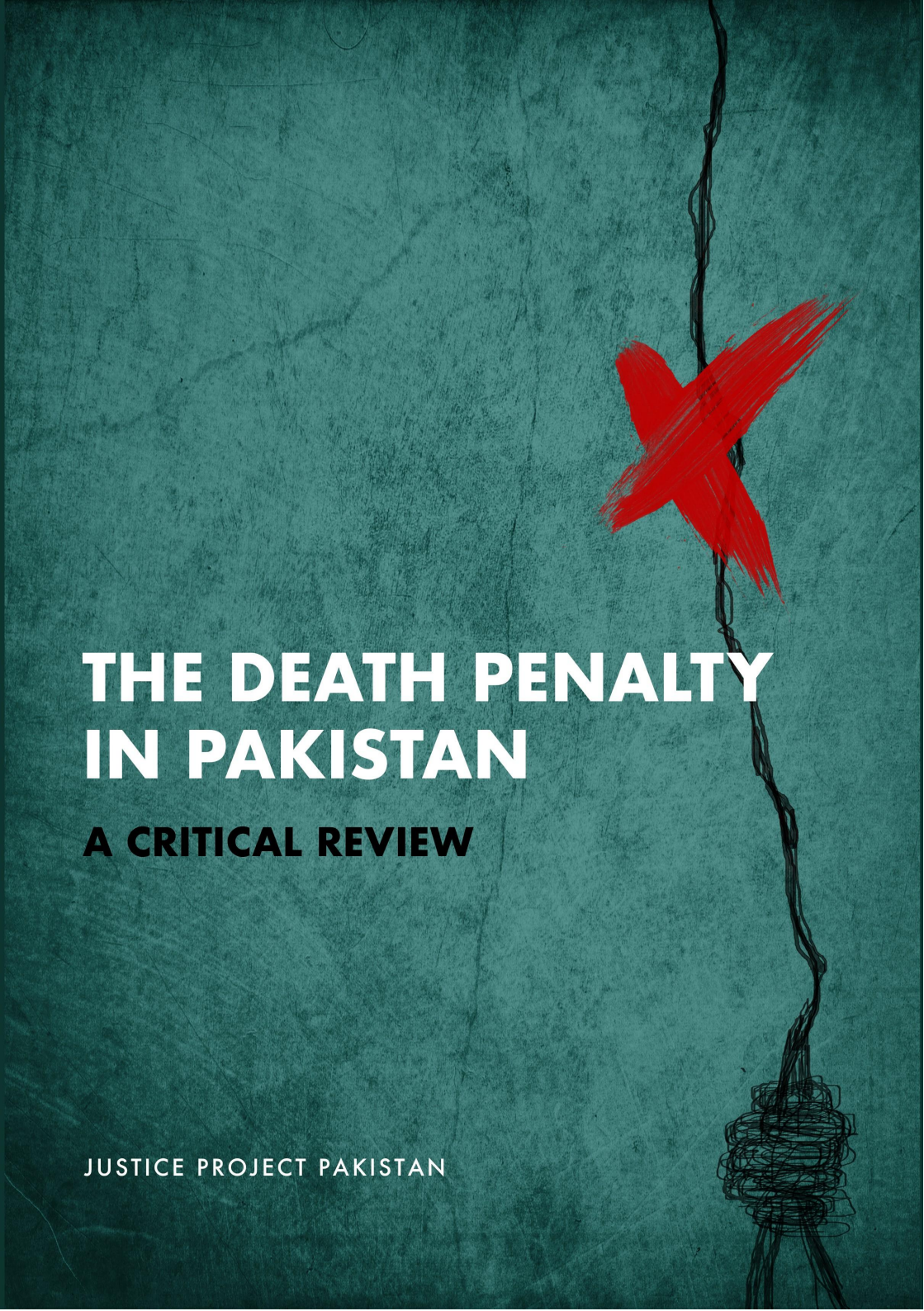

THE DEATH PENALTY IN PAKISTAN

A CRITICAL REVIEW

JUSTICE PROJECT PAKISTAN

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A Critical Review

The Death Penalty in Pakistan

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Dedicated to His Excellency Jean-François Cautain

Thank you for your unwavering support during our darkest times
and for always pleading for life

The Death Penalty in Pakistan : A Critical Review

INTRODUCTION

On December 17, 2014, Pakistan lifted a six-year de facto moratorium on the death penalty. Coming in the wake of the tragic terrorist attack on the Army Public School in Peshawar, the resumption of executions initially applied only to individuals convicted of terrorist offences.[1] Yet within several months, the Ministry of Interior lifted the moratorium for all death-eligible crimes.[2] According to Justice Project Pakistan's research, Pakistan's death row currently holds nearly 4700 individuals, many for offenses that are ineligible for capital punishment under international law.[3] Since ending the moratorium, Pakistan has executed more than 500 people, making it one of the most prolific executioners in the world.[4] Thousands of prisoners remain at risk of execution.

Initially, executions were reinstated for terrorism-related offences only. In March 2015, however, the Government – without any public justification – brought back the death penalty for all capital offences. Thereafter, from December 2014 to March 2015, the Government executed a total of 24 people, or an average of two per week. That rate more than doubled in March 2015 to over five per week, when executions were also resumed for non-terrorism cases. In the period March 2015 to September 2016, the Government executed an alarming total of 393 people.[5]

Pakistan's resumption of executions has drawn sharp criticism from international actors. On June 11, 2015, UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein said, 'the idea that mass executions would deter the kinds of heinous crimes committed in Peshawar in December is deeply flawed and misguided, and it risks

1 BBC, Pakistan Ends Death Penalty Suspension After Seven Years, March 10, 2015, http://www.bbc.com/news/world-asia31812177.
2 Id.
3 Justice Project Pakistan maintains a database of prisoners that have been given the death sentence and executed based on news reports and official government sources.
4 Office of the High Commission for Human Rights, Pakistan: Mass Executions, Particularly of Juvenile Offenders, Serve Neither Deterrence nor Justice – Zeid, June 11, 2015, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16068&LangID=E.
5 Zahid Gishkori, 8261 prisoners: Hanging in the balance, EXPRESS TRIBUNE, December,18, 2014, http://tribune.com.pk/story/808727/6261-prisoners-hanging-in-the-balance/

compounding injustice'.[6] That same week, the European Union delegation mission to Pakistan urged its government 'to reinstate the moratorium immediately to commute the sentences of persons sentenced to death' in order to comply with its international legal obligations.[7] British and German officials have also urged Pakistan to reconsider its decision.[8]

Pakistan's imposition of the death penalty is, at its core, arbitrary. To begin with, Pakistan does not reserve the death penalty for the 'most serious crimes', as required by international law, but instead imposes execution for commonplace offences, such as kidnapping and drug-trafficking. Second, Pakistan's justice system is ridden with deficiencies and abuses of authority. As is documented throughout this book, police routinely coerce defendants into confessing, often by torture, and courts admit and rely upon such evidence. Poor defendants must rely on attorneys who typically provide only cursory and ineffective representation. Once sentenced, defendants lack effective recourse to post-conviction relief, even in the face of new exonerating evidence. Finally, the Anti-Terrorism Act of 1997 (ATA) offers even fewer safeguards than the ordinary criminal justice system and has the effect of fast-tracking convictions. Each of these failings constitutes a human rights violation in itself; taken together, they reveal an unreliable system that is fundamentally incapable of administering the ultimate and irreversible penalty of death.

This book, written by Justice Project Pakistan (JPP), documents the many ways in which Pakistan's application of the death penalty intersects with legal, social, and political realities. In analysing Pakistan's use of the death penalty, we focus on how the death penalty impacts some of the most vulnerable populations: juveniles, the mentally ill, persons with physical disabilities, low-wage migrant workers imprisoned in foreign jails, and the working class. Relying on public records[9] for multiple JPP clients sentenced to death, nearly a decade of experience in the field, as well as extensive experience with

6 Office of the High Commission for Human Rights, Pakistan: Mass Executions, Particularly of Juvenile Offenders, Serve Neither Deterrence nor Justice – Zeid, June 11, 2015.

7 European Union Delegation to Pakistan, Press Release: Local Statement on the Death Penalty Following Resumption of Executions in Pakistan After Ramadan, June 29, 2015, http://eeas.europa.eu/delegations/pakistan/documents/press_corner/20150729_01_en.pdf.

8 Zahid Gishkori, UK, Germany Express Deep Concern over Restoration of Death Penalty, EXPRESS TRIBUNE, March 11, 2015, http://tribune.com.pk/story/851608/uk-germany-express-deep-concern-over-restoration-of-death-penalty

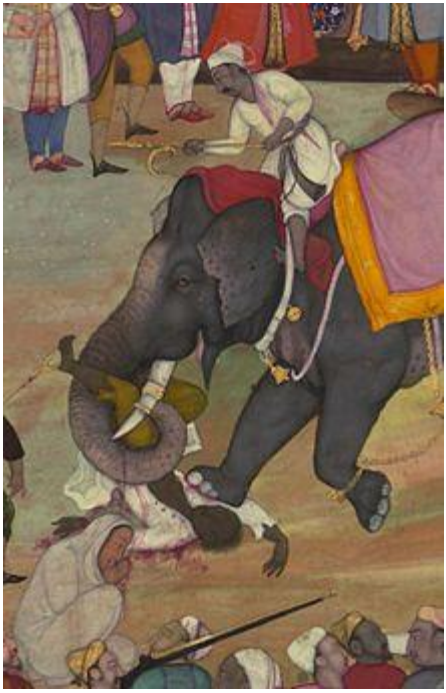
9 These records include charging reports, court transcripts, affidavits, medical records, motions, briefs, and judicial opinions, and death warrants.

legislation and advocacy, this book tracks the many junctures at which violations occur, from arrest to sentencing to execution.

The systemic violations illustrated here compel the conclusion that Pakistan's continuing practice of capital punishment violates international law. The irreversible nature of execution mandates the immediate reinstatement of the moratorium on all executions. Yet a moratorium alone will not suffice. Today, Pakistan continues to sentence to death persons who are juveniles, mentally ill, or very likely innocent. What procedural safeguards exist in theory are largely ignored on the ground. Given the multi-level failings of its criminal justice system, Pakistan should indefinitely suspend all capital sentencing and launch investigations into those cases marked by allegations of juvenility, mental illness, the use of torture and other abuses of authority, and evidence of innocence.

1

HISTORY OF THE DEATH PENALTY IN PAKISTAN



10

The Mughals (1526-1858)

Capital punishment was not common in the Indian subcontinent prior to the British Raj. It became a part of the Indian legal system in the 16th century after Babur's conquest of India brought about the beginning of the Mughal empire. Unseating local

10 .Abū al-Faẓl ibn Mubārak, and Henry Beveridge. 2002. The Akbar nama of Abu-l-Fazl. Delhi: Low Price Publications. Available at http://books.google.com/books?id=TdIVAQAAMAAJ.

Indian legal systems, the Mughals brought Islamic law to the subcontinent along with the opinions and case law of several renowned Islamic jurists and their conceptions of capital punishment.[11] Most Mughal emperors retained the prerogative to sentence someone to death. Hence, the extent of the use of capital punishment varied depending on the emperor in power but remained relatively rare.[12] For instance, Akbar attempted to reduce the mutilation and cruelty that would often accompany a death sentence. A *farman* (decree) of his dated 1582 specifically proscribed capital punishment without his express approval.[13] Aurangzeb never issued a death sentence in his reign.[14] Moreover, even though the emperor was the final arbiter of justice, he found himself constrained by Sharia law and its teachings. Crimes like murder, as per Sharia, were not pursued by the state but rather the aggrieved, who would bring a case against the accused privately in the *diwan-i-mazalim* (the court of complaints).[15] Even though Mughal emperors held court proceedings often, most plaintiffs did not make it to that stage.[16] Cases, then, were few and speedily decided with most disputes settled by local informal structures. While the death penalty was administered relatively rarely, the means of carrying it out were cruel and public, characteristic of ancient sovereigns asserting their dominance to instil fear in the populace. Some of the most prominent means of execution included the crushing of an offender's skull by an elephant, being torn to pieces by feral dogs and being bitten by snakes.[17] Mutilations, dismemberment, and impaling also occurred.[18]

Colonial India (1858-1945)

As the Mughal Empire fell, the British took control and established the Indian subcontinent as its colony until both Pakistan and India gained independence in 1947. Most of the laws and structures currently in place in Pakistan including those related to

11 S. P. Sangar, 'Administration of Justice in Mughal India', Proceedings of the Indian History Congress Vol. 26, PART 2 (1964): pp. 41-48.
12 'XVI. Mughal Administration', Columbia University, accessed August 17, 2018, http://www.columbia.edu/itc/mealac/pritchett/00islamlinks/ikram/part2_16.html
13 Sangar, 'Mughal India'.
14 Id.
15 Columbia University, 'Mughal Administration'.
16 'William Hawkings who visited Indian subcontinent during Mughal Ruler Emperor Jahangir's reign within 1608-13, said that the Indian Emperor sat "Daily in Justice every Day" and retained the power to grant the death sentence only unto himself'. Shaikh Musak Rajjak, 'Justice and Punishment during Mughal Empire (Based on Foreign Travelogues', International Journal of Science and Research ISSN (Online): 2319-7064 (2012): 2444-6, https://www.ijsr.net/archive/v3i12/U1VCMTQxMDQ3.pdf.
17 Sangar, 'Mughal India'.
18 Id.

criminal justice and the legal system date to colonial times. While the British altered the modes of carrying out death sentences and made hanging the norm,[19] they also made it so that capital punishment was administered more readily and frequently. Whereas the Mughals did not have many formal prison systems, the building of new and improved prisons marked the entry of the British into the Indian subcontinent.[20] In her book *Prisoner Voices from Death Row*, Reena Mary George indicates, 'Prisons continue to be located and structured more or less as they were in colonial times. Any change that has been made has been incorporated somewhat clumsily into the old system that basically served the triple colonial aims of order, economy and efficiency'.[21]

The first formal placing of capital punishment in the legal system, though, came when the Governor-General of the India Council enacted the Indian Penal Code in 1860.[22] The law, drafted by a group of Britishers making up the Law Commission, did not attempt to integrate any traditional Indian legal systems and instead, as the historian David Skuy notes, 'the entire codification practice represented the transplantation of English law to India, complete with lawyers and judges'.[23] Since English law at the time was not itself uniform, this was a first attempt to create such a standard body of law. The current Code of Criminal Procedure was introduced in 1898 but draws from the very first code of 1861 that followed the 1857 Indian rebellion.[24] Its intent was to control Indians. Some of the provisions in these laws are termed as 'draconian or black laws'.[25] In fact, these codes made the death penalty the automatic punishment for murder with life imprisonment as the exception rather than vice versa.[26] The primary justification of the death penalty itself today stems from the time Pakistan was still a colony, namely 'the belief that common people can be made to obey the law only through fear instilled by

19 Treating Indians as automatically of a lower class, they did not consider beheading which in Britain itself was reserved for upper class men and women.
20 Reena Mary George, Prisoner Voices from Death Row Indian Experiences, (New York: Routledge, 2016), https://www.taylorfrancis.com/books/9781317075769.
21 Id.
22 Divya Metha, 'Capital Punishment in India: Life, Death and Rebirth?', Brown Political Review, November 29, 2016, http://www.brownpoliticalreview.org/2016/11/capital-punishment-india/.
23 David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century', Modern Asian Studies Vol. 32, No. 3 (July, 1998): pp. 513-557.
24 TNN, 'CrPC was enacted after 1857 mutiny', The Times of India, May 5, 2008, https://timesofindia.indiatimes.com/city/hyderabad/CrPC-was-enacted-after-1857-mutiny/articleshow/3010641.cms.
25 George, Prisoner Voices.
26 Id.

harsh punishment'.[27] This belief persists despite reputable empirical evidence to the contrary and influences public opinion on the death penalty to this day.

Along with increasing the number of convicts and prisons and instating harsh laws, the British increased the number and frequency of executions in the country significantly. In fact, by the 1920s, fearing that they were losing their grip on the Empire, the British executed an average of 3 people every day.[28] According to one scholar, Anderson, 'capital punishment was used extensively in colonial India by the British Empire to control its colonial subjects and reinforce its sovereignty', particularly 'given to the lower caste and class'.[29] This discriminatory trend persists to this day such that a vast majority of those on death row are from marginalised communities with poor socio-economic backgrounds. Time and again, scholars indicate that executions helped 'consolidate imperial rule and eradicate resistance against it'.[30] These often took the form of public spectacles to dissuade dissenters and others from rising up. One example is the blowing up of Indian soldiers by canons for mutiny.

These public displays, in fact, sometimes drew from the harsh means of executions used by the Mughals before them. Other than these public spectacles, hangings for common crimes from murder to theft to refusal to work were also used to teach the colonised a 'lesson'.[31] While the actual number of executions was roughly the same in Britain and India, the difference was that these deaths were public and directly a way to assert dominance and repress insubordination to curb challenges to the British Raj. And though there are multiple cases where the British commuted capital punishment, they often did this in face of a worse punishment of transportation and indentured servitude elsewhere, believing that forcing Indians to move would severely affect their religious practices, funerary rights, and caste structures, and thereby constitute a form of social death.[32] Often, the British would use the bodies of dead prisoners for research – medical or otherwise. These routine post-mortems became one of the sets of grievances that led to the Great Indian Rebellion of 1857.[33]

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27 C. Mohan Gopal, 'Colonial Legacy', Frontline, March 8, 2013, https://www.frontline.in/cover-story/colonial-legacy/article4431152.ece.
28 Id.
29 Clare Anderson, 'Execution and its Aftermath in the Nineteenth Century British Empire', University of Leicester, last accessed August 17, 2018, https://lra.le.ac.uk/bitstream/2381/31686/6/AndersonCriminalCorpseFORMATTED.pdf.
30 Id.
31 Anderson, 'Execution'.
32 Id.
33 Id.

At the same time, the British put in place numerous due process guarantees. As part of several reform movements in 1837, the Colonial Office sought to reconcile law on capital punishment in England with that in the colonies, but inconsistencies remained.[34] As Britain sought to prove its 'civilizing' mission, the push for reforms intensified, but in many ways, this did not reach the colonies they were intended to benefit and the 'theater of execution' continued in the Indian subcontinent.[35] When makeshift gallows were proved prone to botched executions, the British, under heavy criticism, set up new and improved ones. However, problems persisted: 'the drop was often too short, and criminals were on occasion hanged weighed down with heavy fetters on their legs'.[36]

The death penalty in England itself was inherently problematic. Seeing its rise in the industrial era, a sentence of death was the penalty for hundreds of offences from pickpocketing to cutting down a tree to being out at night with a black face to rape and murder.[37] It was only after sustained activism that the death penalty was narrowed down by 1861 from 200 offences to 4.[38]

Rise of a new country (1947- 1976)

Stemming from a history of repression and rule by Emperors or colonialists, the death penalty in Pakistan is inherently plagued with defects that render it incompatible with a democratic system which accords basic human rights protections. Still, capital punishment in the nascent Pakistan remained restricted to two offences: murder and treason.[39] Pakistan's first Constitution of 1956 granted several rights to citizens of the country. It combined 'the principles of democracy, freedom, equality, tolerance, and social justice enunciated by Islam' with language from the Universal Declaration of Human Rights to produce a document that promised to usher in a new age of reform. Article 5 of the Constitution specifically ordered that 'No person shall be deprived of life or liberty save in accordance with law'.

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34 Id.
35 Id.
36 Id.
37 'A brief history of capital punishment in Britain', Historyextra, March 27, 2018, https://www.historyextra.com/period/20th-century/a-brief-history-of-capital-punishment-in-britain/.
38 Id.
39 Muhammad Dawood & Manzoor Khan Afridi, 'Comparison between 1956 and 1962 Constitution of Pakistan', Ma'arif Research Journal (January-June 2016), http://mrjpk.com/comparison-1956-1962-constitution-pakistan/.

A few years later in 1958, Pakistan's budding democracy saw the rise of its first military leader Ayub Khan and after him Yahya Khan. Shifting Pakistan to a decidedly Islamic republic, the 1962 Constitution promulgated by Ayub Khan largely retained the rights accorded in the first constitution, altering instead the method and system of elections (from a direct election in a parliamentary system to an indirect election in a presidential system) and adding in advisory councils of Islamic ideology. The provision in Article 5 of the 1956 Constitution remained in the new one.

This period was followed by a return to democracy as Zulfikar Ali Bhutto became President of the country in 1971. A leftist who emphasised human rights, Bhutto put in place the 1973 Constitution. This Constitution not only retained the original provisions of Article 5 of the 1956 Constitution, but it also established a direct appeal to the Supreme Court in cases where the 'High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death…' or the same where the Federal Shariat Court did so. At the same time, uncertain whether the military might reassert its dominance, Bhutto ensured that the 1973 constitution treated any attempt to overthrow the government as treason, with the penalty being capital punishment. Nevertheless, he made several moves intended to eventually phase out the death penalty including making the alternative of life in prison more palatable by increasing the years from 14 to 25 in prison.

The Period of Islamisation

In a military coup, Zia-ul-Haq ousted Bhutto and took over in 1976. His initial few years in power were characterized by dismantling Bhutto's hold on the country leading up to his execution. Later, from 1979 to 1985, Zia focused on the war against the Soviets in Afghanistan, making him an integral asset to the West during the Cold War. It was in his final years from 1985 to 1988 that he ramped up his domestic political hold and began experimenting with and altering Pakistan's criminal justice system with increased fervour.[40] Subsequently, he would forever alter the laws and norms of the country, expanding the scope of the death penalty to cover several new crimes. He would incorporate Sharia practices into the penal system more fully. By using hangings as a political tool against his opponents, Zia, in his eleven-year reign, set a precedent that is difficult to counter.

40 Shahid Javed Burki, 'Pakistan under Zia, 1977-1988', Asian Survey Vol. 28, No. 10 (October 1988): pp. 1082-1100.

Zia's first act of normalising the death penalty especially for political use was hanging his rival, former Prime Minister Zulfiqar Ali Bhutto. After a trial that faced repeated criticisms for its partiality, Bhutto got his final execution order: 'According to the March 18, 1978 order of the Lahore High Court, you, Mr Zulfikar Ali Bhutto, are to be hanged for the murder of Nawab Mohammad Ahmad Khan', read the order. 'Your appeal in the Supreme Court was rejected on February 6, 1979 and the review petition was turned down on March 24, 1979. The president of Pakistan has decided not to interfere in this matter. So it has been decided to hang you'.[41] This was despite calls for clemency from the heads of states of several nations and several national and international human rights organisations.[42]

This state of events is often called 'judicial murder' since it followed a trial plagued with several due process hurdles. One prominent anomaly was that no one in the history of the country, and South Asia more broadly, had ever been sentenced to death for conspiracy to murder.[43] Another unprecedented aspect of the case was that four men along with Bhutto found themselves sentenced to death as abettors to murder which is commonly not a penalty carrying a death sentence in Pakistani law.[44] Bhutto was also denied the right to appeal with his case tried directly by the High Court. Following this, political deaths continued. In fact, 'a survey by the Geneva-based International Commission of Jurists citing a report by the Lahore Bar Association, charged that 'systematic torture' occurred in five Lahore prisons in 1984, particularly at a jail where many political detainees were held'.[45] In its report titled *The Trial and Treatment of Political Prisoners Convicted by Special Military Courts in Pakistan*, Amnesty

41 Shaikh Aziz, 'A leaf from history: The prime minister is hanged', DAWN, February 1, 2015, https://www.dawn.com/news/1160422.
42 Robert Trumbull, 'Bhutto is Preparing a Final Appeal After Sentence of Death is Upheld', The New York Times, February 7, 1979, https://www.nytimes.com/1979/02/07/archives/bhutto-is-preparing-a-final-appeal-after-sentence-of-death-is.html.
Peter Niesewand, 'Bhutto is Hanged in Pakistan', The Washington Post, April 4, 1979, http://www.washingtonpost.com/wp-dyn/content/article/2007/12/27/AR2007122701067.html.
43 Sherry Rehman, 'Inside Pakistan's most famous murder trial', Daily Times, April 4, 2018, https://dailytimes.com.pk/223338/inside-pakistans-most-famous-murder-trial/.
44 Id.
45 'Oppression under the Regime of General Zia-ul-Haq', World Heritage Encyclopedia, last accessed August 7, 2018, http://self.gutenberg.org/articles/eng/oppression_under_the_regime_of_general_zia-ul-haq.

International echoed these concerns, noting that political prisoners are denied the opportunity to a fair trial, emphasising the use of torture to extract forced confessions.[46]

DAWN

FOUNDED BY QUAID-I-AZAM MOHAMMAD ALI JINNAH

KARACHI

7 Jamadi-ul-Awwal, 1399
Thursday, April 5, 1979

CASIO

The New Twitimers
CITIZEN
Quartz
Multi Alarm

BHUTTO HANGED IN 'PINDI JAIL

Govt Press note on execution of Z. A. Bhutto

Ex-PM buried in family graveyard of Nau Dero

Four others await decision on mercy petitions

From M. A. MAJEED

RAWALPINDI, APRIL 4. MR ZULFIKAR ALI BHUTTO WAS HANGED TO DEATH AT TWO O'CLOCK THIS MORNING IN THE RAWALPINDI DISTRICT JAIL.

A warning to all politicians, says Khurshid

AMIN WARNS TANZANIA

Massive attack on Kampala launched

11 arrested in Liaquat Bagh firing case

Calm prevails throughout Sind province

47

Not only did Zia use the death penalty against his political opponents, but he also worked to integrate it in regular criminal law as part of the state's official policy to deal with criminal and un-Islamic activity. Zia's reign was characterised by the spread of Islamisation, one that was particularly severe, namely Wahabbism. Starting in 1979, the Council of Islamic Ideology began to prepare a draft law for murder which passed in the 80s.

While the steady Islamization under Zia, or *nizam-i-mustapha* (Order of the Prophet), brought many economic benefits and worked to integrate Islam more fully through social reforms, it also lead to an expanded scope of the death penalty. On the legal side, in his push to integrate Islam, Zia created Shariat Appellate Benches which would later become the Federal Shariat Court responsible for hearing special Shariat

46 'The Trial and Treatment of Political Prisoners Convicted by Special Military Courts in Pakistan', Amnesty International, November 1985, https://www.amnesty.org/download/Documents/200000/asa330511985en.pdf.
47 'Remember: The day ZA Bhutto was hanged', DAWN, April 10, 2015, https://www.dawn.com/news/1097716.

petitions. The law, which integrated Sharia, grew over the years to include the Hudood ordinances, expanding the death penalty to cover twenty-seven offenses, including adultery and blasphemy. During his tenure, moreover, martial law was in place and Martial Law Order 53 removed the basic due process right of a defendant to stand as innocent until proven guilty. Military courts often helped clear the backlog from civil courts, which proved to further create a problem.

Military courts limit due process rights for civilian defendants, particularly the right to an appeal. In fact, 'Special military courts imposed the death penalty on over two-thirds of the more than 140 people reported in the Pakistan press to have been sentenced to death mainly for ordinary criminal offences during 1983 and 1984. Amnesty International knows of only three instances during this time in which death sentences imposed by special military courts have been commuted'.[48] The total number of executions was at an all time high. Amnesty International, quoting the then Law Minister, cites that executions around 1979 rose to more than 800.[49] Finally, Zia began the practice of public hangings. Analysing newspaper clippings from 1985 to 1988 reveals at least five cases of public hangings were formally conducted during his tenure as President. All took place in the year he died in a plane crash, 1988, and all were prominent public hangings of murderers — three for murderers of children.[50] These public hangings were eventually challenged before the Supreme Court and overturned.

Even though Zia altered much of the legal framework, his laws had little effect in practice. One of the supposed fundamental changes in the legal realm was altering the 1872 Law of Evidence, coming from the British colonial times, to work in accordance with Sharia law.[51] While it created a prominent difference in testimony for men and women riling women's rights activists,[52] in other ways, the change was not significant. Ultimately other than the provision deeming a woman's testimony to weigh less than that of a man's in financial cases, the Qanun-i-Shahadat Order 1984 (new law of evidence) was a carbon copy of the original British law of evidence except that Zia declared that it

48 Amnesty International, 'Trial and Treatment'.
49 'The Death Penalty', Amnesty International, 26, September 1979, https://www.amnesty.org/download/Documents/204000/act500031979eng.pdf.
50 This is the data I found when I was looking through newspaper clippings for Shoaib: the public hangings took place on 13th Jan 1988 at Mianwali Stadium, 19th Jan 1988 at Zafar Ali Stadium, 1st February 1988 at Multan Qaasim Bagh Stadium and two on 2nd of Feb 1988 at Polo Ground Peshawar and Iqbal Park Faislabad.
51 Charles H. Kennedy, 'Islamization and Legal Reform in Pakistan, 1979-1989', Pacific Affairs Vol. 63, No. 1 (Spring 1990): pp. 62-77.
52 Ammar Rahid, 'The dogged legacy of Pakistan's most destructive dictator', TRTWorld, January 2, 2017, https://www.trtworld.com/opinion/the-dogged-legacy-of-pakistan-s-most-destructive-dictator--8555.

replaced an 'un-Islamic law with an Islamic law'.[53] Sharia law of evidence likewise immensely lessens the severity of the Hudood ordinances since it requires four men to testify to the commission of a hadd offence. Since it is extremely difficult to attain adequate evidence to prove such a law, hadd offenses continue to hardly impact the actual processing of cases. In fact, 'no *hadd* penalties have been meted out in the state and only two *hadd* convictions have ever been upheld by the Supreme Court'.[54] Similarly, in integrating Sharia into the crime of murder, Zia implemented the qisas and diyat ordinances which did more to lessen than increase the death penalty. As one scholar underscores, in large part concerning an actual change in how the criminal justice system operates in the country, 'Zia's reforms have had only a minor impact on political, legal, social and economic institutions of the state'.[55]

Even though the laws themselves were not immensely radical and did little to unseat their original British underpinnings, Zia's largest contribution was to normalise the death penalty and capital punishment.[56] He changed the culture of Pakistan and shifted the country towards a radical Islamic mindset, altering the norms of what was and was not acceptable in ways that persist to today. That is his fundamental legacy. He made hangings the means to maintain his political hold of the state. With several constitutional amendments, he instilled in the President the power to make all these drastic changes and granted immense power to the military to execute as they willed. Even though the change in Sharia laws themselves had little impact on crimes, they set a dangerous precedent that firmly entrenched the death penalty in the country.

In normalising the punishment of death, these laws served to solidify Zia's political regime and oppress those who work in opposition to him. These laws were and continue to be used as a tool to repress minorities and the vulnerable with problematic standards of proof.

Budding Democracy (1988-1998)

After Zia's demise in a plane crash in 1988, democratic elections begun and Benazir Bhutto, daughter of Zulfikar Ali Bhutto, became the first female Prime Minister of Pakistan and the first democratically elected woman to lead a Muslim nation.[57] Bhutto

53 Kennedy, 'Islamization'.
54 Id.
55 Id.
56 S. Akbar Zaidi, 'Special Report: Darkness Descends 1977-1988', DAWN, November 1, 2017, https://www.dawn.com/news/1364410.
57 'Benazir Bhutto', History, https://www.history.com/topics/womens-history/benazir-bhutto.

was a vociferous opponent of the death penalty that took her father's life. In fact, in her first few days in office, Bhutto commuted all death sentences to life imprisonment, a total of 2029 sentences.[58] Public hangings came to a de facto end under her and she pushed away from capital punishment.

However, she did little to change the deeply ideological laws in place that continued to perpetuate a culture of violence with a perception that capital punishment was the only solution to increasing crime and unrest. Subsequent conservative Prime Minister Nawaz Sharif solidified Zia's legacy. While he did nothing to alter the several sentences that carried the death penalty, the Sharia bill passed both the Senate in 1991 and then the National Assembly in 1998. Sharif also promulgated the Anti-Terrorism Act 1997 that extended the death sentence for several terrorism related offenses and set up the Anti-Terrorism Court (ATC) that could speedily sentence and execute alleged terrorists. In the same year, the legislature passed the Control of Narcotics Substances Act 1997, repealing the Dangerous Drug Act, that continues to list the punishment of death for 'trafficking or financing the trafficking of drugs'.[59] Until 1999, Sharif and Bhutto vied for power, the former more conservative and the latter supported for her rights-based campaigning.

Musharraf's Reign (1999-2007)

With the economy failing, the military came into power once again. From 1999 to 2007, General Pervez Musharraf ruled after deposing the then Prime Minister Nawaz Sharif. Capital punishment once again skyrocketed. According to Human Rights Watch, Pakistan had a significantly higher rate of death sentences and executions under Musharraf.[60] Implementation of the Anti-Terrorism Act, further, led to increased sentences. As time passed, ATCs began to try not only cases of terrorism related offenses but also more common cases of murder, leading to pushback from several activists

58 The order has been detailed in P L D 1993 Supreme Court 14. For more details https://www.amnesty.org/download/Documents/200000/asa330031990en.pdf
59 Section 8-9.
60 'Pakistan: Abolish the Death Penalty', Human Rights Watch, June 17, 2008, https://www.hrw.org/news/2008/06/17/pakistan-abolish-death-penalty.

demanding reform and change.[61] Nawaz Sharif himself was tried by an ATC and given a life sentence in 2000 that was eventually commuted to exile.[62]

Other than ATCs, narcotics courts and military courts also tried several offenders with increased frequency. According to a statistic by Human Rights Watch, while the number of people hanged in 2004 was 14, this number increased to 52 in 2005, 82 in 2006 and 134 in 2007.[63] In 2008, Human Rights Watch noted that 'Out of the more than 31,400 convicts in the country, nearly a quarter – more than 7,000 individuals, including almost 40 women – have been sentenced to death, and are either involved in lengthy appeals processes or awaiting execution. In 2007, 309 prisoners were sentenced to death and 134 were hanged'.[64] In the first few months of 2008, there was one execution every week on average.[65] Pakistan, at this point, had become the fourth largest executioner in the world. Moreover, majority of those on death row came from working class backgrounds and many were minorities facing discrimination tried without due process. Because of the substandard quality of legal assistance provided by the state, as Human Rights Watch notes, 'many end up receiving the death penalty, not for the worst crime, as international law requires, but for the worst lawyer'.[66] Once again, then, a double standard prevailed entrenching social inequalities.

One of the only mercy petitions ever granted in the history of Pakistan was Musharraf granting one to a British national Mirza Tahir Hussain for murder against the wishes of the victim's family.[67] In contrast, one of the most prominent and publicised case at the time was that of Zahid Masih, a janitor who was tortured into confessing to the murder of an army child whose mercy petition was denied and who was hanged after receiving a death sentence from a military court.[68] Other than the formal process, during

61 Aftab Kazmi, 'Call to suspend capital punishment until reforms', Gulf News, July 7, 2001, https://gulfnews.com/news/uae/general/call-to-suspend-capital-punishment-until-reforms-1.420559.
62 Nasir Iqbal, 'Nawaz pardon documents placed before apex court', DAWN, June 10, 2009, https://www.dawn.com/news/470309.
63 Brad Adams, 'Letter to Pakistan's Prime Minster to Abolish the Death Penalty', Human Rights Watch, June 17, 2008, https://www.hrw.org/news/2008/06/17/letter-pakistans-prime-minister-abolish-death-penalty.
64 'Abolish the Death Penalty', Human Rights Watch.
65 Beena Sarwar, 'Death Penalty – Pakistan: Reprieve Call Could Save Thousands', Inter Press Service News Agency, July 4, 2008, http://www.ipsnews.net/2008/07/death-penalty-pakistan-reprieve-call-could-save-thousands/.
66 Adams, 'Letter'.
67 'Victim's mother wants man hanged', BBC News, October 28, 2006, http://news.bbc.co.uk/2/hi/uk_news/england/west_yorkshire/6092550.stm.
68 Sarwar, 'Death Penalty'.

this time, local informal courts or jirgas continued to impose the death penalty extrajudicially.[69]

At the same time, in the early 2000s, the Supreme Court echoed the harsh policy of the government. In a 2003 decision, they noted that 'the normal penalty of death should be awarded and leniency in any case should not be shown, except where strong mitigating circumstances for lesser sentence could be gathered'.[70] Similarly, the Supreme Court in 2002 lowered the standard of evidence, claiming that 'technicalities should be overlooked'.[71]

The Moratorium on the Death Penalty (2008-2014)

Following Musharraf's time as President, under increasing domestic and international pressure, one of the main objectives of the new democratic government led by Pakistan People's Party was to address the problem of the death penalty. In 2008, the government imposed a moratorium on executions.[72] This followed a 2007 General Assembly Resolution calling for a worldwide moratorium on the death penalty. Prime Minister Gilani under the presidency of Asif Ali Zardari and of the same political party as the late Benazir Bhutto wanted to follow her precedent and commute the sentences of the 7000 on death row to life imprisonment.[73] The commutation was to benefit all prisoners except those charged with terrorism and treason related offenses. However, facing considerable opposition and legal problems, this commutation never happened, and it was only until the end of the year that the de-facto moratorium was enforced.

