensure that a professional assessment is conducted.

You should seek out a psychiatrist or other mental health professional to assess your client and use the acquired assessment throughout the capital defence process, even if your client is found competent/of sound mind, as other psychiatric conditions may be useful mitigating factors in your argument to reduce your client's sentence.

What duties do I have to a client with mental disabilities?

Your client's mental disability may cause him to be more vulnerable to the complications of the legal system and the dangers of incarceration. You have special responsibilities to ensure he understands his rights and ensure he is treated with due care while incarcerated. If your client develops a mental disability during incarceration, it is your duty to raise mental health grounds as soon as they come to your attention and in further appeals and clemency proceedings.

Ensuring Your Client Understands Their Legal Rights

Individuals with disabilities may not completely understand their rights. It is therefore your responsibility to ensure that your client understands his rights as well as the nature of the proceedings against him. Additionally, you must arrange to meet with the client on a regular basis, as your client may not be able to express a desire to meet with you when needed or may not understand how to request a meeting.

Ensuring Your Client Receives Treatment

You should also take steps to ensure that your client receives adequate treatment while he is incarcerated. Nearly all of the central international human rights mechanisms provide for a right to an adequate standard of living and health care, and the U.N. Standard Minimum Rules for the Treatment of Prisoners mandate that the standards set by these mechanisms should be applied unwaveringly in prisons.

Ensure that your client receives treatment during incarceration, beginning when they are admitted into prison (at which time they should be assessed by a mental health professional). Make sure to check prison records for the assessment records of your client. Ensure that your client receives regular health examinations and assessments, and consider daily check ups on your client's general well being.

Success Story

Safia Bano v Home Department, Government of Punjab is a landmark judgment decided by the Supreme Court of Pakistan that prohibits the execution of persons suffering from mental illness. Prior to this case, the Court did not recognize that mental illness could lead to a legal finding that applying the death penalty would be unjust. It is an exceptional case - a bench of five judges of the Supreme Court of Pakistan decided to convert capital punishments of three condemned prisoners into life sentences.

D. Foreign Nationals

If your client is a foreign national, it is likely that they are entitled to additional legal/diplomatic assistance during their trial. According to article 36 (1)(b) of the Vienna Convention on Consular Relations, the authorities must immediately inform incarcerated foreign nationals of their rights to have their respective consular representatives notified of their incarceration. Additionally, they have the right to communicate freely with consular staff. This principle was reinforced by the International Court of Justice (ICJ) in the *Jadhav Case (India v. Pakistan)*,

where the ICJ ruled that Pakistan has breached its obligations under Article 36, paragraph 1 (a) and (c), of the Vienna Convention, by denying consular officers of India access to Mr. Jadhav, contrary to their right to visit him, to converse and correspond with him, and to arrange for his legal representation.[110]

Initially, you must establish whether your client is a foreign national and which state he belongs to. You must inform your client of their right to communicate with their consulate. If your client consents, contact the office of the consulate to inform them of your client's situation.

Your client's consulate may provide financial and/or legal assistance, as well as easing the process of contacting the client's family members and developing the client's social history. They may also provide diplomatic assistance and facilitate access to international tribunals.

Most importantly, if the detaining authorities do not inform your client of their consular rights or attempt to prevent your client from exercising them, you should petition the Court for a remedy. If your client gave their statement before being made aware of their rights, file an application to exclude their statements on said grounds. If your client was sentenced to death without the knowledge on these rights, you should argue that their sentence be vacated.

It is likely that your client may not comprehend the legal landscape of the country in which they have been incarcerated, therefore make an effort to explain every necessary right and procedures to which your client will be subjected to. In addition, you must ensure that all court documents and proceedings including the charges against them are explained to them in a language that they understand.

---

[110] Para 119 Jadhav Case (India v Pakistan) 17 July 2019 https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf

CHAPTER 6

Trial Rights and Strategy

Under international law, all individuals are entitled to due process and equality before the law.[111] Both of these fundamental rights are multi-faceted. They include, among other things, the right to a fair hearing before an impartial tribunal, the right to trial without undue delay and for a reasonable duration, the right to be present at trial and to participate in a meaningful way, a presumption of innocence, and a right against self-incrimination. These rights are reflected in the Constitution of Pakistan, whereby your client holds the fundamental right to a fair trial.[112]

[111] See, e.g., UDHR Arts. 7, 10; ICCPR, Arts. 2(1), 3, 26; CEDAW Arts. 2, 15; ICERD Arts. 2, 5, 7; ACHPR Arts. 2, 3; ACHR, Arts. 1, 8(2), 24; ECHR, Arts. 6,14; ADRDM, Arts. II, XVIII.

[112] Constitution of the Islamic Republic of Pakistan, art. 10A.

A. What is included in the right to fair and public hearing?

Some of the basic guarantees emanating from the right to fair trial[113] include:

- "equality of arms" between prosecution and defence;
- right to adversarial proceedings;
- right to prompt, intelligible and detailed information about the charges; and
- adequate time and facilities to prepare the defence.
- freedom from forced confessions;
- ability to question relevant witnesses;
- effective representation involving confidential attorney-client meetings during all stages of the criminal proceedings, including criminal interrogation, preliminary hearings, trial and appeal
- respect towards the presumption of innocence,
- effective right of appeal;
- to access legal documents essential for conducting the legal defence or appeal,
- suitable interpretation;
- Access to documents and procedural accommodation for persons with disabilities;
- independence or impartiality of the trial or appeal court.

According to the Lawyers Committee for Human Rights, "[t]he single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defence and the prosecution. Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of a trial."[114] It is impossible to identify

all of the situations that could violate this principle. Such situations might range from excluding the accused and/or counsel from a hearing where the prosecutor is present or, perhaps, denying the accused and/or counsel time to prepare a defence or access to relevant information. This principle encompasses your access to the prosecution's case file to the extent that is necessary to refute the charges and prepare your client's defence. Watch closely for such situations and, where they arise, make appropriate objections before the Court.

Another aspect of your client's fair trial rights includes the right to a public hearing, which helps ensure that your client's due process rights are honoured during trial. Although there are some circumstances under which the public can be excluded from judicial proceedings, this is not the case when the pronouncement of a judgment is involved. Under ICCPR Article 14(1), judgments "shall be made public" except where the interest of juvenile persons otherwise requires or where the proceedings concern matrimonial disputes around the guardianship of children.[115]

B. THE PRESUMPTION OF INNOCENCE

Under international law, your client is entitled to be presumed innocent.[116] According to Article 14(2) of the ICCPR: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law." Although Article 14(2) does not specify the required standard of proof, it is generally accepted that guilt must be proved "to the intimate conviction of the trier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law."[117]

Does this presumption apply to affirmative defences that your client may raise at trial? Not necessarily. Therefore, if your client argues that he acted in

---

[113] For example, BPIJ 5 provides that "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures." At a minimum, the right to a fair hearing, established in ICCPR Article 14(1), encompasses the procedural and other guarantees laid down in paragraphs 2 to 7 of Article 14 and Article 15. But in truth, a defendant's fair trial rights are even broader in scope, since Article 14(3) refers to the specific rights enumerated as "minimum guarantees." Therefore, a trial may not meet the fairness standard envisaged in Article 14(1), even where the proceedings are technically in compliance with paragraphs 2-7 of Article 14 and the provisions of Article 15.

[114] Lawyers Committee for Human Rights, WHAT IS A FAIR TRIAL? A Basic Guide to Legal Standards and Practice, p. 12, March 2000 [hereinafter, LCHR FAIR TRIAL Manual].

[115] LCHR FAIR TRIAL Manual, p. 3.

[116] See, e.g., ECHR, Art. 6(2); ICCPR, Art. 14(2). See also ACHR Art. 8(2).

[117] See Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: "The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening," Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, p. 76, n.10 (June 3, 1994) [hereinafter The Final Report]

self-defence or under duress, for example, the defence team may bear the burden of proof to demonstrate that the defence applies.