Nevertheless, the government did draft an amendment that would abolish the death penalty.[74] A proposal was quickly prepared to alter the Pakistan Penal Code to do this. Political opposition and increasing security fears as well as public opinion strongly in favour of the death penalty, though, thwarted these attempts year after year. At the same time, the government contradicted its position in other ways, increasing the number of crimes that carry the death penalty. For instance, 'President Zardari issued

69 'Pakistan', U.S. Department of State, February 25, 2009, https://www.state.gov/j/drl/rls/hrrpt/2008/sca/119139.htm.
70 Badar Munir vs. State, 2003 YLR 753(G).
71 PLD 2002, SC 558 Muhammad Saleem vs. the State.
72 Frud Bezhan, 'Restoration of Death Penalty Could be dire for Pakistan's Musharraf', RadioFreeEurope RadioLiberty, July 18, 2013, https://www.rferl.org/a/pakistan-musharraf-death-sentence/25049939.html.
73 Sarwar, 'Death Penalty'.
74 Nadeem Farhat Gilani, 'Should Pakistan Abolish or Retain Capital Punishment', Policy Perspectives Vol. 6, No. 2 (July-December 2009): pp. 133-148.

the Prevention of Electronic Crimes Ordinance, stipulating that cyber terrorism resulting in a death would be punishable by the death penalty or life imprisonment'.[75] While executions were not carried out during the de-facto moratorium, the President of Pakistan refused to accept any mercy petition, leading to a death row that continued to increase in size. Nevertheless, the moratorium was an admirable move towards eventual abolition. Most countries follow such suspensions with the abolition. Unfortunately, this was not to be the case in Pakistan.

After the imposition of the moratorium, the number of executions dropped to none except for one controversial execution in 2012 that briefly disturbed the moratorium. In this year, one soldier was sentenced to death for murdering his superior in a personal dispute.[76] This was widely seen as an anomaly conducted as it was under extreme pressure from the military. Notably, even though the executive put in place the moratorium on all death sentences, the judiciary continued to impose the death penalty undeterred. Since the imposition of the moratorium had no effect on the death sentences awarded, Pakistan continues to have a large death row.

Lifting of the Moratorium (2014- Present)

In 2013, Nawaz Sharif was elected the new prime minister of Pakistan. When the moratorium on the death penalty expired, the government was called on to renew it. Initially, Sharif declined to do so and lifted the moratorium. The President, in turn, began systematically declining all mercy petitions. Although the government briefly lifted the moratorium, it once again renewed it for fear of losing a trade agreement with the EU as part of Generalised Scheme of Preferences when informed that lifting the moratorium could work as a setback to this agreement. Objections from his opposition

75 Pakistan, US Department of State.
76 'Pakistan: Execution Ends Moratorium on Death Penalty', Human Rights Watch, November 20, 2012, https://www.hrw.org/news/2012/11/20/pakistan-execution-ends-moratorium-death-penalty.

and the previous ruling party as well as several human rights groups pushed the government to temporarily stay the execution orders.[77][78]

In 2014, a day after the massacre of children by terrorists at the Army Public School, Nawaz Sharif ended the moratorium as part of his government's National Action Plan (NAP) and resumed executions with great fervour.[79] The original objective of the reinstatement of the death penalty was to execute those convicted of terrorist ofences[80] following the tragic terrorist attack on the Army Public School in Peshawar. However, in March 2015, without any public justification, the moratorium was lifted for all those awarded the death penalty under Pakistan's criminal laws, including for non-terrorism related offences.

Since the moratorium was lifted, the Government of Pakistan has executed more than 500 individuals, making it one of the most prolific executioners in the world. Despite the government's predominant narrative claiming that the death penalty is a necessary measure to curb terrorism, only 30 percent of those executed were convicted for crimes of terrorism.[81] This statistic is greatly problematic in light of the original aim

77 Human Rights Commission of Pakistan, 'Pakistani authorities urged to renew moratorium', World Coalition Against the Death Penalty, July 8, 2013, http://www.worldcoalition.org/pakistan-hrcp-human-rights-commission-death-penalty-moratorium-miscarriage-justice-execution.html.
Mateen Haider, 'Nawaz removes moratorium on death penalty', DAWN, December 17, 2014, https://www.dawn.com/news/1151408.
Syed Hassan, 'Pakistan brings back death penalty, anger of rights groups', Reuters, July 5, 2013, https://www.reuters.com/article/us-pakistan-executions/pakistan-brings-back-death-penalty-to-anger-of-rights-groups-idUSBRE96409G20130705.

78 'The EU Ambassador to Pakistan Lars Wigemark said the moratorium on the death penalty was not directly linked with the Generalised System of Preference plus status, which Islamabad is seeking for duty free access, but by declaring a moratorium on the death penalty Pakistan made very positive achievement that the country's diplomats could exploit in its negotiations with the EU'. Zahid Gishkori & Shahbaz Rana, 'Capital punishment: EU cautions against lifting moratorium', The Express Tribune, August 28, 2013, https://tribune.com.pk/story/596285/capital-punishment-eu-cautions-against-lifting-moratorium/.

79 Asad Hashim, 'Pakistan lifts death penalty moratorium', Aljazeera, December 18, 2014, https://www.aljazeera.com/news/asia/2014/12/pakistan-lifts-death-penalty-moratorium-201412171053749938 7.html.

80 See The Washington Post. 'Pakistan Announces A National Action Plan To Fight Terrorism Says Terrorists' Days Are Numbered'. 2014. Web. 13 June 2017. Available at https://www.washingtonpost.com/news/worldviews/wp/2014/12/24/ pakistan-announces-a-national-plan-to-fight-terrorism-says-terrorists-days-are-numbered/?utm_term=.8a9367080ba6

81 Justice Project Pakistan. 'Trial and Terror: The Overreach of Pakistan's Anti-Terrorism Act'. Nov. 14, 2017. Available at: https://www.jpp.org.pk/wp-content/uploads/2017/11/2017_11_13_PRIV_ATA-Report-Final.pdf. [Accessed on May 31, 2019].
Till Sep. 30, 2017.

for which the moratorium was lifted - it clearly establishes that the majority of those being executed are not terrorists. There are currently more than 33 crimes that are punishable by death, a vast majority of which fail to meet the 'most serious crimes' standard under international law.[82] Subsequently, executions began for everyone on death row. which then made up around 8,000 people.[83]

Exacerbating this is the definition of terrorism under the Anti-Terrorism Act (1997), Pakistan's premier anti-terrorism legislation, and its application. A study by Justice Project Pakistan and Reprieve, 'Terror on Death Row', discovered that due to the broad scope of the law, almost 86 percent of those sentenced to death under the ATA were convicted for offences that bore little connection to terrorism as it is traditionally defined.[84] This number highlights the great discrepancy between the government's aim of countering terrorism, that propelled the resumption of executions in December 2014, and the subsequent impact it has had in practice. The ATA also provides the death penalty for a broad range of offences including kidnapping for ransom, murder, and hijacking. Moreover, those convicted under the ATA are more likely to be awarded the death penalty than those tried under the criminal justice system. Since the lifting of the moratorium over 75[8] executions have been carried out for suspects charged under the ATA.

The attack on the children by the Tehrik-i-Taliban Pakistan was undoubtedly horrific. It led to the deaths of 132 students and nine teachers and sent shock waves throughout the country. The response of the Chief of Army Staff at the time, General Raheel Sharif, was 'more than 3000 terrorists should be hanged in the next 48 hours'.[85] This reinvigorated the proponents of the death penalty: 'why are the hands of the state

82 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art 6(2)[ICCPR]
83 '8000 death row prisoners at risk as Pakistan plans execution of non-terrorists', Reprieve, January 28, 2015, https://reprieve.org.uk/press/8000-death-row-prisoners-at-risk-as-pakistan-plans-execution-of-non-terrorists/.
Human Rights Watch, 'Restore Death Penalty Moratorium', reliefweb, 16 September 2014, https://reliefweb.int/report/pakistan/restore-death-penalty-moratorium.
84 Justice Project Pakistan and Reprieve. 'Terror on Death Row'. December 2014. [Terror on Death Row] Available on http://www. jpp.org.pk/wp-content/uploads/2017/01/2014_12_15_PUB-WEP-Terror-on-Death-Row.pdf
85 Akhilesh Pillalamarri, 'Pakistan reinstates the death penalty', The Diplomat, December 19, 2014, https://thediplomat.com/2014/12/pakistan-reinstates-the-death-penalty/.
See also Jon Boone & Ewan MacAskill, 'Pakistan school massacre prompts prime minister to lift death penalty ban', The Guardian, December 17, 2014, https://www.theguardian.com/world/2014/dec/17/pakistan-school-massacre-taliban-nawaz-sharif-lift-death-penalty-ban.

tied while terrorists are killing with impunity?'[86] The number of executions reached a peak in the year 2015, when a total of 326 convicts were hung. As Sarah Belal, Executive Director of JPP, indicated, 'The people of Pakistan think that when you're executing terrorists, you'll be killing those who were responsible for the Peshawar attacks. What you will [largely] see will be regular criminals - people who are accused of murder, robbery, property disputes – being executed'.[87]

[88]

At the same time as the lifting of the moratorium, military courts gained greater powers to try terrorists with the National Action Plan and the Pakistan Army (Amendment) Act of 2015. To strengthen these courts, their proceedings became non-transparent and judges had the power to exclude the public from proceedings.

In recent years, there is hope that once again a push from human rights organisations and civil society will prompt the country to reinstate its moratorium. There are renewed calls for the EU to push for the moratorium using the GSP+ talks as they undergo periodic review and revision.[89] Executions are steadily declining from 87

86 Syed Sami Raza, 'After the Peshawar School Attack: Law and Politics of the Death Sentence in Pakistan', Counter Terrorist Trends and Analyses Vol. 7, No. 5 (June 2015): pp. 22-27.
87 Hashim, 'Death penalty moratorium'. See also 'Pakistan ends death penalty suspension after seven years', BBC News, March 10, 2015, https://www.bbc.com/news/world-asia-31812177.
88 '11 militants carried out Peshawar school attack: police report', Pakistan Today, December 23, 2014, https://www.pakistantoday.com.pk/2014/12/23/11-terrorists-carried-out-peshawar-attack-police-report/.
89 'To date, all of the other GSP+ beneficiary countries have prohibited by law the use of the death penalty (although human rights groups assert it continues in secret in the Philippines and Mongolia). Why isn't Pakistan held to the same regard'?

in 2016 to 65 in 2017. Civil society organisations, including JPP, continue to call for an end or a suspension of the death penalty. At the same time, cases such as that of seven-year-old Zainab's murderer, Imran Ali, have riled the public to demand death for all criminals.[90] With the 2018 elections, Imran Khan comes into power and the fate of the death penalty in the country and of its abolitionist movement is uncertain. The fight to abolish the death penalty has only just begun.

Barbara Matera, 'EU must use GSP+ to end death penalty in Pakistan', The Parliament Magazine, June 5, 2018, https://www.theparliamentmagazine.eu/articles/opinion/eu-must-use-gsp-end-death-penalty-pakistan.

90 'Man seeks public execution of rapist-murderer of 6-year-old daughter', The Express Tribune, June 24, 2018.

OFFENCES PUNISHABLE WITH DEATH IN PAKISTAN

Under the various laws in Pakistan, there are 33 offences that are punishable by death. To better understand the application of death penalty in Pakistan, it is key to gauge the factors and case law that shape the laws penalising with capital punishment. This chapter will discuss in detail the provisions of the law that penalise with the death penalty and the effect that has had on the development of the law.

Introduction to the Pakistani Criminal Legal System

Pakistan continues to use the inherited English legal system which follows the tenants of common law. This means that Parliament is tasked with formulating statues and it is for the courts to interpret them. Key codes and statutes govern Pakistan's criminal legal system. The Pakistan Penal Code 1860 (PPC) details the offences punishable under the general law. The Code of Criminal Procedure 1898 (CrPC) prescribes the procedure for investigations and trials. The Qanun-e-Shahadat Order 1984 (Q&SO) is the evidence act that prescribes the competency of witnesses, the examination of witnesses, forms of evidence and the procedure for presenting the same. The procedure prescribed in the law applies to judicial proceedings and investigations by a court of law in civil or criminal cases. The special courts penalise specific offences and dictates certain provisions on procedure however follows the procedure prescribed in the above-mentioned codes, laid down in the respective statute.[91]

Pakistan is governed by the Constitution of the Islamic Republic of Pakistan, 1973, the principle law of the country, which lays down the hierarchy, procedure, and powers of the government, parliament and court system. The principle of precedent (*stare decisis*) is followed in Pakistan which means that case law developed through the courts will be

91 Hussain, Faqir. The Judicial System of Pakistan. 4th ed. 2015. http://supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf

binding for interpretation and lower courts are bound to follow the rulings by higher courts. The hierarchy of the court system in Pakistan is similar to one found in most common law states. At the lowest level of the criminal courts are the district courts. They are divided between the Magistrates courts which consist of three classes who all serve different functions. Superior to it are the Sessions Court. Cases punishable with the death penalty are triable by the Sessions Courts and the Additional District Sessions Judge. There is a separate procedure for special court as specified in the Special laws such as the Anti-Terrorism Act, 1997 and Control of Narcotics Substances Act, 1997 however they are generally given the powers of a Sessions Court Judge.

As per s. 374 of the CrPC when a death penalty is awarded, an instant appeal lies with the High Court of the province, which re-evaluates the evidence collected in the subordinate court and 'confirms' the death penalty. If the High Court confirms the death penalty, there is no obligation to appeal however it is customary to do so. The appeal lies with the Supreme Court of Pakistan, the apex court. Given the severity of the sentence, the Supreme Court is more lax with its rules and as a norm allows hearing of said appeals — a benefit not extended to other criminal and civil matters. If the Supreme Court confirms the death sentence, there lies no appeal after that except for the clemency procedure under Article 45 of the Constitution which is mercy petition sent to the President of Pakistan[92].

Once the mercy petition is rejected, this is notified to the jail authorities approach the court that tried and convicted the condemned for issuing a *black warrant* (execution warrant). The judge then proceeds to issue an execution warrant that is sent to relevant authorities. The procedure for issuing a black warrant and the necessary preparations for an execution have been detailed in the Pakistan Prison Rules 1978. After the judge issues the black warrant, the prison authorities then start making preparations for the execution. As per notified procedure in the Punjab, the execution has to take place at a minimum of three days after the issuance of the black warrant. The execution may be suspended through a Presidential order, by the Superintendent of the Jail, the Inspector General of Jails, and the Supreme Court, the High Court and the court issuing the black warrant.

As tenets of Islam have been given constitutional supremacy, a parallel Islamic court procedure called the Federal Shariat Court exists under Part VII Chapter 3A of the Constitution. Most offences are tried through the common law procedure as Federal Shariat Court is limited to Hudood (Islamic) Offences and the Protection of Women (Criminal Laws Amendment) Act 2006 further curtailed its power. Appeals against the

92 Mercy petitions have been discussed in more detail in Chapter 9

judgments of the Federal Shariat are heard by the five member Shariat Appellate Bench of the said Court.[93]

Murder

Sections 300 to 302 of the PPC detail the *actus rea* and *mens rea*[94] for the offence of murder. Under these sections there are three different types of murder and two types of punishments - *hadd* and *ta'zir*.

Section 300 defines intentional murder which is termed as Qatl-e-Amd. In the event that one of the following ingredients is met the offence falls within the scope of intentional murder:

a. Intention to cause death
b. Intention to cause bodily injury to a person where death is likely and natural outcome
c. Intention to cause bodily harm where it is imminently dangerous and completely probable death would occur.

This section is reflective of the traditional definition for murder as it accounts for the intention to kill or bodily harm presumed to cause death with the corresponding act of doing so.

Section 301 is an extension of section 300 and applies in the event that a person whose death was not intended by the attacker dies as a result of an action which the accused intended or knew to be likely to cause death in ordinary course of events. Therefore, the person need not have any malice aforethought or foresight with malicious intent to kill the victim i.e. there is no mens rea. Yet his case would fall squarely within the case of heinous intentional murder under the existing law. Courts in Pakistan have, however, defined the elements of this section 301 as an offence with 'felonious intention and an injury causing the death'.[95] Hence, even a mere altercation resulting in death was not deemed sufficient to qualify as an exception to the provision.[96]

93 Hussain, Faqir. The Judicial System of Pakistan. 4th ed. 2015. http://supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf

94 The necessary elements of a crime consists of both a mental and a physical element. Mens rea, a person's awareness of the fact that his or her conduct is criminal, is the mental element, and actus reus, the act itself, is the physical element.

95 PLD 1976 SC 377

96 PLD 1962 Dacca 424

Section 302 states the penal punishments for Qatl-e-Amd. This includes punished with death as qisas, punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, and when qisas is not applicable then with imprisonment that may extend to 25 years.

Under the current jurisprudence and legal climate, there exist three main challenges with the application of the death penalty in cases of murder: arbitrary application of the death penalty, lack of sentencing guidelines and lack of post-conviction review.

Arbitrary Application of the Death Penalty

Evidence collection and the tools used for investigating criminal cases today are outdated, leading to a high margin of error. Courts are often forced to rely on eyewitness testimonies as the primary source of evidence because of a lack of technological tools employed by the prosecution to determine the account set out by the complainant(s) and accused(s). Medical reports, investigation, analysis of weapon, site location, etc., are all treated as corroborating evidence, which, if they do not contradict the account of prosecution, lead to conviction. Absence of forensic analysis has not deterred courts from convicting the person.[97]

In a few cases, the courts have categorically stated that the death penalty is suitable only because of the heinous and shocking nature of the acts of the perpetrator[98]; courts routinely sentence convicted persons to death as a norm - even in cases where reasonable doubt of their guilt exists.

Jst. Rana Bhagwan Das ruled that 'it was firmly laid down that it is high time that Courts should realize that they owe duty to the legal heirs/relations of the victims and also to the society. Sentences awarded should be such, which should act as a deterrent to the commission of offences (…). The approach of the Court should be dynamic and if it is satisfied that the offence has been committed in the manner as alleged by the prosecution, the technicalities should be overlooked'.[99] Therefore, even in cases where there are known contradictions in the evidence, it is considered as a 'technicality to be overlooked' and not used as mitigating circumstances. Similarly a death sentence has

97 See Human Rights Commission of Pakistan & FIDH. "Slow March to the Gallows: Death Penalty in Pakistan" Jan,2007.
98 2010 SCMR 868 Asad Mahmood v. Akhlaq Ahmed
99 PLD 2002 SC 558 Muhammad Saleem v. the State

also been awarded in cases of murder where the dead body was not discovered or post-mortem was not conducted.[100]

A lack of motive is also not considered as a mitigating circumstance even though it is a key ingredient for a crime to be defined as intentional murder.

Additionally, accused persons are often roped in a case simply to expand the 'net' of prosecution. Section 34, PPC[101] read with Section 302 allows parties to use the act of murder as justification for punishing those closely related to the primary accused. Often the co-accused are merely present on the scene of occurrence unarmed or did not commit any offence.

The challenges are further amplified by the lack of sentencing guidelines and post-conviction review.

I. Lack of Sentencing Guidelines

There are no separate guidelines that are to be consistently followed by judges while sentencing those accused of murder apart from brief guidance provided in ss. 366 and 367 of the CrPC. These provisions describe the general requirements on how a judgement is to be delivered. As a result, the decision regarding whether or not to award the death penalty rests entirely upon the judge presiding over the case. This is in stark contrast to comparative jurisdictions, such as the United States, where separate sentencing hearings are held in order to determine the quantum of punishment after a conviction is awarded.

Due to the lack of consistency in the legal precedent regarding the application of the death penalty, there is a need to formulate and to institute sentencing guidelines to be followed by courts when interpreting the application of the death penalty as a penalty. The guidelines can be drawn up from the existing precedent developed by the superior courts of Pakistan regarding which extenuating circumstances warrant a mitigation of death sentence to life imprisonment. Some of these circumstances are listed below:

a. **Judicial oversight; erring on side of 'accused':** Courts have developed various extenuating circumstances for converting death sentence to life imprisonment,

100 1998 SCMR 1778, Raggha v. Emperor AIR 1925 All. 627; Arif Shah v. State 1985 SCMR 850; Muhammad Riaz v. State 1986 PCr.LJ 2233; Rahimuddin v. State 1985 PCr.LJ 463 and Abdul Malik v. State PLD 1996 FSC 1.

101 This section details the concept of abetment which means that more than one person was involved in the crime and they collectively worked towards a common criminal goal. Under s34 PPC and in most jurisdictions, all the accused persons will be liable for same penal punishment.

such as single shot, firing at lower part of body, sudden altercation, incarceration for a long period pending appeal, etc. can mitigate against death penalty.[102]

b. **Reasonableness of the ocular account:** Eyewitness testimonies are given significant weight in determining the fate of a case and the independence of the eyewitness testimony has primary importance. Previous enmity demonstrated through tangible, independent proof (such as registration of criminal and civil cases, etc.) is looked at and can be a mitigating circumstance if other factors prove incidence of false implication, for instance, contradictions in ocular account, or lack of independent witnesses where the incident took place at busy market.[103]

Therefore, the courts have held that any missing link in the chain would destroy the whole and would render the same unreliable for awarding capital punishment.[104] Reliance on exculpatory statement of other accused is not sufficient to award the death penalty.[105]

c. **Presence of witness:** Implausible explanation of witness' presence can serve as a mitigating circumstance against capital punishment.The witness should not be present at the location of the incident by chance — a place where his presence is not likely. Hence, in a case where the eyewitnesses lived a hundred kilometres away from the place of occurrence, their presence there could not be established, and on the basis of the implausibility of the alleged eyewitness having witnessed the incident during commission of offence or immediately after it, death sentences were set aside.[106] In the case of *Gulfam v State*[107], while acquitting the accused, the court held, 'availability of the said eye-witnesses on a roadside near a cart at about midnight and doing nothing and for no purpose was a circumstance which was sufficient to raise doubts. Said eyewitnesses were, thus,

102 2000 SCMR 1166, 2002 SCMR 403, 2003 SCMR 579, 2004 SCMR 810, PLD 2006 SC 365, 2008 SCMR 817, 2013 SCMR 1582
103 1973 SCMR 12
104Ch. Barkat Ali v. Major Karam Elahi Zia (1992 SCMR 1047), 2017 SCMR 2026, 2017 SCMR 986, 2016 SCMR 274
105 PLD 1979 SC 5, 2010 SCMR 1029, 2007 SCMR 670, 1988 SCMR 950
106 M Ismail etc v State in Criminal Appeal 89 of 2013 decided on 04.04.2017. Chance witness is termed as 'waj-takkar'. 2015 SCMR 1142, 2012 SCMR 419,
107 2017 SCMR 1189

nothing but chance witnesses who had failed to establish any reason for their availability near the place of occurrence at the relevant time.'

d. **Identification of accused**: Failure to follow proper procedure pertaining to identification of the accused can also serve as a mitigating circumstance in sentence. It is unlawful to organise a joint parade[108] of multiple accused persons at once.[109] If they have not been identified with reference to the specific role played by them in the incident under investigation, such a test identification parade is legally laconic and is of no evidentiary value.[110] The identification of accused present in court without identifying them individually does not conform to good practises.[111] Though this principle is not always invoked by courts.[112]

e. **Interpolation and over-writing**: If the entries in the police's daily diary[113] are found to be forged, corrected or back-dated, such entries are doubtful and negatively affect the entire investigation and are therefore, unable to uphold a capital sentence.

f. Locale of injury and manner of death: Exact location of injury has to be considered to determine knowledge or intention of assailant.[114] If it cannot be

108 An identification parade is recorded by a magistrate. 8 to 10 people are lined up with the accused and the witness has to positively identify the accused in said line-up and state the offence committed. Joint parade means that more than one accused is put in a single line-up even when there are more than 8-10 people in the lineup.

109 P 1981 S 142, 2008 SCMR 1210, 2010 SCMR 1189, 2011 SCMR 537, 2018 SCMR 577, 2018 SCMR 372

110 1985 SCMR 721,1988 SCMR 557, 1992 SCMR 2088, 1995 SCMR 127, 2008 SCMR 302, 2008 SCMR 1221, 2011 SCMR 537, 2011 SCMR 563, 2012 SCMR 522.

111 1992 SCMR 2088, 2011 SCMR 527, 2011 SCMR 683, 2017 SCMR 135.

112 PLD 1976 SC 452, PLD 1974 SC 87, PLD 1974 SC 266, PLD 1971 SC 541, PLD 1975 SC 174, 2016 SCMR 1766

113 This is also called 'Rozmancha'. This is a register maintained at every police station which records the comings and goings of all the police officials and other necessary entries including the activity the police have left the police station, which vehicle they left in, recording arrest, temporary complaints by complainants, etc. Generally only one person in the police station is in charge of writing and maintaining it. The original register has to be produced in court and examined by the court. A copy of the necessary entry(ies) is made and kept on file for the case.

114 M.A. Jalil v. The State PLD 1969 SC 552; Munawar Hussain v. The State 1983 SCMR 1165 and Shafey Ali v. Asrar Beg and others PLD 1992 SC 232.

determined who fired the fatal shot, death sentence must be reduced to life imprisonment.[115]

Unnatural death of a person such as the wife or dependent in the house of the accused has not been held as sufficient proof of guilt. Burden does not shift to accused wholly, although they need to establish circumstances for death.[116]

g. Provocation: In a recent case of *Saleh M v State*[117] the deceased family members did not allow a husband to go back into matrimonial fold for a long time which led to frustration and consequently erupting into an argument and murder. Such a situation is held to be a valid mitigating circumstance against death sentence. The accused's wife did not appear as a witness, which indicates that she wanted to go back into matrimonial fold. The death sentence was converted into life imprisonment.

If a wife murders her spouse, domestic violence and slow burn should serve a mitigating circumstance .[118]

h. Life expectancy: There is no concept of life expectancy or double punishment in Pakistan's jurisdiction, although it is internationally recognised to be a mitigating circumstance. Death sentence of such a convict could be commuted to life imprisonment if undergone equal to or more than life imprisonment term, but not on the sole ground that he remained incarcerated in the death cell for a lengthy period of time.[119] Where convict sentenced to death is incarcerated for 17 or 18 years, extenuating circumstances such as single shot, sudden altercation, firing on lower part, etc., can mitigate towards life imprisonment.

II. Lack of Post-Conviction Review

There is also no specific provision in law providing a forum and procedure for filing a review or a re-trial in light of new evidence in death penalty cases.[120] The Supreme

115 1984 SCMR 284, 1984 SCMR 1069, 1995 SCMR 142, 2006 SCMR 577, 2007 SCMR 1413, 2007 SCMR 1639.
116 2017 SCMR 724, 2015 SCMR 710, 2005 SCMR 1524.
117 Criminal Appeal 79/13 decided on 14.04.2017.
118 2010 SCMR 1729; PLD 2001 SC 222
119 PLD 2015 Supreme Court 50, 2013 SCMR 1582, PLD 2013 SC 793
120 See https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=22859

Court of Pakistan can intervene under Article 184(3) of the Constitution in exercise of its original and supervisory jurisdiction. The High Court can be approached for rectification of error under Article 199 of the Constitution. These provisions are inadequate safeguards and lead to uncertainty.[121] The Government of Pakistan has claimed in its initial report to the UN Human Rights Committee under the ICCPR Rights that Article 184(3), as well as Article 199 provides an adequate remedy for post-conviction reviews, and that the court's inherent power to recall an order passed allows for post-conviction reviews. However, in practice, attempts to introduce potentially exculpatory evidence almost never succeed.

Terrorism

The Anti-Terrorism Act, 1997 (ATA), promulgated in 1997, is Pakistan's primary legislation addressing terrorism. It explicitly overrides all other legal provisions and applies to the entire country. Enacted with the intent to address acts of terrorism, ATA laid down a separate legal regime and established specialized Anti-Terrorist Courts (ATC). In this regard, it was envisaged that the ATCs, would provide a forum for expedited investigations for a maximum of 30 days and for the speedy trial of terrorist offences where cases would be dispensed with within a period of seven days. Special powers were also conferred on law enforcement agencies so as to enable them to effectively investigate acts of terrorism.

Since the lifting of the moratorium on the death penalty in December 2014, over 80 prisoners have been executed for sentences under the ATA, accounting for around **16%** of total executions.

Disproportionate Application of the Anti-Terrorism Act

The preamble[122] of the Anti-Terrorism Act, 1997, states that the purpose of the Act is the 'prevention of terrorism, sectarianism and for speedy trial of heinous offences'.[123]

121 For detailed discussion on inadequacy of these remedies, see https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=22859

122 A clause at the beginning of a constitution or statute explaining the reasons for its enactment and the objectives it seeks to attain.
West's Encyclopedia of American Law, edition 2. S.v. "preamble." Retrieved March 25 2019 from https://legal-dictionary.thefreedictionary.com/preamble

123 The Anti-Terrorism Act (Act No. XXVII of 1997) [ATA], Preamble, http://www.ppra.org.pk/doc/anti-t-act.pdf (accessed February 4, 2019).

A fundamental flaw in the ATA is the extremely broad and vague definition of terrorism as defined by Section 6, which allows the inclusion of offences bearing little or no connection to terrorism as it is traditionally understood.

A study by Justice Project Pakistan and Reprieve in December, 2014 discovered that almost 86 percent sentenced to death under the ATA were accused of offences that had nothing to do with terrorism as it is traditionally defined.[124]

Political and economic influence serves as a primary determinant for whether an offence is tried under the ATA or under the ordinary criminal justice system. Police routinely charge accused persons for offences under the ATA in order to appease complainants, the general public or influential persons. Not only does this fundamental weakness lead to serious miscarriages of justice, it also serves to overburden police, prosecution services and courts and thus results in delays in the administration of 'real' cases of terrorism. For instance, in Karachi, Sindh, during the period January 2013 to December 2013, over 69.2% of the cases heard by the city's 5 ATCs were eventually transferred to regular courts for failing to fall within the ambit of the ATA.[125]

The vague and overly broad definition of terrorism is additionally problematic as the punishments provided under the ATA are more harsh and rigorous than those provided for corresponding provisions under the Pakistan Penal Code. Section 7 of the ATA sets out the available punishments. The punishment of 'death or imprisonment for life' is available for three of these actions: causing the death of any person (Section 7(a)); kidnapping for ransom or hostage-taking (section (e)); and hijacking (Section 7(f)). As a result in December 2014, **86.3%** of those sentenced to death by the ATC's were convicted for offences bearing little or no connection to terrorism.[126] The imposition of the death penalty under the ATA is additionally problematic as at least two of the offences – hijacking and kidnapping for ransom - are not lethal and thereby fall out of the scope of crimes permissible under international law.

124 Justice Project Pakistan, Terror on Death Row: The abuse and overuse of Pakistan's anti-terrorism legislation, December 2014, http://www.jpp.org.pk/wp-content/uploads/2017/01/2014_12_15_PUB-WEP-Terror-on-Death-Row.pdf (accessed February 4, 2019), pg. 14.
125 Pervez T., & Rani M., An Appraisal of Pakistan's Anti-Terrorism Act (Aug 2015) Available at: https://www.files.ethz.ch/isn/193068/SR377-An-Appraisal-of-Pakistan%E2%80%99s-Anti-Terrorism-Act.pdf
126 Staff Reporter, '465 executed since lifting of moratorium on death penalty' (July 07, 2017) Dawn Url: <https://www.dawn.com/news/1343720/465-executed-since-lifting-of-moratorium-on-death-penalty> (Accessed on 18th Oct, 2017)

Excess Powers of Police and Violations of Fair Trial under the ATA

The Anti-Terrorism Act, 1997 provides law-enforcement agencies with enhanced powers and extended discretion that pose a direct threat to long-standing procedural safeguards that protect privacy, security, due process, fair trial and protection from torture enshrined under the Constitution of Pakistan and international human rights law.

Accused persons tried under the ATA are subject to the following extraordinary police powers:

(i) enhanced powers with respect to the collection of evidence (S. 19A);
(ii) use of necessary force by police (Section 5(1));
(iii) the arrest of suspects without warrant (S. 5(2)(ii));
(iv) recording of evidence in police custody (S. 21-H);
(v) police remand of 30 days at a time (S. 21-E);
(vi) Preventive detention of up to 3 months without review (Section 6)

III. Heightened Risk of Police Torture and Abuse

As a result of the suspension of fundamental guarantees and safeguards under the counter-terrorism regime, there is a heightened risk of torture for suspects under the ATA. The Committee Against Torture accordingly noted that the Anti-Terrorism Act, 1997, 'eliminates legal safeguards against torture that are otherwise provided to persons deprived of their liberty'.[127]

The ATA allows police to detain a person for up to thirty days without review or the possibility of a habeas petition.[128] During this time, investigation is meant to be concluded by a joint investigative team. However, Section 21-E of the ATA allows the remand to be extended by another 90 days on application to the courts 'if further evidence may be available'. These provisions are relied upon extensively by police to extract confessions and statements from accused persons through resorting to heinous forms of torture.[129]

127 Id.
128 ATA, S. 21
129 Terror on Death Row. 17

The risk of torture is increasingly heightened on account of the 30-day maximum period for the completion of investigation mandated upon the police through the ATA. Compelled to produce suspects within the stipulated deadline, the police resort to rounding up several suspects and torturing them into confessing.

Under Section 21-H of the ATA confessions made under the custody of police are admissible in court. This is contrary to the Qanun-e-Shahadat Order, 1984, which renders any confessional statements made under police custody inadmissible as proof. Therefore, confessions and statements extracted by police through heinous torture and abuse often form the basis of convictions and death sentences under the ATA.

The ATA is explored in greater detail in Chapter 5.

Narcotics

The previous law on narcotics in Pakistan, the Dangerous Drugs Act, 1934, was repealed by the Control of Narcotics Substances Act, 1997 (CNSA). Death penalty for the offence of narcotics was added in 1994 as an amendment to the Dangerous Drugs Act.[130].

The CNSA was enacted to 'consolidate and amend the laws relating to narcotic drugs, psychotropic substances, and control the production, processing and trafficking of such drugs and substances'.[131] Section 9(c) of the CNSA penalises with death for possession, import or export and trafficking of more than one kilogram of a controlled substance. Since the lifting of the moratorium in December in 2014 there have been no executions for drug offences.

Narcotic offences are generally investigated by the police, the Anti-Narcotics Force and Pakistan Customs. As per the CNSA, there are Special Narcotics Courts that preside over these matters. When it comes to sentencing, the law does not distinguish between possession and organised trafficking, because in practice cases tried under the law exclusively involve possession, while sentencing is based solely on seizure size.

Suspects prosecuted and charged for drug crimes are often vulnerable women and children who are themselves being trafficked as drug mules. However, with size of possession being the sole determinant in sentencing, these victims are often sentenced to death regardless of their circumstances.

130 https://cmsdata.iucn.org/downloads/dangerous_drugs_act_1930__from_manual_of_drug_laws_.pdf
131 Preamble, Control of Narcotics Substances Act 1997.

Whilst judges often adopt leniency when deciding bail application and sentencing women in crimes that merit the death penalty for most crimes, such leniency is often not extended to drug crimes. For instance, in the case of *Surraya Bibi v. The State*[132], the Supreme Court of Pakistan refused to mitigate the sentence of a woman despite the fact that she was pregnant and had 5 children. The Supreme Court admitted in its judgment 'that the drug peddlers, to achieve their nefarious objects, had adopted obnoxious device by engaging womenfolk and children and through them crimes were being committed and ultimately mercy was sought against such accused on humanitarian grounds'. Thereupon the Supreme Court declined to reduce the sentence of the accused woman.

Judicial Response: Reluctance and the Low Application of Capital Punishment

A detailed analysis of judgments by superior courts reveals a high rate of overturned death sentences.[133] This indicates that superior courts recognise that the nature of commonly occurring forms of drug offences do not merit the imposition of the death penalty, which should ideally pave the way for the legislature to abolish the awarding of the death penalty for drug offences.

In the landmark case of *Ghulam Murtaza and Another vs. The State*[134] (later affirmed by the Supreme Court), Justice Asif Saeed Khosa set out sentencing guidelines by categorizing the narcotic, the specific amount of recovery, and the imprisonment and fine to be awarded. He further elaborated other mitigating circumstances regarding juveniles and women. The ruling streamlined the sentences awarded by all courts when trying cases for narcotics thereby reducing death sentences. The application of the death penalty can be progressively restricted through codification of these sentencing guidelines.

Judicial decision making on drug offences is inherently problematic due to the nature of the offence. Unlike homicide or anti-terrorism offences, possession, export, import, or trafficking of drugs does not usually take place in public or in plain sight of independent witnesses. It does not usually leave any documentary or other kind of trail linking or delinking an accused with the alleged offence. A bird's eye view of a typical prosecution story reveals that police are tipped off with 'secret information' regarding alleged offence under CNSA and carries out a raid against the accused. There is in most

132 2008 SCMR 825
133 Justice Project Pakistan, Counting the Condemned, October 4, 2018.
134 PLD 2009 Lahore 362

cases no other witness than the police. If a group of people are travelling in a car, recovery of illicit drug implicates all with joint liability for the offence. In some cases, a hired driver has been implicated, booked and convicted under the law.[135]

Consistent jurisprudence of higher and apex courts over two decades has been to mitigate against capital punishment as a harsh punishment on the grounds of, inter alia:

a. Connection Test: Exclusive Possession

Courts have held that connection to the illicit drug is determined by physical possession or control over the drug or the place where it is placed. In the *Riaz Mian VS State* (2014 SCMR 1165) case, setting aside conviction against drivers.

Determining exclusive possession is inherently uncertain and requires detailed scrutiny. Awarding the death penalty in cases involving a weak chain of evidence does not meet the strict due process requirements.

b. First Time Offender

Minor contradictions between the evidence and prosecution account can mitigate against a harsh capital sentence. In *Tahir Mehmood v The State/Anti-Narcotics Force*[136] the court reduced the capital sentence to life imprisonment on the ground that the 'accused persons, were first offenders and having no antecedents of any criminal case to their score, death penalty being harsh punishment' . The sentence mitigated the punishment despite no material contradictions in the accounts of prosecution witnesses, no plea of alibi proven and the case was proved beyond doubt.

c. Contradictions in Evidence & Prosecution

The prosecution account of the events leading up to the raid and recovery of prohibited drugs has to be corroborated with independent evidence and consistently exhibited before the court. The practice of the court is to rule against death penalty of the accused if there is even a hint of procedural irregularity.

In *Athar Iqbal vs The State*[137] the court noted that:

Recovery officer and one of the recovery witnesses expired before making their statements before the Trial Court. Only material witness produced by the prosecution before the Trial Court was a witness who had attested memorandum of recovery. Head of raiding party was not produced before the Trial Court and no explanation for such

135 Haroon Rasheed vs The State - PCrLJ 2016 Lahore High Court 56, although in this peculiar case, illicit drug was found in the driver compartment, 2010 SCMR 927, PLD 2010 SC 1052, 2009 SCMR 1403
136 2017 YLR 524
137 2015 SCMR 291

failure was offered. Parcels of recovered narcotic were sealed with the monogram (name initials) of an official who was not even posted at the relevant police station at the time of alleged recovery from accused. No explanation was offered as to why the said parcels did not contain the monogram of the recovery officer.

The prosecution's deletion of co-accused or fellow passengers from the array of defendants can also mitigate against death sentence, as was held in the case of *Jamshed Khan vs The State*[138] where the court noted that 'enigmatic abandoning of co-passengers of accused by the prosecution, was a crucial circumstance, which needed to be looked at with doubt, as to the award of capital punishment to accused'.

d. Sampling

There is no statutory provision for the correct sampling procedure of chemical examination of alleged illicit substances. Minor procedural illegality can lead to mitigation against capital sentencing. In *Shaukat Ali alias Billa vs The State*[139], the court held that for alleged recovery of 20 packets of one kilogram each , a sample had to be taken from each packet and sent separately for chemical examination. The prosecution, instead, took small samples from 10 packets and bundled them together. The court held that only recovery of 10 kg was proved against the accused, while reducing the death penalty to imprisonment for 14 years under Section 9(c) proviso, as opposed to life imprisonment.

Similarly, in the case of *Asad Ali vs The State*[140] the court converted a death sentence into life imprisonment where 'narcotic weighing 200 kilograms was recovered from the vehicle which was being driven by the accused… [whereas only] six samples of 5 grams each were separated from the recovered charas and sent for chemical analysis'. The court overturned the trial court's decision as 'separate samples from each packet/piece were not collected for purposes of chemical analysis, therefore the sample sent could not be said to be a "representative sample" and it also did not fall within the definition of "sufficient quantity"'.

138 PCrLJ 2016 Lahore High Court 1882
139 2015 SCMR 308
140 PLD 2013 Islamabad 42

Comparative Law Analysis

There are atleast 35 countries that have the death penalty for drug offences and between 2008 and 2018, 4366[141] were executed[142]. Internationally, the trend to punish drug traffickers started in the 1970s, despite this 16 countries had abolished the death penalty for drug offences. By 2015, 140 countries had either abolished it or made the law ineffective.

The movement for capital punishment for drug offences was led by the United States of America. Many countries which adopted the death penalty and harsh laws during that era faced 'fierce international pressure'.[143] In 2018, Malaysia's parliamentary cabinet unanimously agreed to do away with the death penalty in certain cases for drug offences, inter alia, for being ineffective and 'not appropriate for all drug trafficking offences'.[144]

Empirical research has demonstrated that there is no evidence that the death penalty reduces drug trafficking. Countries that retain the death penalty for drug trafficking continue to have higher rates of drug related crimes compared to countries that have abolished the death penalty. For example, Singapore has had excessively harsh laws against drugs since 1973 and is one of the world's leading executioners for drug crimes. However, according to the European Institute for Crime Prevention and Control in 2010, Singapore's drug-related crime rate is far worse than other countries such as Costa Rica and Turkey, which do not prescribe the death penalty for drug offences.[145] The number of drugs seizures in Singapore has continued to increase in recent years. The Central Narcotics Bureau of Singapore reported record numbers of seizures in 2012. The estimated street value of the drugs seized was S$18.3 million, 14% higher than in 2011.[146] The escalating rate of drug trafficking in Singapore shows that harsh laws are ineffective in deterring drug trafficking and access to drugs.

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141 excluding China, including very limited data from Vietnam
142The Death Penalty for Drug Offences: Global Overview 2018, Giada Girelli, Feburary 2019, Harm Reduction International. Available at: https://www.hri.global/death-penalty-drugs-2018,
143 Gallahue P and Lines R. "The Death Penalty for Drug Offences: Global Overview 2015" (2015) Harm Reduction International: London p. 8.
144See: http://www.theaustralian.com.au/national-affairs/foreign-affairs/malaysia-to-drop-mandatory-death-penalty-for-drug-trafficking/news-story/188d8617ecedee6ede70d42909ca6496
145 WCADP. The Death Penalty Doesn't Stop Drug Crimes. (2015) Available at http://www.worldcoalition.org/media/resourcecenter/2015WD-LeafletEN.pdf
146 Press Release, Central Narcotics Bureau, dated 7 June 2013. Available at https://www.cnb.gov.sg/docs/default-source/news-documents/cnb-2012-press-release_updated-figures-on-23-jul-2013-(1).pdf

Islamic Law

In countries such as Iran, Malaysia, and Pakistan, religious doctrine, specifically Sharia law, has been referenced to support the imposition of the death penalty, including for drug crimes. It has been argued that the application of the death penalty for drug crimes is consistent with the tenets of Islam. Since no punishment for drug offences is specified under Sharia law, the laws relating to the death penalty for drug-related offences have been developed based mostly on juristic discretion and independent legal reasoning, and therefore do not have the status of being primary law in Islam.

Therefore, many Muslim scholars have argued that drug crimes cannot be punishable by death, because this would be in violation of the Quranic principle that a person's life can only be taken as explicitly specified under Sharia law.[147] Moreover, many Muslim scholars have noted that the death penalty in general is not particularly encouraged in Islam, but that repentance and forgiveness are seen as preferable instead. [148] Abolishing the death penalty for drug crimes and adopting a more rehabilitative approach toward drug offences is thus compatible with and supported by the teachings of Islam.[149]

Perjury

Under Section 194 of the Pakistan Penal Code (PPC), a person providing false testimony as a consequence of which an innocent person is convicted and executed shall be punished with death or life imprisonment.

Application of the Death Penalty

Awarding the death penalty for falsified testimony leading to a death sentence, as provided under Section 194, has a high likelihood of leading to wrongful death sentences and executions. There have been multiple cases recorded in Pakistan and worldwide where witnesses have been coerced, including by officials operating within the criminal

147 Penal Reform International. 'Crime and Justice: Application of Death Penalty under Sharia Law'. (2015) Available at https://www.penalreform.org/wp-content/uploads/2015/07/Sharia-law-and-the-death-penalty.pdf
148 Id
149 Id

justice system, to falsely testify against another under duress from the complainant(s).[150] In Pakistan, particularly, in the absence of legislation criminalizing torture and establishing independent investigation mechanisms to process allegations of torture against law enforcement officials, witnesses are routinely tortured by police with impunity to testify against accused parties.[151] This is especially true in cases under the Anti-Terrorism Act, 1997 where under Section 21-H statements given in custody of police are admissible as evidence. Since Section 194, provides no exceptions or safeguards for witnesses who have been coerced into providing wrongful testimony, its application raises serious concerns of wrongful executions.

Furthermore, in the event that a person is accused of providing false testimony under S. 194, investigation will inevitably be the responsibility of the police. As a result, the witness is placed yet again at the mercy of the police who may have been responsible for coercing him into providing the false testimony. Additionally, if a police officer is accused of providing false testimony under the section, the investigation will be conducted by his peers and therefore has limited chances of being conducted in an objective and impartial manner.

Executing a perjurer neither serves as a deterrent nor does it serve any penological purpose – it only highlights flaws in the criminal justice system for not being able to conduct a proper investigation and a fair trial, thereby resulting in the execution of innocent people. This adversely impacts the integrity of the country's criminal justice system.

In recent years there have been no record of a death sentence let alone an execution carried out under this offence in Pakistan. This is primarily due to the high standard of evidence required to procure a conviction as the prosecution must first prove that the testimony was false, that the accused wilfully provided the falsified evidence and that it was with the intention to procure a conviction. Additionally the prosecution must also prove that the person executed was actually innocent. Therefore, the existence of the death penalty in Pakistan's criminal law for an offence where no convictions have

150 See Human Rights Watch (HRW), 'This Crooked System: Police Abuse and Reform in Pakistan'. September 2016. Available at https://www.hrw.org/report/2016/09/26/crooked-system/police-abuse-and-reform-pakistan ; Justice Project Pakistan (JPP) & Allard K Lowenstein International Human Rights Clinic. ' A Most Serious Crime: Pakistan's Unlawful Use of the Death Penalty. September 2016: https://law.yale.edu/system/files/area/center/schell/2016_09_23_pub_dp_report.pdf

151 See 'Rimsha case: Witnesses who testified against Khalid Jadoon backtrack'. THE EXPRESS TRIBUNE. October 1, 2012. Available at https://tribune.com.pk/story/445178/rimsha-case-witnesses-who-testified-against-khalid-jadoon-backtrack/

occurred only serves one purpose — to move Pakistan further away from its compliance with international standards.

Comparative and International Analysis

Retentionist countries, or countries that advocate the continued use of the death penalty, that carry the death penalty for perjury leading to wrongful executions include Egypt, Nigeria, Singapore, United Arab Emirates, United States (in the states of California and Idaho) and Yemen. However, there have been no reported executions for perjury in any of these countries within the past 10 years.[152] On 14th February, 2017, the European Parliament (EP) issued a resolution on 'executions in Kuwait and Bahrain' wherein it express its concerns over 'the large number of offences for which the death penalty is imposed in Kuwait such as those relating to perjury or forced perjury'.[153]

Haraabah and Dacoity with Murder

Harabah (Arabic for 'unlawful warfare') is defined as the following under Section 15, Offences Against Property (Enforcement of Hudood) Ordinances, 1979:

> When any one or more persons, whether equipped with arms or not, make show of force for the purpose of taking away the property of another and attack him or cause wrongful restraint or put him in fear of death or hurt, such person or persons are said to commit haraabah.

The offence of *harabah* is subject to the hadd punishment of death laid out under Section 17(4) if the accused either confesses to the offence or if two adult Muslim men have witnessed the act and neither one was the victim of the alleged act[154]. Additionally, for the latter, the court must be satisfied about the witnesses meeting the *Tazkiya ul-Shuhood* standard of evidence i.e. they are truthful persons who have abstained from all major sins.

If these requirements are not fulfilled, then the accused may still be sentenced to the *ta'zir* punishment which constitutes of the corresponding punishments for robbery contained in the PPC. Dacoity (robbery) is defined under section 391 of the PPC. The

152 See

153 European Parliament. 'European Parliament resolution on executions in Kuwait and Bahrain'. 14.02.2017. B8-0154/2017. Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2017-0154&language=EN

154 Section 16, Offences Against Property (Enforcement of Hudood) Ordinance, 1979

PPC provides for the death penalty in cases where a group of five or more persons commits a dacoity that results in murder. Section 396 of the PPC provides for the death penalty for all persons involved in the incident regardless of who committed the murder.

Application of the Death Penalty

CASE STUDY: TAHIR MIRZA HUSSAIN

In 1988, Tahir Mirza Hussain claimed he was attacked, held at gunpoint and sexually assaulted by his taxi driver. During the struggle the taxi driver, Jamshed Khan, was killed as the gun went off. Hussain voluntarily reported the incident to police and was arrested. In September 1989, a Sessions court sentenced him to death.155

The High Court overturned the death penalty in November 1992 due to serious discrepancies in the prosecution's case and ordered a retrial. In April 1994, the trial court convicted him again and awarded him life imprisonment. Thereafter, Hussain appealed to the High Court and was acquitted of all charges in May 1996. However, a week later his case was referred to the Federal Shariat court on the basis that the crime he was charged with haraabah, fell under its jurisdiction. In August 1998, the Shariat Court's judges sentenced him to death again, even though Section 16 of the Ordinance required either a confession or the eyewitness testimony from two adult male Muslim witness of good character. The prosecution had neither.156

In November, 2006, after much appeal from Hussain's family and international pressure, President Musharraf intervened and commuted his death sentence. Thereafter Hussain was released after spending over 18 years on death row.

Hussain's case is a perfect illustration of the fundamental flaw of having two parallel systems of laws and courts operating for corresponding offences. This

155 Islamic Human Rights Commissio. "Alert Update: Mirza Tahir Hussain British Muslim Facing Execution in Pakistan" 11 May 2006. Available at http://www.ihrc.org.uk/show.php?id=1852
156 See Amnesty International. Mirza-Tahir Husain. 2006 Available at http://www.amnesty.eu/static/documents/2006/Mirza_Hussain_briefing_background_092006.pdf

creates a situation where essentially the same person can be tried twice for the same offence. Additionally, given the inordinate period of time it takes for a case to move from initial arrest to the exhaustion of appeals within each system of laws, a person must undergo pre-trial detention twice with the possibility that he is found innocent eventually.

The awarding of the mandatory death penalty for harabah means that the courts are unable to take mitigating circumstances into account in order to award a lesser sentence.

Dacoity with Murder

There is no conclusive evidence that indicates that the death penalty is effective in deterring crimes such as robbery and murder. According to research by Justice Project Pakistan, Punjab is the largest practitioner of the death penalty, accounting for 83 percent of executions, and 89 percent of death sentences in Pakistan.[157] However, it has also witnessed only a 9.7 percent drop in murder rates from 2015-2016.[158] Sindh, on the other hand, has viewed a drop of nearly 25 percent in the same time period – even though it carried out only 18 executions compared to Punjab's 382.[159]

Additionally, Section 396, PPC appears to have created an arbitrary standard of five persons or more for an armed robbery to merit the death penalty. It is unclear why the involvement of five people creates a criminal liability so fundamentally different than an offence with the involvement of four persons or less that it merits death penalty. The provision creates a situation where all persons involved in the offence can be awarded the death penalty regardless of the role played in the actual killing. Therefore, even a person playing a passive role in the occurrence for instance, arranging the vehicles used or planning the robbery can be sentenced to death for a murder that occurred as a result of gun fight that occurred at the scene of the crime. In the case of *Rashid Ali v State*[160], the Lahore High Court stated that under S. 396 the 'individual role of the accused in cases of dacoity did not matter much and every participant of such a crime regardless of his role would be an accused in equal degree'.

157 Justice Project Pakistan (JPP), Counting Executions. July 2017
158 Ibid
159 Ibid
160 2013 PCRLJ 297

In Pakistan, it is not unusual for the police to nominate all male relatives of an accused in a First Information Report (FIR) for a particular offence. Under Section 396, this regular practice of the police opens up the possibility of unlawful death sentences and executions.

Islamic Law

There exists considerable disagreement amongst Muslim scholars, regarding whether or not there exists a mandatory death penalty for *harabah* under Islamic law. The Arabic term *haraabah* is derived from harb which literally means war. It is taken from Quran 5:33 which classified *harabah* as 'wag[ing] war against God':

Indeed, the penalty for those who wage war against God and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment.[161]

Although the Quran does not clearly define what is meant by 'wag[ing] war against God' or 'caus[ing] corruption on earth', the specific meanings of such concepts were provided by early Islamic jurisprudence (fiqh) to include mass murder, rape and murder, war crimes, and other forms of deliberate extreme violence which result in death.[162] The inclusion of robbery within the definition of *harabah* as under Hadood Ordinances finds no parallel in traditional Islamic jurisprudence.

The jurist Abu Ishaq al-Shatibi explains that legal theorists have always agreed that these punishments specified under verse 5:33 cannot all be administered at the same time to the same individual. The judge will have to choose which punishment to administer based on circumstances and severity of the offence, therefore making it a discretionary sentence.[163] Furthermore, the Hanafi school imposes a statute of limitation of one month on hadd offences (aside from unfounded allegations of adultery).[164]

161 Quran 5:33
162 See Penal Reform International. Sharia law and the Death Penalty :Would the abolition of the death penalty be unfaithful to the message of Islam? 2015. Available at https://www.penalreform.org/wp-content/uploads/2015/07/Sharia-law-and-the-death-penalty.pdf
163 ibid
164 ibid

Hijacking

Section 402-A of the Pakistan Penal Code, defines the offence of aircraft hijacking and Section 402-B specifies its punishment with death penalty or life imprisonment and liable for forfeiture of property and fine .

Application of the Death Penalty

The PPC contains no definition of the term hijacking. Thereafter, the elements of the offence are open to judicial interpretation and may vary on a case by case basis. The provision fails to specify under what circumstances would the penalty of death be imposed and in which cases life imprisonment. This is particularly troubling as Section 402-B delineates a broad range of offences of different disparities pertaining to hijacking including conspiracy, attempt, and actual commission as meriting the death penalty.

Section 7 of the Anti-Terrorism Act, 1997 (ATA), also outlines airplane hijacking or the assisting of airplane hijacking as offences falling within the scope of terrorism. As a result, following 1997, all cases pertaining the hijacking are tried under Section 7 by the Anti-Terrorism Courts (ATC). Therefore, Section 402-B is essentially superfluous and its existence in the Pakistan Penal Code serves little additional purpose in terms of deterrence or penalization of hijacking. Given the nature of the offence, there are only a few cases in Pakistan's legal history that have been tried and awarded convictions under the relevant legal provision.

In the case of *Muhammad Nawaz Sharif v. The State* (PLD 2002 Karachi 152), an Anti-Terrorism Court (ATC) in April 2000 convicted Prime Minister Nawaz Sharif of plotting against General Pervez Musharraf and found the Prime Minister guilty of hijacking and terrorism. Prosecutors claimed that the Prime Minister tried to stop a commercial aircraft with General Musharraf on board from landing in Pakistan, risking the lives of 198 passengers. He was sentenced to life in prison and not given a death sentence.[165]

In 2009, The Supreme Court cleared Prime Minister Nawaz Sharif of all charges, stating in the judgment that 'the petitioner had neither used force nor ordered its use and undisputedly no deceitful means were used. Looking at the case from any angle, the

165 Luke Harding, "Sharif sentenced to life for Musharraf plot," The Guardian, April 7, 2000 https://www.theguardian.com/world/2000/apr/07/pakistan.lukeharding

charge of hijacking, attempt to hijack or terrorism does not stand established against the petitioner'.[166]

In 2012, a passenger Javed Ansari "threatened" to hijack a PIA flight PK 586 from Karachi to Bahawalpur. After questioning Ansari, it was determined he did not have any intent to hijack the aircraft and there was no evidence that he belonged to a terrorist group.[167] Rather than let him go, Ansari was tried in an ATC and was released on bail due to lack of evidence.[168]

Sabotage of the Railway System

The punishment mentioned in Section 127 of the Railways (Amended) Act, 1995 with regards to sabotaging the railway system or having intent to endanger a person on a train is death sentence or life imprisonment.

Application of the Death Penalty

The existence of the death penalty from sabotage of the railway system, is not being implemented to penalise perpetrators nor does it seem to serve as deterrence against the crime. From 2013 to December 2016, 25 major train incidents occurred in Pakistan, of which only seven were considered sabotage. [169] However, there was no punishment given in any of them. In 2017, three railway accidents occurred, in which one was said to have been due to sabotage however, no further reports were released on the investigation of the incident.[170]

This points to flaws in the criminal justice system, as it is unclear if thorough investigations were conducted into the incidents, as there were no suspects identified or convicted, in any of the 10 incidents.

166 "CRIMINAL PETITION NO.200 OF 2009," The Supreme Court of Pakistan, http://www.supremecourt.gov.pk/web/user_files/File/Crl.P.200of2009.pdf
167 "Inquisitive passenger of PIA lands into police custody," Dawn, April 27, 2012 https://www.dawn.com/news/713960
168 "Man who threatened to hijack PIA plane released on bail," The News, May 6, 2012 https://www.thenews.com.pk/archive/print/360286-man-who-threatened-to-hijack-pia-plane-released-on-bail
169 https://www.pakistantoday.com.pk/2017/11/07/pakistan-railways-plans-to-close-vigilance-cell/
170 Hamza Rao, "Chaman saved from a major attack after unknown terrorists sabotage railway tracks," Daily Pakistan, May 9, 2017 https://en.dailypakistan.com.pk/pakistan/chaman-saved-from-a-major-attack-after-unknown-terrorists-sabotage-railway-tracks/

An analysis of the reported case law reveals that cases that are actually tried under the section bear no relation to an offence that is of such gravity to merit the death penalty. In *Muhammad Ashraf v. State* (1978 PLD 1087) the accused was tried under the respective section simply for being found in possession of fishplates from a railway track.

Comparative Analysis

The Indian Railways Act, 1989, is an analogous law. However, according to Section 152, the death penalty and life imprisonment are only awarded if the person carries out an act knowing that it may cause death.

Interestingly, in October 2017, the Gujarat High Court commuted the death sentence of 11 convicts to rigorous life imprisonment and upheld the sentencing of 20 others to life term in the 2002 Godhra train burning case. The judges referred to the Law Commission's recommendation that the death penalty should be abolished for any crime that is not related to terror or war against the state. The Court ruled that it was 'neither terrorism nor an act of waging war against the state', and that the convicts did not deserve death.

Rape

The offence of rape is defined in Section 375 of the Pakistan Penal Code as sexual intercourse by a man with a woman 'against her will', 'without her consent', 'with her consent…obtained by putting her in fear of death or hurt' or 'with or without her consent' if she is below 'sixteen years of age'. The proviso states that 'penetration' is sufficient to constitute 'sexual intercourse' necessary for the offence of rape. Section 376 stipulates the punishment for rape as 'death' or 'imprisonment' of between 10 and 25 years, also liable to 'fine'.[171] The punishment for gang rape i.e 'committed by two or more persons' is prescribed as 'death' or 'imprisonment for life'.

Statistics: Persistence of Rape

The stipulation of the death penalty as punishment for rape in Pakistan has failed to act as an active deterrent. The statistics for rape delineate that the number of offences being committed have progressively increased every year. A total of 1,582 cases were

171 Pakistan Penal Code, Section 376

reported across the country in 2014 as compared to 772 in 2013.[172] In 2014, 3,508 children were sexually abused while in 2013, the total number was 3,002.[173]

Despite the existence of the death penalty for gang rape, data compiled by the Aurat Foundation show that the incidence of the offence has increased progressively every year from 2008 to 2014 from 778 to 1,515.[174]

However, despite the high rate of occurrence of rape and gang-rape, there is a failure to report the crime(s). As a result, rates of prosecution, conviction and sentencing for rape in Pakistan remain woefully low. This points to the existence of inherent flaws within the criminal justice system that must be addressed before any meaningful form of 'justice' can be provided to rape victims.

In a 2014, according to a report by War Against Rape (WAR), a total of 383 sexual assault cases were reported in hospitals across Karachi last year, yet FIRs were registered against only 27.67 percent of the cases.[175] In the 45 cases investigated by WAR, it found that the age group most vulnerable to sexual assault was between five and 13 years. [176] The report also states that between 2005 and 2014, around 3,242 medical examinations for sexual assault cases were conducted in the three major public hospitals in Karachi. However, FIRs were registered in only 1,101 of the cases.[177]

One school of thought believes that the prescription of the death penalty for the offences of rape and gang rape is ineffective in practice, as courts are hesitant to convict perpetrators and award excessively severe punishments. This becomes particularly relevant in the case of gang rape, where all accused may be punished by death, as courts are unwilling to award the death penalty to multiple people, and so fail to convict them for the crime. The estimated conviction rate for gang rape in Karachi is between 2 to 4 percent.[178] Thus, this clearly demonstrates the inability of the stipulation of the death penalty for rape and gang rape to act as an effective deterrent.

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172 See WAR Report 2014: Four women raped every day in Pakistan . THE EXPRESS TRIBUNE. Available at: <https://tribune.com.pk/story/913772/miserable-figures-rape-a-bigger-problem-than-meets-the-eye/>
173 ibid
174 Aurat Foundation. Annual Report 2014: Violence Against Women in Pakistan. Jan 2015. Available at https://www.af.org.pk/PDF/VAW%20Reports%20AND%20PR/VAW%202014.pdf
175 See WAR Report 2014: Four women raped every day in Pakistan . THE EXPRESS TRIBUNE. Available at: <https://tribune.com.pk/story/913772/miserable-figures-rape-a-bigger-problem-than-meets-the-eye/>
176 ibid
177 ibid
178 In 5 years, 277% Rise in Rape Cases Reported in Delhi; Govt Initiatives Falter, Funds Underutlised. INDIA SPEND. July 2017. Available at http://www.indiaspend.com/cover-story/in-5-years-277-rise-in-rape-cases-reported-in-delhi-govt-initiatives-falter-funds-underutilised-91626

Comparative analysis

India

In September 2013, the perpetrators in the brutal gang rape of Jyoti Singh were sentenced to death. In May 2017, the Supreme Court of India upheld this ruling.

However, according to data released by the Delhi Police, 616 rape cases were registered in Delhi between 1 January, 2014 to 30 April, 2014; an increase of 36% compared to around 450 cases registered in the same period in 2013.[179] In May 2017, in response to the brutal kidnapping and rape of another young woman, the General Secretary of the National Federation of Indian Women, Annie Raja, stated the 'death penalty is not enough to prevent such heinous crimes'.[180] This highlights the need to address the deeply entrenched systemic issues that create an environment where gender-based violence is committed against women on a routine basis.

United States

In 1977, the U.S. Supreme Court in *Coker v. Georgia*, 433 U.S. 584, held that awarding the death penalty for the rape of an adult was 'grossly disproportionate' and an 'excessive punishment', and hence was unconstitutional under the Eighth Amendment.[181]

United States Supreme Court Justice Byron White, in his 1977 Coker v. Georgia majority opinion, stated that 'rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder'[182]. 'Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond

179 In 5 years, 277% Rise in Rape Cases Reported in Delhi; Govt Initiatives Falter, Funds Underutlised. INDIA SPEND. July 2017. Available at http://www.indiaspend.com/cover-story/in-5-years-277-rise-in-rape-cases-reported-in-delhi-govt-initiatives-falter-funds-underutilised-91626

180 ibid

181 https://deathpenaltyinfo.org/death-penalty-offenses-other-murder

182 U.S Supreme Court. Coker v. Georgia, 433 U.S. 584 (1977) available at https://supreme.justia.com/cases/federal/us/433/584/case.html

repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability"…is an excessive penalty for the rapist'.[183]

The Louisiana Supreme Court in 2007 upheld the death sentence for Patrick Kennedy for the rape of his step-daughter, in *Louisiana v. Kennedy* (No. 05-KA-1981, May 22, 2007). However, in June 2008, Louisiana's law was struck down by the U.S. Supreme Court, in a decision which also held that the death penalty would be 'disproportionate' for any offence against an individual that did not involve 'death of the victim'.[184]

It is also important to note that no one has been executed in the United States for the crime of rape since the reinstatement of the death penalty in 1976[185].

Stripping a Woman's Clothes

Section 354-A of the Pakistani Penal Code details the offence and the penalty being with death or life imprisonment and liable to a fine. The offence has three elements mainly;

1. Assault or the use of criminal force on a woman,
2. Stripping of her clothes, and
3. in that condition exposing her to public view.

Cases that would fall under this offence in Pakistan, however, have not seen any criminal proceedings or path to any sort of justice. For example, in 2016, a 28-year-old Christian woman was allegedly stripped naked and assaulted by four men; in 2012, a mob disrobed a woman and paraded her naked around a village in Muzaffargarh district[186]; in 2011 in Khyber Pakhtunkhwa a woman was stripped and forced to walk in the village naked.[187] However, in all of these cases, no court proceedings took place.

183 https://deathpenaltyinfo.org/death-penalty-offenses-other-murder
184 https://deathpenaltyinfo.org/death-penalty-offenses-other-murder
185 https://deathpenaltyinfo.org/death-penalty-offenses-other-murder

186 "Pakistani Police arrest men for marching girl naked through village". THE GUARDIAN. Available at https://www.theguardian.com/world/2017/nov/02/pakistani-police-arrest-men-for-marching-girl-naked-through-village
187 Pakistani woman villager is forced to parade naked. BBC NEWS. 14 June 2011. Available at http://www.bbc.com/news/world-south-asia-13766656

There has been no case found where the death penalty was given as a punishment for this offence in Pakistan. The courts' hesitation in sentencing the accused to death under section 354-A of the PPC has been evidenced in various cases even where egregious violations have occurred. In fact, Court appear to prefer convicting persons under Section 354 which provides a maximum penalty of imprisonment of two years.

In *Muhammad Abdullah v The State*, the accused had allegedly beat the complainant's daughter and outraged her modesty, as a result of which she sustained injuries. They had 'caught hold of her by dragging her on the ground, torn her clothes and insulted her besides causing injury to her'.[188] However, the Peshawar High Court held that these facts were not 'sufficient to constitute offence under section 354-A, P.P.C.', as the necessary 'ingredients' for this are 'stripping off the clothes of the woman' and exposing her to the 'public view' in that condition. The Court held that bail was allowed for the accused.

Similarly in *Heman v. The State*, the shalwar of a nine year old was removed in the public by two accused who attempted to rape her.[189] The Sindh High Court, acquitted the accused under S. 354-A and released them on the grounds that they had already served two years in prison which was the maximum term of imprisonment under S. 354.

Comparative Analysis

The death penalty for this offence is deemed by the UN Human Rights Committee to violate Article 6 of the International Covenant on Civil and Political Rights, as it is considered not be a 'most serious crime', as it has not resulted in the death of a person.[190] Similar to rape and other offences mentioned, the death penalty for this offence is disproportionate to the crime.

Out of the retentionist country, reports of death sentences being awarded under the offences of stripping a woman are only found in Kenya. In Kenya, three men were sentenced to death for stripping and attacking a woman in 2017.[191] However, due to Kenya's ban on executions, no executions have been carried out since 1987, meaning the

188 2013 MLD 395
189 2016 PCRLJ 119
190 Concluding Observations of the Human Rights Comm.: Sudan, ¶ 8, 90th Sess., July 9-27, 2007, U.N. Doc. CCPR/C/SDN/CO/3
191 Three Kenyan men sentenced to death for stripping woman. BBC. 19 July 2017. Available at http://www.bbc.com/news/world-africa-40654155

three would essentially serve life sentences. In 2016, President Uhuru Kenyatta commuted all death sentences in the country to life imprisonment.

India criminalizes the offences of outraging a woman's modesty under ss. 354 and 509 of the Indian Penal Code. However, the punishment for the offence is a maximum of two years imprisonment and a maximum of one year respectively. This demonstrates that the imposition of the death penalty for a similar offence in Pakistan is clearly disproportionate.

Kidnapping and Abduction

Under the Pakistan Penal Code the death penalty may be awarded for kidnapping under the following circumstances:

I. Kidnapping or abducting a person under the age of 14

Under section 364-A, PPC the death penalty may be awarded in the event that the person kidnapped is below the age of 14 and the offence is committed with the intent of murder or 'subjecting to grievance hurt or slavery, or to the lust of any person'. Other than the existence of intent, the death penalty may also be awarded under section if the person kidnapped 'may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery, or to the lust of any person'.

As a result, the relevant provision includes instances where the offence is of a non-lethal nature i.e. the alleged act does not result in or was not intended to result in the death of the person kidnapped. Additionally, Section 364-A is a non-compoundable offence. Thereafter, the accused is required to serve out his/her sentence, including death sentence, even if a compromise is arrived at with the legal heirs of the victim.

II. Kidnapping or Abducting for ransom

Under Section 365-A, death sentence may be awarded in the event that a person is accused of kidnapping or abducting any person for the purposes of extorting any property or any valuable security, such as government bonds or cash, or to use the offence to otherwise compel any other person to comply with any demands.

Application of the Death Penalty

A significant number of cases under Section 364-A are registered against legal guardians in custody disputes. For example in *Mehnaz v. Judicial Magistrate*[192] the accused was a father who had been charged under S. 364-A with kidnapping his 5 year old son from the custody of his former wife. Similarly, in *Muhammad Tufail v. Pattoki*[193], the complainant filed a case of kidnapping against his wife and her family for kidnapping his son in response to her filing a suit of maintenance of her children. Similarly, convictions under 364-A often award convictions and death sentences primarily on the basis of circumstantial evidence.

There is no evidence that the death penalty has had an effective impact of deterring this crime – the evidence, in fact, points to the contrary. In a 2015 report, the United Nations Office on Drugs and Crime (UNODC) stated that criminal networks operating in Pakistan generated approximately $927 million through human trafficking and migrant smuggling in 2013.[194] According to the report, human trafficking and migrant smuggling increased from 2007 to 2013 in Pakistan. Similarly, in a 2015 US State Department Trafficking in Persons report, Pakistan was written as a source, transit, and destination country for men, women, and children subjected to forced labor and sex trafficking.[195]

In 2015 in Karachi, over 2,200 children were reported missing, not for ransom but rather for being trafficked, others sexually abused and/or sold within the city.[196] According to Madadgaar National Helpline, 170 children went missing or were kidnapped from Karachi alone in the first nine months of 2012.[197] This shows a steep increase in cases of kidnapping for ransom and missing children in 2012.[198] Kidnappings for ransom were at an all-time high in Lahore where 400 cases of kidnappings were registered in the first three months of 2012 as kidnappers continued to target children, young girls and women in the city. In March 2017, it was reported that the number of

192 2008 YLR 1669
193 1998 PCRLJ 1521
194Business of Human trafficking on the rise: report. DAWN. Feb 2015. Available at https://www.dawn.com/news/1164732
195 US Department of State. Trafficking in Persons Report. July 2015. Available at https://www.state.gov/documents/organization/245365.pdf
196 Ibid
197 Child Trafficking and Abduction," Society for the Protection of the Rights of the Child, 2013 http://www.sparcpk.org/2015/Other-Publications/CT2013.pdf Pg. 2
198 Ibid

kidnapping for ransom cases in the Rawalpindi region increased approximately 50% in the last year.[199]

An important and fundamental issue with this law is that in Pakistan the Anti-Terrorism Courts (ATCs) also have the jurisdiction to try kidnapping for ransom and extortion cases under Schedule II regardless of the proximity of the nature of the offence to terrorism. With the result that there are two parallel systems operating for identical offences with both carrying the punishment of the death penalty.

Zina Liable to Hadd

According to Sections 5 and 8 of the Zina Ordinance (Enforcement of Hudood), 1979, the death penalty is given in cases where a person who is married has intercourse with someone they are not married to. In order to prove this, they must either confess or the complainant must bring forth at least four adult male eyewitnesses to provide evidence of the act of penetration necessary to the offence.

Application of the Death Penalty

The Federal Shariat Court is extremely reluctant to implement this punishment. In *Zarina Bibi vs. The State*[200], it was established that criminology in Islam aims to draw inferences to acquit an accused person in Hudood cases, and not convict them. Furthermore, in the ground breaking judgement of *Hazoor Bakhsh vs. Federation of Pakistan*[201], it was held that the stoning of a married person to death for committing adultery is not derived from the Quran, as verse 24:2 discriminates between married and unmarried people in respect of *hadd* (punishment). Stoning to death is repugnant to the injunctions of Islam. This in itself is enough evidence to adduce that not only is death penalty not a mandatory punishment but rather is not a mandated offence at all. As a result, the punishment is effectively null and void in practice. Keeping it the law only serves as evidence of Pakistan's non-compliance with international standards.

It is important to note here that in a majority of the cases, where the couple or woman is executed/stoned, the punishment is handed down from a village court or a

199 Despite Enhanced Security number of kidnapping cases up by nearly 50% in Rawalpindi last year. Express Tribune. March 2017. Available at: https://tribune.com.pk/story/1357471/despite-enhanced-security-kidnapping-cases-nearly-50-pindi-last-year/
200 1997 PCrLJ 313 FSC
201 PLD 1981 FSC 145

group of village leaders rather than a federal court or a Federal Shariat Court. In fact, in 2002, it was the Federal Shariat Court that overturned the death sentence of Zafran Bibi and acquitted her.

Blasphemy

The law on blasphemy has been detailed in Chapter XV of the PPC, however s.295-C is the only blasphemy offence that carries the death penalty.