Case officials, adjudicators, and public authorities have a duty to maintain the presumption of innocence by "refrain[ing] from prejudging the outcome of a trial."[118] You should pay close

attention to the appearance of your client during a trial in order to maintain the presumption of innocence. For example, you should be prepared to object if the Court requires your client to wear handcuffs, shackles, or a prison uniform in the Courtroom without a reasonable justification.

C. RIGHT TO BE PRESENT AT TRIAL

To properly conduct a capital defence, you will need immediate access to your client in open Court in order to communicate about evidence and witness testimony, among other things. Therefore, your client must be present at trial to participate in his own defence.[119] For your client's participation in the defence to be meaningful, he will have to understand what is happening during the proceedings. As noted in Chapter 2, international law establishes that everyone is entitled "[t]o have the free assistance of an interpreter if he cannot understand or speak the language used in Court."[120]

You should ensure that any interpreter provided by the Court is competent and experienced, and whenever you observe that the interpreter has failed to translate accurately, object. Generally speaking, the right to an interpreter includes the translation of all the relevant documents.[121] When granted, the right to the assistance of an interpreter is usually free and cannot be restricted by seeking payment from your client upon conviction.

D. RIGHT TO CONFRONT AND EXAMINE WITNESSES

Your client has the right to examine the witnesses against him. This right also allows the defendant to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him.[122] The general principle is that accused persons must be allowed to call and examine any witness whose testimony they consider relevant to their case. Similarly, they must be able to examine any witness who is called, or whose evidence is relied on, by the prosecutor. Several other rights spring from these basic principles.

First, the parties should be treated equally with respect to the introduction of evidence by means of interrogation of witnesses. Second, the prosecution must tell you the names of the witnesses it intends to call at trial within a reasonable time prior to the trial so that you may have sufficient time to prepare your client's defence. Finally, your client also has the right to be present during the testimony of a witness and may be restricted in doing so only in exceptional circumstances, such as when the witness reasonably fears reprisal by the defendant.

To prevent violations of a defendant's right to examine and have examined witnesses against him, you must press the Courts to scrutinise closely any claims by the prosecution of possible reprisals. Removal of your client or co-defendants from the courtroom should occur only in truly valid instances. You should immediately object when a witness has been examined in the absence of both the defendant and counsel. Similarly, the use of the testimony of anonymous witnesses at trial is generally impermissible, as it represents a violation of the defendant's right to examine or have examined witnesses against him.

E. RIGHT TO KNOW THE GROUNDS OF THE TRIBUNAL'S DECISION

You should advocate strongly for your client's right to access a reasoned, written opinion from the Court, completed in a prompt fashion. This right is inherent in the right to a fair trial and forms the basis for your client's right to appeal. If the Court does not

[118] ECHR Art. 5(2); HRC General Cmt. 13 (Art. 14), 7 (April 12, 1984).

[119] ICCPR Art. 14(3)(d); ICTY Statute Art. 21(4)(d); ICTR Statute Art. 20(4)(d); ICC Statute Art. 67(1)(d). Although the right to be present at trial is not expressly mentioned in the European Convention, the European Court has stated that the object and the purpose of Article 6 mean that a person charged with a criminal offence is entitled to take part in the trial hearing. See Colozza and Rubinat, App. Nos. 9024/80, 9317/81, 27, ECtHR (February 12, 1985).

[120] See Art. 14(3)(f)

[121] For example, the Inter-American Commission considers the right to translation of documents as fundamental to due process. See Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/11.62, Doc.10, rev. 3, IACHR (1983)

[122] ECHR Art. 6(3)d; ICCPR Art. 14(3)(e). ACHR Art. 8(2)(f) recognizes the right of defendants to examine witnesses against them and those testifying on their behalf, under the same conditions as the State, with the purpose of defending themselves.

automatically provide a written judgment, you should move the Court to provide such a document.

II. Trial Strategy

In order to effectively advocate for your client at trial, you will have to consider how to develop your trial strategy. First and foremost, this involves developing a theory of the case that will give your defence its overall shape. Your theory of the case should guide you through the evidence you plan to introduce, including your selection of witnesses and exhibits. A well-developed theory of the case should carry you through all phases of trial, including jury selection, witness examination, and opening and closing arguments.

Your trial strategy will be affected by local laws, culture, and your assessment of how the judge will respond to the tactics you employ.

F. DEVELOPING A THEORY OF THE CASE

Trials are often a contest between two versions of what happened: the version offered by the

prosecution, and the version offered by the defence. A theory of the case is necessary in order to make sure that the case presented by the defence is consistent and believable. A theory of the case can also provide a guide for your investigation of the defence. For example, your theory may be that your client killed the deceased in self-defence. Or, it may be that this is a case of mistaken identity, and your client is not guilty of any crime. Whichever theory you choose, you will need to highlight evidence that is consistent with your theory, and provide an explanation for evidence that appears to undermine your theory.

1. Comprehensive

A good theory of the case will be comprehensive. Your theory should tie together all of the various facts of the case into a single, unified narrative. A theory of the case is more than just the legal defence. A good theory of the case must be simple to understand for an average person while presenting a narrative that accounts for every piece of evidence that will be presented in the case. You should analyse all the facts and legal arguments that you might present, and select the theory of the case that best fits every element.

2. Consistent

In order to convince the jury of your theory of the case, your theory must be consistent. In a capital trial, you must consider both the guilt phase and the penalty phase of the trial. Your theme should be presented consistently through both phases. Stated another way, your theory at the guilt phase of trial must complement, support, and lay the groundwork for the theory at the mitigation phase. If you take contradictory positions at the guilt phase and the penalty phase, you will lose credibility with the judge and jury. You should be careful, then, to formulate a single consistent theory that will be reinforced at both the guilt and mitigation phases of trial.

Some lawyers may be tempted to argue every conceivable theory available, challenging every point of evidence, no matter how consequential, even if those theories contradict each other. This is a mistake you should avoid. If you offer multiple competing theories, the court will not know which theory of the case to believe. Instead, focus on one, singular narrative theory of the case and make your presentation of the evidence consistent with that theory.

3. Constant

Judges start forming an opinion about each case very early on. Because of this, you should be prepared to present your theory of the case constantly, at every stage of the trial, including witness preparation, pretrial hearings, opening statement, presentation of evidence, and closing arguments.

You should make sure to introduce concepts that will be important at the penalty phase of trial as early as possible. For example, if mental health issues are part of your theory of the case at the penalty phase, you should introduce evidence relevant to mental health early on.

4. Concise

Even in complex cases, you should usually be able to state the theory of the case concisely, often in a single phrase or in a sentence or two. A concise and simple statement of your theme can be repeated throughout the trial, during your arguments and presentation of evidence. Repetition of a simple theme will help the judge remember your theory of the case.

G. IDENTIFYING WITNESSES YOU WILL CALL

1. What Kind Of Witnesses Should I Call?

The number and type of witnesses you should call will vary widely depending on the crime your client is charged with, the strength of the prosecution's case, and the resources available to you and your client. In rare instances, your client may be best served by not calling any witnesses and instead focusing your client's defence on highlighting the prosecution's inability to meet its burden of proof for each element of the crime your client is charged with. In many cases, however, defending your client will require calling and examining witnesses. Decisions regarding the type and number of witnesses you are going to call should be made based on direct consultations with your client.

2. Fact Witnesses

Fact witnesses are often crucial to a successful defence strategy. Witnesses who were with your client at the time of the crime can establish your client's alibi (and hence, his innocence). Witnesses who were at the scene of the crime may be able to testify that they did not see your client, that somebody else committed the crime, or that your client acted in self-defence. Witnesses who were with your client at the time of his arrest can also often provide valuable information about his actions and the behaviour of the police.

3. Character Witnesses

Family members and witnesses who have known your client for a long time may be able to provide favourable testimony regarding your client's character or testimony that may be useful in humanising your client. Former employers, religious leaders, and teachers can also provide compelling testimony regarding your client's good character.

4. Expert Witnesses

Where funding is available, it is important to consider calling expert mental health witnesses, as well as expert witnesses to opine on the reliability of the prosecution's investigation techniques and forensic evidence, including the post-mortem report indicating cause of death, identification parades or "lineups," ballistics, DNA evidence, and fingerprints. If expert witness testimony is crucially important to your client's case, your client has the right to secure and produce such testimony.[123] Before hiring an expert witness or asking the Court to appoint one, verify the credentials of the expert.

5. Should My Client Testify?

As noted above, your client has the right against self-incrimination. Accordingly, one of the most fundamental decisions in defending a capital case is whether your client will testify. Allowing an accused defendant to affirmatively proclaim his innocence and tell his side of the story can be a powerful tool. Under QSA, accused persons are liable to be cross-examined, therefore one of the most important things you must do if your client testifies is to prepare them for their cross examination. This means preparing your client for every possible line of questioning you anticipate the prosecution to take.

6. What If A Witness Refuses To Cooperate?

If you identify a witness who may be helpful to your client's case but who refuses to cooperate, you should attempt to compel his participation in the proceedings. In Pakistan, the Court can issue a summon to force a witness to testify; be sure you are familiar with the processes available under the CrPC to compel such witnesses to attend judicial proceedings.

7. What Do I Need To Do After Selecting My Witnesses?

Once you have decided which witnesses to call, it is your responsibility to make sure they are prepared to testify and are able to come to Court. On the most basic level, this means advising them about suitable courtroom dress and demeanour.

Similarly, you need to ensure that your witnesses know when and where hearings will take place and to take every possible measure to ensure that they can attend the hearings at which they are expected to testify. In rural communities with poor roads, it may take witnesses a day or more to travel to Court, and they will need advance notice. Transportation is often a challenge. If you are unable to provide transportation yourself, consider filing a motion to obtain necessary funds to compensate the witnesses for public transportation, accommodation and food. If a witness cannot appear at a hearing where they are

[123] J. L. García Fuenzalida v. Ecuador, 9.5, Communication No. 480/1991, U.N. Doc. GAOR/A/51/40/ vol. II, HRC (July 12, 1996) (finding violations of Articles 14(3)(e) & (5) where a court had refused to order such expert testimony)

expected to testify, it is important to notify the Court immediately and to ask for a postponement of hearing. If the Court refuses to delay the hearing, it is your duty to raise a formal objection.

Witnesses must also be prepared on a substantive level. Providing a witness with an overview of how their testimony fits into your case strategy and theme can often lead to more compelling and useful testimony. If possible, you should let your witnesses review the demonstrative evidence and exhibits you will be questioning them about. It is equally advisable to notify your witnesses of questions you think they may be asked on cross-

examination. When preparing a witness your obligation is to assist the witness in giving their own testimony and not the testimony preferred by you or your client.

H. IDENTIFYING EVIDENCE AND EXHIBITS YOU WILL INTRODUCE

Tangible evidence and exhibits can have a disproportionately persuasive impact on a judge. There is no substitute for allowing the court to come to its own conclusions after seeing, touching, smelling and/or hearing an exhibit. For instance, witness testimony regarding a crime scene becomes more convincing and credible if you can introduce an actual photograph that supports a witness's testimony. While the specifics of each case dictate what types of evidence and exhibits you should introduce, you will want to consider whether physical evidence exists that can exculpate your client. Favourable expert reports regarding forensic issues, such as ballistics, DNA evidence, fingerprints, or the age of the defendant should be submitted for consideration by the judge. Similarly, if you have useful expert reports or letters detailing your client's psychological state, you should consider introducing those into evidence. You may also wish to introduce demonstrative evidence that portrays your client in a favourable light (such as awards, trophies, military medals, certificates in prison) and evidence that helps humanise your client (like family photos).

I. Examining witnesses

1. Examination in Chief

Examination in Chief or Direct examination is your opportunity to present your client's case. Direct examination should be used to further your defence strategy and to develop your theory of the case. If your client is pursuing an affirmative defence, such as lack of mental capacity, you will need to elicit testimony that is sufficient to satisfy the applicable burden of persuasion. You should create a direct examination plan for each of your potential defence witnesses. For each witness you are considering, ask yourself the following questions:

- What do I intend to prove or disprove with this witness?
- How does this witness's testimony contribute to the theme I have developed?
- Can this witness undermine any of the elements of the crime my client is charged with?
- Can this witness bolster or undermine the credibility of other witnesses?
- Can I use this witness to introduce any of my intended exhibits?

Avoid the temptation of trying to prove too much through any single witness. If you rely too much on a single witness, and that witness is disbelieved or disliked by the judge or jury, your theory of the case will be less convincing. Another purpose of direct examination is

to bolster the credibility of your witnesses. When appropriate you should ask your witnesses questions that will allow them to testify regarding the basis for their knowledge, their ability to observe the incident they are testifying about and their lack of bias or interest in the outcome of your client's case. For expert witnesses, it is important to help your witness establish their expertise in the field they are testifying about.

2. Cross Examination

Article 132(2) of the QSA provides for cross examination of a witness by "the adverse party". Cross examination presents you an opportunity to undermine the prosecution's witnesses. To properly prepare for a cross examination you must evaluate what you expect the prosecution's witnesses to say and whether you will need to challenge that information. Your cross-examination should consist of leading questions that call for a yes or no answer.

Article 141 says the leading questions may tend:

(1) to test his veracity;

(2) to discover who he is and what is his position in life; or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

You should never ask a question when you don't know what the answer will be, unless there is no chance that the answer will damage your defence. Your questions should always concern only one fact at a time (e.g., "You said it was 7 p.m. when you saw the incident?"

"The sun sets at 6 p.m.?" "There were no streetlights?" "You were

standing 50 metres away?"). Do NOT be tempted to ask the following question: "So therefore, you could not see what happened?" By asking this final question, you invite the witness to insist that he could in fact see, and you destroy the effect of your careful cross examination up to that point.

Asking yourself the following questions can help you prepare an effective cross examination:

- Does the witness have a bias or motive for testifying against your client and for the prosecution?
- Does any part of the witness's testimony conflict with other portions of their testimony?
- Does the witness's testimony conflict with their earlier statements about the topic?
- Can you spot inconsistencies in the testimony of the witness and a prior witness?
- Was the witness in a position to observe the incident they are testifying about?
- Can the witness help you establish facts that undermine aspects of the prosecutor's case?
- Can the witness help you establish facts that are helpful to your theory or theme?
- Can you minimise any damaging testimony that came out during direct examination?
- Can you make the witness retract or discredit their own testimony?
- Can you get the witness to admit that they are uncertain about an issue they testified about?
- Can additional facts be raised that will lessen the impact of the witness's direct examination?
- If the witness overstated their knowledge about an issue, can you make them retract or back away from that testimony?
- Has the witness ever been charged with lying under oath?
- Has the witness ever been convicted of a crime? (You should investigate the criminal record of all witnesses and demand that the prosecution provide criminal records in their possession.)
- Has the witness attempted to introduce evidence that requires particular knowledge or expertise?
- Is the witness an expert whose expertise, training, knowledge or experience can be challenged?
- Does the prosecution's expert meet your jurisdiction's requirements to qualify as an expert witness?
- You should also prepare all documents and exhibits that you intend to use during your cross-examination.

J. INTRODUCING AND OBJECTING TO EVIDENCE

1. INTRODUCING EVIDENCE

Generally, before you can ask the Court to consider a piece of evidence, you must provide a basis for the Court to determine that the evidence is relevant, authentic and does not violate evidentiary rules. To establish authenticity, you will typically need a witness who can testify that they are familiar with the piece of evidence you are seeking to introduce and that the evidence is actually what you claim it to be. Likewise, the general rule regarding relevance is that the evidence you are seeking to introduce must make some disputed fact more or less likely. Proper trial preparation requires you to not only determine which evidence you would like to introduce, but to ensure that the evidence is admissible and that you have a witness who can assist you in laying the foundation necessary to introduce the evidence.