Blasphemy laws are not unique to Pakistan.[202] It is a criminal offence in Austria,[203] Brazil, [204] Denmark, [205] Finland, [206] Germany, [207] Greece, [208] India, [209] Israel, [210] and Netherlands.[211] In traditionally Muslim countries it is an offence in Afghanistan (with the death penalty),[212] Algeria,[213] Bangladesh,[214] Egypt,[215] Indonesia,[216] Iran (with the

202 Blasphemy and Related Laws in Selected Jurisdictions, The Law Library of Congress, January 2017. Available at: http://www.loc.gov/law/help/blasphemy/blasphemy.pdf
203 §188 and §189 of the Austria: Penal Code (Strafgesetzbuch - StGB)
204 Art 208 of the Penal Code of Brazil
205 § 140 of The Criminal Code (Denmark)
206 Section 10 of Chapter 17 of The Penal Code of Finland
207 Section 166 of the German Criminal Code (Strafgesetzbuch)
208 Articles 198, 199, and 201 of the Greek Penal Code
209 Section 295A of the Indian Penal Code
210 Articles 170 and 173 of the Penal Code (Israel)
211 Section 147 of the Criminal Code (Wetboek van Strafrecht) (Netherlands)
212 Not a specific offence in the Penal code however penalized under Islamic law.
Blasphemy and Related Laws in Selected Jurisdictions, pg 46-47, The Law Library of Congress, January 2017. Available at: http://www.loc.gov/law/help/blasphemy/blasphemy.pdf
213 Article 144 (2) of the Penal Code (Algeria)
214 Section 295A of the Bangladesh Penal Code
215 Article 98F of the Penal Code (Egypt)
216 Article 156a of the Indonesian Penal Code

death penalty),[217] Jordan,[218] Malaysia,[219] Nigeria,[220] Saudi Arabia (with the death penalty),[221] UAE[222] and Yemen.[223]

The laws on blasphemy were introduced during the colonial era in British India with the introduction of the Indian Penal Code in 1860. The initial purpose of this section was to provide punishments for anyone who injured the religious feelings of any citizen of the land.[224] These punishments ranged from one to two years in jail, and targeted the *mens rea* for the offence. In 1927, the act of outraging or insulting the religious feelings of any person was declared a crime under s.295A[225].

Decades later, during the days of military dictator General Zia-ul-Haq, a number of other sections pertaining to blasphemy were added as a means to 'Islamise' the law. In 1986, s.295C was introduced, which made defiling the name of the Prophet Muhammad (PBUH) in any way or form an offence punishable by the death penalty or life imprisonment[226].

Despite the language of the s. 295-C penalizing 'with death or imprisonment for life', the mandatory death penalty was imposed by the Federal Shariat Court[227] stating, 'we are of the view that the alternate punishment of life imprisonment as provided in section 295-C, P.P.C. is repugnant to the Injunctions of Islam'. This made s. 295-C the only offence with a mandatory death penalty in Pakistan.

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217 Berkley Center for Religion, and Georgetown University. "National Laws on Blasphemy: Iran." Berkley Center For Religion, Peace and World Affairs. Accessed April 20, 2019. Available at: https://berkleycenter.georgetown.edu/essays/national-laws-on-blasphemy-iran.
218 Title VI Chapter 1 of the Penal Code No. 16/1960 and all its amendments and amended by the latest Act No. 8/2011 (Jordan)
219 Article 295 and 298 of the Penal Code Act No. 574 of 1997 (Malasiya)
220 Section 204 of the Criminal Code Act (Nigeria)
221 Berkley Center for Religion, and Georgetown University. "National Laws on Blasphemy: Saudi Arabia." Berkley Center For Religion, Peace and World Affairs. Accessed April 22, 2019. Available at: https://berkleycenter.georgetown.edu/essays/national-laws-on-blasphemy-saudi-arabia.
222 Article 312 of The Penal Code Federal Law No. 03/1987 (UAE)
223 Article 194 and 195 of the Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties (Yemen)
224 "As Good as Dead": the impact of Blasphemy Laws in Pakistan, Amnesty International, 21 December 2016. Available at: https://www.amnesty.org/en/documents/asa33/5136/2016/en/
225 ibid
226 inserted by Act III of 1986. PLD 1986 Cent St 70
227 Muhammad Ismail Qureshi vs. Pakistan PLD 1991 Federal Shariat Court 10

Statistics

Even though courts have sentenced people to death, no one has been executed under blasphemy charges.[228]

Since 1990, close to 70 people have been lynched so far on blasphemy charges, while another 40 are currently on death row or serving a life sentence. [229] Blasphemy accusations between the years 1927-1986 were seven compared to 1335 in the years 1987-2014[230] proving a stark difference when the penalties became stricter. Another report states that between 1987 and August 2012 there were 247 blasphemy cases.[231]

Data provided by National Commission for Justice and Peace (NCJP) shows a total of 633 Muslims, 494 Ahmedis, 187 Christians and 21 Hindus have been accused under various clauses of the blasphemy law since 1987.[232] The Legal Aid Society of Karachi reports that between 1953 and July 2012, 'there were 434 offenders of blasphemy laws in Pakistan and among them were 258 Muslims (Sunni/Shia), 114 Christians, 57 Ahmadis, and 4 Hindus'.[233] Given that the non-Muslim population of Pakistan is 4%,[234] it is evident from the statistics that blasphemy charges are used as a means of oppression.

Application of the death penalty

The *actus rea* of the offence under s295-C PPC is significantly wide however the court has narrowed it by stating that the circumstances of the occurrence, as well as custom and usage of the present day must be considered.[235] This is because an act that may be considered deeply offensive in one circumstance may be deemed less offensive in another. The *mens rea* has not been subscribed in the statute however the same Federal

228 State of Human Rights 2014, Human Rights Commission of Pakistan. Available at: http://hrcp-web.org/hrcpweb/data/HRCP%20Annual%20Report%202014%20-%20English.pdf
229 State of Human Rights 2018, Human Rights Commission of Pakistan. Available at: http://hrcp-web.org/hrcpweb/wp-content/uploads/2019/04/State-of-Human-Rights-in-2018-English-1.pdf
230 State of Human Rights 2014, Human Rights Commission of Pakistan. Available at: http://hrcp-web.org/hrcpweb/data/HRCP%20Annual%20Report%202014%20-%20English.pdf
231 Mohammad Nafees, "Blasphemy laws in Pakistan: A historical overview", Centre for Research and Security Studies, Islamabad, 2013, p.44. Available at www.csi-int.org/fileadmin/Files/pdf/2014/blasphemylawsinpakistan.pdf
232 https://www.bbc.com/news/world-south-asia-12621225
233 The Supreme Court of Pakistan judgment, The State v Muhammad Qadri, Criminal appeals No. 210 and 211 of 2015, (2015) p. 26, Available at www.supremecourt.gov.pk/web/user_files/File/Crl.A._210_2015.pdf
234 http://www.pbs.gov.pk/sites/default/files//tables/POPULATION%20BY%20RELIGION.pdf
235 Muhammad Ismail Qureshi vs. Pakistan PLD 1991 Federal Shariat Court 10

Court judgment held 'Shariah recognises an offence liable to Hadd only if it is accompanied by an express intention'. The intention should also be one with the express intention to insult.[236]

Given that the application of the death penalty is mandatory for the offence of s.295-C and the specific procedures that need to be followed in said cases, the practice in reality is marred by misapplication of the law. Weak evidence and malicious prosecution have led to several acquittals.[237] Insanity has also been considered a defence resulting in acquittal.[238] The police are obligated to consult for 'proper guidance from [a] well-known and unbiased religious scholar…'[239] however this is not always honoured. It is a common practice in blasphemy cases that the prosecution presents a *fatwa*[240] by some absent or unauthorised religious scholar as evidence against the accused. This practice contravenes the precepts prescribed in the Qanun-e-Shahat Order 1984, because the author of the document has not been cross examined [241] or he cannot furnish proof of his qualifications.[242]

As the offence under s.295-C is a *hadd* offence, [243] two male witnesses are requirement. The said witnesses must have the requirements of *tazkiyah-al-shuhood* i.e. the witnesses must be closely scrutinized by the Court, which must carry out an inquiry in the witness' class of people. This inquiry should investigate the everyday dealings of these eyewitnesses to ascertain their credibility as good Muslims. Because of this requirement it excludes witnesses who are friends of the complainant [244] and vengeance.[245]

Mercy and forgiveness play a significant role in Islamic teachings and principles hence insisting and swearing that one has not uttered such words as alleged by the complainant then the court can not insist that the abusive language was used. [246]

236 1989 MLD 896, 1993 S.C.M.R. 153, 2004 YLR 2249
237 2009 MLD 616, 2008 YLR 2798, 2008 YLR 1386, 2008 YLR 387, 2007 YLR 336, 2006 MLD 1504, 2003 YLR 2422, 2003 YLR 2000, 2002 PLD 587 Lahore, 2001 YLR 484, 2000 YLR 1273, 1992 PCRLJ 452
238 1995 MLD 667
239 Muhammad Mahboob alias Booba v the State PLD 2002 Lahore 587
240 a ruling on a point of Islamic law
241 2009 MLD 616
242 PLD 2007 Peshawar 83
243 Muhammad Ismail Qureshi vs. Pakistan PLD 1991 Federal Shariat Court 10
244 2007 YLR 336
245 2009 MLD 616
246 2000 YLR 1273, 2008 YLR 2798

The law on blasphemy has been misused as a means of 'getting back' and to amplify the seriousness of other criminal cases. This has been used for tribal blood feuds,[247] vengeance of becoming a witness for another case,[248] work related feuds,[249] abused by law enforcement officers,[250] and business competition.[251]

It is an undeniable fact that this particular offence has been in the spotlight many times due to the political, religious and social sentiment attached to it. This has been evidenced in the murders of Salman Taseer[252] and Shahbaz Bhatti,[253] the lynching of Mashal Khan,[254] and the acquittal of Asia Bibi;[255] to name a few. These cases have led to mass riots which have also bought the nation to a screeching halt.[256][257] Given the nature of the offence, it has received a high press coverage by both the local and international media. It has also been a concern for the UN and foreign governments as this offence has also been brought up in parliaments of other countries including the UK and USA.

Fair trial standards have been affected by this sentiment. Due to the public outrage, defence lawyers routinely receive threats in blasphemy cases.[258] Judges too, are not safe

247 Muhammad Usman v Meer Khurshid 1990 PCrLJ 609
248 Anwar Masih v the State 2005 PCrLJ 1636
249 Major-General Fazal-I-Raziq, Chairman, WAPDA, Lahore v Ch. Riaz Ahmad PLD 1978 Lahore 1082
250 Zahid Hussain v State 2005 PCrLJ 1683
251 Asian Human Rights Commission, "Pakistan: Death Threats to Minorities by the Fundamentalists," news release, April 27, 2001, http://www.ahrchk.net; Shea, "Testimony of Nina Shea."
Centre for Legal Aid, Assistance, and Settlement, "A 55 Year Old Pakistani Christian Doctor Jailed on Blasphemy Charges," May 9, 2008, http://www.claas.org.uk; "Is There an End?" Dawn, August 6, 2009, http://www.dawn.com.
252 Islamabad, Omar Waraich. "The Martyrdom of Pakistan's Advocate of Tolerance." Time. January 05, 2011. Accessed April 22, 2019. Available at: http://content.time.com/time/world/article/0,8599,2040792,00.html.
253 Guerin, Orla. "Pakistan Minorities Minister Shahbaz Bhatti Shot Dead." BBC News. March 02, 2011. Accessed April 22, 2019. Available at: https://www.bbc.com/news/world-south-asia-12617562.
254 Farooq, Muhammad. "Mashal Khan's Second Death Anniversary." Thenews. April 13, 2019. Accessed April 22, 2019. Available at: https://www.thenews.com.pk/print/457524-mashal-khan-s-second-death-anniversary.
255 Bhatti, Haseeb. "Supreme Court Acquits Aasia Bibi, Orders Immediate Release." DAWN.COM. November 06, 2018. Accessed April 22, 2019. Available at: https://www.dawn.com/news/1442396.
256 Hashim, Asad. "Pakistan PM Calls for Calm after Aasia Bibi Cleared of Blasphemy." Pakistan News | Al Jazeera. October 31, 2018. Accessed April 22, 2019. Available at: https://www.aljazeera.com/news/2018/10/pakistan-pm-calls-calm-aasia-bibi-cleared-blasphemy-181031173052989.html.
257 "Mumtaz Qadri Supporters Rally in Islamabad after Clashes." BBC News. March 28, 2016. Accessed April 22, 2019. Available at: https://www.bbc.com/news/world-asia-35909716.
258 "As Good as Dead": the impact of Blasphemy Laws in Pakistan, Amnesty International, 21 December 2016. Available at: https://www.amnesty.org/en/documents/asa33/5136/2016/en/

and receive threats of violence and death. The UN Special Rapporteur on the independence of judges and lawyers has noted that the judiciary in Pakistan has 'grown very afraid of public sentiment regarding blasphemy cases. Such sentiment, coupled with intimidation and violence, as well as the lack of protection measures from authorities, seriously encroaches on the independence of the judiciary and results in a biased delivery of justice.'[259]

High Treason

The offence of treason is the only death penalty offence in the Constitution of Pakistan. High treason has been defined in Article 6 of the Constitution as 'to abrogate or subvert or suspend or hold in abeyance' the Constitution by 'use of force or show of force or by any other unconstitutional means'. This includes both attempt and conspiracy. The offence of treason is unique is Pakistan as it does not specifically involve either an enemy/enemy state nor against a head of state.

The death penalty for treason has been provided for in Section 2 of the High Treason Act, 1973. In the history of Pakistan the suspension of the Constitution has only occurred when there has been a military coup. The only trial under these provisions were against former Chief of Army Staff and President, Pervez Musharraf. The trial is still pending[260]. The death penalty is not the mandatory punishment for this offence; the alternative punishment given is life imprisonment.

Given that there has not been a conviction under this offence, and the fact that life imprisonment is a punishment, the judges and courts of Pakistan should take a step towards progress and sentence anyone convicted to life imprisonment, as the death sentence is not mandatory.

259 7 United Nations General Assembly. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul - Addendum - Mission to Pakistan 04 April 2013, para. 58, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/43/Add.2

260 Treason case: SC to intervene if special court fails to decide how to record Musharraf's statement, report Dawn, March 25, 2019. Available at: https://www.dawn.com/news/1471786/treason-case-sc-to-intervene-if-special-court-fails-to-decide-how-to-record-musharrafs-statement

Military offences

In January 2015, Pakistan empowered military courts to try civilians for terrorism-related offences as part of its 20-point 'National Action Plan', adopted by the Government following the horrific attack on the Army Public School in Peshawar. The expansion of military jurisdiction over civilians was accomplished through the 21st Amendment to Pakistan's Constitution and amendments to the Army Act, 1952. These amendments allowed military courts to try offences related to 'terrorism' committed by those who claim to, or are known to, belong to a terrorist organization 'using the name of religion or a sect'. Both amendments lapsed on 6 January, 2017 pursuant to a 'sunset clause'.[261]

The National Action Plan had envisioned the use military courts in this manner to be a short-term 'solution' for the purpose of effectively prosecuting 'terrorists', to be operational only for a two-year period during which the Government would bring about necessary 'reforms in criminal courts system to strengthen the antiterrorism institutions'. Now, more than four years have passed since military courts were first empowered to try civilians and there is little sign of the promised reforms to strengthen the ordinary criminal justice system to effectively handle terrorism-related cases. [262]

Meanwhile, the system of 'military justice' currently in place in Pakistan is a violation of its legal obligations and political commitments to respect the right to life, the right to a fair trial, and the independence and impartiality of the judiciary.[263]

In the four years since military courts were empowered to try terrorism-related offences, they have convicted at least 641 people, possibly including children, in opaque, secret proceedings. Only five people have been acquitted. At least 56 people have been hanged after trials that are grossly unfair: In all these cases, the government and military authorities have failed to make public information about the time and place of their trials; the specific charges and evidence against the convicts; as well as the judgments of military courts including the essential findings, legal reasoning, and evidence on which the convictions were based.[264]

261 International Commission of Jurists, Military Injustice in Pakistan, Briefing Paper, January 2019. Available at https://www.icj.org/wp-content/uploads/2019/01/Pakistan-military-courts-Advocacy-Analysis-brief-2018-ENG.pdf
262 ibid
263 ibid
264 ibid

The amended Army Act, 1952, also gives military courts retrospective powers, meaning that they are competent to try persons for conduct that occurred prior to the amendments. The law also provides all those associated with military courts complete indemnity from prosecution or other legal proceedings for actions taken in 'good faith' or 'intended to be done' under the law.[265]

Military courts have thus far concluded the trials of at least 646 people, finding the defendants guilty in at least 641 cases (a rate of 99.2 percent). Some 345 people have been sentenced to death and 296 people have been given imprisonment sentences. At least 56 out of the 345 people sentenced to death have been hanged.[266]

Some of the incidents these civilians were tried for include the attack on the army public school in Peshawar; an attack on a bus carrying members of the Muslim Ismaili community near Safoora Chowk in Karachi; an attack on a bus carrying Shiite Muslim Hazara pilgrims in Mastung; the killing of activist Sabeen Mahmood; an attack on Saidu Sharif Airport (between villages of Dherai and Kanju in Khyber-Pakhtunkhwa); and other violent attacks against law enforcement agencies.[267]

Offences punishable with death and tried by military courts include:

1. Mutiny – s.31 of the Pakistan Army Act, s.36 & 37 of the Pakistan Navy Ord. 1961 and s.37 of the Pakistan Air Force Act 1953
2. Offences in relation to the enemy – s.24 of the Pakistan Army Act and s.34 of the Pakistan Air Force Act
3. Misconduct in action by persons in command – s.29 of the Pakistan Navy Ord. 1961
4. Misconduct in action by other officers and men – s.30 of the Pakistan Navy Ord. 1961
5. Obstruction of operation – s.31 the Pakistan Navy Ord. 1961
6. Corresponding with, supplying or serving with the enemy – s.32 of the Pakistan Navy Ord. 1961
7. Disclosure of parole or watchword – s.26 of the Pakistan Army Act
8. Arms Trading – s.13A(c)(1) of Pakistan Arms Ordinance 1965

265 ibid
266 ibid
267 ibid

In addition, military courts have jurisdiction to try certain offences under the Anti-Terrorism Act, 1997, including the 'use or threat of action' involving and of the following:

1. Grievous violence against a person or grievous bodily injury or harm to a person
2. Grievous damage to property
3. Acts that are likely to cause death or endangers a person's life
4. Firing on religious congregations or places of worship
5. Burning of vehicles or any other serious form of arson
6. 'Serious coercion or intimidation' of a public servant to force them to discharge or to refrain from discharging their lawful duties
7. "Acts as part of armed resistance by groups or individuals against law enforcement agencies"

It has been documented how proceedings before Pakistani military courts fall far short of national and international standards requiring fair trials before independent and impartial courts: Judges are part of the executive branch of the State and continue to be subjected to military command; the right to appeal to civilian courts is not available; the right to a public hearing is not guaranteed; a duly reasoned, written judgment, including the essential findings, evidence and legal reasoning, is denied; and the procedures of military courts, the selection of cases to be referred to them, the location and timing of trial, and details about the alleged offences are kept secret. The imposition of the death penalty after clearly unfair trials is a violation not just of the right to life, but also the right to be free from torture and other ill-treatment[268].

Conclusion

The analysis of the national law presented in this chapter leads to the conclusion that the death penalty in Pakistan is marred by inconsistencies and human rights violations in the criminal justice and legal system. A common thread in all of the offences is that the death penalty does not serve as a deterrent to committing the crime.

268 International Commission of Jurists (ICJ) and Human Rights Commission of Pakistan (HRC), Joint Submission to the Committee on Torture on the first periodic report of Pakistan, March 2017, para 32

Policy and law makers should look to other common law countries as examples on their evolution of either restricting the use or halting executions or abolition of the death penalty. The domestic law surrounding the death penalty needs significant amendments for the application of the death penalty to be consistent with international law and the first step in that direction should be reducing the number of offences that warrant the death penalty.

PAKISTAN'S COMPLIANCE WITH INTERNATIONAL LAW

International law places strict limits on the scope and processes whereby states may obtain a death sentence and execute prisoners. Though not specifically prohibited under international law,[269] capital punishment may be imposed only for the gravest criminal offences. Under the International Covenant on Civil and Political Rights (ICCPR), which Pakistan ratified in 2010, a 'sentence of death may be imposed only for the 'most serious crimes'.[270] The United Nations Human Rights Committee, the body responsible for overseeing the interpretation and implementation of the ICCPR, maintains that the term 'most serious crimes must be read restrictively to mean that the death penalty should be a quite exceptional measure'.[271] While Article 6(2) of the ICCPR does not define the precise boundaries of what constitutes 'most serious crimes', the only crimes that clearly fall within that term are intentional killings or attempted killings.[272] Through its authoritative published opinions, the Committee has held that the various lesser offences

269 International Bar Association, The Death Penalty Under International Law (2008) http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/death_penalty_resolution.aspx

270 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 6(2) [hereinafter ICCPR] (emphasis added).

271 Human Rights Commission, General Comment No. 6, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 (1994)

272 The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions set forth an even higher standard, namely that the death penalty should only be available in 'cases where it can be shown that there was an intention to kill which resulted in the loss of life'. UN Doc A/HRC/4/20 (2007). A concurring opinion in the Committee's decision, Kennedy v Trinidad and Tobago (845/98), suggested 'that unintentional or "inadvertent" killing was not serious enough to attract the death penalty under article 9(2)'. Comm. on Human Rights, U.N. Doc. CCPR/C/74/D/845/1998 (2002). In Concluding Observations on Kenya, the Committee 'note[d] with concern that . . . the death penalty applies to crimes not having fatal or similarly grave consequences, such as robbery with violence or attempted robbery with violence, which do not qualify as "most serious crimes" within the meaning of article 6, paragraph 2, of the Covenant'. Comm. on Human Rights, Concluding Observations of the Human Rights Comm.: Kenya U.N. Doc. CCPR/CO/83/KEN (2005)

do not constitute 'the most serious crimes'[273] and therefore cannot incur the death penalty without violating Article 6.

Under international law, the death penalty may only be imposed pursuant to a legal process that rigorously observes the procedural guarantees required under the International Covenant on Civil and Political Rights.[274] Based on the Covenant's mandate that 'no one shall be arbitrarily deprived of his life',[275] states may not impose the death penalty in the absence of a fair trial.[276] The Human Rights Committee has specified that in trials involving capital punishment, states must observe 'scrupulous respect of the guarantee of fair trial'.[277] The Economic and Social Council has further stated that 'capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14' of the ICCPR.[278] The execution of individuals in the absence of such protections may also constitute a violation of Article 7's prohibition on inhuman and degrading treatment.[279]

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273 Rodley, Nigel S, and Matt Pollard. 2011. The Treatment Of Prisoners Under International Law. 3rd ed, 299-300.

274 ICCPR, art. 6(2).

275 ICCPR, art. 6(1).

276 Rodley & Pollard, The Treatment of Prisoners; see also Human Rights Comm., General Comment No. 6, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 (1994) (stating that '[t]he procedural guarantees . . . prescribed [in article 14] must be observed' for the purposes of article 6).

277 Human Rights Comm., General Comment No. 32, ¶ 59, U.N. Doc. CCPR/C/GC/32 (2007); see also Gunan v. Kyrgyzstan, ¶ 6.5, U.N. Doc. CCPR/C/102/D/1545/2007 (2011) ('[T]he imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation . . . of article 6 of the Covenant. In light of the Committee's findings of a violation of article 14, it concludes that the author is also a victim of a violation of his rights under article 6, paragraph 2, read in conjunction with article 14, of the Covenant'.).

278 U.N. Econ. & Soc. Council Res. 1984/50 (May 25, 1984).

279 Human Rights Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 1421/2005, 87th session, ¶ 7.11, U.N. Doc. CCPR/C/87/D/1421/2005 (2006) ('[T]o impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. In circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to considerable anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. Indeed, as the Committee has previously observed, the imposition of any death sentence that cannot be saved by article 6 would automatically entail a violation of article 7. The Committee therefore concludes that the imposition of the death sentence on the author after the conclusion of proceedings which did not meet the requirements of article 14 of the Covenant amounts to inhuman treatment, in violation of article 7'.). The European Court of Human Rights has similarly held that 'the imposition of the death sentence . . . following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3 of the European

Torture

International law prohibits the use of torture and requires the exclusion of evidence obtained through torture.[280] First, as a State Party to the Convention Against Torture (CAT) and to the ICCPR, Pakistan is required to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.[281] It also separately provides that legal assistance must be made available during pre-trial procedures including police questioning.[282] For instance, the Human Rights Committee has stated that 'in cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings'[283] and all defendants are entitled to effective legal counsel under international law.[284] 'Blatant misbehaviour or incompetence'[285] violate this standard. Where it is 'manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice',[286] the State violates the Article 14 right to fair trial.[287]

Second, the use of torture undermines the fairness, accuracy, and legitimacy of the justice system. Article 14(g) of the ICCPR guarantees the right of defendants 'not to be compelled to testify against himself or to confess guilt'.[288] The Human Rights Committee

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Convention of Human Rights'. U.N. Doc. E/CN.4/2006/83 at 7, http://daccessods.un.org/access.nsf/Get?Open&DS=E/CN.4/2006/83&Lang=E (discussing Ocalan v. Turkey, 2005-IV Eur. Ct. H.R. 282).

280 The prohibition of torture is non-derogable. Article 1 of the Convention Against Torture (CAT) explicitly prohibits 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession'. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 1(1) [hereinafter CAT]. This prohibition is enshrined in the ICCPR. ICCPR, art. 7 ('No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . '.).

281 CAT, art 2(1).

282 Human Rights Comm., General Comment No. 32, ¶ 38.

283 Id.

284 ICCPR, art. 14(3)(d) ('To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'.).

285 General comment No. 32 ¶ 38.

286 Id.; see also Campbell v. Jamaica, U.N. Doc. CCPR/C/44/D/248/1987, IHRL 2371 (UNHRC 1992) ('The Committee recalls its jurisprudence that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice'.).

287 Id

288 ICCPR, art. 14(g).

elaborates that 'domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence'.[289] Similarly, in *Othman v. United Kingdom*, the European Court of Human Rights stressed the importance of excluding evidence obtained through torture, stating: 'Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself'.[290]

In Pakistan, torture at the hands of the police as an instrument for collecting evidence is widespread and rarely punished.[291] In a 2007 report on the death penalty in Pakistan, the International Federation of Human Rights concluded that '[t]orture in order to obtain confession, to intimidate, and terrorise is widespread, common, and systematic'.[292] JPP and the Lowenstein Clinic confirmed those findings in a 2014 report. Researchers examined 1,867 medical-legal certificates of independent physical examinations of criminal defendants from Faisalabad. The figures were striking; physicians found conclusive evidence of abuse in 1,424 of the 1,867 cases.[293] Police were documented as having 'beaten victims, suspended, stretched and crushed them, forced them to witness other people's torture, put them in solitary confinement, subjected them to sleep and sensory deprivation, confined them to small spaces, exposed them to extreme temperatures, humiliated them by imposing culturally inappropriate or unpleasant circumstances, and sexually abused them'.

289 Human Rights Comm., General Comment No. 32, ¶ 41.
290 Othman (Abu Qatada) v. United Kingdom, App. No. 8139/09, 2012 Eur. Ct. H.R. 56.
291 After a 2011 visit to Pakistan, the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment concluded that '[t]orture, including rape, and similar cruel, inhuman or degrading treatment are rife in Pakistan', and that it is 'most frequently used to secure confessions or information relating to suspected crimes'. U.N. Commission on Human Rights, E/CN.4/1997/7/Add.2 (1996). The International Federation of Human Rights further reports how 'torture is routinely used to extract information or confessions from suspects, and illegal detentions are common', and quotes a police superintendent as affirming that 'in effect, the police has complete and unchecked powers. And the lack of modern investigative techniques means that we are "forced" to torture to secure confessions'. Human Rights Commission of Pakistan, Slow March to the Gallows: Death Penalty in Pakistan 40 (Jan. 2007), https://www.fidh.org/IMG/pdf/Pakistan464angconjointpdm.pdf

292Id
293 JPP-Lowenstein, Policing as Torture. October 2015.

The routine reliance on torture in Pakistan has been documented repeatedly over the last thirty-five years[294], but genuine reforms have yet to take hold.[295] Formal prohibitions against torture exist under Article 14(2) of Pakistan's Constitution, yet there is still no law expressly criminalising torture in Pakistan, despite Pakistan's ratification of the Convention Against Torture in 2010.[296]

Due Process

The ICCPR requires that all defendants have 'adequate time and facilities for the preparation of [their] defence and to communicate with counsel of [their] own choosing'.[297] The Human Rights Committee has found violations where a court refused to postpone a trial, despite the fact that the defendant had never met with defence counsel until trial[298] or has only met with counsel in very brief meetings.[299] The Committee has also found a breach when lack of time 'affected counsel's possibility of determining which witnesses to call'.[300] An adequate defence is all the more vital where a conviction may result in deprivation of life;[301] a state must 'afford special protection [to accused] by allowing time and facilities for the preparation of their defence, including the adequate

294 See International Crisis Group. 2008. 'Reforming Pakistan's Police, Asia Report N°157', 1-4,9,25. https://www.fidh.org/IMG/pdf/Pakistan464angconjointpdm.pdf., See also, Sikander Ahmed Shah et al, Police Order 2002: Police Reforms in Pakistan, in DEVOLUTION AND GOVERNANCE: REFORMS IN PAKISTAN, ed. Syed M. Ali & Muhammad A. Saqib (Oxford University Press, USA, 2008.)

295 While the Torture and Custodial Death (Prevention and Punishment) Bill has been pending in National Assembly since it was first introduced in 2012, the Bill has been allowed to lapse several times with no demonstrable political will pushing for its enactment. The National Action Plan of Human Rights had set July of 2016 as the deadline for the enactment of this law. U.S Department of State (2016). Country Reports on Human Rights Practices for 2015: Pakistan. [online] p.6. Available at: http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252973 [Accessed 29 May 2019]

296 Asian Human Rights Commission, AHRC Special Report:Torture Situation in Pakistan 1, 2(June 26, 2010), http://www.humanrights.asia/resources/special-reports/AHRC-SPR-001-2010-01/. For a general discussion of the difficulties of police reform, see Shoaib Suddle, Obstacles to Reform, in Stabilising Pakistan through Police Reform in Abbas, Hassan (Washington: Asia Society, 2012), 36.

297 ICCPR, art. 14.

298 Rodley & Pollard, The Treatment of Prisoners, supra note (summarizing Reid v. Jamaica, ¶¶ 11.3-11.5, U.N. Doc. CCPR/C/39/D/250/1987 (1990))

299 Id. (summarising Little v. Jamaica, ¶¶ 8.4 & 3.2, U.N. Doc. CCPR/C/43/D/283/1988 (1991)).

300 Smith v. Jamaica, ¶ 10.4, U.N. Doc. CCPR/C/47/D/282/1988 (1994).

301 McLawrence v. Jamaica, ¶ 5.10, CCPR/C/60/D/702/1996 ('Where a capital sentence may be pronounced on the accused, sufficient time must be granted to the accused and his counsel to prepare the trial defence'.).

assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases'.[302]

Aside from the poor quality of representation, limited time and resources further handicap the legal defence that capital defendants in Pakistan are able to mount. Counsel is often assigned to indigent defendants[303] once a trial is already underway, and as a result, defence attorneys are rarely involved in investigations, nor provided sufficient time and resources to expend upon parallel inquiries.

Furthermore, Pakistan's special courts for political and terrorism-related acts have dramatically reduced the time available to prepare for trial. Between 1987 and 1994, Pakistan established Special Courts for Speedy Trial that had exclusive jurisdiction over certain offences.[304] These included non-violent acts of political dissidence such as sedition[305] as well as acts of violence such as 'waging, or attempting to wage war, or abetting waging of war against Pakistan',[306] for which the death sentence could be imposed. The Anti-Terrorism Act, for instance, requires that the investigating officer complete the investigation of cases triable by the court within thirty working days.[307] It imposes a seven-day limit (with a two-day extension) on trials.[308] These time limits, combined with an enormous caseload,[309] impose further strain on the ability of lawyers to prepare an adequate defence for their clients and would seem to increase pressure on prosecutors to rely on confessions, all-too-often coerced.

The ICCPR also provides that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'.[310] This

302 U.N. Econ. & Soc. Council Res. 1989/64 (May 24, 1989) (emphasis added).
303 Cornell Center on the Death Penalty Worldwide. 'Death Penalty Database, Pakistan'. deathpenaltyworldwide.org. http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=pakistan#f41-6. [Accessed May 30, 2019]
304 Blood, Peter R., ed. Pakistan: A Country Study. DIANE Publishing, 1996.
305 PAK. PENAL CODE, § 124-A.
306 PAK. PENAL CODE, § 121.
307 Anti-Terrorism Act of 1997 (XXVI of 1997) § 19(1). This provision resulted from a set of 2013 amendments specifically designed 'to grant more leverage to the law-enforcement agencies while dealing terrorism related cases'. See Ordinance Issued to Amend Anti-Terrorist Act, NATION (Oct. 11, 2013), http://nation.com.pk/islamabad/11-Oct-2013/ordinance-issued-toamend-anti-terrorist-act.
308 Anti-Terrorism Act of 1997 (XXVI of 1997) § 19(7). Specifically, the provision states: 'The Court shall, on taking cognizance of a case, proceed with the trial from day-to-day and shall decide the case within seven days, failing which the matter shall be brought to the notice of the Chief Justice of the High Court concerned for appropriate directions for expeditious disposal of the case to meet the ends of justice'. Id.
309 An estimated 17,000 cases were pending in July 2014. Asad Hashim, Pakistan Activists Upset By New Security Law.
310 ICCPR, art. 14(1).

presumption of innocence 'is fundamental to the protection of human rights'.[311] The United Nations Economic and Social Council (ECOSOC) Safeguards guaranteeing protection of the rights of those facing the death penalty develop further this requirement, stipulating that a death sentence may only follow 'when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts'.[312]

While Pakistan asserts that 'courts operate on the salutary principle that an accused is presumed innocent until proven guilty',[313] the reality on the ground suggests differently. Coerced confessions, ineffective counsel, and the resource constraints confronted by both defendants and police, all work together to call into question courts' adherence to the standard presumption of innocence. These deficiencies are greatly amplified by a series of problematic Supreme Court decisions dating from the early 2000s. Most significantly, in a 2002 decision, the Supreme Court of Pakistan ruled that if a court 'is satisfied that the offence has been committed in the manner as alleged by the prosecution, the technicalities should be overlooked'.[314] According to the International Federation of Human Rights, 'small discrepancies in the evidence' increasingly have been overlooked and more questionable evidence let in since that ruling.[315]International law requires not only that persons accused of capital crimes be guaranteed a right to appeal, but also requires that this right be 'effective'[316] in practice and that it be granted without 'undue delay'.[317] Article 14(5) of the ICCPR provides the right of each criminal defendant 'to his conviction and sentence being reviewed by a higher tribunal according to law'.[318] The appellate procedure must also be effective.[319] The Human Rights Committee has stated that this Article 'imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the

311 Human Rights Comm., General Comment No. 32, ¶ 30

312 U.N. Econ. & Soc. Council Res. 1984/50 (May 25, 1984). Rodley and Pollard suggest that this is a 'gloss on Covenant article 14'. Rodley & Pollard, The Treatment of Prisoners, 312.

313 Periodic Report of the Human Rights Comm.: Pakistan, ¶131, Oct. 2015, U.N. Doc. CCPR/C/PAK/, https://documents-ddsny.un.org/doc/UNDOC/GEN/G15/267/96/pdf/G1526796.pdf?OpenElement.

314 The State (through Advocate-General, Sindh, Karachi) v. Salman Hussain, PLD 1995 SC 1.

315 Intl. Fed. for Human Rights, Slow March to the Gallows: Death Penalty in Pakistan, p. 16, http://www.fidh.org/IMG/pdf/Pakistan464angconjointpdm.pdf, Mar. 8, 2007.

316 Human Rights Comm., General Comment No. 32, ¶ 45.

317 Id. ¶ 35.

318 ICCPR, art. 14(5).

319 Rodley and Pollard, The Treatment of Prisoners at 314.

conviction and sentence, such that the procedure allows for due consideration of the nature of the case'.[320]

While the ICCPR does not explicitly require that individuals be given the right to an appeal upon discovery of new evidence, this right is strongly implied by the Human Rights Committee's interpretation of Article 14. According to the Human Rights Committee, the ICCPR requires that a higher court review the allegations against a convicted person 'in great detail' and consider 'the evidence submitted at the trial and referred to in the appeal'.[321]

Defendants also have a right under the International Covenant, 'to be tried without undue delay', which includes the right to appeal.[322] In the case of Pratt and Morgan v. Jamaica, the petitioners were unable to proceed to appeal to the Privy Council because it took the Court of Appeal almost three years and nine months to issue a written judgment. The Human Rights Committee, in concluding that Jamaica had violated Article 14(3)(c), stated that 'in all cases, and especially in capital cases, accused persons are entitled to trial and appeal without undue delay, whatever the outcome of those judicial proceedings turns out to be'.[323] In other cases, the Human Rights Committee has concluded that a delay of 29 months from arrest to trial was contrary to Article 14(3)(c), and that a delay of two years between arrest and trial also violates Articles 14(3)(c)[324] and 9(3) of the Covenant.