2. OBJECTING TO IMPROPER EVIDENCE AND HEARSAY

Hearsay evidence is generally inadmissible. Typically, only statements made during a trial or hearing may be offered as evidence to prove the truth of the matter being testified about. The underlying reason for this rule is that in order to have a fair trial an accused

should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time of the proceedings. Be vigilant of attempts to circumvent your client's right to subject adverse witnesses to cross-examination and object when the court allows such statements into evidence.

3. OPENING AND CLOSING STATEMENTS

The opening and closing statements are critical opportunities for the defence. The opening statement is your first chance to present your theory of the case in a comprehensive fashion to the judge. The closing argument, similarly, is your final chance to explain the evidence in light of your theory and convince the judge of your client's innocence and/or the mitigating circumstances of the case. For both your opening and your closing, you should spend a significant amount of time thinking about and practising what you will say. This will help you present a convincing and credible demeanour.

Recent Capital Case Law

Below are some examples that can help you as an advocate to understand the evolving jurisprudence of Pakistan and how cas law can aid you in helping your client:

- Lack of premeditation, which can be evidenced by the incident occurring on the 'spur of the moment';
- Failure to inflict repeat injuries where there was an opportunity to do so;
- Co-accused received a lesser sentence;
- Lack of clarity about who inflicted the fatal injuries. Further, a death sentence should be commuted to life where the accused has already served a full life term of imprisonment (25 years), giving rise to the 'expectancy of life' doctrine.[124]
- The Supreme Court considers that accused who play lesser roles in causing a lethal offence lack the moral culpability to be sentenced to death. If you assess that your client was a mere accessory to the alleged offence or at least did not play a central role in its commission, it is important to present evidence of this to the Court.[125]
- The Supreme Court considers that a crime committed under provocation is less worthy of a death sentence than a crime committed without provocation. The Court may set aside your client's death sentence if you can show that the circumstances immediately preceding the alleged crime diminished his capacity to exercise self-control.[126]
- The Supreme Court may consider aspects of an accused's life prior to his arrest. A good mitigation story paints a humane picture of your client's life struggles leading up to the alleged crime. It offers the judge a chance to consider your client as a product of his difficult circumstances instead of just focusing on his alleged criminality. There may be several aspects of your client's life before his arrest that the Court may consider to have mitigating value. It is therefore important to seek mitigating evidence that thoroughly investigates your client's personal social, economic and cultural background, his familial circumstances,[127] whether he has any personal or familial history of mental health, and information on how others perceived his character and reputation prior to the commission of the alleged crime.[128]

[124]PLD 2013 SC 793
[125]2012 SCMR 12
[126]PLD 1996 SC 1.
[127] PLD 1996 SC 1
[128] PLD 1996 SC 1

- Juvenility is a complete bar to the death sentence. Additionally, the Supreme Court of Pakistan also considers that where a person is over 18 but still 'young', this operates as a mitigating factor. If your client is between the ages of 18 and 25, it is important to present this as mitigating evidence emphasising their youthful impulsivity to convince the Court to set aside their death sentence. (An expert in neuropsychology may also help demonstrate to the court that your client's brain may not have reached maturity at the time of the offense. The Supreme Court may also consider the elderliness and infirmity of the accused to be a mitigating factor in conjunction with other mitigating factors.[129]

- Physical disabilities are impairments that may affect a person's capacity or mobility. According to the Convention on the Rights of Persons with Disabilities, "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[130]"

[129]PLD 27 SC 152

[130] Article 1, United Nations Convention on the Rights of Persons with Disabilities (CRPD), available here: https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html. See also: ICT Rights of Persons with Disabilities Act 2018, available here: http://www.na.gov.pk/uploads/documents/1545385013_141.pdf

CHAPTER 7

Sentencing, Appeals and Post-Conviction Relief

A. Your Client Has The Right To Appeal His Conviction And Sentence

At the end of your client's trial, he will either be acquitted or convicted of the charge for which he has been accused. In case of acquittal, the Court shall "record an order of acquittal.[131]" If, however, the Court finds the accused guilty, it shall pass a sentence according to law.[132] If your client has been convicted, you must inform him of his right to appeal to the High Court[133] and make sure he understands the appellate process and timeline. You should try to visit your client in person and explain how you will attempt to challenge the conviction.

If your client is sentenced to death by the Court of Sessions, it is mandatory that an appeal should be submitted before the High Court and "the sentence shall not be executed unless it is confirmed by the High Court."[134] The High Court may, accordingly, take one of the following actions:

a) If the High Court thinks that a further inquiry should be made into or additional evidence should be considered on any point bearing upon the guilt or innocence of the convict, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session;[135]

b) confirm the sentence of death or pass any other sentence warranted by law;[136]

c) annul the conviction and convict the accused of any offence of which the Sessions Court might have otherwise convicted him, or order a new trial on the same or an amended charge;[137] or

d) may acquit the accused.[138]

The High Court, however, cannot pass an order until the period for filing an appeal has expired and if an appeal is presented within such time, until such appeal is disposed of. If your client has been sentenced to death at trial, you must appeal to the High Court within the prescribed period of seven (7) days.[139] If, however, your client has been sentenced to a punishment less than death at trial, you must appeal to the High Court within the prescribed period of sixty (60) days.[140] The psychological impact of the death sentence is immense and is sometimes accentuated by harsh prison conditions. Both can weaken your client's health and make him unwilling or unable to help you prepare for his defence on appeal. As a capital defence lawyer, you have a duty to prepare an effective defence strategy on appeal as well as at trial. Therefore, even where the trial has been concluded, you should continue to meet with your client and explain how you will attempt to challenge the conviction. Also if you are unable to represent your client on appeal, you should ensure that your client is ably represented at the appellate stage before you withdraw from the case

B. Practical Suggestion

1. Meet with Your Client As Soon As Possible

As soon as you are entitled to represent your client, it is crucial to educate the client on the appeals process (as well as how you will attempt to challenge their conviction) and timeline, advising them to not complete any filing of documents given by authorities without conferring with you beforehand. Furthermore, the psychological impact of the death sentence/detention conditions on your client must be taken into account. Be aware and observant of the conditions within the prison and the treatment given to the client, and intervene if necessary by making a direct complaint with the head officer. Additionally, do not assure your client that the case will have an overly positive or negative outcome - make them aware of all potential legal consequences of their actions, as well as advising them in a direct manner what actions will benefit them according to national law.

2. Obtain the Court Records and Transcript of the Trial Proceedings.

It is within your rights to have access to the Court records and trial transcript; this request cannot be rejected by the lower Court. Once you have acquired the records, make a copy of the files.

3. Obtain a Copy of the File Kept by the Previous Counsel, If Relevant

If you were not your client's first lawyer, contact the previous counsel and acquire a copy of their client file. Review and discuss their relationship with your client, the strategies that were used at trial, and the [illegible]al and procedural issues. This will assist you in

[131] Section 265H, Code of Criminal Procedure 1898
[132] ibid
[133] Section 410, Code of Criminal Procedure 1898
[134] Section 374, Code of Criminal Procedure 1898
[135] 11 Section 375, Code of Criminal Procedure 1898
[136] Section 376, Code of Criminal Procedure 1898
[137] ibid
[138] ibid
[139] Rule 91, Pakistan Prison Rules 1978
[140] ibid

having a clearer understanding of what issues should be raised on appeal.

4. Investigate the Basis for Your Client's Conviction and Sentence

Sometimes you must present on appeal information that was not raised at trial. When possible, explore areas that have not yet been investigated thoroughly or at all. For example, a crucial factor to consider and investigate is the mental health of your client. If you have reason to believe that the client has a mental impairment or illness, request any mental health reports that have already been filed, or request a psychiatric evaluation and report if these do not yet exist. Even if your client already received a mental health assessment, it may be necessary to conduct a new one if they have developed a new mental impairment. You should seek out investigators and mitigation experts who can assist you in finding evidence that attacks the validity of the conviction and/or sentence.

5. Master the Procedural Rules and Jurisprudence Related to Capital Cases

Deadlines:

It is essential that you be aware of the relevant deadlines, as your appeal may be rejected if you fail to meet them. If you are ever in a situation where your client only consulted you after the appeal deadline has passed, consider raising the following arguments to obtain an extension to file the appeal:

- Your client was not assisted by counsel after the end of their trial and was unaware of their right to file an appeal or the deadline to do so. Your client has the right to legal representation at all stages, otherwise the trial is unfair. Argue that the late appeal should not be dismissed due to the client's deprivation of assistance by counsel.
- The deadline to file an appeal was unreasonably short and prevented the defence from filing a strong and effective appeal argument. In this case, present a new appeal that argues that your client's right to a fair trial must include a reasonable time frame and access to the Court in order to effectively prepare his defence.
- The delay occurred because of the previous counsel's negligence. Argue that it was the lawyer's incompetence that led to the failure to meet the deadline, and the consequences should not fall on the client.

Jurisdiction:

Establish which Court has jurisdiction over your case as well as where the petition for appeal must be filed. You should be aware of the format required for your petition and research the court's deadlines, in order to avoid your petition being dismissed.

Jurisprudence:

Ensure that you have extensive knowledge of capital punishment jurisprudence in Pakistan, taking into account the landmark decisions issued by higher Courts.

International Remedies:

In addition to Pakistani law ensure that you have in-depth knowledge of international law regarding the death penalty. This is useful when authorities fail to meet international law standards, leading to international assistance in protecting your client. Additionally, consult the progressive jurisprudence of neighbouring countries.

Review the Judgment of the Trial Court

Be observant of the particular reasoning for the court's trial judgment. The defendant has the right to a reasoned judgment (so that he may raise arguments on his appeal), which will assist you in assessing whether his case was heard fairly.

C. What To Challenge

There are a number of international legal arguments that have successfully been raised in national courts around the world. Although these rules or guidelines are not binding on the court, you should argue that they nonetheless have persuasive value. In addition, you should look for precedents in Pakistan and from other national courts in your region to establish that they have relied on decisions by international bodies to determine the permissible scope of the death penalty.

I. The Death Penalty May Only Be Imposed For The "Most Serious Crimes"

The following norms support the emerging legal argument that a highly restricted form of capital punishment is now considered a part of customary international law.

Article 6(2) of the International Covenant on Civil and Political Rights states: "In countries which have not abolished the death penalty, sentences of death may be imposed only for the most serious crimes..." In a general comment on Article 6 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee has stated: "The term 'the most serious crimes' must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing. Crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty."[141] Moreover, "a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty."[142]

II. Death Row Phenomenon

The death row phenomenon is a term used to describe the severe mental health impact on prisoners of prolonged imprisonment on death row, in harsh and degrading conditions of confinement, due to long delays between the date of conviction/ sentence and an eventual execution date.

There are multiple cases in which international bodies and national courts have characterised the length of time between the conviction and the execution of a death sentence as a form of inhuman punishment and a violation of international and domestic norms. The death row phenomenon is broadly accepted among key international and domestic courts.

In Pakistan, the Federal Shariat Court has observed:

"The current prison practice is already torture oriented.…Prisons are being used only for the purpose of awarding physical pain and punishment in addition to mental torture."[143]

In order to determine whether the death row phenomenon is a relevant concept in your client's case, you will need to consider the conditions of confinement on death row, the length of incarceration, the degree of isolation during incarceration, and whether the prison fails to inform your client about the date and time of execution. These factors may contribute to severe psychological maltreatment and lead to grave mental anguish that may be recognized as an instance of death row phenomenon.

III. Preventing The Execution of Clients with Mental Illness

After being given a death sentence, your client may develop severe mental illness due to the stressful circumstances of incarceration on death row taking a toll on their mental state. Individuals with severe mental illness are protected from execution both under international law and pursuant to recent case law from the Pakistan Supreme Court.

If you have a suspicion that your client has developed a mental illness or that their mental health has deteriorated on death row, you should seek a stay of execution and reach out to a mental health expert for an assessment.

In Pakistan, the Safia Bano judgment asserts that if a condemned prisoner, due to mental illness, is found to be unable to comprehend the rationale and reason behind his/her punishment, then carrying out the death sentence will not meet the ends of justice.[144]

IV. Ineffective Assistance Of Counsel

Your client has the right to effective legal representation at every stage of the death penalty process. If your client's previous lawyer failed to provide effective and competent assistance, you must raise this issue on appeal as a ground for a new trial and/or sentencing.

V. Foreign Nationals Deprived Of Consular Rights

If your client is a foreign national, they have the right to consular notification under Article 36(1)(b) of the Vienna Convention on Consular Relations and under customary international law. You should investigate whether the detaining authorities made your client

[141] U.N. Human Rights Committee, General Comment 36 on Article 6 of the International Covenant on Civil and Political Rights, para. 35.
[142] Ibid.
[143] PLD 2010 FSC 1.
[144] 2021 PLD 488 SUPREME COURT

aware of his right to have his consulate notified of his detention. If your client gives you consent, you should contact consular officers from their home country to request assistance in the defence of your client. For example, Kulbushan Jhadhav, an Indian National accused of carrying out espionage and sabotage activities against Pakistan at the behest of India's intelligence agency, was facing the death penalty in Pakistan. The case was ultimately taken to the ICJ by India for violation of his consular protection rights. The ICJ held that Jadhav was entitled to consular protection, regardless of the nature of charges against him.[145]

VI. No Ex Post Facto Punishments

If your client was given a penalty that arose under a law that did not exist at the time of the commission of offence, your client may not be subject to the death penalty. Ex post facto punishments are prohibited by human rights treaties as well as the Constitution.

Investigate the legal history of the offence for which your client was sentenced. If the law was not in effect at the time of the crime, you could argue that the client's sentence violates international law and the Constitution.

VII. Your Client Was Sentenced To Death After An Unfair Trial

The lack of sufficient fair trial safeguards is a major challenge faced by lawyers in retentionist states (i.e. jurisdictions which retain the death penalty for ordinary crimes). Fair trial rights revolve around procedural protections that are required in order to ensure that the accused gets the fair, unbiased trial to which they are entitled. The term 'equality of arms' is one such right: the defence must be granted confidentiality, autonomy, the ability to challenge the government's case, as well as adequate resources that are equal to the government's in order to investigate the charges and construct a strong defence.

D. Clemency

Your Client Has the Right to Seek a Pardon or Commutation of his Death Sentence

Under the Constitution of Pakistan, 1973, the president has the mandate to grant pardons, reprieves, or respites, or to remit, suspend, or commute any sentence passed by any Court, tribunal or other authority.[146] This is also enshrined in section 55-A of the Pakistan Penal Code.[147] The President thus has the power not only to pardon individuals under sentence of death but also to commute death sentences into life imprisonment. The law places certain restrictions on the powers of the president. For instance, according to the Code of Criminal Procedure, a death sentence cannot be commuted or suspended without the consent of the heirs of the victim.[148] However, the Lahore High Court held in a recent judgment that the president's power to suspend or commute any death sentence is unfettered and cannot be made subservient to any subordinate legislation such as the Pakistan Penal Code, the Pakistan Prison Rules or the Code of Criminal Procedure.[149] As a result, counsel can file the mercy petition for the commutation or suspension of the death sentence even where the heirs of the victim have not forgiven your client. Lastly, the power to commute the death sentence also rests with the provincial government.[150]

Your Duties as Clemency Counsel

As clemency counsel, your primary duty is to know the law relating to the filing of mercy petitions, including the exact form of mercy petitions and the time limit in which to file it. Detailed rules are laid out in chapter 5 of the Pakistan Prison Rules, 1978.[151]

Firstly, it is the duty of the prison authorities to grant reasonable facilities for preparing and filing a mercy petition.[152] The Prison Rules also require that prison authorities submit a report by a medical officer on the current state of health of your client. Furthermore, the mercy petition must be filed within seven days of the dismissal of an appeal to the Supreme Court or the dismissal of an application for leave to appeal to the Supreme Court. However, if the mercy petition is rejected, a new petition may be filed if there are fresh grounds to do so.[153] A template for a mercy petition is attached at the end of the manual to assist you in drafting your petitions.