Pakistan violates international law by failing to ensure an individual's right to appeal without undue delay. To cite just a few examples, the trial court decided Muneer Hussein's case[325] in 2001, and it took six years for the High Court to hear his appeal in 2007. Ubeid Pershaad has been on death row for 13 years pending appeal. Asia Bibi was finally granted an appeals hearing in July 2015, six years after being sentenced to death on blasphemy charges. As these cases illustrate, a nominal right to appeal is meaningless unless it is effective in practice.

320 Human Rights Comm., General Comment No. 32, supra note , ¶ 48.
321 Id. ¶ 45 (emphasis added).
322 ICCPR, art. 14(3)©.
323 Pratt and Morgan v. Jamaica, Human Rights Committee, Communication No.210/1986 & 225/87, HRC 1989 Report, Annex X.F.
324 J. Leslie v. Jamaica, Communication No. 564/1993, U.N. Doc. GAOR, A/53/40 (vol. II) ¶ 9.3
325 For details about Muneer Hussein's case, please see page 43 of JPP's report, A Most Serious Crime.

The Right to Seek Pardon

The right to seek pardon or commutation of death sentences is enshrined clearly in international law. The ICCPR provides unambiguously: 'Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases'.[326] The right to seek pardon or clemency has been affirmed by the practices of almost every country applying the death penalty and is sufficiently widespread to be considered a rule of customary international law.[327] In the words of the U.S. Supreme Court, clemency 'is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted . . . the 'fail safe' in our criminal justice system'.[328]

The right to pardon must exist in fact, not just on paper. The Inter-American Commission on Human Rights held in the case of Lamey v. Jamaica that the state failed to fulfill its obligation 'to guarantee . . . an effective right to apply for amnesty, pardon, or commutation of sentence'.[329] In that case, the Commission found that Jamaica, by denying the plaintiffs access to legal counsel and delaying their criminal proceedings, had 'effectively barred recourse for those victims'.[330]

Pakistan's clemency process makes it virtually impossible for the accused to obtain pardons or commutations of death sentences. The Pakistan Prison Rules formally require prison authorities to submit a mercy petition on behalf of each prisoner unrepresented by legal counsel.[331] In practice, most mercy petitions contain just three perfunctory lines: 'The prisoner's Supreme Court decision has come through. He has been sentenced to death. Please consider his case for mercy'. [332] Even prisoners who are fortunate enough to secure legal representation face insurmountable odds. Although the President of Pakistan possesses the constitutional authority to pardon death row

326 ICCPR, art. 6(4).
327 Roger Hood & Carolyn Hoyle, The Death Penalty: A Worldwide Perspective (Oxford University Press ed. 2014).
328 Herrera v. Collins, 506 US 390, 411-12 (1993).
329 Lamey v. Jamaica, Case 11.826, Inter-Am. Comm'n H.R., Report No. 41/00, OEA/Ser.L/V/II.106 doc. 3 (2000) (emphasis added).
330 Id. ¶ 225.
331 Pakistan Prison Rules, Rule 104(I) (1978).
332 Sanam Maher, Will the Judiciary in Pakistan Deliver Justice to the Country's Death Row Prisoners As It Determines Abdul Basit's Fate Today?, CARAVAN (Aug. 25, 2015) http://www.caravanmagazine.in/vantage/will-judiciary-pakistan-deliver-justicecountry-death-row-prisoners-abdul-basit.

defendants by accepting mercy petitions under Article 45 of the Constitution, in practice,[333] such petitions are always denied. The President's office repeatedly denied mercy petitions submitted by all prisoners whose cases were reviewed by the authors of this report. According to a recent press article, the President's office has rejected mercy petitions filed by more than 444 people since December 2014.[334]

Rulings by the Federal Shari'at Court (FSC) and the Supreme Court have further undermined the ability of death row prisoners to seek pardon and commutation by the President. In a 1992 judgment, the Supreme Court held that the President had no power to commute death sentences resulting from hudud or qisas offences, although the President retains the power to commute death sentences given as ta'zir punishments.[335] In 1996, the full bench of the Supreme Court held that '[u]nder article 45 of the Constitution, the President enjoys unfettered powers to grant remissions in respect of offences . . . apart from specific cases where relief is by way of grace alone'.[336] The FSC, which was created to evaluate the conformity of Pakistani laws with shari'a, ruled that the legal heirs of a murder victim are the sole persons entitled to grant mercy to the culprit.[337] A Punjab Home Department official stated in 2006, '[a]ccording to the law, a death penalty can only be pardoned by relatives of victims'.[338]

The Anti-Terrorism Act also expressly forbids commutations or pardons: '[N]o remission in any sentence shall 200 be allowed to a person who is convicted and sentenced for any offence [under the Act]'.[339] Consequently, death row prisoners have been denied the post-conviction rights to which they are entitled under international law.

333 PAKISTAN CONST. art. 45. That portion states that '[t]he President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority'. Id.

334 Hasnaat Malik, Over 350 Death Row Prisoners Hanged Since Dec 2014, Govt Informs SC, TRIBUNE (Mar. 22, 2016), http://tribune.com.pk/story/1070486/over-350-death-row-prisoners-hanged-since-dec-2014-govt-informs-sc.

335 Hakim Khan v. Government of Pakistan, PLD 1992 SC 595.

336 Shah Hussain vs. The State, PLD 2009 SC 460.

337 FIDH, Slow March. 2007.

338 Id.

339 Anti-Terrorism Act of 1997 (XXVI of 1997) § 21(F).

Juveniles

In the case of juveniles, international law recognises that, for the purposes of criminal justice, children are inherently different from adults and thus merit special considerations throughout the legal process, particularly at sentencing. International law clearly, repeatedly, and categorically condemns use of the death penalty for offences committed by juveniles. The United Nations Convention on the Rights of the Child (CRC), which Pakistan ratified in 1990, dictates that 'neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age'.[340] Moreover, the ICCPR states: 'Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age'.[341] These binding prohibitions reflect a universal and unqualified protection of juveniles from the death penalty.

The Human Rights Committee commentary reflects this view, noting the involvement of parents or legal guardians where appropriate, as well as an obligation for 'appropriate assistance in the preparation and presentation of their defence'.[342] While 'juveniles are to enjoy at least the same guarantees and protection as are accorded to adults', they additionally require 'special protection' and treatment 'in a manner commensurate with their age'.[343] As a result of physiological and psychological differences, it is critical that proceedings for juveniles are fundamentally more protective than those accorded to their adult counterparts. Capital punishment, the most severe form of state retribution, wholly disregards a child's 'limited culpability, circumscribed choices, and enhanced potential for redemption'.[344]

The ICCPR provides that 'the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation'[345] and that 'accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication'.[346] Moreover, 'detention before and during trial should be avoided to the

340 Convention on the Rights of the Child, U.N. Doc. A/RES/44/25, art. 37(a) (1989) [hereinafter CRC]
341 ICCPR, art. 6(5).
342 Human Rights Comm., General Comment No. 32, ¶ 42.
343 Id. ¶ 42-43.
344 Quinnipiac University School of Law Civil Justice Clinic & Allard K. Lowenstein International Human Rights Clinic Yale Law School. 2013. 'Youth Matters A Second Look For Connecticut'S Children Serving Long Prison Sentences', https://law.yale.edu/system/files/documents/pdf/YouthMatters2013.pdf
345 ICCPR, art. 14(4).
346 1 ICCPR, art. 10(2)(b). In Thomas v Jamaica, the detention of the defendant from the ages of 15 to 17 with adult prisoners violated article 10(2)(b) and (3). U.N. Doc. CCPR/C/49/D/321/1988 (1993).

extent possible'.[347] Similarly, the CRC reiterates these special protections, mandating that 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits'.[348]

Upon commission of a criminal offense, 'every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance',[349] as well as a right 'to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation'.[350] These safeguards overwhelmingly reflect accepted international norms.[351]

Because of the weight and breadth of these obligations to protect children, international law dictates that when written or official proof of age is unavailable, the ambiguity should be resolved in favour of the defendant. The CRC emphasised this favorable presumption in its commentary on children's rights in juvenile justice, stating that: 'If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt'.[352]

In response to Pakistan's continued failure to grant that presumption, UN experts issued a statement[353] reiterating that the prohibition on executing juveniles should apply in all cases: 'International law, accepted as binding by Pakistan, is clear: it is unlawful to execute someone who was under 18 years old when they allegedly committed a crime'.[354]

Pakistan's procedural protections for juveniles do not meet international standards, and even the limited protections it does provide are widely ignored in practice. Given its

347 Human Rights Comm., General Comment No. 32, , ¶ 42.
348 CRC, art. 37©.
349 CRC, art. 37(d)
350 CRC, art. 40(2)(b)(iii).
351 Rodley and Pollard, supra note 5.
352 Comm. on the Rights of the Child, General Comment No. 10, ¶ 39, U.N. Doc. CRC/C/GC/10 (2007).
353 U.N. Office of the High Commissioner for Human Rights, UN experts urge Pakistan not to execute juveniles (Mar. 20, 2015),
http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15729&LangID=E. The expert panel included Christof Heyns (the UN Special Rapporteur on extrajudicial, summary or arbitrary executions), Juan E. Méndez, (the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), and Kirsten Sandberg (the Chairperson of the UN Committee on the Rights of the Child).
354 Id.

obligations as a party to both the ICCPR and CRC, the burden is on the Pakistani government to take all necessary steps to ensure that individuals not be executed for offences committed as juveniles.

Pakistan has a clear and non-derogable duty to ensure that juveniles are not subjected to torture, but it fails to protect them. Pakistan also fails to provide adequate protections to children in police custody. Article 37(a) of the CRC imposes an affirmative obligation on State Parties to ensure that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.[355] Torture, already a violation of international law, is particularly devastating when applied to juveniles. In the context of criminal justice, torture heightens the likelihood that juveniles will make false confessions during interrogation. Aftab Bahadur, for instance, was tortured into confessing murder at age 15. In Aftab's words, 'It would perhaps have been better not to have to think of what the police did to try to get me to confess falsely to this crime'.[356]

These harmful practices are perpetuated by shortcomings in appellate proceedings. International law mandates that such inquiries be available at all stages of the adjudicatory process. This obligation requires a review of any evidence made available that may verify a defendant's juvenile status. Yet Pakistani appellate courts rarely question the trial court's age determination (or lack thereof), a failure that has prevented hundreds of juveniles from obtaining relief or retrials in age-appropriate proceedings.

Exposing children to these heightened penalties directly contravenes international law and runs counter to the rehabilitative purpose underlying international criminal process safeguards for juveniles. [357] The execution of juveniles neither serves the interests of justice, nor makes Pakistan any safer, and certainly does not respect the rule of law.

The Mentally Ill and Intellectually Disabled on Death Row

Because procedural deficiencies especially disadvantage defendants with mental illness or intellectual disabilities, international law condemns the execution of these vulnerable people. The Convention on the Rights of Persons with Disabilities (CPRD),

355 CRC, art. 37(a).

356 Bahadur, Aftab. 2015. 'My 22 Years On Pakistan'S Death Row Could End This Week. What Purpose Will My Execution Serve? | Aftab Bahadur'. The Guardian. https://www.theguardian.com/commentisfree/2015/jun/09/22-years-pakistan-death-row-what-purpose-execution.

357 Justice Project Pakistan & Reprieve. 2015. 'JUVENILES ON PAKISTAN'S DEATH ROW'. https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/PAK/INT_CRC_NGO_PAK_21444_E.pdf.

which Pakistan ratified in 2011, guarantees the 'inherent dignity' of individuals with disabilities.[358] Furthermore, the Human Rights Committee has found that the issuance of an execution warrant in the case of a mentally ill prisoner violates Article 7 of the ICCPR.[359] Persuasive sources of international law are more explicit in their prohibition of executions of prisoners with mental illness. For instance, the third of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty provides that 'the death penalty [shall not] be carried out . . . on persons who have become insane'.[360] The Commission on Human Rights has urged retentionist countries 'not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person'.[361] Finally, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has made repeated calls to states to stop executing those with mental disabilities, stating that 'international law prohibits the capital punishment of mentally retarded or insane persons'.[362] Along these lines, Europe has urged states not to impose the death penalty on those 'suffering from any mental illness or having an intellectual disability'.[363] The United States also prohibits the execution of insane persons and persons with intellectual disability.[364]

As the Special Rapporteur on extrajudicial, summary or arbitrary executions noted, 'because of the nature of mental retardation, mentally retarded persons are much more

358 Convention on the Rights of Persons with Disabilities, U.N. Doc. A/RES/61/106CRPD (2006), http://www.undocuments.net/a61r106.htm [hereinafter CRPD].

359 Sahadath v. Trinidad and Tobago, Communication No. 684/1996, CCPR/C/74/D/684/1996 (2002).

360 U.N. Econ. & Soc. Council, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ¶ 3, E.S.C. Res. 1984/50, U.N. Doc. E/1984/92, 1984. See also U.N. Econ. & Soc. Council, Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, U.N. Doc. E/1989/91, May 24, 1989. The Council recommended that states eliminate the death penalty 'for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution'. Id.

361 U.N. Comm. on Human Rights, Human Rights Resolution 2005/59: The Question of the Death Penalty, E/CN.4/RES/2005/59 (2005), http://www.unwatch.org/wp-content/uploads/2014/06/Death-penalty-rev-1.pdf.

362 U.N.Comm. on Human Rights, ¶ 686, U.N. Doc. E/CN.4/1994/7 (1993).

363 Council of the European Union, EU Guidelines on Death Penalty, Doc 8416/13 COHOM 64 PESC 403, at 11 (2013),
http://eeas.europa.eu/human_rights/guidelines/death_penalty/docs/guidelines_death_penalty_st08416_en.pdf.

364 Atkins v. Virginia, 536 U.S. 304 (2002) (banning executions of persons with intellectual disabilities); Ford v. Wainwright, 477 U.S. 399 (1986) and Panettti v. Quarterman, 551 U.S. 930 (2007) (banning execution of persons who, as a result of their mental illness, do not have a rational understanding of the reason they are to be executed).

vulnerable to manipulation during arrest, interrogation, and confession'.[365] Similarly, mental illness may yield false confessions, due to a greater tendency for impulsivity, extreme compliance, and suggestibility.[366] Accordingly, the Convention on the Rights of Persons with Disabilities (CRPD), requires 'effective legislative, administrative, judicial or other measures'[367] to ensure persons with disabilities are equally protected from torture or cruel, inhumane, or degrading treatment (CIDT). Persons with mental disabilities also are affected acutely by incompetent representation due to their diminished capacity to represent themselves. As a commentator has observed, 'one of the most critical issues . . . in a mental disability law context is the right to adequate and dedicated counsel'. [368] Thus, the CRPD mandates that 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.[369]

The dearth in procedural safeguards—both generally and those specifically designed to assist vulnerable persons—means that Pakistan regularly deprives mentally ill defendants of a fair trial, including recourse to mental health defences. First, the lack of procedural safeguards at the arrest stage exposes persons with mental illness to high risks of manipulation and abuse during police interrogations. Once in the court system, access to psychiatric care remains very limited, and the lack of diagnosis compounded by the dearth in competent representation renders ineffective the procedural protections set out in Pakistan's Criminal Procedure Code.

The Code provides a number of potential mental health defences, and requires that the magistrate and the Court of Sessions note and postpone further proceedings pending a medical examination if there is 'reason to believe that the accused is of unsound mound' or '[i]f any person . . . appears to the Court at his trial to be of unsound mind'.[370] Such

365 U.N. Comm. on Human Rights: Report by the Special Rapporteur, ¶ 58, U.N. Doc. E/CN.4/1998/68/Add.3 (1998), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/102/37/PDF/G9810237.pdf?OpenElement

366 American Civil Liberties Union. 'Mental Illness and the Death Penalty'. May 5, 2009. Available at: https://www.aclu.org/files/pdfs/capital/mental_illness_may2009.pdf (citing William C. Follette et. al, Mental Health Status and Vulnerability to Police Interrogation Tactics, 22 CRIM. JUST. 42, 46-49 (2007)). [Accessed February 1, 2019]

367 CRPD, art. 15(2).

368 Perlin, Michael L. Mental disability and the death penalty: The shame of the states. Rowman & Littlefield, 2013, 145.

369 CRPD, art. 12(3).

370 PAK. CODE CRIM. PROC., Ch. 34 §§ 464-65; see, e.g., PLD 1960 (W. P.) (Lahore) 111 ('If, during the enquiry, nothing comes to the notice of a Magistrate to induce a belief in him that an accused person is of unsound mind and if at the trial before the Sessions Court it does not appear to the latter that the accused

discretionary judgments, especially where the defence of mental illness was unsound mind. Such discretionary judgments, especially where the defence of mental illness was not raised by the defendant's counsel, are inadequate to ensure mentally ill defendants are properly protected. Consequently, 'given the generally poor psychiatric services available in the country and the dearth of training in the provision of expert psychiatric evidence in courts',[371] mental health defences are rare. The Mental Health Ordinance, enacted in 2001, provides for the establishment of special security forensic facilities for mentally ill prisoners.[372] However, in reality, they are rarely transferred to forensic facilities and instead are kept in detention in death row cells without requisite treatment. Khizar Hayat was sentenced to death in 2003. He was diagnosed as a paranoid schizophrenic in 2008 by jail authorities and suffers from severe delusions. Despite facing multiple attacks in prison, Khizar was not transferred to a psychiatric facility. Instead, he remained in effective solitary confinement in the jail hospital until he passed away on March 22, 2019, at Jinnah Hospital Lahore after being critically ill.

Even when an individual on death row receives a mental illness diagnosis, the death sentence may not be lifted. During her incarceration, Kanizan Bibi's mental health has deteriorated significantly over the twenty-six years she has been on death row. For the last eight years, she has been mute; at times, she is unable to feed or clothe herself; and when family members visit, she does not recognise them. Yet, after two medical boards diagnosed Kanizan as schizophrenic, the President rejected her mercy plea. She could receive a black warrant at any time.

The dearth in mental health resources interacts troublingly with another critique of the capital punishment regime in Pakistan: individuals who are mentally ill are overrepresented in the group of defendants prosecuted under the blasphemy laws of Pakistan. As one scholar has noted, '[i]ndividuals with psychotic disorders, such as mania and schizophrenia, can present symptoms of grandiose and bizarre delusional systems of being of divine origin, behavioral disinhibition and lack of insight, which place them at risk of prosecution under these laws'.[373]

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is of unsound mind and consequently incapable of making his defence, there is nothing for them to do except to proceed with the inquiry or the trial in the normal manner'.).

371 Muzaffar Husain. 'Blasphemy Laws and Mental Illness in Pakistan'. 2014. Psychiatric Bulletin 38. 40, 42. Available at: http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4067851/pdf/pbrcpsych_38_1_010.pdf. [Accessed May 1, 2019.

372 Mental Health Ordinance of 2001 (VIII of 2001), § 55.

373 Husain, Blasphemy Laws, supra note 103.

Detention and Prison Conditions

Conditions on death row echo the systemic failures of the criminal justice system: overcrowded cells are the result of an oversized death row population, many of whom are wrongly sentenced for 'less serious crimes'. Prisoners are provided with inadequate health care, resulting in the deterioration of prisoners' mental and physical health. Similarly, confinement of juveniles and mentally ill persons on death row is proof of past and enduring transgressions of international law. These two groups are also more vulnerable to severe mental trauma that may result from confinement on death row, giving rise to further violations of international law.

States parties to the ICCPR must observe certain minimum standards of detention, including the provision of medical care for prisoners.[374] According to the Human Rights Committee, poor conditions of detention may amount to inhuman and degrading treatment in violation of Articles 7 and 10 of the ICCPR. Such transgressions have included overcrowding[375], inadequate sanitary facilities[376], inadequate nutrition[377], and lack of recreational facilities[378]. In addition, the Committee has affirmed that 'the obligation to treat individuals with respect for the inherent dignity of the human person encompasses the provision of, inter alia, adequate medical care during detention'.[379] These transgressions also run contrary to the Standard Minimum Rules for the Treatment of Prisoners, the key international standard governing the treatment of prisoners, introduced in 1955 as well as the revised standards, also known as the Mandela Rules, adopted by the UN General Assembly in 2015.

Despite its international obligations, Pakistan houses prisoners in poor, overcrowded conditions and routinely denies them adequate medical and mental health care.[380] Furthermore, Pakistan continues to hold juveniles on death row. The Human

374 Marinich v. Belarus, ¶ 10.3, U.N. Doc. CCPR/C/99/D/1502/2006 (2010) ('States parties are under an obligation to observe certain minimum standards of detention, which include provision of medical care and treatment for sick prisoners, in accordance with rule 22 of the Standard Minimum Rules for the Treatment of Prisoners'.).

375 Portorreal v. Dominican Republic, ¶ 9.2, U.N. Doc. Supp. No. 40 (A/43/40) at 207 (1988).

376 Mukong v. Cameroon,¶ 9.3, U.N. Doc. CCPR/C/51/D/458/1991 (1994)

377 Id.; Brown v. Jamaica, ¶ 6.13, U.N. Doc. CCPR/C/65/D/775/1997 (11 May 1999).

378 Edwards v. Jamaica, ¶ 8.3, U.N. Doc. CCPR/C/60/D/529/1993 (1993).

379 Kelly v. Jamaica, ¶ 5.7, U.N. Doc. CCPR/C/41/D/253/1987 at 60 (1991)

380 See Human Rights Commission of Pakistan, State of Human Rights in 2014, supra note , at 88 (identifying '[c]hronic issues such as overcrowding, lack of proper healthcare system, inferior quality food, corruption and rampant torture')

Rights Committee maintains that holding juveniles on death row amounts to cruel and inhuman punishment in direct contravention to Article 7 of the ICCPR.[381] Holding juveniles on death row also violates Article 10(3) of the treaty, which provides that 'juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned'.[382] However, case after case details instances of juveniles confined with adults on death row, simultaneously violating both of these important international obligations.

Notice of Execution

Because of the gravity of receiving notice of one's imminent execution, the way in which a state issues execution dates and stays may rise to cruel, inhuman, or degrading treatment in violation of international law. The Human Rights Committee has found gratuitous cruelty in a state's delay in giving a prisoner notice of his execution.[383] It has also held that a delay in the notice of a stay amounted to cruel and inhuman treatment.[384] The Committee has also found a violation of Article 7 where death row inmates were held in 'death cells' for over two weeks after being issued a warrant for execution.[385] Furthermore, under international law, the families of death row prisoners must be informed about a capital defendant's detention and execution.[386]

For example, the Human Rights Committee has found that a violation of Article 7 where 'complete secrecy surround[s] the date of execution . . . [because it] ha[s] the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress'.[387] The Special Rapporteur on extrajudicial, summary or arbitrary executions has likewise concluded that such practices were inhuman and degrading, stating that 'refusing to provide convicted persons and family members with

381 Johnson v. Jamaica, CCPR/C/64/D/592/1994 (1998).
382 ICCPR, art. 10(3).
383 Rayos v. Philippines, ¶ 7.1, U.N. Doc. CCPR/C/81/D/1167/2003 (2004).
384 Pratt & Morgan v. Jamaica, ¶ 13.7, U.N. Doc. Supp. No. 40 (A/44/40) at 222 (1989).
385 Martin v. Jamaica, ¶ 12.3, U.N. Doc. CCPR/C/47/D/317/1988 (1993); Pennant v. Jamaica,¶ 8.6, U.N. Doc. CCPR/C/64/D/647/1995 (1998).
386 See generally Helen F. Kearney, Children of Parents Sentenced to Death, at 2 (2012), http://www.quno.org/sites/default/files/resources/ENGLISH_Children%20of%20parents%20sentenced%20to%20death.pdf.
387 Lyashkevich v. Belarus, ¶ 9.2, U.N. Doc. CCPR/C/77/D/887/1999 (2003); see also Concluding Observations of the Human Rights Committee: Japan, ¶ 21, U.N. Doc. CCPR/CO/79/Add.102 (1998) ('[T]he failure to notify the family and lawyers of the prisoners on death row of their execution [is] incompatible with the Covenant'.).

advance notice of the date and time of execution is a clear human rights violation'.[388] In Pakistan, despite revised guidelines for the issuance of black warrants in 2014,[389] notification to prisoners of their imminent execution remains arbitrary and at odds with international law. Mohammad Sarfraz's case illustrates how an arbitrary notification system can further infringe on a prisoner's fundamental rights. On March 16, 2016, a black warrant was issued for Mohammad by the Rawalpindi District and Sessions Court. However, the very next day, his counsel was unable to obtain a copy of the warrant, and subsequently was informed that none had been issued. Such misrepresentation hindered Mohammad's ability to avail himself of the legal and judicial remedies to which he has a right. Ultimately counsel was able to obtain a stay of execution from the Supreme Court, but the violations persisted.

While the Supreme Court stayed Mohammad's execution after scheduling a hearing for April 22, a black warrant was issued scheduling his execution for April 19. On May 10, Mohammad Sarfraz was executed. Such practices, while unlawful under Pakistani law,[390] are widespread. In Pakistan, the lack of comprehensive intervention on behalf of persons condemned to die in violation of international law results in further suffering of these prisoners. With each new black warrant, prisoners and their families are subjected to renewed trauma.

Conclusion

International law dictates that capital punishment must be reserved only for the most serious crimes, subject to fair and legitimate processes that protect a defendant's basic rights and provide meaningful access to post-conviction relief. It unambiguously prohibits the imposition of the death penalty on juveniles, and international customary law prohibits the execution of the severely mentally ill as well.

On all of these fronts, Pakistan has not lived up to its international obligations. Severe violations of international law are apparent at every stage of a defendant's

388 U.N. Comm. on Human Rights: Report by the Special Rapporteur, ¶ 32, U.N. Doc. E/CN.4/2006/53/Add.3, (2006).

389 High Court Lahore Notification No. 402/Legis/H-D-4(HD) (Dec. 24, 2014) (requiring that execution dates be issued 'not less than three or more than eight days from the date of the issue of the warrant').

390 Rule 5, Order XXIII of the Supreme Court Rules of 1980 provides: 'In case of a petition for leave to appeal involving a sentence of death, the Registrar shall, as soon as the petition is filed or received from the Officer-in-charge of a Jail, intimate the fact of the petition having been filed/received in the Court of the Government of the Province concerned and thereupon the execution of the sentence of death shall be stayed pending the disposal of the petition, without any express order of the Court in this behalf'.

encounter with the criminal justice system. Laws that purport to protect fundamental rights, such as laws that prohibit the introduction of evidence obtained by torture and forbid the execution of juveniles and the mentally ill, are applied inconsistently, and often not at all. On death row, prisoners are housed in conditions that violate their human rights, and many aspects of their experience reproduce and amplify the critical failures of the Pakistani criminal justice system.

In contravention of international law, many prisoners were not given fair trials and received death sentences for offences that did not involve the 'most serious crimes'. On death row, prisoners lack meaningful ways to challenge their sentences through effective appeal proceedings or with mercy petitions, which are routinely denied.

Since lifting the moratorium, Pakistan has executed more than 500 individuals. The failure to meet international obligations and ensure necessary protections means that an unknown number of those executed were innocent, severely mentally ill, or juveniles. Many more languish on death row.

The systemic violations illustrated here compel the conclusion that Pakistan's continuing practice of capital punishment violates international law. The irreversible nature of execution mandates the immediate reinstatement of the moratorium on all executions. Yet a moratorium alone will not suffice. Today, Pakistan continues to sentence to death persons who are juveniles, mentally ill, or very likely innocent. What procedural safeguards exist in theory are largely ignored on the ground. Given the multi-level failings of its criminal justice system, Pakistan should indefinitely suspend all capital sentencing and launch investigations into those cases marked by allegations of juvenility, mental illness, the use of torture and other abuses of authority, and evidence of innocence.

TORTURE

Introduction

'Police tortured me to try and make me confess. I was hung by my hands, beaten repeatedly with batons, punched, slapped and kicked. They held a gun to my head and said they would kill me if I did not confess. I was 17 years old at the time'

– Muhammad Amin, juvenile offender executed on 31 March 2015

Torture by police and other law enforcement agencies is endemic and prevalent in Pakistan. The inhumane practice is so common that it is largely considered a routine part of criminal investigation. Despite ratifying the United Nations Convention Against Torture and Cruel Inhuman and Degrading Treatment (UNCAT) and the International Covenant on Civil and Political Rights (ICCPR) in 2010, the Government of Pakistan has failed to enact comprehensive legislation criminalizing torture, specifying punishments and establishing an independent investigation mechanism to inquire into allegations. Therefore, torture by police remains widespread due to impunity enjoyed by the perpetrators which in turn is fueled by socio-cultural acceptance of violence, procedural and legal loopholes and lack of independent oversight of the police.

A report by Justice Project Pakistan, in collaboration with Yale Law School titled 'Policing as Torture: A Report on Systematic Brutality and Torture by the Police in Faisalabad, Pakistan'[391] discovered conclusive signs of abuse in **1,424** cases out of a sample of 1,867 Medico-Legal Certificates compiled by a government-appointed District Standing Medical Board in the district of Faisalabad during 2006 and 2012. In 96 other cases, physicians found signs indicating injury and required further testing to confirm. According to the data, out of the 1,424 cases, **58** of the victims were children and over **134** were women.

391 Justice Project Pakistan, *"Policing as Torture: A Report on Systematic Brutality and Torture by the Police in Faisalabad, Pakistan",* 22 Oct 2015. Accessed at: http://www.jpp.org.pk/report/policing-as-torture/

Based on the sheer magnitude of the figures, it is evident that police torture is not limited to a few isolated instances but rather systematically employed by police as a matter of practice. In addition to severe beating, victims were also subjected to sexual assault and humiliation, which included rape and being forced to strip. For instance, over 61% of the women had been sexually assaulted, 81% had been subjected to cultural humiliation and 61% had been forced to witness torture of others often family members. In none of the cases specified in the report were the victims accorded an impartial investigation or any redressal or rehabilitation. Similarly, there was no proof of a single perpetrator being held accountable or punished. Based on interviews conducted of the victims, it was discovered that victims who filed complaints were subjected to further harassment and abuse by the police, forced to withdraw their cases, and, in some cases, forced to relocate altogether due to fear of further reprisals.

In 2018, Justice Project Pakistan[392] submitted a complaint before the National Commission for Human Right (NCHR) under the National Commission for Human Rights Act, 2012. The complaint was based on the Medico-Legal Certificates issued by the Faisalabad District Standing Medical Board that found conclusive signs of abuse in 1,424 of 1,867 cases, as documented in 'Policing as Torture'.

In May 2018, the National Commission for Human Rights Pakistan (NCHR) initiated a groundbreaking inquiry based on a complaint filed by JPP on the 1,424 confirmed cases of torture by the Faisalabad police. As part of the inquiry, the NCHR recorded testimonies of witnesses and survivors, conducted a hearing at the Faisalabad police headquarters with police officers named in complaints, and surveyed a random sample of 350 MLCs from the 1,424 categorized by gender, age, and religious affiliation to uncover systemic flaws. In February 2018, the NCHR released ***Police Torture in Faisalabad,*** the first ever comprehensive report on torture by a state body in Pakistan.

392 Ibid

POLICING AS TORTURE IN FAISALABAD

Major findings:

- An ineffective state response and weak accountability mechanisms
- Lack of legislation leading to weak prosecution and lack of punishment
- Issue of compromise
- Lack of inter-agency cooperation
- Lack of rehabilitation and reparation mechanism
- Impartial and independent investigation mechanism

Major recommendations:

- ***Legislative Reforms***
    - Enactment of law criminalizing torture
    - Creation of an independent investigative mechanism
- ***Criminal Justice Reform***
    - Circulate SOPs to the lower judiciary, which contain stepwise procedures on dealing with cases of torture to develop sensitivity
    - Declare offences of hurt as non-compoundable, as they currently fall under the category of 'compoundable offence', in order to disallow compromise with perpetrators of torture

- ***Institutional Reform***

    - Organise trainings to build capacity for all officials who handle cases of torture
    - Update the methodology on conducting investigations and documenting cases of torture for all officials involved, including medical professionals and paramedics
    - Ensure that the procedure of arrest and raid as outlined under the CrPC and Police Order is implemented in letter and spirit

- ***Policy Reforms***

    - The Government of Punjab must create a judicial inquiry against the perpetrators of torture documented in the NCHR report 'Police Torture in Faisalabad'
    - Establish a Complaint Cell in all districts dealing specifically with cases of police torture
    - Establish rehabilitation and reparation centers to provide medical and psychological assistance to victims of torture
    - Ensure Pakistan fulfills all obligations as outlined under international law, including the CAT, ICCPR and Convention on the Rights of Child
    - Prepare a list of all stakeholders / departments with timelines for effective implementation

Lack of Definitions and Criminalisation of Torture in Domestic Law

Pakistan is a party to the United Nations Convention Against Torture (UNCAT) which provides the minimum standard of a definition of torture and obliges the

Government of Pakistan to legislate to prevent and criminalise torture and make it an offence punishable with appropriate penalties.

The law in Pakistan does not contain any definition of torture. The only mention of the word "torture" in Pakistani law is in the Constitution of Pakistan under Article 14(2) which states (in its entirety) "[n]o person shall be subjected to torture for the purpose of extracting evidence". This comes nowhere near to encompassing and criminalizing "torture" as defined in UNCAT Article 1. Additionally, a narrow reading of the text of the Article 14(2) indicates that it only prohibits acts of torture committed by public officials for the sole purpose of extracting evidence.

There is no mention of torture under Pakistan's two primary criminal codes: the Pakistan Penal Code 1860 (**PPC**) and the Code of Criminal Procedure 1898 (**CrPC**). The Penal Code stipulates penalties for certain acts of torture under related offences such as 'public servant disobeying law, with intent to cause injury', 'causing hurt to extort confession or to compel restoration of property', 'wrongful confinement to extort confession or compel restoration of property' or provisions governing 'criminal force and assault'. These offences, however, do not encompass all the components of torture as outlined under article 1 of the UNCAT.

The term 'hurt' under section 337-K of the Penal Code is legally ambiguous and it is uncertain whether or not it encompasses both physical and mental suffering. The UN Committee Against Torture stated in **General Comment 2** that UNCAT requires that the offence of torture is named and defined as distinct from 'common assault' in order to alert victims, perpetrators and the general public of the special gravity of torture.[393]

Article 156(d) of the Police Order 2002 provides penalties against any police officer who inflicts "violence or torture" upon any person in his custody. However, the statute only penalizes acts by police officers and does not extend to other public officials. Furthermore, it contains no definition of torture. It fails to distinguish torture as an offence distinct and more severe than the mere infliction of violence by police officers and, as a result, fails to satisfy Pakistan's obligations under the UNCAT.

393 UN Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by State Parties,* 24 Jan 2008, Accessed at: http://www.refworld.org/docid/47ac78ce2.html

Absence of Independent Oversight Allows Impunity to Perpetrators of Torture

In the absence of a comprehensive legislative framework criminalising torture, police departments operate with little or no oversight. This fosters a culture of impunity for the infliction of torture and other abuse of power. Moreover, there is a culture in many police departments that ignores or belittles victims' grievances. For example, in one of the narratives mentioned in 'Policing As Torture', a victim of torture named Noor approached the Deputy Superintendent of Police with her complaint about police mistreatment, but he told her to commit suicide and that no one would listen to her. She registered a case of police torture against the SHO who had abused her and her family, but the new SHO suppressed the case.

The Pakistani public perceives the police as corrupt and brutal.[394] In public opinion surveys, Pakistanis routinely rank the police as one of the most corrupt organizations in Pakistan.[395] The Punjab police have also conducted assessments that confirm the police force's lack of credibility with the public and the need to improve the force's image.[396] By the late 1990s, public confidence in the police force was at an all-time low, with complaints ranging from routine neglect and incompetence to institutionalized and widespread corruption.

The Police Order of 2002 was enacted to introduce a system of independent monitoring on the operation of the police force. Issued by President Pervez Musharraf in 2002, the Order was promulgated partially in response to widespread recognition of various abuses of authority and had the stated objective of making the police publicly accountable, professionally efficient, and responsive to the needs of the community.[397] The Order provided for the institution of accountability mechanisms for reporting police abuse. At the district level it established District Public Safety and the Provincial Public Safety at the Provincial level.

394 Hassan Abbas. Reforming Pakistan's Police and Law Enforcement Infrastructure: Is It Too Flawed to Fix?. 2011. United States Institute of Peace 4. Available at: http://www.usip.org/sites/default/flles/resources/sr266.pdf.
395 Pakistan, National Corruption Perception Survey 2011, Transparency International 6 (2011), http://www. transparency.org.pk/report/ncps2011/ncps2011.pdf (showing that the police were ranked the most corrupt institution in Pakistan in 2009 and 2010, and the second most corrupt institution in 2011).
396 Jam Sajjad Hussain, Police Plan Steps to Restore Public Confidence, The Nation, Nov. 2, 2010, http://www. nation.com.pk/lahore/02-Nov-2010/Police-plan-steps-to-restore-public-confldence.
397 Abbas. 'Reforming Pakistan's Police'. 2011.