E. The 'Court of Public Opinion'

You should carefully consider whether your client would benefit from media coverage. In many cases,

[145] Jadhav, India vs. Pakistan, 17 July 2019, https://www.icj-cij.org/case/168

[146] Article 45, Constitution of Pakistan, 1973
[147] Section 55-A, Pakistan Penal Code, 1860
[148] 402-C, Code of Criminal Procedure, 1898
[149] Muhammad Ali Alias Makhan vs. Government of the Punjab and others, PLD 2023 Lahore 19
[150] 401-C, Code of Criminal Procedure, 1898
[151] Chapter 5 of the Pakistan Prison Rules, 1978
[152] Rule 104, Punjab Prison Rules
[153] *Id.*

media coverage and international publicity campaigns can cause a backlash that can be harmful to your client's case. For example, judges or other decision-makers who might have been inclined to commute your client's death sentence may feel pressured by publicity to let the death sentence stand. Engaging with the media may also be personally risky for human rights defenders. We encourage lawyers to carefully think through all possible repercussions before speaking out publicly about their client's case.

Despite these caveats, media coverage has proven to be an effective tool in many cases. As discussed below, given advances in technology such as the internet, it is now easier than ever to generate such publicity with both traditional media and social media.

Timing is an important consideration in all media campaigns. Highly visible media campaigns are most common when an execution is imminent. Once a clemency petition has been filed, external pressure can influence the executive's decision on that petition, especially a popularly elected executive sensitive to their country's reputation in the international community. Moreover, many journalists look for a "hook" to write a story. Bear in mind that when you are working with the media, you need a theory of the case (see Chapter 7) and to be able to tell a compelling story that justifies either a commutation of your client's death sentence or their release. Many potential claims in capital cases are newsworthy, especially claims of actual innocence, but don't ignore claims of prosecutorial misconduct, discrimination, faulty investigative work, and your client's life history.

One route to favourable media coverage is to educate a reporter by giving them access to Court filings. Many reporters will want to interview your client, but this is a very risky step. You must carefully evaluate whether your client is liable to say something that could harm their chances of commutation and/or release. Once you give a journalist access to your client, you have very limited control over the nature of the publicity that follows. Many criminal defendants are uneducated and can be easily manipulated, so if your client does speak to the media, you must control the interview as much as possible. Insist on being present, and ask for a list of questions in advance to go through them with your client in advance.

Using Traditional Media

In the past, the only source of publicity for capital cases was local, national or international media, including newspapers, magazines, radio, and television. Often these local or national newspapers reported on the underlying crime, the investigation, and the trial. You should investigate prior media coverage about the crime, investigation and trial of your client before developing a strategy for further publicity.

Using Social Media

Technological advances have transformed lawyers' ability to generate publicity, both good and bad. As noted above, the traditional route for publicity is through a journalist in mainstream media—for example, a newspaper, magazine or TV reporter. Now, such traditional media can be supplemented or bypassed by online appeals to the public (and indirectly to the government). Consider Facebook, Twitter, YouTube and other forms of social media to raise the level of awareness of your client's plight. In conjunction with this, you should contact national and international anti-death penalty groups to see if they can assist in publicising your case either through traditional media or through their own website and networks. Your client's legal, moral and compassionate grounds for relief can be posted on the internet for the world to see. You can consider posting some of your petitions and written arguments, as well as commentary about the case and your client's plight. Social media may be particularly useful to generate pressure on the member of the executive who will decide whether to grant or deny clemency.

Finally, social media can be an effective tool to network with other capital defence counsel and human rights advocates. This is particularly true for advocates practising in rural areas, where access to relevant statutes, case law, and human rights instruments may be difficult.

CHAPTER 8

Advocacy Before International Bodies

There are several situations in which you should consider the potential benefits of appealing to an international body. International appeals may be made for individual clients based on the legal issues presented in their cases, or they may be filed on behalf of multiple individuals who share a common plight. Experienced advocates strategize carefully before presenting a case to an international body. It is important to note that international advocacy is only one of the tools in your arsenal and is in most cases effectively used only in combination with domestic remedies. Experienced advocates strategize carefully before taking a case to an international body.

The following chapter highlights some key mechanisms that can be used for international advocacy and outlines the benefits and limitations of each.

WHICH OF YOUR CLIENT'S RIGHTS WERE VIOLATED AND WHICH INTERNATIONAL MECHANISM SHOULD YOU FILE A PETITION WITH?

Before you present your case to an international body, you must identify which of your client's rights have been violated, such as your client's rights to be treated humanely, to a speedy trial, and to other rights that he has during the pretrial process. This will help you determine what arguments to make, as well as which international body to appeal to.

Pakistan is an active United Nations Member State. It became a member on 30 September 1947, just over a month after its independence. Pakistan has participated in its state reviews before treaty bodies, most recently its review under the ICCPR[154]. Given the government's active participation in key UN bodies, it is safe to say that the UN's influence cannot be underestimated.

[154] List of Issues came out in November 2023, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FPAK%2FQ%2F2&Lang=en

A. Treaty Based Mechanisms

Virtually every major human rights treaty provides for the establishment of a "treaty body" or committee of experts empowered to review compliance with the treaty and to receive and consider petitions from individuals alleging violations of their rights under the treaty. The right to submit individual petitions is not automatic, however. In some cases, the government needs to ratify a separate treaty or protocol that provides for the right of individual petition (e.g. ICCPR, CEDAW). In other cases, the right to petition is provided within the treaty itself, but the government may enter a reservation to that article (e.g. CAT).[155]

Four of the major human rights treaty bodies (HRC, CERD, CAT and CEDAW) may, under certain circumstances, consider individual complaints or communications from individuals:

- The HRC considers individual communications relating to States parties to the First Optional Protocol to the ICCPR;
- The CEDAW may consider individual communications relating to States parties to the Optional Protocol to CEDAW;
- The CAT may consider individual communications relating to States parties who have made the necessary declaration under article 22 of CAT; and
- The CERD may consider individual communications relating to States parties who have made the necessary declaration under article 14 of CERD.
- The Convention on Migrant Workers also contains provisions for allowing individual communications to be considered by the CMW; these provisions will become operative when 10 states parties have made the necessary declaration under article 77.

However, Pakistan does not currently recognise individual complaint procedures under any of the treaty bodies.[156]

B. Special Procedures

Special procedures are established by the Human Rights Council to address issues specific to certain areas or thematic issues felt across the globe. They are handled either by an individual, such as a Special Rapporteur, or a Working Group. Working groups are typically composed of five individuals. Most special procedures receive information on specific human rights violations and send communications to the government, such as urgent appeals and letters of allegation.

Most special procedures receive information on specific human rights violations and send communications to the government, such as urgent appeals and letters of allegation. They also visit specific nations and issue reports. More information on special procedures is available from the UN High Commissioner on Human Rights' website.

With the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR), special procedures:

- Undertake country visits
- Act on individual cases of reported violations and concerns of a broader nature by sending communications to States and others
- Contribute to the development of international human rights standards, and
- Engage in advocacy, raise public awareness, and provide advice for technical cooperation.

The complaints procedure of the Special Procedures is not a quasi-judicial procedure, and the Special Procedures do not have power or authority to enforce their views or recommendations.

Given that Pakistan has not submitted to the complaint mechanism of any of the treaty bodies, the

[155] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Art. 22 Treaty Series, vol. 1465, p. 85, 10 December 1984, https://www.refworld.org/legal/agreements/unga/1984/en/13941

[156] UN Treaty Body Database, Ratification Status of Pakistan https://tbinternet.ohchr.org/layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=131&Lang=EN

only international recourse available to a Pakistani lawyer is Special Procedures.

Depending on the facts of your case, you may write a submission in the form of an urgent appeal or letter to the following mechanisms:

1. UN Office of the High Commissioner on Human Rights

The High Commissioner on Human Rights has the power to issue statements calling on governments to take certain actions in relation to individual cases or systemic issues relating to the application of the death penalty. The OHCHR supports the Special Procedures in carrying out their mandates.

2. Working Group on Arbitrary Detention

The Working Group on Arbitrary Detention is a UN-mandated entity of independent human rights experts that investigates certain types of criminal and administrative detention that may violate international human rights laws, including laws related to fair trial rights. The Working Group considers individual complaints from individuals in any State, and complaints may be filed on an urgent basis. If the Working Group finds violations of applicable law it will send an opinion to the State and may make further appeals to the State through diplomatic channels.

3. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions is a UN expert tasked with investigating and reporting on executions that are conducted without legal procedures or with insufficient legal procedures. The Special Rapporteur provides a model questionnaire for the submission of individual complaints, which may be submitted by an individual in any state. The Special Rapporteur may issue urgent requests to governments regarding a pending case, may request permission to conduct an on-site visit, and can engage in a confidential dialogue with the government about cases or systemic issues relating to the application of the death penalty.

4. Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment

The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment is a UN expert responsible for investigating and reporting on punishments that constitute torture or otherwise violate applicable international law. The Special Rapporteur provides a model questionnaire for the submission of individual complaints, which may be submitted by an individual in any state. The Rapporteur's powers are similar to those described in relation to the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions.

C. CHARTER-BASED MECHANISMS

Universal Periodic Review

The Universal Periodic Review is a periodic review of the human rights record of a UN Member State by other States. During the review process, States make recommendations to the State under Review (SuR) on how to improve its human rights situation. On average, a State can receive around 200 recommendations per review covering all human rights issues: economic, social, cultural, political, civil and principles of International Humanitarian Law.

How does the process work?

Each State is reviewed based on: (1) National Reports (prepared by the government); (2) reports by other UN mechanisms, including UN Special Rapporteurs and Treaty Bodies; and (3) Stakeholder reports, including by NGOs and National Human Rights Institutions (NHRIs). The Universal Periodic Review (UPR) Working Group, comprising 47 Member States, reviews the files and drafts a report. Based on the report, the SuR is reviewed in an interactive public consultation that takes place over 3.5 hours. The SuR has the option to "accept" or "note" recommendations. Recommendations cannot be rejected, but a State can provide reasons why they do not enjoy their support. Following the public hearing, an outcome document is prepared. The outcome document is adopted by the HRC after three to four months in its regular session.

Why is the UPR important?

The UPR is a review of a State by other UN Member States. Therefore, the recommendations carry significant weight. Additionally, the entire human rights record of a State is placed under scrutiny, regardless of the State's treaty ratification status. However, since the review takes place every four years, it is not the best forum in which to raise urgent cases. Instead, the focus should be on using it as an effective means to influence legislative and policy reform pertaining to the death penalty, torture, juvenile justice reform, etc.

How can you participate?

NGOs often submit their reports as a coalition. You can ensure that the reform of the death penalty is highlighted in the report prepared by the coalition. UN Member States draft recommendations based on inputs from Civil Society Organizations and activists.

Moreover, following the adoption of the outcome report, you can play an active role in monitoring and following up on implementation of the recommendations accepted by the Member State. You can also encourage the State to submit its mid-term implementation report.

Success Story

Live Screening of Pakistan's UPR session

On the occasion of the Universal Periodic Review of the Government of the Islamic Republic of Pakistan (3rd cycle, Feb 2023), Justice Project Pakistan organised a live screening in collaboration with the National Commission on Human Rights (NCHR) and the Parliamentarians Commission for Human Rights (PCHR). The live screening was held in the presence of prominent civil society activists, lawyers, diplomats, journalists, students, and government representatives. To maximise the social media reach of the session, the event also featured live tweeting with the hashtag #UPRPak and provided a space for informal discussions among relevant stakeholders. The participants also expressed their opinions through posters inscribed with emojis with tied lips, and signs with phrases such as 'Danger: High Voltage' and 'Just Do It'. Public interest in the process resulted in the hashtag #UPRPak was trending on Twitter by the end of the session.

GSP Plus

Why is GSP+ important

The European Union's GSP+ scheme supports developing countries in improving governance and meeting sustainable development goals by allowing them to earn additional revenue through trade incentives. These incentives are offered in return for the implementation of core international conventions by countries under the GSP+ arrangement.

Pakistan was granted GSP+ status by the EU in January 2014 for the period 2014-2023. The EU is Pakistan's second most important trading partner, accounting for 14.3% of Pakistan's total trade in 2020 and 28% of Pakistan's total exports.[157] One of the conditions of GSP+ is to maintain a moratorium on executions. As a result, Pakistan has maintained a moratorium on executions since 2019, and implemented safeguards against execution for juveniles and persons with psychosocial disabilities. It has also removed two capital crimes from its legislation.

How can I engage with GSP+ mechanism?

As a lawyer defending a client facing imminent execution, you can refer to the policy issued by the Ministry of Commerce and Ministry of Foreign Affairs through notification No. 14(2)/2020-EU-II to keep the executions of death sentences on hold.

Recommendations from Pakistan's 2023 GSP+ assessment report

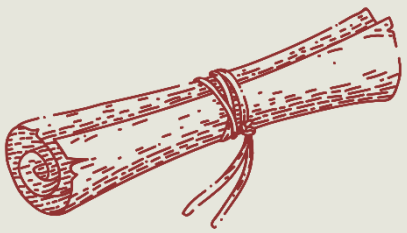
On November 22nd, 2023, the European Commission published the EU Special Incentive Arrangement for Sustainable Development and Good Governance (GSP+) assessment of the Islamic Republic of Pakistan covering the period 2020-2022.

After acknowledging progress made over the past two monitoring cycles, the 2023 report recommended that Pakistan:

- Further reduce the number of capital crimes;
- Introduce a revised, transparent system of mercy petitions that would allow death row prisoners to meaningfully seek pardon;
- Tackle persistently prolonged periods spent on death row due to delayed judicial proceedings;
- Take steps to bolster the judiciary and strengthen capital sentencing standards in the lower courts.

[157] https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/pakistan_en

Appendix



RESOURCES

See what international human rights treaties your country is a party to at the United Nations Treaty Collections, Chapter IV: Human Rights, at http://treaties.un.org/pages/Treaties.aspx?id=4&su bid=A&lang=en.

See what regional human rights treaties your country is a party to at the following:

United Nations Office of the High Commissioner for Human Rights, Regional Human Rights Treaties, at http://www.ohchr.org/EN/Issues/ESCR/Pa ges/RegionalHRTreaties.aspx.

See also Justice Project Pakistan, a website and database about the laws and practices relating to the application of the death penalty in Pakistan, at www.jpp.org.pk.

TEMPLATES

MODEL UN COMPLAINT FORMS Model form under the Optional Protocol to the ICCPR, the CAT, or the ICERD, available at

https://www2.ohchr.org/english/bodies/docs/annex1.pdf

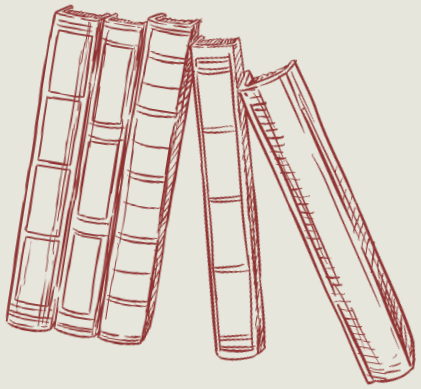
List of guidelines for submitting petitions to different human rights bodies, available at

https://www.ohchr.org/en/treaty-bodies/individual-communications

Online complaint form for the ICCPR, CAT, CEDAW, and ICERD, available at

https://www.ohchr.org/en/documents/tools-and-resources/form-and-guidance-submitting-individual-communication-treaty-bodies

MERCY PETITION TEMPLATE



APPLICANT INFORMATION

- Name: _____
- Father's Name: _____
- Date of Birth: _____
- Address: _____

CONVICTION SUMMARY

1. Circumstances of Conviction

    - Briefly describe the circumstances of the offence(s) for which clemency is being requested.
    - Include conviction sections, sentencing court, and dates of judgment at all appellate levels (attach certified copies as Annexes).
    - State the total duration of incarceration.
    - Mention constitutional grounds for clemency (e.g. under Article 45 of the Constitution of Pakistan, 1973).