The National Public Safety Commission has been empowered to oversee and evaluate the performance of the federal law enforcement agencies. The more appropriate authority to file a complaint pertaining to police abuse would be the Police Complaints Authority. The Federal Complaints Authority is tasked with receiving complaints against federal law enforcement agents. The Provincial Complaints Authority is to receive serious complaints against the police and the District Complaints Authority is to address complaints pertaining to neglect, excess and misconduct against a police officer.

In 2004, President Musharraf amended the Order, greatly weakening its potential for police reform. Under the amendments, for example, the provincial government selects the Provincial Police Officer after reviewing recommendations from the federal government, not from the National Public Safety Commission (NPSC), as was the process under the original Order. The removal of the NPSC from the process of selecting the PPO means that the recommendations given to the provincial government are not vetted by an independent body, thereby increasing the likelihood that politics will play a role in the selection. The amendments also weakened the mechanisms for registering complaints against police. Under the original Order, a separate Police Complaints Authority (PCA) existed at the provincial level and reviewed complaints from individuals, the DPSC, and the Head of District Police. The 2004 amendments merged the PCAs with the public safety commissions mentioned above —two bodies that were established for different functions — thereby eliminating a body dedicated solely to accepting complaints at the provincial level.

The Police Order 2002 also created accountability mechanisms for reporting police abuse. At the district level, it established District Public Safety and Police Complaints Commissions (DPSPCC). The purpose of these commissions is to prevent the police from engaging in unlawful acts, including torture. Only a few of the commissions, however, have been established in Pakistan, and those that exist lack enforcement mechanisms and have had very little impact. The commissions typically lack binding enforcement mechanisms. The Faisalabad Public Safety Commission has not been in operation since 2005. At the provincial level, the Provincial Public Safety and Police Complaints Commissions (PPSPCC) are tasked with coordinating the DPSPCCs and prosecuting allegations of torture. Very few PPSPCCs are functioning; the Punjab PPSPCC has not met for the past five years.

In the absence of functioning monitoring bodies that can entertain complaints of torture, victims have to approach police for registration of First Information Report (FIR). This creates a ludicrous situation where the victim must register an FIR with the very people who committed the torture. People who have approached police with

complaints of police mistreatment have often been jeered at and turned away. Police often refuse to file complaints of torture against their colleagues and threaten and intimidate victims and their families, saying they must withdraw their complaints. Even if an FIR is registered against a police officer, the court will inevitably rely upon the police to undertake an investigation against itself. In most cases, the accused officers are themselves appointed to undertake the investigation. In order to avoid culpability and reduce the credibility of the victims, the police often then file false charges in retaliation.

The Current Law In Pakistan Does Not Adequately Bar The Use of Evidence Procured Through Torture

Police torture is effectively deemed to be an acceptable method of criminal investigation, largely due to a lack of resources and training, as well as a pervasive institutional culture that disregards human dignity. Confessions and testimonials obtained under torture are used as the primary form of evidence in order to "resolve" cases expeditiously. These statements in turn result in harsh sentences including life imprisonment and the death penalty.

Article 14(2) of the Constitution explicitly prohibits the "use of torture for the purposes of extracting evidence". Article 38 of the Qanun-e-Shahadat Order 1984 renders any confessional statement made under police custody inadmissible as proof. Article 39 and 40 of that Order make all statements, confessional or otherwise, made in police custody inadmissible in a court of law, unless they are made in the presence of a magistrate however evidence obtained in police custody is admissible if corroborated with other pieces of evidence. This rule was made in recognition of the fact that many statements are tortured out of people; however, its "implementation" merely ratifies this reality, rather than challenging it. The law prescribes a detailed process for recording a confession before the magistrate; wherein the accused is given time to reflect before recording the confession, is specifically asked about threat and inducement from anyone (including the police), and the magistrate is obligated to physically examine the accused for signs of torture, before recording the confession. In practice the police find a number of ways to get around the law. However, once a confession is acquired by the police through torture, the prisoner is threatened with more violence if he does not reproduce his statement in the presence of the magistrate. Moreover, a prisoner can be tortured into making false statements about physical evidence, which makes it admissible in court.

Meanwhile, recent legislation has broadened the scope of admissible evidence obtained through torture. Under Section 21-H of the ATA, confessions made under the custody of police and/or security forces in terrorism cases are now admissible as evidence.

CASE STUDY: AFTAB BAHADUR[398]

In 1992, Aftab Bahadur, a 15-year-old plumber's apprentice, and his co-worker Ghulam Mustafa were arrested and charged with the murder of a woman and her two sons. The deceased were the wife and children of a local businessman who hailed from an influential family. The case was tried under the now defunct and much maligned Speedy Trials Act of 1991, under which the police was required to submit the results of their investigation within 14 days to the Special Court, which in turn, had a maximum of a month to conclude the trial. This gave the defendants little time to prepare their case while simultaneously encouraging police to falsify evidence and pin the blame on a vulnerable defendant.

Aftab, a poor teenager from a minority Christian community proved to be that easy target. Aftab was arrested on the basis of the eye-witness testimony of an elderly servant at the household who was allegedly found unconscious in a park near the house on the night of the murders. The Speedy Court relied exclusively on his testimony to convict and sentence Aftab to death. Years later, the eye witness retracted his statement and professed that he was tortured by police and coerced by his employer to place Aftab and Ghulam at the scene.

Furthermore, Aftab's fingerprints were claimed to have been found at the scene of the crime but, during the trial, Aftab recounted how the police took him to the scene of the crime and brutalized him until he put blood soaked hands on a cupboard. The police recorded his age as 21, even though according to government issued documents, he was born in 1977, making him 15 years-old at the time of offence.

Aftab spent the next 23 years on death row and was executed in 2015.

398 Justice Project Pakistan, *"Death Row's Children; Pakistan's Unlawful Executions of Juvenile Offenders"*, February 2017, Accessed at: http://www.jpp.org.pk/report/death-rows-children-pakistans-unlawful-executions-of-juvenile-offenders/

CASE STUDY: MOINUDDIN AND AZAM

Azam (aka Abdur Rehman) and Moinuddin were arrested in 1998 and `convicted in 1999 for murder and armed robbery. According to the accused, they went to a house to collect an unpaid debt but the homeowner refused to pay, resulting in a fight. Moinuddin had a pistol on his person, and in the scuffle the owner of the house was killed.

The investigating officer filed the case under the Anti-Terrorism Act (ATA), which meant the duo would face a harsher punishment and be tried without judicial safeguards. Confessions were extracted from the accused by severe torture, and the brutality of torture was such that Azam admitted to be someone else in order to stop the police from inflicting pain. Fabricated evidence and confessions obtained through torture ultimately led to the death sentence for both accused.

At the time of their arrest, both Azam and Moinuddin were 17 years-old. In 2004, the jail authorities had lodged an appeal to have both the prisoners' sentence reduced because of their age but the appeal was rejected. The court refused to take their age into consideration because the Juvenile Justice System Ordinance is not a supreme law and is not applied in "terrorism" cases.

Azam and Moinuddin have spent the past 17 years in jail. A black warrant was issued for their execution in 2015 but a stay was obtained. Despite having no links to any terrorist group or evidence of having committed a terrorist act, they were tried under anti-terror laws.

International Obligations to Criminalise Torture

International law prohibits torture and cruel, inhuman, or degrading treatment. Under both the CAT and the ICCPR, Pakistan, as a party to the treaties, has an obligation to adopt all measures to prevent and to punish acts of torture and cruel, inhuman, or degrading treatment. Torture is defined under the CAT as

[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[399]

The U.N. Special Rapporteur on Torture has explained that torture constitutes a horrible attack on human dignity. International law also prohibits the use of cruel, inhuman, or degrading treatment that does not fully meet the definition of torture. State Parties to the CAT are required to take measures to prevent any act of torture or cruel, inhuman, or degrading treatment in their territory. States are obligated to ensure that education and information regarding the prohibition against torture and cruel, inhuman, or degrading treatment are included in the training of law enforcement personnel.

According to the Human Rights Committee, the body established by the ICCPR to monitor states' compliance with its provisions, each state has a duty to 'afford everyone protection through legislative and other measures as may be necessary against the acts prohibited.' [400] The Committee has stressed that each state must adopt administrative and judicial measures to prevent and punish acts of torture.

Under the CAT and the ICCPR, states have an obligation to provide adequate redress to victims of torture and cruel, inhuman, or degrading treatment. The CAT requires the state to guarantee that 'any individual who alleges she has been subjected to torture … has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities'.[401] States must ensure prompt and impartial investigations into allegations of torture and cruel, inhuman, or degrading treatment. The CAT also requires states to ensure that victims of torture obtain redress and full compensation for any acts of torture they suffer. Similarly, the Human Rights Committee has emphasized that "states may not deprive individuals of the right to an effective

399 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly, Res. 39/46, 10 December 1984, Art. 1.

400 UN Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994). Available at: http://hrlibrary.umn.edu/gencomm/hrcom20.htm. Accessed June 11, 2019.

401 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 13), 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: https://www.refworld.org/docid/3ae6b3a94.html. Accessed June 18, 2019.

remedy, including compensation and such full rehabilitation as may be possible. "As a party to both the CAT and the ICCPR, these obligations are binding on Pakistan.

I. Review of Pakistan by the UN Committee against Torture

In April 2017, the Government of Pakistan was reviewed for the first time by the United Nations Committee against Torture on its compliance with the CAT during the committee's 60th session. The Committee stated in its Concluding Observations:

The Committee urges the State party to take the necessary measures to incorporate into its legislation a specific definition of torture that covers all the elements of the definition contained in article 1 of the Convention and establishes penalties that are commensurate with the gravity of the act of torture. The Committee encourages the State party to review the torture, custodial death and custodial rape (prevention and punishment) bill to ensure its full compatibility with the Convention and promote its adoption, or propose new legislation to accomplish that.

Upon ratifying the CAT, a state must submit an initial report within one year to be reviewed by a committee of experts. Periodic reports are subsequently due every four years. The UN Committee Against Torture meets three times a year for four-week sessions, each time reviewing eight or nine states under Article 19 of the Convention.

On June 1, 2017, the UN Committee Against Torture published its Concluding Observation on the initial report submitted by Pakistan after meetings with stakeholders and Pakistan's official delegates. The Government of Pakistan then had to submit a follow-up one year after the Concluding Observations were published to address developments on three specific points. On 31st May, 2019, the Government of Pakistan submitted its response to those specific Concluding Observations to the Human Rights Committee. Pakistan's next review under CAT will take place on 12 May, 2021.

II. Review of Pakistan by the UN Human Rights Committee

Pakistan was also reviewed by the Human Rights Committee, the monitoring body of the ICCPR in July 2017. The Committee in its Concluding Observations directed the Government to:

(a) amend its laws to ensure that all elements of the crime of torture are prohibited in accordance with article 7 of the Covenant and to stipulate sanctions for acts of torture that are commensurate with the gravity of the crime;

(b) ensure prompt, thorough and effective investigations into all allegations of torture and ill treatment, prosecute and, if convicted, punish the perpetrators, with penalties commensurate with the gravity of the offence, and provide effective remedies to victims, including rehabilitation;

(c) ensure that coerced confessions are never admissible in legal proceedings;

(d) take all measures necessary to prevent torture including by strengthening the training of judges, prosecutors, the police and military and security forces.

The reporting and follow-up procedure for the ICCPR is the same as the CAT. Pakistan's next review under the ICCPR takes place on 28 July, 2020.

The Long Awaited Law on Torture

The National Action Plan for Human Rights, introduced by the Federal Ministry for Human Rights in February 2016, set a six month deadline to pass the Torture, Custodial Death, and Custodial Rape (Prevention and Punishment) Bill. Three similar draft bills on the prohibition and criminalization of torture were pending in Parliament; two of them in the Senate and one in the National Assembly however none of them passed successfully through the legislative process.

Timeline for the Bill

- **2008** Pakistan signed Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)
- **2010** Pakistan ratified UNCAT
- **August 2014** PPP Senator Farhatullah Babar moved anti-torture bill in the upper house.
- **October 28, 2014** The Bill was moved in the NA by PML-N MNA Maiza Hameed, which provides for the prevention of all acts of torture, custodial death and custodial rape perpetrated by public servants or any person acting in an official capacity and for the protection of citizens of Pakistan and of all other persons from such acts. National Assembly referred the bill to the concerned Parliamentary Committee
- **January 21, 2015** The Senate Standing Committee on Interior unanimously adopted the draft anti-torture bill moved by PPP Senator Farhatullah Babar and referred it to the Chairman Senate
- **October 2015** Bill lapsed in the Parliament due to failure to pass it within 90 days.
- **February 2016** Government announces National Action Plan for Human Rights which states June 2016 as a deadline to enact the Torture Bill
- **March 21st 2016** Joint Session of the Parliament to take place at 5pm to pass the PIA bill. Torture bill was amongst the seven bills on the agenda for the session, however it was never discussed
- **January 2019** Minister for Human Rights Shireen Mazari shares news that the Ministry of Human Rigths plans to present the Anti-Torture Bill in the National Assembly.

THE ANTI-TERRORISM ACT

Introduction

The Anti-Terrorism Act (ATA), Pakistan's primary anti-terrorism legislation, was promulgated in 1997. The legislative intent underpinning the ATA was to increase the power of law enforcement agencies to prevent and investigate terrorism and create special courts to expedite trials of terrorist suspects.[402] However, since its inception, the ability of the law to effectively convict terrorists and fulfil its mandate of reducing terrorism in the country has come under considerable criticism from various stakeholders.

The limited ability of the law to fulfil its mandate gained renewed relevance, and as a result, increased scrutiny, in the wake of Pakistan lifting the de-facto 6-year moratorium on the death penalty on December 17, 2014. The original objective of the reinstatement of the death penalty was to execute those convicted of terrorist offences[403] following the tragic terrorist attack on the Army Public School in Peshawar that resulted in the deaths of over 145 civilians, including 135 children.

However, in March 2015, without any public justification, the moratorium was lifted for all those awarded the death penalty under Pakistan's criminal laws, including for non-terrorism related offences. Since the moratorium was lifted, the Government of Pakistan has executed more than 500 individuals, making it one of the most prolific executioners in the world. Despite the government's predominant narrative claiming that the death penalty is a necessary measure to curb terrorism, only 30 percent of those

402 Anti-Terrorism Act, 1997[ATA], Preamble

403 See The Washington Post. 'Pakistan Announces A National Action Plan To Fight Terrorism Says Terrorists' Days Are Numbered'. 2014. Web. 13 June 2017. Available at https://www.washingtonpost.com/news/worldviews/wp/2014/12/24/ pakistan-announces-a-national-plan-to-fight-terrorism-says-terrorists-days-are-numbered/?utm_term=.8a9367080ba6

executed were convicted for crimes of terrorism.[404] This statistic is greatly problematic in light of the original aim for which the moratorium was lifted as it clearly establishes that the majority of those being executed are not terrorists. There are currently more than 27 crimes that are punishable by death, the vast majority of which fail to meet the 'most serious crimes' standard under international law.[405]

In order to determine the efficacy of the ATA in combating terrorism, it is crucial to examine the ways in which it has essentially created a separate legal realm for terrorist offences. It stipulates a parallel set of procedures for the custody, detention, prosecution, and sentencing of terrorism suspects in the country, establishing special Anti-Terrorism Courts (ATCs) for the 'speedy trial'[406] of offences triable under the ATA and authorising policies such as the denial of bail to terrorist suspects, enhanced police powers, extended remand of suspects, preventive detention, and death penalty for certain offences. Additionally, the ATA's broad, vague definition of terrorism has created regressive effects for those who may lawfully be charged for offences other than terrorism, known as 'scheduled offences'. In such scenarios, they are deprived of the key procedural safeguards, such as pertaining to custody and detention, that they would be entitled to under Pakistan's ordinary criminal justice system.

A study by Justice Project Pakistan (JPP) and Reprieve, 'Terror on Death Row', discovered that due to the broad scope of the law, almost 86 percent of those sentenced to death under the ATA were convicted for offences that bore little connection to terrorism as it is traditionally defined.[407] This number highlights the great discrepancy between the government's aim of countering terrorism, that propelled the resumption of executions in December 2014, and the subsequent impact it has had in practice.

In effect, the anti-terrorism regime created by the ATA is being employed by the police and law enforcement as a means to subvert the fundamental rights during arrest, investigation, and trial of non-terrorism suspects, as opposed to effectively countering terrorist offences in Pakistan. This is made worse by the fact that the ATA provides the death penalty for a broad range of offences including kidnapping for ransom, murder, and hijacking. Moreover, those convicted under the ATA are more likely to be awarded the death penalty than those tried under the criminal justice system. Since the lifting of

404 Till September 30, 2017.

405 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art 6(2)[ICCPR]
406 ATA, S 13(1)
407 Justice Project Pakistan and Reprieve. 'Terror on Death Row'. December 2014. [Terror on Death Row] Available on http://www. jpp.org.pk/wp-content/uploads/2017/01/2014_12_15_PUB-WEP-Terror-on-Death-Row.pdf

the moratorium, 80 executions[408] have been carried out for suspects charged under the ATA. According to Amnesty International's 2016 Death Penalty report, out of a total of 277 death sentences in 2016, 31 death sentences were handed out by the ATCs.[409]

The ATA has come under considerable criticism from various stakeholders regarding its inability to effectively try, convict, and punish terrorists. In August, 2017, Justice Dost Muhammad Khan authored a Supreme Court judgment[410] criticising the broad application of the ATA in ordinary crimes. In his judgement, he noted that the ATA was a 'harsh law' and should not be extended liberally to include the crime of murder or attempted murder for any reason or motive that has no connection with terrorism or militancy.

The international human rights community has repeatedly highlighted the lack of conformity of the ATA with Pakistan's international legal commitments. The United Nations Human Rights treaty bodies have expressed serious concerns regarding the failure of trials under the ATCs to abide by international human rights standards and urged the Government of Pakistan to introduce significant legal and policy reforms in successive state reviews.

One of the most concerning aspects of the ATA was its power to override the provisions of the Juvenile Justice System Ordinance 2000 (JJSO). Juvenile offenders charged under the ATA were deprived of the special procedural safeguards accorded to them under the JJSO and even sentenced to death. However, with the recent enactment of the Juvenile Justice System Act (JJSA) in May 2018, the JJSA could have overriding powers. It is yet to be seen how the clash between the ATA and the JJSA will be interpreted by the superior courts.

Following a Presidential Notification in 2001, the Government of Punjab issued a letter to the Registrar of the Lahore High Court setting out the eligibility criteria for the special remission for juveniles under the Notification on 18 August, 2003.[411] Stating that all juvenile offenders were automatically entitled to remission if their death sentences were confirmed by the High Court before 17 December, 2001, the letter included a list of juveniles whose claims the Home Department was directed to forward to 'the

408 Till May 14, 2019.

409 Amnesty International. 'Death Sentences and Executions 2016'. 2017. p.24

410 See, for example, Dawn, SC warns against use of Anti-Terrorism Act over 'non-terrorist actions', 15 August 2017, Accessed at: https://www.dawn.com/news/1351635

411 Government of the Punjab, Home Department, Grant of Special Remission Under Article 45 of the Constitution to Condemned Prisoners, (Aug 19,2003)

concerned District and Sessions Judge/Juvenile Court through the concerned Superintendent Jail'. Despite the existence of the Notification and the letter by the Government of Punjab, juveniles sentenced prior to the enactment of the JJSO continue to be denied its protections.[412]

[413] Requests by prisoners and/or family members for an inquiry regarding their juvenility under the Presidential Notification, including those identified by the provincial government, continue to be denied by the provincial Home Departments and the Courts. Out of the 28 juvenile offenders in Punjab whose names were on the aforementioned list, ten prisoners were tried by Anti-Terrorism Courts. To date, four have been executed, while three have been released and one is currently awaiting execution. There is a lack of information available regarding the remaining juveniles.

This chapter attempts to delineate the plethora of flaws and procedural inadequacies in the ATA that have rendered it ineffective in the context of Pakistan's counter-terrorism efforts. This conclusion is reached after a comprehensive review of 27 cases, as well as interviews of law practitioners and those convicted under the ATA. It is cognisant of the institutional flaws deeply entrenched in the judiciary and law enforcement agencies. Ultimately, it delineates the egregious violations of fundamental rights inherent in the summary and unlawful executions of some of Pakistan's most vulnerable prisoners, whose crimes bear no nexus to terrorism.

International Human Rights Standards and Treaty Body Review

The provisions of the ATA, particularly with respect to the death penalty have come under criticism from various United Nations treaty bodies that have reviewed Pakistan's state reports within the past two years. The following standards and recommendations highlight the violations of the Government of Pakistan's international human standards inherent in the application of the ATA.

412 See Death Row's Children, 19.
413 Justice Project Pakistan. 'Death Row's Children'. February 2017. Available on https://www.jpp.org.pk/wp-content/uploads/2017/10/Death-Rows-Children.pdf

(i) United Nations Human Rights Committee

The UN Human Rights Committee is the monitoring body of the International Covenant on Civil and Political Rights (ICCPR). Pakistan became a party to the ICCPR in 2010. Following ratification of the UN Treaty, the Government of Pakistan submitted its Initial Report following a four-year delay in 2015.

In its Concluding Observations on Pakistan's Initial report, issued on 23 August, 2017, the Human Rights Committee expressed concern regarding the broad definition of terrorism laid down in the ATA, as well as its supremacy over other laws. The Committee particularly noted with concern the trying of juveniles under the ATCs and thereby out of the purview of the Juvenile Justice System Ordinance, 2000 (JJSO). The Committee also highlighted the admissibility of confessions made in police custody as evidence in court under the ATA as a matter of concern and additionally highlighted the lack of conformity of the courts' extensive jurisdiction and lack of procedural safeguards with the provisions of the ICCPR. The committee recommended that:

> *22. The State party should review the Anti-Terrorism Act with a view to aligning the definition of terrorism provided in Article 6 of the Act in accordance with international standards; removing the jurisdiction of the Anti-Terrorism Courts over juvenile offenders; repealing Section 21-H of the Act; and establishing procedural safeguards in the Act and bringing the court proceedings in line with Articles 14 and 15 of the Covenant to ensure fair trials. It should also take the measures necessary and in line with the Covenant to reduce the existing backlog of cases.*

(ii) Committee on the Rights of the Child (CRC)

Pakistan ratified the UN Convention on the Rights of the Child (UNCRC) in 1990. In its Concluding Observations on Pakistan's fifth periodic report issued in July 2016,[414] the Committee on the Rights of the Child (CRC), the monitoring body of the UNCRC, noted with alarm the application of the death penalty on juvenile offenders under the ATA,

414 Committee on the Rights of the Child, Concluding observations on the fifth periodic report of Pakistan, 11 July 2016, Accessed at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsj6w6N%2f47zTb2GZCw8ZJMH Bo%2fKlxkcysXmsISop1yo0QfaT1E6yAhOmn1FhkSztV8IkZY%2f0FcydIBPHSpz3tSnn6uT1XlVbgwtgC5kzi77Xw

terming it a human rights violation inherent [415] under the ATA. The Committee additionally observed the juvenile offenders sentenced to death had limited access to procedures for challenging their sentence on the basis of their age. Thereby, the CRC directed the government to ensure that all stages of cases involving juveniles are overseen by juvenile courts, even those concerning terrorism.

(iii) Committee Against Torture (CAT)

Pakistan ratified the UN Convention against Torture (UNCAT) in 2008. The Committee Against Torture, the monitoring body of the UNCAT, in its concluding observations on Pakistan's initial report stated with concern that Pakistan's counter-terrorism legislation, chiefly the Anti-Terrorism Act, eliminated legal safeguards against torture that were otherwise provided to persons deprived of their liberty. The Committee noted that the legislation allows security agencies to detain any person suspected of committing an offence under the ATA for up to three months in clear violation of the provision of the Convention. The Committee recommended that the ATA should be repealed or amended to ensure that persons deprived of their liberty had access to legal safeguards against torture, arbitrary arrest, and detention.

Anti Terrorism Act: A Flawed Legal Framework

The ATA, promulgated in 1997 with the stated purpose of 'prevention of terrorism, sectarian violence and for speedy trial of heinous offences'[416] is the primary counter-terrorism legislation in Pakistan. It has been supplanted overtime by special laws including the Investigation for Fair Trial Act, 2013 and the Protection of Pakistan Act, 2014. However, it remains the primary law under which all terrorism suspects are tried.

The ATA created special mechanisms for investigation and prosecution of offences that fell within its ambit previously absent in the normal legal system. Key amongst these mechanisms were Anti-Terrorism Courts (ATCs). Such courts are to be established by the government in its discretion and are to be presided over by a judge of the Sessions

415 Committee against Torture, Concluding observations on the initial report of Pakistan, 1 June 2017, Accessed at: http://doc
store.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgtfJm%2bHg0lSmJyv0jaC3TzAJeutm6y
rgXJIVjuF22ng8BZ7wV1kAzb7NUPDGkasYZmwEAkxcWxJLHQpI07R4Vt5Zh2ids2P%2bUSoPSydL0LF
416 The Anti-Terrorism Act (Act No. XXVII of 1997) [ATA], Preamble. Available at http://www.ppra.org.pk/doc/anti-t-act.pdf

Court, or an Additional Sessions Judge, or a District Magistrate, or a Deputy District Magistrate, or an advocate with ten or more years of experience appointed by the government[417]. The procedures of the special courts are subject to strict time constraints – the prosecution is provided with seven days to complete the investigation[418] and the court is provided with seven days to try the case[419]. The recalling of witnesses is forbidden[420] and no adjournments beyond two days are countenanced[421]. Those accused of crimes may be tried in absentia as long as adequate notice concerning the dates of the trial is published[422]. In addition, special ATA Tribunals were established — appeals against the conviction and acquittal of ATCs lies exclusively with such Tribunals, whose decisions are final and no further appeal could be filed.

In addition, the ATA gave the police and armed forces broad discretionary powers to pre-empt and prevent suspected terrorist activity. They may 'arrest, without warrant' not only any person who has committed an act of terrorism or a scheduled offence, but also one who is 'about to commit' any such act.[423] They may also 'enter and search, without warrant any premises' to arrest or take possession of any 'firearm' or 'weapon' used or 'likely to be used'.[424]

Almost immediately after its enactment, the ATA was challenged before the Supreme Court in the landmark case Mehram Ali v The Federation of Pakistan[425]. Mehram Ali, a member of a Shia organisation, was charged with detonating a remote-controlled bomb in the vicinity of the Lahore courts, where two Sunni leaders of an anti-Shia group had been brought for a hearing on 18 January, 1997. The explosion resulted in the deaths of 23 people and injured more than 50. Following the enactment of the ATA, Mehram Ali's case was sent from a Sessions Court judge to a newly established ATC which convicted and awarded 23 death sentences and 550 years of imprisonment. Thereafter, he appealed to the Anti-Terror Appellate Tribunal which upheld its conviction. Following the dismissal, Mehram Ali filed a writ petition under Article 199 of the Constitution of Pakistan before the Lahore High Court which assumed

417 ATA, S. 14

418 ATA, S.19(1)
419 ATA, S. 19(4)
420 ATA, S. 12(3)
421 ATA, S. 19(8)
422 ATA, S. 19(10)
423 ATA, S 5(2)(ii)
424 ATA, S 5(2)(iii)
425 PLD 1998 SC 1445

jurisdiction despite the provisions of the ATA which granted exclusive jurisdiction over all appeals from decisions of the ATCs to Special Appellate Tribunals.

The High Court upheld the decision of the ATC leading to an appeal to the Supreme Court. Though the Supreme Court upheld the original decision it also declared the bulk of the ATA, as it existed, to be unconstitutional[426]. It stressed that no parallel legal system could be constructed that completely bypassed the rules and oversight of the regular legal system, ordering that these special courts would also be subject to the same procedural rules as regular courts, including most importantly, rules of evidence. The decisions of these courts would be subject to appeal before the constitutionally mandated higher courts. These changes were incorporated into the ATA through the Anti-Terrorism (Amendment) Ordinance of 1998. The Mehram Ali decision did much to rectify some of the fair trial issues posited by the promulgation of the ATA and brought the courts within the judicial oversight of constitutional courts. However, many pressing issues that result in potential miscarriages of justice remained part of the ATC system.

Each subsequent amendment to the ATA, between 1998 and 2002, broadened its scope, increasing the offences that could be tried under it. For example, in 2000 during the regime of General Musharraf, the offence of hijacking was included in the ATA, and the Act was prominently used to try the case of 'hijacking' against former Prime Minister Nawaz Sharif. This case exemplified the contrast the ATCs provided to the regular legal system by convicting Nawaz Sharif of the offence on evidence that was tenuous at best and would not have been so easily proven, and resulted in such a speedy conviction in a regular court[427]. Following the 9/11 attacks, General Musharraf's government was put under international scrutiny and pressure to respond to the menace of terrorism in the country. Pursuant to a UN Security Council resolution, which 'obligated all states to amend their anti-terrorism legal regimes to include measures prohibiting and punishing financing to terrorists', the ATA was amended again.[428] The ATA was later amended in 2004, 2005, 2010, and twice in 2013, the last three under the new democratically elected government.

In 2004, two new subsections were included in the ATA, which gave 'right of the appeal' to 'the victims or the legal heirs of the victim' against the judgment of the ATC,

426 Charles H. Kennedy, 'The Creation and Development of Pakistan's Anti-terrorism Regime, 1997-2002', in RELIGIOUS RADICALISM AND SECURITY IN SOUTH ASIA, ed. Satu P. LIMAYE, Mohan Malik, and Robert G. Wirsing (Honolulu: ASIA PACIFIC CENTER FOR SECURITY STUDIES, 2004), 391

427 Id

428 Kamran Adil, 'Amendments to Anti-Terrorism Law of Pakistan: An Overview', Pakistan Journal of Criminology; Peshawar5.2 (Jul-Dec 2013): 140

to be filed in the High Court within thirty days of the ATC decision.429 In 2005, there were 'further modifications' in the ATA 1997 — the word '14-years' was replaced by 'imprisonment for life' as far as the maximum jail term for the convicted militants was concerned. 430 'Special Benches' of High Courts were also established, to hear the appeals of the victims or heirs of the victim.431 Terrorism-related cases could also be 'transferred from one province to another'.432 ATCs could now try offences related to the 'abduction or kidnapping for ransom' as well as 'use of firearms or explosives by any device, including bomb blast, in a place of worship or court premises'.433 In 2009, the government promulgated the Anti-Terrorism Amendment Ordinance (2009) which contained new provisions for new terrorism-related offences to facilitate placing charges against the hundreds of suspected militants in detention. 434 The Ordinance also extended the detention period from 30 days to 90 days while the onus of proof was shifted to the suspect.435 Moreover, it made 'extra-judicial confessions' recorded by security personnel admissible as evidence in ATCs. 436 The Anti-Terrorism (Amendment) Act 2013 authorised government agencies with 'extended powers to seize, freeze, and detain property or money of anyone suspected to be using it for financing terrorism'. 437 It also amended the definition of terrorism to include 'foreign government or population or an international organisation' under the threat of terrorism.438 In addition, it substituted 'proscribed organisations' with the phrase, 'an organisation concerned in terrorism or a terrorist'.439 Later in 2013, the Anti-Terrorism (Second Amendment) Act 2013 was passed. It included keeping the 'pre-charged detention period' for suspected terrorists at '90 days'; 'denying passports and arms licenses to members of banned outfits'; considering 'the carrying of explosives without a lawful reason' to be a 'terrorist act'; 'running illegal FM radio stations and many other

429 Naeem Ahmed, 'Combating Terrorism: Pakistan's Anti-Terrorism Legislation in the Post-9/11 Scenario', JRSP, Vol. 52, No. 2, July-December, 2015: 121

430 Naeem Ahmed, 'Combating Terrorism: Pakistan's Anti-Terrorism Legislation in the Post-9/11 Scenario', JRSP, Vol. 52, No. 2, July-December, 2015: 122
431 Ibid
432 Ibid
433 Ibid
434 Sitwat Waqar Bokhari, 'Pakistan's Challenges in Anti-Terror Legislation', Centre for Research & Security Studies, 2013: 15
435 Ibid
436 Ibid
437 Ibid, 19
438 Ibid
439 Ibid

violent and suspicious activities as acts of terrorism'.440 In addition, the detainees were prohibited to ask for release on bail or to file a petition for habeas corpus in any court of law.[441] The accused were to be presented in court in-camera within 24 hours of their detention.[442] The amendment also expanded the definition of the threat of terrorism to include 'intimidating and terrorising the public, social sectors, business community, security forces, government installations, officials, and law enforcement agencies' as well.[443]

However, despite these successive and far-reaching amendments, the ATA remains ineffective in addressing Pakistan's terrorism challenges. This is evident by the decision of the Parliament in January 2015 to establish military court trials for terrorism suspects for a period of 2 years despite the existence of the Anti-Terrorism Courts. In March, 2017, the Parliament voted to pass the 23rd Constitutional Amendment renewing the mandate of the military courts for an additional two years.[444] It is important to recognise that this extension was not accepted by Parliament without opposition - many argued that no effort had been made to reform the ATA, which manifested in the failure of the Anti-Terrorism Courts. Even the most 'vehemently anti-military justice lawmakers and parliamentarians' had no alternative but to support the proposal for another two-year extension.[445]

CASE STUDY: SHABBIR HUSSAIN

Shabbir Hussain was arrested on 21 February, 2009 and convicted for kidnapping and murdering the brother of a business partner for ransom by an

440 Sitwat Waqar Bokhari, 'Pakistan's Challenges in Anti-Terror Legislation', Centre for Research & Security Studies: 21

441 Ibid

442 Ibid

443 Ibid

444 Maria Kari ' No sunset for Pakistan's Secret Military Courts' THE DIPLOMAT. 24 April 2017. Available at <https://thediplomat.com/2017/04/no-sunset-for-pakistans-secret-military-courts/>

445 Ibid

Anti-Terrorism Court, Lahore on 29 August, 2009. The alleged murder had taken place in Shabbir's house where the business partner's brother Faisal Rasheed was staying on his visit to Lahore. Shabbir claimed that two dacoits had forcibly entered the house at night resulting in the violence which led to the deceased being killed. It is clear from both the defence and prosecution's version of the story that Faisal Rasheed was voluntarily in Shabbir's house and was killed there later on the same day. Despite the nature of the alleged offence bearing no connection to traditional definitions of terrorism, the ATC accepted jurisdiction in the case, without any discussion.

Shabbir claims that the ATA charge was included by the Police following his inability to pay a hefty bribe. He claims that following arrest he was unlawfully detained at various places for five days before he was presented before a Magistrate who granted a police remand for 14 days. During this time, he was tortured severely by strappado (hanging by the wrists), severe beating and rula (damaging veins and nerves in the thighs and calves through use of a bamboo stick). The police asked him repeatedly to ask his business associate for money.

The High Court rejected his appeal and confirmed his death sentence on 1 June, 2011. The Supreme Court subsequently accepted his appeal and converted his death sentence to seven years.

The Vague and Overly Broad Definition of Terrorism

A fundamental flaw within the ATA is the vague and overly broad definition of 'terrorism' under its provisions. This allows offences bearing no nexus to militancy and proscribed terrorist networks to be tried under its provisions. Not only does this fundamental weakness lead to serious miscarriages of justice, it also serves to overburden police, prosecution services, and courts and so, results in delays in the administration of 'real' cases of terrorism.

Based on interviews of lawyers conducted by JPP, it was observed that political and economic influence serves as a primary determinant for whether an offence is tried under the ATA or under the ordinary criminal justice system. According to a lawyer with over 17 years of experience representing clients under the ATC, police often book suspects under the ATA in the First Information Report (FIR) in response to the influence exerted

by the complainant, even for offences that would not otherwise be defined as terrorism.[446] The same was reiterated by Mr. Imran Asmat Chaudhry, another senior Advocate of the High Courts with over seven years of experience in the ATCs, who stated that:

> *'I have personally taken around 11 cases, which were sent to ATCs for trial. [The] motive behind all cases was personal enmity, political rivalry, or any other malignant intentions of the police themselves - even though the crime had no nexus to the ATA'.*[447]

It was additionally noted that police routinely book suspects under the ATA as the law provides them with broad powers of arrest and investigation along with fewer safeguards for suspects.[448] The broad definition under the law has often allowed it to be used as a tool of political victimisation by ruling parties against opponents.[449]

According to data provided by the Prosecutor General of Punjab, in a study conducted in 2014, out of a total of 1,195 cases heard by the province's 14 ATCs, 178 (15 percent) were transferred to regular courts due to the police incorrectly applying the ATA to the alleged offences. Similarly, in 2013, in Karachi 391 of 565 cases (69.2 percent) heard by the city's five ATCs were transferred to the regular courts for falling within the ATC's ambit.[450]

Statutory Language Under Section 6

The preamble of the ATA lays out the intent of the law in the following words: 'the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and

446 Interview with Anonymous. 20 March 2017. Available on file.
447 Interview with Imran Asmat Chaudhry. 20 March 2017. Available on file

448 Id
449 Id
450 Tariq Parvez & Mehwish Rani. 'An Appraisal of Pakistan's Anti-Terrorism Act' United States Institute of Peace. (August 2015), p 5. Available at https://www.usip.org/sites/default/files/SR377-An-Appraisal-of-Pakistan%E2%80%99s-Anti-Terrorism-Act.pdf

for matters connected therewith and incidental thereto'. The inclusion of heinous offences, which are not defined within the law, widens its scope beyond crimes of terrorism and sectarian violence to almost all acts of violence. In addition to the preamble, Section 6 lays out the definition of terrorism. The original definition, at the time of the enactment of the law was limited to two paragraphs. However, successive amendments have broadened it to an unwieldy 28 paragraphs that extends to all violent crimes and not just those pertaining to terrorism. Section 6(1) defines terrorism as:

> *the use or threat of action where*
>
> *(b) The use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or*
>
> *(c) The use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause, or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies, provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law*

Section 6(2) lays out 17 acts (or threat of actions) that are to be combined with the *mens rea* requirements under Section 6(1) in order to qualify as an offence under the Act. These include virtually all forms of violent crimes including murder, kidnapping, robbery, banditry, intimidation, extortion, grievous violence, damage to property, barring public servants from their duties, and inciting hatred and contempt through religion.