2. Background Information

    - Provide family and socio-economic background.
    - Outline early life, education history, and employment record.
    - Summarise relevant circumstances leading to the conviction.
    - State age at the time of offence and provide supporting documentation (school certificates, CNIC, birth registration, affidavits, etc. as Annexes).

3. Arrest and Trial History

    - Date and place of arrest.
    - Treatment during detention (including any allegations of torture).
    - Access to legal representation and adequacy of defence.
    - Any confessional statements (note if coerced or involuntary).

4. Grounds for Mercy

    - Evidence of juvenility (if applicable).
    - Disparity in sentencing compared to co-accused.
    - Lack of fair trial or due process violations.
    - Prolonged incarceration (death row phenomenon).
    - Physical or mental health conditions.
    - Rehabilitative efforts (education, religious or vocational contributions).
    - Expressions of remorse and acknowledgement of victim impact.
    - International and domestic legal grounds (e.g. ICCPR, UNCRC, JJSA 2018, Constitution of Pakistan).

MITIGATING CIRCUMSTANCES

- Juvenility at time of offence (with documentary proof)
- Confessional statement as a result of coercion/torture
- Lack of adequate legal representation
- Death row phenomenon and prolonged incarceration
- Breach of fundamental rights under the Constitution and international law
- Impact on health, life expectancy, and prohibition on double punishment
- Other mitigating circumstances

REPRESENTATION

If prepared with assistance, provide details:

- Name of legal representative(s) / organisation
- Address: _____
- Telephone: _____

PRAYER

In light of the mitigating factors and constitutional, statutory, and international legal protections, it is most respectfully prayed that **Your Excellency, the President of Pakistan, commute the sentence of death to life imprisonment.**

This mercy petition has been prepared with the help of legal representatives, and the contents have been read out and explained to the petitioner in Urdu.

(Signature/Thumb Impression of Prisoner)

(Name of Prisoner)

(Prison Name and Location)

Consider interviewing the following life history witnesses: Family members (including mother, father, siblings, aunts, uncles, nieces and nephews), village headman, neighbours, religious leaders, schoolteachers, nurses, policemen, prison guards, prisoner's children. Note: Depending on the facts of the case, some communities may be disturbed by the thought of the prisoner's release. In some rural African communities, it may be necessary to approach the village head person and inform him/her of your intentions prior to interviewing any witnesses. Whether the community will be disturbed by your presence depends on many factors, including the length of time that has passed between the crime and your visit, how the offence was committed, and the relationship of your client to his family and the larger community. You should explain that you are trying to ensure that your client receives a fair trial, and that you wanted to be sure that you had correct information about his life and the nature of the offence. If it is appropriate, you can explain that you are focusing on saving his life and preventing the imposition of the death penalty, and that there is little chance he will be released from prison. Before you start interviewing the witness, identify yourself and explain that you are assisting the prisoner in his defence. If the case is on appeal, explain that you are assisting in the appeal. Ask the witness if she has had any contact with the prisoner and when they last spoke/saw each other. Explain that he is still in prison and give them any updates you can on his health, general condition, and the status of the case. Ask them if there is any message they would like you to convey to the prisoner. Before asking any questions, explain to the witness that you will be asking a lot of questions, some of which may seem strange, and some of which will ask about information that is very private. Assure him/her that even if it seems that you are asking for information that seems harmful, you are only using it to help your client. The most important thing is to be honest. Everything you say is confidential. Explain that you are not there to judge anyone, but only to understand. Explain that it is important to ask about these things as they give you a more complete picture of your client's life and can possibly explain his behaviour and thus help prepare a stronger defence.

Questions to map out prisoner's family tree:

- Can you tell me a little about [name of prisoner]? What was he like as a [brother/child/father]?
- Did he have any positions of leadership in the village?
- What was his reputation in the village/community?
- Did he have a job? What did he do? At what age did he start working? What kind of work did he do as a child (assuming he worked as a child).
- Did he go to church/mosque? Any position of leadership? Did you ever notice any change in his religious observance?
- Schooling: Where did he go to school, how far did he get, why did he stop?
- Did he learn to read and write? How was his school performance compared to his siblings/other family members? Did he have any difficulty learning his subjects?

Questions to determine possible mental illness and mental disabilities:

- What was the prisoner's health like as an infant, child, teenager? Did he ever suffer from any serious illnesses? Malaria, tuberculosis, other illnesses?
- Did he ever suffer any head injuries? (details, due to what, age, witnesses, hospitalised?)
- Did he ever lose consciousness, did he ever lose time? (details; what age, how long, how often, witnesses)
- Did he suffer from headaches?
- Did he ever have seizures?
- Did you or anyone in your family ever take him to a traditional healer? Why? (details; what age, how long, how often, witnesses)
- What sort of traditional remedies, if any, did he receive for any mental difficulties? Did he ever go to a doctor?
- Have you ever noticed anything unusual about him, compared to your other [brothers/children/people in your family/people in your community]?
- Did he ever use drugs? How much, how frequent?
- Was the use of drugs common in his family?
- Did his parents take drugs? More or less than others in his community?
- How was their behaviour after taking drugs?
- What was the relationship like between his parents? Did they ever fight? Did they fight with loud words, or were their fights physical? Can you describe some of those fights? Did the prisoner ever intervene to stop those fights?
- Was your client ever a victim of violence from a family member? How severe was it?
- Was he ever a witness to any other form of violence within his family or in the community?
- How was he punished as a child when he misbehaved? Did he misbehave more or less than his brothers/sisters? What kind of trouble would he get into as a young child?
- Any indications that the prisoner was a victim of sexual abuse or sexual violence by a family member or anyone within the community?
- Did [name] ever suffer from rages, or panic attacks?
- [If the answer is yes]: What sets him off? Does he ever lose it? • What happens when he gets set off, loses it?
- At what age did this behaviour start?
- Have you ever noticed anything else that is unusual about the prisoner's behaviour?

Questions about pre- and post-natal health (for mothers in particular, but also elder siblings, aunties, fathers):

- Explain that prenatal and postnatal health (problems) can have long term effects on physical growth, cognitive development and future learning capacity, school performance, educational outcomes, and work performance.
- When you were pregnant with [name], did you ever experience times of severe malnourishment? Times where there was no food at all? Any droughts during the pregnancy? Details, when, how often. How would you get additional food? What was your diet when you were pregnant?
- Are any details known about the pregnancy and the delivery of the client?

- Any complications during the pregnancy? (ask for details)
- Any complications during delivery? (ask for details) How was your delivery of [name] compared to the delivery of your other children? Did you deliver in a hospital or at home? Who was present with you?
- Were there any times when your child [the prisoner] experienced times of severe malnourishment? Times where there was no food at all? Due to drought? Due to unemployment caretaker? Details, when, how often. How would you get additional food?
- How quickly did [name] develop in comparison with your other children? At what age did he learn to walk, talk, use the toilet? Was this earlier or later than your other children?

Closing the interview:

Thank them for their time. Tell them how much you appreciate having had the opportunity to speak to them. Give them a sense for how long you expect the trial/appeal to take. Tell them that you will do your best to help [prisoner], but that you cannot make any promises or even predict what will happen. If you are handling the appeal of a prisoner on death row, explain that you're trying to make sure he is not executed, to get him the physical/mental health care that he needs, and reduce his prison sentence.

Justice Project Pakistan

jpp.org.pk