Section 6(3) further broadens the scope of the law by providing that any types of actions that involve the use of firearms, explosives, or any other weapons are acts of terrorism regardless of whether they satisfy the requirements under section 6(1)(c). This effectively categorises all acts of violence involving any form of weapons as acts of terrorism regardless of whether they were committed in furtherance of a political or ideological motivation that is central to all acts of terrorism.[451] This provision relegates the intent underpinning an act to secondary importance, its sole focus is that the *actus*

451 See Umair Javed 'Ideology and Terrorism'. Inter Press Service. 18 July 2016. Available at http:/www.ipsnews.net/2016/07/ideology-and-terrorism/

reus i.e the use of firearms, explosives or any other weapon in any action falling within section 6(2), which consists of a vast list of acts, should be established. As a result, all acts of violence committed with a firearm, even those resulting from personal enmity or disputes, are classified as acts of terrorism.

The effect of section 6(3) is to expand the ATA's jurisdiction from a more general, public domain, to potentially regulating private acts occurring between individuals, that have traditionally been prosecuted under Pakistan's general criminal law. It is necessary to critically analyse whether the legislative intent underpinning the law envisaged for it to encompass such a broad range of acts.

Ordinary Crimes Tried by ATCs Due to Vague and Overly Broad Definition of Terrorism

ATA Section Section 6 | In this Act, 'terrorism' means the use or threat of action where an action:	**Ordinary Crime That May Fall Under It**
2(a) Involves the doing or anything that causes death	Accidental death during armed robbery
2(c) Involves grievous damage to property including government premises, security installations, schools, hospitals, offices or any other public or private property including damaging property by ransacking, looting or arson, by any other means	Damaging a car during protests by throwing stones
2(e) Involves in kidnapping for ransom, hostage taking or hijacking	Kidnapping someone to raise money, not to fund terrorist organisation

2(p) Involves in dissemination, preaching ideas, teachings & beliefs as per own interpretation... without explicit approval of the government	Friday sermons / general discussions on TV etc

Additionally, under section 34 of the ATA, the government holds the authority to add even more offences punishable under the law as 'scheduled offences' to the Third Schedule through a simple notification. In 2004, the following three offences were added to the Third Schedule as exclusively to be tried by the ATC regardless of overlapping jurisdiction with other laws including the Pakistan Penal Code:

(i) Abduction or kidnapping for ransom;

(ii) Use of firearms or explosives by any device, including bomb blast in a mosque, *imam-bargah*, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby; and

(iii) Firing or use of explosives by any device, including bomb blast in the Court premises. All offences included in the Third Schedule are interpreted as exclusively triable by the ATCs 'even if an offence is committed for absolutely private motives and having no nexus with terrorism'.

All offences included in the Third Schedule are interpreted as exclusively triable by the ATCs 'even if an offence is committed for absolutely private motives and having no nexus with terrorism'.[452] As Imran Asmat Chaudry, a lawyer with over 17 years of experience, points out:

> 'If someone comes into conflict with the ATA he is harassed perpetually. Accused are booked under the law primarily for the satisfaction of the aggrieved party and the people in the locality, as the case will be

452 National Public Safety Commission. 'Manual on Anti-Terrorism Act,1997'. National Police Bureau Islamabad. October 2008. Available at https:/www.unodc.org/tldb/pdf/Pakistan_Anti-terrorism_Manual_2008.pdf

concluded in a speedy manner. Otherwise, the same remedies are available under the ordinary criminal law'.

This was evident in the case of Mushtaq Ahmed, who was detained by police in 2010 for the murder of three police officers. In 2002, Mushtaq Ahmed's nephew was involved in a fight with a group of men who had abducted his 11-year-old sister. As an outcome of the fight, one of the abductors was murdered. Thereafter, the family of the deceased named Mushtaq and a number of his male relatives as suspects in the FIR. He has since then been acquitted of the charge. One night, policemen tried to illegally enter his house in order to take him into their custody without any warrant. Once the police broke into the house, a gun-fight ensued. The neighbors assumed that a robbery was taking place and thus began firing at the armed policemen. This resulted in the deaths of three policemen.

The only evidence tying Mushtaq to the crime is the ocular evidence given by the accompanying police-men themselves and a gun which was later recovered from the house. No forensic testing was done to show Mushtaq's fingerprints on the gun, nor was his presence corroborated by any other witnesses despite the arrival of his neighbors at the scene of the incident. The mere fact that a gun was recovered from the house was taken to mean that he, the owner of the house, had employed the gun to shoot at the policemen in the dead of the night.

According to Mushtaq, the police asked his mother to pay them a bribe of PKR 800,000 ($5700) which she refused. As a result of her refusal, the police, tortured him severely and eventually settled on a bribe of PKR 7000 ($50). The police also took his wife, mother, four children, and brother-in-law into unlawful custody only to release them following the payment of a bribe of PKR 400,000 ($2,800).

Mushtaq was convicted and sentenced to death by the Anti-Terrorism Court on 6 September, 2011. The Lahore High Court dismissed his appeal and confirmed his death sentence on 2 February, 2015. Finally, the Supreme Court accepted his leave to appeal on 3 March, 2017, and the case is currently pending.

Judicial Interpretation of Terrorism By Superior Courts

Judicial interpretation of the definition of terrorism has served to contribute to its vagueness and disparity of nexus to terrorism and sectarianism. In the case of Kashif Ali v. The Judge, Anti-Terrorism Court, No. II, Lahore (PLD 2016 Supreme Court 951) the

Supreme Court stated that the insertion of the term 'design' in Section 6 has 'widened the scope of the Act and the terms 'intention' and 'motive' previously used have been substituted with the sole object that if the Act is designed to create a sense of fear or insecurity in society then the Anti-Terrorism Act will have the jurisdiction'. The Court went on to state that the motivation and intent were no longer relevant for cases falling under Section 6(2) and what mattered was the object for which the alleged act was designed. In the words of the Court it was 'only required to see whether the terrorist act was such that it would have the tendency to create a sense of fear or insecurity in the minds of the people or any section of the society, as well as the psychological impact created on the mind of the society'.

While adjudicating upon the facts presented before it, the Supreme Court ruled that even though a single murder had been committed as a consequence of personal enmity or vendetta it fell within the definition of terrorism under Section 6 by virtue of the fact that it was committed in a public place and on election day when it was busy with voters. The precise location and time was, in the opinion of the court, sufficient evidence that the act was designed to create a feeling of fear in the society.[453] In order to establish its interpretation as determinative of all future cases the court unequivocally stated that 'we have attempted to generalise the principles which need to be applied by the Courts while deciding the jurisdiction of an Anti-Terrorism Court. We expect that from now onwards the Anti-Terrorism Courts as well as the High Courts would apply the principles set forth herewith'.

As stated above, this inordinately wide definition of terrorism has resulted in a large number of conventional criminal offenses to be tried before ATCs. The jurisprudence of the Court continues to develop in a way where all offences that can incite fear in a person are brought within the ambit of terrorism for spreading a 'sense of fear and insecurity'. There are several salient examples of this.

Shafqat Hussain was sentenced to death by an Anti-Terrorism Court in November, 2004, for alleged kidnapping and murder, on the basis of a confession extracted after nine days of torture in police custody. Shafqat also described that one of his co-workers, a guard at the building where Shafqat worked as a caretaker, was also arrested alongside him and was tortured by the police, but was eventually released after his family bribed the police officers. Since Shafqat was a juvenile and his family was based in another province, he was more susceptible to abuse.

453 Para 17

Recognising that the case against Shafqat could not stand, the Sindh High Court threw out his murder conviction and held that the most it could show was guilt of a botched kidnapping in which death was accidental. Yet, the Court did not strike down the associated 'terrorism' charge of kidnapping, which had been tenuously justified on the basis that the crime 'created a sense of terror in the wider community'. Shafqat was executed in August, 2015 despite a report by the Sindh Human Rights Commission (SHRC), a statutory body, requesting the Supreme Court of Pakistan to initiate an inquiry into evidence pertaining to his juvenility and torture.

'I was forced to strip in front of my detained sons and on the next day my feet were beaten with a bamboo cane till they were swollen and after that I was forced to do push-ups and when I lost consciousness, I was thrown into the cell.

On the same night I was brought out of the cell and beaten till my hips bled. Marks of those wounds still exists. During the remaining days of remand the police applied rullas[454] over my thighs due to which I can't walk properly till today'.

– Sharif Baksh, 70-year-old prisoner on death row for the last 12 years

Extraordinary Police Powers and Suspensions of Fundamental Safeguards

The Anti-Terrorism Act, 1997 provides law-enforcement agencies, including police, with enhanced powers and extended discretion that pose a direct threat to long-standing rights to privacy, security, due process, fair trial, and protection from torture enshrined under the Constitution of Pakistan and international human rights law under

454 While the victim lies down, a roola or thick bamboo stick is placed on top of him. The perpetrators stand on both ends of the stick to weigh it down and roll it over the victim's body. The pressure from the bamboo stick causes extreme pain and crushes the victim.

the International Covenant on Civil and Political Rights and the UN Convention Against Torture. In a country where the police faces widespread allegations regarding arbitrary and discriminatory abuse of power, the existence of the counter-terrorism regime under the ATA has led to grave violations of key safeguards.

A vague and broad definition of terrorism additionally allows the police to use its exceptional powers in relation to all offences rather than just terrorism crimes. As a result, accused charged under the ATA essentially waive key procedural safeguards to which they are otherwise entitled, regardless of the nature of their crimes. These include being subject to:

(i) enhanced powers with respect to the collection of evidence (S. 19A);
(ii) use of necessary force by police (Section 5(1));
(iii) the arrest of suspects without warrant (S. 5(2)(ii));
(iv) recording of evidence in police custody (S. 21-H);
(v) police remand of 30 days at a time (S. 21-E);
(vi) preventive detention of up to 3 months without review (Section 6).

Additionally, the ATA grants indemnity to police with respect to all acts done or intended to be done in good faith. Such indemnity essentially provides impunity to police for acts of brutality, custodial torture, false encounters, and unlawful detention.[455] Interviews with legal practitioners revealed that the discretion to exercise enhanced powers of arrest, investigation and detention is critical to the determination of the police regarding whether to charge an accused under the ATA or the PPC.[456]

455 See Oves Anwar, Human Right and the Anti-Terrorism Act, 1997 in HUMAN RIGHTS AND PAKISTAN'S COUNTER-TERRORISM LEGISLATIVE LANDSCAPE (Research Society of International Law; January 2017), 64. Available at http:/rsilpak.org/wp-content/uploads/2017/05/2.-2017-Human-Rights-and-Pakistan%E2%80%99s-Counter-Terrorism-Legislative-Landscape-Final.pdf

456 See Interview with Syed Abbas Haider. 20 March 2017. Available on file57 Committee Against Torture. Concluding Observation on the Initial Report of Pakistan. Para 12, 60th Session, 4 May 2017 U.N. Doc.CAT/C/PAK/CO/1

Heightened Risk of Torture and Coerced Confessions

Shahzad was arrested by 5 police officers from his village and taken to a nearby police station. He was subsequently informed that he had been arrested for the murder and kidnapping of a person whom he had never heard of. The police then took him to a private house where they tortured him for a week. He was kicked in the face, beaten with sticks and deprived of food for four days. Finally, when Shahzad refused to confess despite the heinous torture, the police brought his wife and mother to the police station and threatened to tear their clothes off. Shahzad was kept in the police station for over a month in total, during which time the police took him to a private house three times. The police then took him before a Magistrate where he confessed to the crime as he was afraid that his wife and mother would be arrested again. Shahzad was convicted and sentenced to death under S. 7 (a) ATA by Anti-Terrorism Court, Hazara Division on 9 July, 2012.

Torture by police is endemic and systemic in Pakistan. A study by Justice Project Pakistan in collaboration with the Yale Law School, Allard K Lowenstein International Human Rights Clinic, discovered 1,424 cases of torture confirmed by a government appointed District Standing Medical Board (DSMB) out of a sample of 1,867 Medico-Legal Certificates in the district of Faisalabad during the period 2006-2012. 134 of the victims were women and 58 were children.

Despite being a party to the UN Convention Against Torture (UNCAT) and the International Covenant on Civil and Political Rights (ICCPR), Pakistan has failed to enact a comprehensive legislative framework that criminalises torture and establishes an independent investigation mechanism to investigate allegations of torture against the police. As a result, police in Pakistan enjoy virtual impunity to torture suspects. In May, 2017, the UN Committee Against Torture, the monitoring body for the UNCAT, expressed serious concern at 'consistent reports that police engage in the widespread practice of torture throughout the territory of the state party with a view to obtaining confessions from persons in custody'. [457] As a result of the suspension of fundamental

457 Committee Against Torture. Concluding Observation on the Initial Report of Pakistan. Para 12, 60th Session, 4 May 2017 U.N. Doc.CAT/C/PAK/CO/158 Id.

guarantees and safeguards under the counter-terrorism regime, there is a heightened risk of torture for suspects under the ATA. The Committee Against Torture accordingly noted that the Anti-Terrorism Act, 1997, 'eliminates legal safeguards against torture that are otherwise provided to persons deprived of their liberty'.[458]

The ATA allows police to detain a person for up to thirty days without review or the possibility of a habeas petition.[459] During this time, investigation is meant to be concluded by a joint investigative team. However, Section 21-E of the ATA allows the remand to be extended by another 90 days on application to the courts 'if further evidence may be available'. These provisions are relied upon extensively by police to extract confessions and statements from accused persons through resorting to heinous forms of torture.[460] The risk of torture is increasingly heightened by the 30-day maximum period for the completion of investigation mandated upon the police through the ATA. Compelled to produce suspects within the stipulated deadline, the police resort to rounding up several suspects and torturing them into confessing. Interviews of convicted persons under the ATA revealed that police often arrest and detain several suspects and ask them for exorbitant bribes. Those able to pay are released, while the rest are tortured by police into confessing.

This is evidenced in the case of Amjad Ali, who was arrested in 2006 on charges of abduction for ransom, creating a sense of fear in society, and for impersonating a police officer. Following his arrest, Amjad was kept in an undisclosed place for over a fortnight where the police subjected him to severe torture to coerce him into providing evidence. He was subsequently taken to People's Colony Police Station and presented to the Magistrate the next day. The Special Anti-Terrorism Court, Gujranwala convicted Amjad on 31 January, 2007, on the basis of a recovery of PKR 30,000 ($300) and some jewellery ornaments that the police claim to have made from his place of residence. The evidence was not presented under proper procedures and no other forensic evidence proving Amjad's possession of the money and personal effects was presented. The sole witnesses to identify Amjad as part of the kidnapping gang were the complainants and reliance was almost entirely placed upon their identification of Amjad in an identification parade. According to Amjad, the complainants were his acquaintances and had personal enmity against him due to a dispute over a piece of land which Amjad had purchased from the complainant, who then refused to hand over the possession to

458 Ibid

459 ATA, S. 21

460 Terror on Death Row. 17

Amjad. The Lahore High Court rejected his appeal and confirmed his death sentence on 2 June, 2009. The Supreme Court of Pakistan finally accepted his leave to appeal on 25 October, 2016, and his death penalty was converted to life imprisonment after spending over 9 years on death row.

Under Section 21-H of the ATA, confessions made under the custody of police are admissible in court. This is contrary to the Qanun-e-Shahadat Order, 1984, which renders any confessional statements made under police custody inadmissible as proof. Therefore, confessions and statements extracted by police through heinous torture and abuse often form the basis of convictions and death sentences under the ATA. In its Concluding Observations, the Human Rights Committee, termed Section 21-H as a violation of Pakistan's international obligation under the International Covenant on Civil and Political Rights (ICCPR) and issued recommendations to the Government to repeal it.

Out of the 17 cases reviewed for the report 'Trial and Terror' by JPP, almost all alleged experiencing some form of torture, whereas more than half claimed that they had been kept under illegal detention and tortured before being formally charged.

Lack of Effective Legal Representation

International law provides all defendants with the right to effective legal counsel.[461] The UN Human Rights Committee has stated that this right is particularly important in cases of death penalty.[462] Accordingly in Pakistan, the High Court Rules provide access to a lawyer at state expense for cases where the punishment is death or imprisonment for life.[463] However, these lawyers are often only engaged once the trial is underway. As a result, the accused remains unrepresented during all stages of arrest, police remand, and investigation, where as described above, he is vulnerable to many forms of intimidation and abuse particularly due to the relaxed procedural safeguards under the ATA. This

461 International Covenant on Civil and Political Rights, art. 14(3)(d) ('To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'.)

462 General Comment No. 32, para 38

463 Lahore High Court: Rules and Orders of the Lahore High Court, Lahore: Vol. V: Relating to Proceedings in the High Court (2005), Part E. Available at http:/www.lhc.gov.pk/system/files/volume5.pdf

inevitably means that the accused is also without counsel to challenge the jurisdiction of the Anti-Terrorism Courts over his offence.

Additionally, the lawyers appointed at state expense are selected from a list of volunteers, maintained by High Court Judges and appointed by the Advocate General's Office. These volunteers inevitably comprise of young and inexperienced lawyers or those who are unable to find work on their own. In the absence of minimum quality standards, the quality of legal representation provided by these lawyers is poor, with most never appearing for hearings and/or meeting with the clients.

Shafqat Hussain was convicted for alleged murder and kidnapping on the basis of a single piece of evidence; a confession extracted after nine days of torture in November, 2004. Shafqat was a juvenile offender. His lawyer failed to raise a single shred of evidence regarding the torture he had endured at the hands of the police or his juvenility that could have prevented him from being convicted or sentenced to death. The lawyer told Shafqat that 'no one leaves the anti-terrorism courts without a death sentence' thereby deeming it to be pointless to raise a defence for his client.

Similarly, Tariq Mukhtar was arrested along with 11 male members of his family for the death of four persons that occurred as a consequence of a fight that broke out between two families over a property feud. The police looted their house under the guise of 'search and seizure' and stole many valuable possessions. The loss of material possessions and the arrest of all adult male members prevented them from hiring a lawyer throughout their trial. Additionally, Tariq and his co-accused were never informed of the date of their appeal at the High Court and were unable to arrange any representation, which resulted in their appeal being dismissed without their knowledge.

As a result, accused persons prefer to engage their own counsel, often at a heavy cost which they are unable to bear. Interviews with the accused revealed that the quality of private counsel is extremely poor. More than half the interviewees suffered from inadequate representation particularly in the early stages of their cases and in almost all cases the lawyers failed to challenge the jurisdiction of the Anti-Terrorism Courts over the alleged offences, even if the offence clearly did not fall within the definition of terrorism.

Lawyers tend to take advantage of indigent prisoners and their family through extracting exorbitant fees and failing to raise an adequate defence. In certain cases, egregious errors by lawyers directly resulted in convictions based on false testimony, and in the executions of juvenile offenders and other vulnerable groups that are owed special protections under international law. The consequences of poor representation are worsened by the fact that the law provides no remedy, such as post-conviction reviews,

on grounds of incompetent or ineffective counsel.[464] For example, Amjad Ali was convicted of kidnapping for ransom and sentenced to death by Anti-Terrorism Court, Gujranwala on 31 January, 2007. Amjad's family was too poor to hire a lawyer and he had to be represented by the counsel of his co-accused who he never met outside the courtroom. The counsel did not raise a single piece of evidence in Amjad's defence, nor was he provided a chance to record his statement.

CASE STUDY: ANSAR ABBAS

Ansar was convicted and sentenced to death by an Anti-Terrorism Court III, Lahore of shooting and killing a policeman and injuring another at a checkpoint on 20 March, 2007. Ansar's death sentence was confirmed by the High Court, an appeal to which is currently pending before the Supreme Court.

The convictions at both the Trial and High Court level relied heavily on the eyewitness account of one policeman who was injured in the incident which took place at night. According to Ansar, he remained in extra judicial custody for 25 days and was subjected to torture for a confession statement. Of the two accused in custody, only Ansar was made to go through the 'identification parade' used to identify the perpetrator, ten months after he was arrested. The entire prosecution case hinged on this positive identification.

The weapon recovered from Ansar at the time of arrest did not match the bullets found at the scene of the crime but that was overlooked by the court on the basis that Ansar 'might have thrown away the actual weapon and might have gotten this new one' before his arrest. Moreover, reliance was also placed on the alleged admission of guilt by the third co-accused to the owner of the motorcycle, which they were riding. This was a gross laxity of procedures, as the third partner had been killed as a result of a police encounter and could no longer confirm or deny the admission to which only one person, the motorbike owner, was a witness.

Based on this evidence that in no way satisfactorily proved that Ansar was present at the scene or the one who shot at the police, and would not have held up in a regular court, Ansar was awarded the harshest available penalty. To date Ansar has already spent 12 years on death row.

464 A Most Serious Crime P. 16

Juvenile Offenders

As a party to the UN Convention on the Rights of the Child (UNCRC) and the ICCPR, Pakistan is under an obligation to provide special protections to juvenile offenders throughout the legal process, particularly at sentencing. Additionally, international law categorically condemns the use of the death penalty for juvenile offenders. The UN Committee on the Rights of the Child (UNCRC) dictates that 'neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age'.

In order to bring its criminal justice system in conformity with its international legal obligations, the Government of Pakistan enacted the Juvenile Justice System Ordinance, 2000 (JJSO). The JJSO prohibits executions of juveniles below the age of 18 years and makes provisions for separate juvenile courts, trial and detention centres from adults. However, over 17 years following its enactment the JJSO is woefully under implemented. Given the dismal rates of birth registration (less than 32 percent[465]) in the country, juvenile offenders who are arrested often lack any identification documents in the rare cases in which the police records the age of a suspect, it is primarily on the basis of arbitrary visual age assessments.[466] The police are almost always inclined to record the age of the accused as above 18, in order to deliberately deny them the benefits accorded under the JJSO.

Courts, in violation of international law, fail to accord the benefit of doubt to the accused person in age determination proceedings. Research by JPP of over 140 cases pertaining to age determination has demonstrated that courts remain divided on the evidentiary value of conflicting records, including identity documents issued by the government. In the absence of age determination protocols, courts are free to choose any evidence that favours the verdict of their choice. Birth certificates are often rejected outright as forgeries, despite the fact that they are government-issued documents. As a result, juvenile defendants are in a virtually impossible situation to prove their juvenility. Due to the limitations of age determination mechanism, Pakistan has unlawfully

465 UNICEF, Birth Registration Progress Report 2012-2015, pg 7, Accessed at: https://www.unicef.org/pakistan/Birthregistration_LR.pdf
466 Ibid

executed at least six juvenile offenders despite the existence of credible evidence in favour of their juvenility. These six juveniles were:

- Aftab Bahadur (convicted at age 15, executed on 10th June, 2015)
- Muhammad Sarfaraz (convicted at age 17, executed on 10th May, 2016)
- Shafqat Hussain, (convicted at age 17, executed on 4th June, 2015)
- Mohammad Amin (convicted at age 17, executed on 31st March, 2015)
- Ansar Iqbal (convicted at age 17, executed on 29th September, 2015), and
- Faisal Mehmood, (convicted at age 17, executed on 27th March 2015).

Muhammad Amin was 17 when he was arrested in 1998 for allegedly killing a man during a botched burglary. He was convicted for murder and given two death sentences by a Special Anti-Terrorism Court. Amin claimed that he was subjected to severe torture to confess to the shootings. Muhammad's age was raised on appeal, but the documentary evidence of juvenility was deemed to 'be of no avail so belatedly' and a medical assessment conducted after Muhammad had reached adulthood was relied upon instead. The Supreme Court also upheld his conviction and sentence on 19 March, 2002. In 2004, he was pardoned for the murder conviction on behalf of the family of the victim. However, since Section 21-F of the ATA bars the remission of any sentence unless granted by the Government, Muhammad was executed on 21 March, 2015 after spending over 17 years on death row.

CONDEMNED JUVENILES

The following defendants were sentenced to death by Anti-Terrorism Courts despite credible evidence that they were juveniles at the time of committing the offence:

MUHAMMAD AZAM

Muhammad was sentenced to death by ATC Gujranwala in 1999. According to his birth certificate, he was less than 18 years old when he committed the offence. The ossification test conducted on orders of the prosecution deter- mined his age to be 16. The Trial Court admitted to his

juvenility but still sentenced him to death. The Lahore High Court upheld the sentence and Supreme Court dismissed his appeal in 2002.

MOHAMMAD IQBAL

Arrested in 1998 and sentenced go death in July 1999, several documents confirmed Muhammad Azam to be 17 years old at the time of commission of offence. He was even initially incarcerated at a borstal institute for juveniles in Karachi. In 2004, jail authorities sent Trial Court a request to conclusively determine his age so his sentence could be commuted under the JJSO. The Court rejected the request on the basis that the plea should have been raised during the trial.

MOHAMMAD DIN

Mohammad Din was sentenced to death and given life imprisonment by an ATC in Bahalwapur when he was between 16 and 17 years of age according to medical examinations ordered by the court. His 13 year old brother was also handed down life imprisonment before he was acquitted a year later due to his young age. Since Mohammad was not charged under any ATA offence, his compromise with the victim's family was accepted by the Trial court and he was finally released after spending a decade on death row.

Juveniles Offenders Tried as Terrorists and Sentenced to Death Under ATA

According to Section 14 of the JJSO, the law does not repeal other laws but applies 'in addition' to them. However, the ordinance also provides juvenile courts 'exclusive jurisdictions to try cases in which a child is accused of commission of any offence'. Since the enactment of the JJSO, jurisprudence by superior courts has been unable to uniformly address the jurisdiction of juvenile courts over crimes for which special courts have been enacted, particularly terrorism. As a result, juveniles continue to be tried as

adults and are sentenced to death by special courts whose procedures fail to comply with internationally agreed fair trial standards.

Under Section 32, the ATA is granted overriding effect over all laws currently in force. Upon reading Section 32 of the ATA in juxtaposition with Section 14 of the JJSO, courts often interpret the provisions of the ATA as meaning that for terrorism offences under the ATA, the Anti-Terrorism Courts possess exclusive jurisdictions even for juvenile offenders.

In the case of Asadullah v. the State, the Sindh High Court recognised that the ATA held that 'Section 14 of the JJSO strengthened the view that the court constituted under the ATA had jurisdiction over the scheduled offence, irrespective of any limit of age or any other class of offenders'.

However, the JJSO was replaced by The Juvenile Justice System Act, 2018 (JJSA). The law is the most recent and primary law underlying the conduct of juvenile justice in Pakistan and was promulgated 'to provide for criminal justice system and social reintegration of juveniles'. [467] With the promulgation of JJSA, Juvenile Justice System Ordinance, 2000 (JJSO), which was the primary law underlying juvenile justice in Pakistan from 2000 to 2018, was repealed.

The most significant features of the new JJSA is its Section 23 which states, 'The provisions of this Act shall have overriding effect notwithstanding anything contained in any other law for the time being in force'. This gives it overriding effect over other laws in force, thereby making JJSA the supreme law when dealing with juvenile offenders over and above the ATA.

Denial of Age Determination Inquiries Under the Presidential Notification

Since the Juvenile Justice System Ordinance 2000 was not enacted retrospectively, the President of Pakistan on 13 December, 2001, issued a Notification stating that any prisoner who had their death sentences confirmed prior to the introduction of the JJSO, but in whose cases there existed evidence that they were juveniles at the time of committing the alleged offences, should be granted a 'special remission' and have their death sentences commuted. Such remission was to accrue on the basis of an inquiry into their age by provincial-level executive committees constituted specifically for this purpose.

467 The Juvenile Justice System Act, 2018 (Act No. XXII of 2018) [hereinafter JJSA], preamble

However, the operation of the Notification subsequently became the subject of proceedings before the Supreme Court in the case titled *Ziaullah v. Najeebullah*.[468] The Court opined that questions pertaining to determination of age could only be decided by relevant Sessions courts under the JJSO. Thereafter, the executive committees were dissolved.

In 2003, the Punjab Government declared in a circulated letter that all juvenile offenders were entitled to remission if their death sentences were confirmed by the High Court before 17 December, 2001. Attached with the letter was a list of juveniles incarcerated in Punjab who were entitled to this remission.

Despite the existence of the Notification and the letter by the Government of Punjab, juveniles sentenced prior to the enactment of the JJSO continue to be denied its protections.[469] Requests by prisoners and/or family members for an inquiry regarding their juvenility under the Presidential Notification continue to be denied by the provincial Home Departments and the Courts. An analysis of case studies reveals that there is simply a lack of awareness regarding the effect of the Notification amongst the provincial home departments and the Sessions judges who are responsible for its implementation.

The list of condemned juveniles attached with the Government of Punjab, Home Department's letter included details of 28 prisoners from Punjab, ten of whom had been tried by Anti-Terrorism Courts. According to information acquired by Justice Project Pakistan at least four of the prisoners have been executed, three have been released and at least one is still serving his sentence.

Similarly following the issuance of the Presidential Notification, the Office of the Superintendent of Central Jail Karachi, Sindh sent a letter on 9 August, 2004, to the Anti-Terrorism Court, Karachi seeking age determination inquiries for six prisoners under the Notification. The letter stated that 'this office has received the instructions of the Home Department, Government of Sindh through Inspector General of Prisons Sindh to refer the matter to the Honourable Juvenile Court concerned for the determination of the ages of the condemned prisoners in accordance with section 7 of the Juveniles Justice System Ordinance 2000'. However, the Anti-Terrorism Court, Karachi on 2 September, 2004, dismissed the request of the Government of Sindh on the reasoning that as the accused had not raised their juvenility before any trial and/or appellate court they had lost the right to agitate the plea at this stage. This was despite the fact that during the

468 PLD 2003 SC 656

469 See Death Row's Children, 19.

time of their conviction the JJSO had not been promulgated and no such plea was available at their disposal.

As a result, none of the six juvenile offenders identified by Government of Sindh have been granted an age determination inquiry to which they are entitled under the Presidential Notification 2001.

Conclusion

This chapter has attempted to delineate, through a comprehensive examination of statute as well as case law, the multiple flaws, both procedural and substantive, inherent in the framework created by the Anti-Terrorism Act, 1997. It has demonstrated the discrepancy between the Pakistani government's objective of countering terrorism and the practical impact of the ATA, coupled with the lifting of the moratorium on death penalty for all offences, including non-terrorism related offences- almost 86 percent of those sentenced to death under the ATA were convicted for offences that bore little connection to terrorism as it is traditionally defined. In practice, the anti-terrorism regime created by the ATA is being employed by the police and law enforcement to subvert the fundamental rights during arrest, investigation and trial of non-terrorism suspects, as opposed to effectively countering terrorist offences in Pakistan.

We have also highlighted the salient criticisms advanced against the ATA by various United Nations Treaty Bodies that demonstrate the ways in which this legislation contravenes international human rights standards. One of its most egregious violations is its impact on juvenile offenders; those charged under the ATA are deprived of the essential procedural safeguards accorded to them under international law as well as under Pakistan's domestic law, the Juvenile Justice System Ordinance, 2000. ATCs continue sentencing juvenile offenders to death despite the existence of credible evidence in favour of their juvenility.

In light of the aforementioned, there are several recommendations that can be made to reform the existing legislation.

(a) Reduce the scope of the definition of 'terrorism' under the Anti-Terrorism Act and ensure that only those crimes that pertain to terrorism or to militancy or organised terrorist outfits are tried by the Anti-Terrorism Courts.

(b) Introduce an amendment explicitly barring the jurisdiction of Anti-Terrorism Courts over juvenile offenders regardless of the nature of their offences. Ensure that for cases where the evidence of juvenility is discovered after the trial is already underway, the cases are remanded to an appropriate juvenile court and retried.

(c) Repeal provisions awarding powers of search and seizure to police without warrants and ensure that procedural safeguards in line with the ICCPR are introduced.

(d) Repeal Section 21-H of the Act, and introduce provisions barring the admissibility of confessions/statements recording in the custody of police.

(e) Initiate an inquiry into all cases wherein the accused has been sentenced to death under the ATA with a view to commuting the sentences in the event that a violation is discovered. During the course of such an inquiry the moratorium on the death penalty should be reinstated.

JUVENILES ON DEATH ROW

Introduction

Aftab Bahadur was arrested at the age of 15 for the murder of a woman and her two children. Aftab protested his innocence to the very end. The only eyewitness who testified against Aftab recanted his statement by claiming that he had been coerced by the police to provide his damning testimony. In fact, he admitted, that Aftab had not even been present at the scene of the crime. The Supreme Court of Pakistan, however, refused to consider the exculpatory evidence stating that a fresh appeal was untimely. Aftab Bahadur therefore, marched to the gallows at the age of 38 after having spent over 22 years on Pakistan's death row.

He was executed on 10 June 2015.

Like 160 countries in the world, Pakistan has enacted legislation prohibiting the sentencing and imposition of the death penalty against juvenile offenders — persons who commit crimes before turning 18 years old.[470] The Government of Pakistan is, additionally, a party to both the United Nations International Covenant on Civil and Political Rights (ICCPR) and Convention on the Rights of the Child (CRC) which categorically prohibits capital punishment for juvenile offenders. However, despite the explicit bar, cases of juvenile offenders such as Aftab Bahadur are far from the exception.

As a result of a criminal justice system that violates international human rights standards at each stage of the judicial system, arrest, investigation, trial, sentencing, and punishment, the death penalty is disproportionately applied to the most vulnerable of Pakistan's population — the mentally ill, physically disabled, and juvenile offenders.[471]

470Child Rights International Network (CRIN), The Death Penalty Inhuman Sentencing of Children, https://www.crin.org/en/home/campaigns/inhuman-sentencing/problem/death-penalty (visited January 16,2017)

471*See* Justice Project Pakistan & Allard K. Lowenstein International Human Rights Clinic, A most Serious Crime: Pakistan's Unlawful Use of the Death Penalty, 2-3, (2016) [hereinafter JPP-Lowenstein, Death Penalty Report]

Since the moratorium was lifted, at least six juvenile offenders have been executed despite credible evidence in support of their juvenility.

Pakistan's failure to protect juvenile offenders from the death penalty since the resumption of executions drew sharp criticism from international actors. In June 2015, four United Nations experts, whilst urging the Government of Pakistan to halt the execution of juvenile offenders, condemned the existence of 'several hundred' juvenile offenders on death row as a violation of its international law obligations.[472] Similarly, in June 2016, the UN Committee on the Rights of the Child urged the Government of Pakistan to stay the executions of all juvenile offenders and reopen all cases where there was even the slightest indication of the minority of the accused at the time of the commission of the alleged offence.[473]

Pakistan enacted the Juvenile Justice System Ordinance (JJSO) in 2000 in order to bring its criminal justice system in conformity with its obligations under the United Nations Convention on the Rights of the Child. In 2018, the JJSO was repealed and replaced by Juvenile Justice System Act (JJSA). The law prohibits executions of juveniles and makes provisions regarding separate courts, trials, and detention centres from judges and lawyers. However, in the 18 years that had passed since the JJSO came into force, it remained virtually ignored in practice. Firstly, the law was enacted without retrospective force – thereby denying its protection to juvenile offenders sentenced to death prior to its enactment in 2000. A Presidential Notification granted a 'special remission' for all juvenile offenders whose death sentences were confirmed prior to the JJSO on the basis of an inquiry into their juvenility. However, such inquiries were seldom conducted and when they were the investigation was replete with incompetence, inefficiency, and violations of human rights standards.

Pakistan has also consistently failed to set up juvenile courts, borstal institutions and provisions for effective legal aid for juveniles as provided under, first the JJSO and now JJSA. In a context marred with low birth registration and a lack of sensitisation of law enforcement and judiciary to juvenile delinquency, a significant number of juvenile

472U.N Office of the High Commissioner on Human Rights, UN experts urge Pakistan not the execute Juveniles (Mar. 20, 2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15729&LangID=E
The panel included Christof Heyns (the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions), Juan E. Mendez (UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), and Kirsten Sandberg (UN Chairperson on the UN Committee on the Rights of the Child).

473 Concluding Observations of the Comm. On the Rights of the Child: Pakistan, para 24, U.N Doc. CRC/C/PAK/CO/5 (July 2016)

offenders fall outside the few institutional safeguards actually implemented in practice. As a result, the juvenile justice system is rarely applied to those it is designed to protect, resulting in a significant number of death sentences being meted out to juvenile offenders. Once sentenced these juvenile offenders are denied effective recourse to appeals and post-conviction reliefs, even in the face of exonerating evidence. All of these aforementioned problems constitute violations of international law and taken together reveals a broken criminal justice system that fails to protect juvenile offenders from the most severe and irreversible form of punishment – the death penalty.

The irreversible nature of the violations mandates that Pakistan reinstate a moratorium of its application on the death penalty and launch an independent investigation into all death row cases particularly those marked by allegations of juvenility. Additionally, in order to prevent future executions of juvenile offenders and to ensure that they are extended the requisite protections under international human rights standards requires a comprehensive reform of its juvenile justice system starting from the determination of age at the time of arrest to the grant of mercy prior to execution.

I. Prohibition On Execution of Juvenile Offenders Under International Law

The execution of offenders under the age of 18 years is squarely prohibited in international law by a number of multilateral treaties. The prohibition is determined by the age of the offender at the time of committing the alleged crime and does not cease when the juvenile turns 18. The United Nations Convention on the Rights of the Child, which Pakistan ratified in 1990, dictates under Article 37 (a) that 'neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age'. Additionally, the International Covenant on Civil and Political Rights (ICCPR) under Article 6(4) states that 'sentences of death shall not be imposed for crimes committed by the persons below 18 years of age'.

Intergovernmental bodies have also repeatedly called for the exclusion of child offenders from the death penalty on the basis that the use of the death penalty against child offenders is contrary to international law. Several of the relevant resolutions have been adopted without a vote, a sign of strong consensus among states that these provisions should be observed.[474] For example, in 1984 the UN Economic and Social

474 Amnesty International, The Exclusion of Child Offenders from the Death Penalty Under International Law,3, July 2013.

Council (ECOSOC) adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty ('ECOSOC Safeguards'). Safeguard 3 of this instrument states: 'Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death'. The ECOSOC Safeguards were endorsed by the UN General Assembly in resolution 39/118 of 14 December 1984, adopted without a vote.

The international community realises that for the purposes of criminal justice, children are inherently different from adults and thus merit special considerations throughout the legal process, particularly during sentencing. The ICCPR accordingly provides that 'the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation and that the 'accused juvenile persons will be separated from adults and brought as speedily as possible for adjudication'.[475] Similarly the CRC reiterates these special protections mandating that every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so'.[476]

Capital punishment – the most severe of punishments - fails to take into account the child's limited culpability and disallows opportunities for rehabilitation or redemption. Therefore, international law categorically prohibits the sentencing of juvenile offender to death and their executions.

A. Pakistan faces criticism from the United Nations

Since lifting the moratorium on the death penalty, the Government of Pakistan has faced consistent criticism from the international diplomatic community on account of its failure to respect international human rights obligations. On 20 March 2015, four UN human rights experts urged the Government of Pakistan to halt the execution of juvenile offender, Shafqat Hussain, noting that 'several hundred' prisoners on Pakistan's death row 'may have been sentenced for crimes they committed as children'.[477] The experts emphasised that 'Shafqat's confessions were obtained after he was reportedly tortured over a period of nine days by police officers after his arrest in 2004'.[478] The UN experts reiterated their condemnation of the imminent execution of Shafqat Hussain in June

475International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 10(2)(b)[hereinafter ICCPR]. In *Thomas v Jamaica*, the detention of the defendant from the ages of 15 to 17 with adult prisoners violated article 10(2)(b) and (3). U.N. Doc. CCPR/C/49/D/321/1988 (1993).

476United Nations Convention on the Rights of The Child [hereinafter CRC], U.N. Doc. A/RES/44/25, art 37 (c)

477 Supra note 3

478 Id.

2015.[479] The experts stressed that, 'Under Pakistani law and Article 6 of the International Covenant on Civil and Political Rights and 37.1 the Convention on the Rights of the Child, the death sentence cannot be imposed on a defendant who was under 18 at the time of the crime'.[480]

Shafqat, however, was executed in August 2015.

Additionally, in May 2016, Pakistan's fulfilment of its obligations under the United Nations Convention on the Rights of the Child was reviewed by the UN Committee on the Rights of the Child. In its Concluding Observations the committee noted that it 'is seriously alarmed by reports of the execution of several individuals for offences committed while they were under the age of 18 years, or where the age of the individual was contested following the lifting of the moratorium on the death penalty in December 2014, despite numerous calls from the international community and the United Nations in this regard'.[481] The Committee also expressed its concern regarding the large number of juvenile offenders on death row and that 'these persons have limited access to procedures for challenging their sentences on the basis of their age'.[482] The Committee therefore recommended the government to order a stay in executions involving minors and launch a review of all cases where there is an indication that the accused was a juvenile with a view to rather release him/her or commute his/her sentences.[483]

However, despite facing continued censure from the international diplomatic community, the Government of Pakistan continues to sentence and execute juvenile offenders in violation of international legal standards.

479 U.N Office of the Commissioner on Human Rights, Pakistan Must Immediately halt execution of Child Offender Shafqat Hussain- UN experts urge, (5 June 2015).
http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16046&LangID=E
480 Id.
481 Supra note 5
482 Id.
483 Id.

II. Juvenile Justice System in Pakistan: A Flawed Legal Order

A. Juvenile Justice System Act 2018

The Juvenile Justice System Act, 2018 (JJSA) is the most recent and primary law underlying the conduct of juvenile justice in Pakistan. The law was promulgated 'to provide for criminal justice system and social reintegration of juveniles'. [484] With the promulgation of JJSA, Juvenile Justice System Ordinance, 2000 (JJSO), which was the primary law underlying juvenile justice in Pakistan from 2000 to 2018, was repealed.

The legislation was intended to bring Pakistan's laws on juvenile justice closer in line with international standards and address some lacunas in JJSO. The flaws of JJSO included an ill-defined age determination protocol, which resulted in many juveniles being arrested and tried as adults, and a lack of clarity on the jurisdiction of juvenile courts in terrorism cases as the Anti-Terrorism Act was interpreted as having supremacy over other laws.

The key safeguards provided in the law include:

- Prohibition of sentencing to death of a person who was a juvenile at the time of offence (Section 16(1))
- Prohibition of sentencing juvenile offenders to labour or being put in fetters (Section 16(2))
- Provision of the right to legal assistance at the expense of the state within 24 hours of being taken into custody from a legal practitioner with at least seven years of experience (Section 3)
- Establishment of exclusive juvenile courts with exclusive jurisdiction to try cases involving juvenile offenders (Section 4)
- Obligation of the arresting officer to keep in an observation home and inform the guardian of the arrested child at the earliest possible opportunity following the arrest of the arrest and the details of the Juvenile Court before which the child will be produced (section 5).
- Prohibition of joint trial of a child together with an adult (Section 12)
- Protection of identity of the child from publication in any public medium including newspapers, magazine, journal (Section 13)

484 The Juvenile Justice System Act, 2018 (Act No. XXII of 2018) [hereinafter JJSA], preamble

- Special protections for female juveniles from being apprehended or investigated by male police officers (Section 17)
- The JJSA has overriding effect over other laws, including the Anti-Terrorism Act (Section 22)
- Offenders who claim to be juveniles have a right to have an inquiry made into their age by the officer-in-charge of the police station through a review of pertinent documents (i.e. birth certificates, education certificates etc.) or a medical examination in the absence of such documents (Section 8)

The JJSA is a very recent law and lacking implementation hence for the purposes of this chapter, it is more useful to go over the JJSO to analyse the problems of juvenile justice in Pakistan. Many of the problems of JJSO are expected to re-occur in the implementation of JJSA as they are institutional and structural problems rather than problems related to the letter of the law.

B. Juvenile Justice System Ordinance 2000: Overview

The Juvenile Justice System Ordinance, 2000 (JJSO) The law was promulgated to 'provide for the protection of children in criminal litigation, their rehabilitation in society, reorganisation of Juvenile Courts'.[485] The legislation delineated separate and strengthened safeguards for juveniles below the age of 18 involved in criminal litigation with an aim to rehabilitate and reintegrate them back into society. The law provided the following key safeguards:

- Prohibition of the sentencing of juvenile offenders to death, or labour during their imprisonment (Section 12).
- Establishment of exclusive juvenile courts with exclusive jurisdiction to try cases involving juvenile offenders. (Section 4(3)).
- Prohibition of joint trial of a child together with an adult (Section 5).
- Protection of identity of the child from publication in any public medium including newspapers, magazine, journal.
- Right to legal assistance at the expense of the state for juvenile offenders. Such legal assistance must be provided by a legal practitioner with at least 5 years of standing at the Bar (Section 3).

485 Juvenile Justice System Ordinance of 2000 (XXII of 2000) [hereinafter JJSO], preamble

- Obligation of the arresting officer to inform the guardian of the arrested child at the earliest possible opportunity following the arrest, as well as the details of the Juvenile Court before which the child will be produced (section 10(1)(a)).
- Possibility of being released on probation under the care of a guardian for a child convicted by a Juvenile Court (Section 11 (a)).

However, since its enactment the JJSO was marred by a lack of implementation and political will. In 2004, a full Bench of the Lahore High Court declared the JJSO to be 'unreasonable, unconstitutional and impracticable' and revoked it with immediate effect. The Court accepted the argument of the applicant wherein he stated that the JJSO was unconstitutional as it unduly protected minors.[486] In February, 2005 the Supreme Court admitted appeals filed by the Federal Government and the Society for the Protection of the Rights of the Child (SPARC) against the 2004 judgment and stayed it, pending a final decision on the case. The case remained pending up till JJSO's repeal, meaning the law remained in limbo for its entire duration.

C. Lack of Implementation of Juvenile Safeguards

In the 18 years JJSO was a law, the Government of Pakistan consistently failed to implement its provisions and since the promulgation of JJSA the same pattern remains. Juvenile offenders are meted the same treatment as hardened criminals. Given the dismal rates of birth registration in the country, juvenile offenders who are arrested often lack any identification documents. Police officers in Pakistan also remain largely unaware of their duty to conduct an age determination in the absence of such documents before the start of legal proceedings. As a result, children are kept in prison with adults until a plea of juvenility is raised at the trial stage. Juvenile offenders are subjected to heinous torture by police who coerce them into providing damning confessions that eventually form the basis of convictions and death sentences. A study by Justice Project Pakistan in collaboration with Yale Law School, Allard K Lowenstein International Human Rights Clinic discovered 58 cases of torture of juveniles out of a sample of 1,867 Medico-Legal Certificates (MLCs).[487]

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486 See *SC suspends LHC Judgment: Juvenile Justice Ordinance*. DAWN (Feb 13, 2005), http://www.dawn.com/news/402002

487 Justice Project Pakistan & Allard K. Lowenstein International Human Rights Clinic, Abuse of Juveniles By The Faisalabad Police, 2-3, (June 2014) Available at https://www.law.yale.edu/system/files/documents/pdf/JPP_Abuse_of_Juveniles_Follow_Up_Report_053014.pdf

Pakistan has also failed to provide children with legal assistance when they come in contact with the law despite it being a right guaranteed under the JJSO and JJSA. Panels of lawyers constituted by the provincial governments to fulfil the right remain ineffective due to a lack of budgetary allocation resulting in negligible remuneration.[488] Based on UNICEF estimates, almost 89 percent of children charged with bailable offences are in prison primarily because of their inability to afford a lawyer.[489] Lack of legal aid also means that juveniles are also less likely to raise juvenility pleas during investigation and trial, and therefore, fall outside the ambit of the JJSO. Moreover, courts are extremely unlikely to admit pleas of juvenility raised during appeals or post-conviction reviews. This results in countless juvenile offenders being sentenced to death and executed.

Despite the JJSO and JJSA's explicit obligation to establish separate juvenile courts in all provinces, the first juvenile court in Pakistan was established in Lahore only in December 2017 and remains the only functional juvenile court to date.[490] In most cases, the Government attempts to get around the obligation to have separate courts for juveniles by notifying regular District and Sessions Judges, Additional District and Sessions Judges, Senior Civil Judges and Judicial Magistrates as special juvenile courts. Therefore, regular judges are empowered to act as juvenile judges alongside discharging their regular duties. However, judges notified as 'Juvenile Judges' are hardly ever provided with additional training to sensitise them on how to deal with juvenile offenders in a manner consistent with human rights standards. Additionally, the designated courts do not abide by most safeguards provided under the JJSO and JJSA – courts remain open to the public and cases for juveniles are heard alongside those for adults.[491] Furthermore, juvenile judges are often overburdened resulting in a slow judicial processes which leads to juveniles being detained for even longer than adults.

In spite of the provisions of the JJSO and JJSA, no specialised detention facilities or borstal institutions have been established in Khyber-Pakhtunkhwa and Balochistan. Punjab, the country's most densely populated province, has only two borstal institutions whereas Sindh currently has four.[492] Borstal institutions in both Punjab and Sindh

488 Society of the Protection of the Rights of Children (SPARC), Juvenile Justice http://www.sparcpk.org/2015/sopc2014/JJ_Final.pdf

489Pakistan: Child Advocacy Groups Press for Reform of Justice System. IRIN News. Web. 2014. http://www.irinnews.orgwww.irinnews.org/report/26010/pakistan-child-advocacy-groups-press-for-reform-ofjustice-system

490 '*First sentence handed down by Juvenile court'.* Pakistan Today. (May 2018) <https://www.pakistantoday.com.pk/2018/05/09/first-sentence-handed-down-by-juvenile-court-report>

491 Interview with Iftikhar Mubarik, Plan International. Date: 25.11.2016

492 International Crisis Group, Reforming Pakistan's Prison System, 18, (October 2011)

operate in subpar conditions and are run by prison administration of the two provinces who are untrained to handle juveniles in detention.[493]

III. The Juvenile Justice Legal Framework Is Not Given Retrospective Force

The JJSO was not expressly enacted retroactively. Therefore, juvenile offenders sentenced to death before 2001 were left with no recourse to the protection from the death penalty. However, the President of Pakistan issued Notification No. F.8/41/2001-Ptns dated 13.12.2001 (Notification) in exercise of his powers under Article 45 of the Constitution of Pakistan 1973. As per this notification, special remission under Article 45 is to be granted to all juveniles sentenced to death whose sentences were confirmed by the High Court before 17 December 2001, and their death sentence is to be commuted to life imprisonment. The relevant part of the Presidential Notification reads as follows:

'The death sentence of those condemned prisoners who were Juvenile as defined in the Juvenile Justice System Ordinance, 2000 at the time of commission of offence stands converted to life imprisonment provided that the death sentence has been awarded under Tazir and not Qisas or under other Hudood Laws'.

Under the Notification, the special remission on the death sentence to life imprisonment was to accrue on the basis of an inquiry to determine age by an executive committee constituted specifically for this purpose. The executive committee was to include 'an expert, Home Secretary, I.G Prisons and Superintendent of the Jail where the condemned prisoner is housed'.

However, the operation of this notification subsequently became the subject of proceedings before the Supreme Court in case titled *Ziaullah vs. Najeebullah* [PLD 2003 SC 656]. The Court held that:

'The President of Pakistan has allowed special remission... to the juvenile offenders who were below 18 years at the time of commission of the offence to claim the benefit... [and we] hold that the Committee constituted by the Home Secretary, Government of Punjab for purpose of determining age of an accused... has no lawful authority to do so… the matters can be referred to concerned Sessions Judge, who also exercises powers of Juvenile Court'.

The Supreme Court opined that questions relating to the determination of age in terms of Section 7 of the JJSO 'can only be determined by a judicial forum for it is a

493 Supra note 18

question of fact which can be settled judiciously for the purpose of treated the accused to be a juvenile offender' and that such an exercise of judicial function cannot be exercised by an executive committee.

On 18 August 2003, the Government of Punjab issued a letter to the Registrar of the Lahore High Court setting out the eligibility criteria for the special remission for juveniles under the Presidential Notification.[494] The letter stated that all juvenile offenders were entitled to remission if their death sentences were confirmed by the High Court before 17 December 2001. The letter confirmed that such remission was to accrue automatically without the need for the submission of a mercy petition under Article 45 of the Constitution. Attached with a letter was a list of juveniles with regards to whom the responsibility was placed on the Home Department to forward their claims to 'the concerned District and Sessions Judge/Juvenile Court through the concerned Superintendent Jail'. The letter additionally directed the Superintendent of all jails to intimate the condemned prisoners claiming special remission under the Notification to approach the respective Courts and vested them with the responsibility of informing the Home Department of the outcome of the court.

In 2004, the Lahore High Court confirmed the Presidential Order. It ruled that a juvenile under sentence of death, whose case had been decided before the promulgation of the JJSO is still entitled to the protection of the JJSO. It asserted the retrospective effect of the JJSO in all cases, even those where the death sentences had been confirmed by the superior courts. The judgment related to the case of Sikander Hayat and Jamshed Ali who were both under 18 at the time of the alleged murder and whose death warrants had been issued. The District and Sessions judge in Jhelum, where the juveniles had originally been tried, had refused to commute the death sentences, as the Supreme Court had confirmed them.[495]

Despite the existence of the Notification and the letter by the Government of Punjab, juveniles sentenced prior to the enactment of the JJSO continue to be denied its protections. Requests by prisoners and/or family members for an inquiry regarding their juvenility under the Presidential Notification continue to be denied by the provincial Home Departments and the Courts. This includes requests made by those prisoners whose names were included in the list in the letter from the Home Department, Government of Punjab dated 18 August 2003. An analysis of case studies reveals that there is simply a lack of awareness regarding the effect of the Notification amongst the

494 Government of the Punjab, Home Department, Grant of Special Remission Under Article 45 of the Constitution to Condemned Prisoners, (Aug 19,2003)
495http://www.dawn.com/news/350914/islamabad-no-death-sentence-for-juveniles-lhc

provincial home departments and the Sessions Judges who are responsible for its implementation. Sessions Judges invariably refuse to overturn decisions of the Appellate Courts despite the existence of credible evidence in support of juvenility.

Courts frequently deny requests for age determination for juveniles sentenced prior to the enactment of the JJSO on the grounds that on account of all appeals having been exhausted the question of the age cannot be reopened or even worse, that a plea of juvenility may only be raised during the investigation or trial. Therefore, the accused persons are often caught in an impossible situation – the JJSO was not in existence at the start of their proceedings and they can no longer rely upon it as it is too late.

Muhammad Anwar was sentenced to death in 1998 for a crime allegedly committed when he was just 17 years old. Following the 2001 special remission, his family submitted an application to the Home Department requesting that he be granted the special remission on the basis of his age. Although an age determination inquiry was initiated by the Home Department – which gathered contemporaneous birth records showing Anwar to have been a juvenile at the time of the offence – this inquiry was never completed due to the decision in *Ziaullah* set out above. Since then, Anwar's family has tried every possible means to request an age determination from the Sessions Court, submitting no fewer than four applications. In over a decade and a half, however, no forum has ever taken a final decision on this issue. In December 2014, Anwar came within hours of execution and he remains at serious risk of receiving another execution warrant.

Muhammad Azam was another juvenile offender who was arrested in 1998 for murder and convicted and sentenced to death by an Anti-Terrorism Court vide judgment dated 8 July 1999 — prior to the promulgation of the JJSO. Copies of his birth records, jail records, including a copy of the birth roll all confirm that he was 17 when he was first admitted into custody. Jail records also demonstrate that Azam was initially held in Youthful Offenders Industrial School Karachi – a borstal institution specially designed for juvenile offenders. Following the 2001 Notification the jail authorities, on 9 August 2004, sent a request to the trial Court asking the Court to make a determination of Muhammad Azam's age to ascertain whether his sentence should be commuted. The request was however rejected by the court on the basis that no plea of majority was raised during the course of the trial and on the basis that the trial court was already *functus officio* following the conclusion of the appeals.

IV. Judging Juvenility: Determination of Age Under Pakistan's Juvenile Justice System

A. Failure to Register Births leads to Reliance on Arbitrary Visual Age Assessments

Pakistan has one of the lowest rates of birth registration in the world. There are nearly 10 million children below the age of five years that are currently unregistered with the figure growing by nearly three million every year.[496] Article 7 of the CRC specifies that every child has the right to be registered at birth without any discrimination. Apart from being the primary and first legal acknowledgement of a child's existence, birth registration is central to ensuring that children are not treated as adults when they are brought into contact with the criminal justice system as accused parties. The Government of Pakistan's failure to fulfil the right to birth registration for its children means that the criminal justice system is marred by a high risk of wrongful arrests, detention and executions of child offenders.

The responsibility of birth registration falls within the jurisdiction of the National Database and Registration Authority (NADRA) established in 2000. The current administrative framework requires that new-borns be registered within the shortest time possible after birth. However, based on official figures, only 34 percent of children under the age of five have been registered.[497] Rates of registration also vary drastically between the different provinces with 74 percent children in Islamabad Capital Territories, 46 percent in Punjab, 25 percent in Sindh, 23 percent in Gilgit-Baltistan, 10 percent in Khyber-Pakhtunkhwa and less than eight percent in Balochistan being registered.[498] Birth registration is also linked to economic status with only five percent registration for children in the lowest wealth quintile.[499] Furthermore, only 32 percent of the population in Pakistan has a birth certificate whereas 46 percent of the population has no form of registration.[500] As a result, upon arrest a significant proportion of the juvenile population possesses no form of evidence to prove their juvenility and is likely tried and sentenced as adult offenders. Based on registration figures, juvenile offenders belonging to

496 UNICEF, Progress Report 2013-2015: Results for Children in Pakistan: Birth Registration,7-8, (July 2015), https://www.unicef.org/pakistan/Birthregistration_LR.pdf
497 National Institute of Population Studies (NIPS), Pakistan: Demographic and Health Survey: 2012-2013, 19-22, (December 2013)
498Id.
499 Id.
500 Id.

impoverished socioeconomic backgrounds are more likely to be victims of wrongful arrests.

Under Section 7 and 10 of the JJSO, it was the responsibility of the arresting officer to determine whether the person who has been arrested is a child or an adult. However, the law posited no mandatory requirement for the police to investigate the age of the accused at the time of the arrest and even the First Information Report (FIR)[501] does not contain a column to record the age of the accused.[502]

A lack of sensitisation to juvenile justice safeguards often leads to police failing to investigate the age of the accused persons in their custody. Since recording the age of the accused remains at the discretion of the police, they also often deliberately overlook it in order to retain custody of the accused and to deny them the protections accorded to them under the law. Interviews with civil society actors reveal that even when police are trained in juvenile justice safeguards they refuse to abide by them owing to a bias against juvenile offenders. It is common belief amongst police officers that despite the existing legal framework juvenile offenders should not be given special treatment within the criminal justice system.[503]

In cases where the police choose to record the age of the accused, it is predominantly based on a cursory visual assessment. The low rate of birth registration combined with an absence of protocols prescribing the method of determination of age leads to the police to record ages of accused persons based on their observation of their physical appearance in a high number of cases. In practice, police are inclined to record the age of the accused as much higher than it appears. Based on JPP's experience dealing with cases of juvenile offenders, in cases where the appearance of the accused leaves little doubt of his juvenility the police invariably record his/her age as '16/17' whereas where an accused's physical appearance does not make his/her juvenility obvious the police records it as '22/23'. [504]

According to jail authorities, the medical examination conducted when an accused person enters a jail is also based primarily on visual observation. Similarly, even the age of the prisoner recorded in their statement before the court under S. 342 of the Code of Criminal Procedure is also based on an assessment of his/her physical appearance. Even though the prisoner formally signs these statements, they are usually unaware of their

501 FIR is a written document prepared by police on receiving information regarding the commission of a cognisable offence.
502 Interview with Mr. Atif Adnan Khan, Legal Aid at SAHIL. Date: 25. 11.2016
503 Interview with Iftikhar Mubarik, Date: 26.11.2016
504 See Case Study of Ansar Iqbal

contents on account of a majority being illiterate. The problematic nature of relying upon the age of the accused under S. 342 was highlighted recently by the Supreme Court of Pakistan in *Muhammad Raheel v. State* (PLD 2015 SC 145) in the following words: 'Recording of an accused's person's age under S. 342 Cr. PC. is invariably based upon a cursory visual assessment which can substantially be off the mark, as proverbially, appearances can be deceptive'.[505]

Despite the Supreme Court's ruling, trial and appellate courts continue to attach presumptions of correctness on visual assessments by police of age.[506] This becomes particularly problematic as courts inevitably put the burden of proof upon the juvenile offenders who are not extended any benefit of doubt.[507] As a result, juvenile offenders, particularly those lacking documentary evidence of age, are in a virtually impossible position to challenge the falsified and/or arbitrary assessments. Even in instances where juvenile offenders are in possession of official documentary record supporting their juvenility, such record is dismissed in favour of arbitrary visual assessments by police.[508] Reliance upon arbitrary age assessments is in violation of Pakistan's international human rights obligations under the Convention on the Rights of the Child. The United Nations Committee on the Rights of the Child (CRC Committee) has made clear in its General Comment No. 10 that in the absence of proof of age 'the child is entitled to a reliable medical or social investigation that may establish his/her age'.[509] In its List of Issues (LOI) issued to the Government of Pakistan during the review of the fifth periodic state report, the CRC Committee accordingly asked:

505 Para 7

506'..the age of the appellant was recorded as 21 years in the statement under Section 342 Cr.P.C, which is part of the judicial record, and presumption of correctness is attached to it unless rebutted. Both the documents mentioned above [i.e. Form-B and School Leaving Certificate] are not reliable to rebut the age recorded in the statement under Section 342 Cr.P.C.' (para 8) *Niaz Muhammad v. Umar Ali* (2009 PCr.LJ91)[Peshawer]

507 'Claim of Juvenility was based upon an assertion of fact and the onus to prove such fact was upon the accused person and if he failed to establish such fact through positive evidence then no advantage could be taken by him on such score and no benefit of any doubt regarding his age could be extended to him' (para 7) *Muhammad Raheel v. The State* (PLD 2015 Supreme Court 145)

508 Supra note 40

509 Comm. On Rights of the Child, General Comment No. 10, para 39, U.N. Doc CRC/C/GC/10 (2007)

> *'Please explain to what extent visual assessments of a child's age by the police or other law enforcement officials in the process of issuing an arrest or jail certificate complies with a child's entitlement to a reliable medical or social investigation into his or her age.'* [510]

The Government of Pakistan in its reply to the LOI failed to furnish any adequate response.

B. Adjudication of juvenility claims falls short of international law standards

The absence of comprehensive guidance on how and when to determine the age of an accused person marred a significant number of trials of juvenile offenders with confusion and arbitrariness. There was no prescribed process under either the Pakistan Penal Code (PPC) or the Code of Criminal Procedure (CrPC) to determine the age of a prisoner at the time of arrest and during the trial. Section 7 of the JJSO was the sole provision under Pakistani law dealing with determination of age inquiries. It simply states: 'If a question arises as to whether a person before it is a child for the purposes of this Ordinance, the juvenile court shall record a finding after such inquiry which shall include a medical report for determination of the age of the child'. This section clearly did not contain sufficient detail to ensure that determinations of age are conducted in accordance with international standards, including those set out in General Observation 6 of the Committee on the Rights of the Child, which states that the assessment on the age of a child 'must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, s/he should be treated as such'.[511]

Condemning the failure of the current juvenile justice framework in identifying juvenile offenders and protecting them from executions the CRC Committee, in its Concluding Observations to Pakistan's fifth periodic state report, recommended that the

510Comm. On Rights of the Child. List of Issues in relation to the fifth periodic report of Pakistan, para 25, CRC/C/PAK/Q/5 (2015)

511UN Committee on the Rights of the Child, General comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin (1 September 2005)(CRC/GC/2005/6), para 31 <http://www.refworld.org/docid/42dd174b4.html> accessed on 4 March 2016

Government of Pakistan 'establish effective age determination mechanisms in order to ensure that in cases where there is no proof of age, the child is entitled to a proper investigation to establish his or her age and, in the case of conflicting or inconclusive evidence, has the right to the rule of the benefit of the doubt'.[512]

(i) Lack of age determination protocols lead to conflicting judgments on the evidentiary value of different types of evidence

Contrary to international legal jurisprudence, the burden of proof was posited on the accused person in age determination proceedings under Section 7, JJSO, who is also not accorded any benefit of doubt. The Supreme Court of Pakistan in *Muhammad Raheel v. State* unequivocally stated that 'claim of juvenility was based upon an assertion of fact and the onus to prove such fact was upon the accused person and if he failed to establish such fact through positive evidence then no advantage could be taken by him on such score and no benefit of any doubt regarding his age can be extended to him'.[513] As discussed above, given the low rate of birth registration such a burden is virtually impossible to dispel in a majority of the cases. Even where government registration documents are present, they are often disbelieved by the courts at both trial and appellate levels.[514] In the absence of any protocols governing the determination of age by courts and no benefit of doubt being accorded to the accused the eventual outcome is that the court invariably relies upon the evidence that disputed the juvenility plea of the accused regardless of its nature.[515] Domestic jurisprudence is conflicted on evidentiary value of conflicting records, and an empirical analysis of judgements under Section 7 demonstrates that there is no apparent consistency of age determination procedure adopted by the courts; in practice they are free to choose any evidence that favours the verdict of their choice.

Justice Project Pakistan has analysed around 140 reported cases, since the beginning of the operation of the JJSO in 2000 to 2016, wherein a plea of juvenility under Section 7 of the JJSO had been raised by an accused person. The analysis looked at the way four different types of evidence (statement under S. 342, medical evidence, birth certificate/Form-B and school leaving certificate) had been considered across these cases, noting where judges had placed reliance on each, and where they had rejected each:

- Seven of the cases analysed included a decision on whether a defendant's statement under Section 342 of the Code of Criminal Procedure

512 Supra note 9, para 25
513 PLD 2015 Supreme Court 145
514 Supra note
515 Supra note 43

1898 (i.e. the defendant's statement at trial) should be relied on as primary evidence of age. In two cases the statement was refused while in five it was accepted. The Section 342 statement is the statement made by the accused at trial. Often, accused persons will not expressly mention their age if they are not aware that it may have relevance to criminal proceedings, and the age may be inaccurately recorded, or may not even be recorded at all. Based on JPP's experience, during the trial, the court officer often just copies the police records regarding the age into the statement without questioning the accused and/or giving him a chance to rebut.

- 49 of the cases analysed included a decision on whether a medical board report should be relied on over and above documentary forms of evidence. In 12 of these cases, the opinion of the board was rejected in favour of the documentary evidence, but in 37, it was accepted despite contradictory documentary evidence. Over-reliance on medical tests can be dangerous, however, and experts in the field have made it clear that there is no ''silver bullet' method that will give government and agencies an 'objective' and 'scientific' answer as to the precise chronological age of an individual'.[516] Results of medical tests such as ossification tests of the kind used in Pakistan are not reliable when used on persons with ethnic backgrounds from Asia, Africa, and the Middle East.
- 44 of the cases analysed included a decision on whether the defendant's birth certificate should be relied on. In 28 cases the certificate was not accepted, while in 16 cases it was. Where birth certificates are not relied on, it is usually because the courts believe that such certificates are false or fabricated, despite the fact that these are government-issued documents. In the Supreme Court case of *Ali Hasan alias Jamshed v. the State***,** it was held that so far as the National Database and Registration Authority's record is concerned, there is no objection that the entry made therein may not be conclusive proof of the age of petitioner.[517] If even government-issued identity documents can be ignored by the courts in determining juvenility, then the defendant is placed in an impossible position if they are to be required to prove their age.

516Aynsley-Green, T.J. Cole, H. Crawley, N. Lessof, L.R. Boagi and R.M.M Wallace, *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control,*British Medical Bulletin (2012).

517 *Ali Hasan alias Jamshed* v. The State (2012 SCMR 242)

- 36 of the cases analysed included a decision on whether the defendant's school leaving certificate should be relied on. In 23 cases it was not accepted, while in 13 cases it was accepted. As with birth certificates, courts frequently refuse to rely on these documents on the basis that they may be fabricated, despite the fact that these are government issued documents.

In addition to analysing the cases in which different types of evidence were relied upon, JPP also analysed the cases to determine whether or not the courts of Pakistan recognised the principle that where there was doubt as to the age of the accused this should be interpreted in favour of the accused. In eight of the cases, the court considered whether the burden of proof should be on the defendant to prove juvenility, or whether the JJSO should be interpreted liberally. In five of these cases, the court held that the law should be interpreted liberally. In three others, they held that the burden of proof should be placed squarely on the defendant. In practice, however, the lower courts most frequently require the defendant to prove the issue of juvenility, a burden which is difficult to dispel.

This lack of consistency and clarity has already resulted in the execution of a number of people who were under 18 at the time of their alleged offence and has also resulted in lengthy custodial sentences and other punishments being imposed on juvenile offenders in violation of domestic and international law.

Age determination protocols under the JJSA

Under the JJSA's section 8, there has been an attempt to address the ambiguity of the correct procedure of age determination. The section states that when 'a person alleged to have committed an offence physically appears or claims to be a juvenile...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', thereby giving official documents the highest evidentiary value over and above medical tests or visual assessments. This is a major development as it gives primacy to government issued documents, which have been treated with suspicion and ignored by the courts in the past. However, as explained above, a majority of Pakistanis do not have official documents issued by NADRA due to pervasive lack of birth registration. As such even with this improved law, many will not benefit from the lack of ambiguity.

In absence of official documents, such as birth certificates or school leaving certificates, the law provides, 'age of such accused person may be determined on the basis of a medical examination report by a medical officer'. However, medical examinations

are still the backup option and as will be developed below, they are not as reliable as they are believed to be.

CONSIDERATION OF EVIDENCE BY COURTS IN DETERMINATION OF AGE PROCEEDINGS

TOTAL CASES: 184
PERIOD: 2000 – 2016

1) **Type of Evidence**	2) **Accepted**	3) **Dismissed**	4) **Total**
5) Statement under S. 342 Criminal Penal Code	6) 5	7) 2	8) 7
9) Birth Records	10) 16	11) 28	12) 44
13) Medical Evidence	14) 37	15) 12	16) 59
17) School Leaving Certificate	18) 13	19) 23	20) 36

(ii) Courts rely upon unreliable medical testing in age determination proceedings

On account of the distrust accorded by the judiciary to government records in age determination proceedings, courts commonly rely upon medical tests as determinative proof of age. The most commonly used form of medical tests in Pakistan for the determination of age is an ossification test, where the age is

determined on the basis of using x-rays of bone density, conducted by a medical board comprising of three or more doctors established by the court for this purpose.

Determination of age through medical tests such as the ossification tests does not offer conclusive proof of age. Problems with 'testing' age through 'medical' procedures have been thoroughly explored by doctors in the context of immigration controls in Europe[518]:

a. First, imaging of bones or teeth can never indicate precisely the chronological age of the individual. Images can only provide an estimate compared with images from control subjects, and within the very substantial range of normal development during adolescence. Methods such as ossification testing were not designed to assess disputed chronological age—they were prepared for medical use in diagnosing and monitoring disorders of growth.

b. Second, the assessment of age should be undertaken through a comparative assessment of the image of the individual against standards of normality for the population from which the person originates. Such standards are simply not available for children and young people from many countries in Asia, Africa or the Middle East, and it is unsatisfactory to assess their images from the standards derived from Caucasian, European or North American children.

c. Third, although superficially easy to do, radiography demands expert interpretation by experienced paediatricians, dentists or radiologists.

In its Concluding Observations, the United Nations Committee on the Rights of the Child, has on multiple occasions cited the need for official systems of age verification focusing on objective evidence such as birth and school records rather than relying on medical testing for age assessment.[519]

Similarly, the United Nations High Commissioner for Refugees: Guidelines on Protection and Care Preface that set out standards for the improved protection and care of refugee children draw caution to using 'scientific procedures such as dental or bone X rays' by emphasising that these methods can only estimate age and must therefore allow for margins of error. They suggest that when the age is uncertain, the child should be

518Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control, Aynsley-Green, T.J. Cole, H. Crawley, N. Lessof, L.R. Boagi and R.M.M Wallace, Br Med Bull (2012) 102 (1): 17-42.

519Concluding Observations: Nepal 2005 and Concluding Observations: Bangladesh 2006 in Cipriani, 2009:135)

given the benefit of the doubt.[520] The Separated Children in Europe Programme (SCEP) has also developed detailed recommendations for the practice of age assessment based on the UNHCR guidelines and the jurisprudence of the UN Committee on the Rights of the Child. In these recommendations, the SCEP recommends age assessment procedures including the dental and bone X rays must be carried as 'a measure of last resort, not as standard or routine practice, where there are grounds for serious doubt and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish the individual's age'. The Recommendations also note 'that age assessment is not an exact science and a considerable margin of uncertainty will always remain inherent in any procedure'.[521]

Comparative jurisdictions such as India have similarly denounced placing too much reliance on medical jurisprudence whilst determining the age of an individual. In the case of *Ram Deo Chauhan v. State of Assam*[522] the Supreme Court of India stated that 'too much of reliance cannot be placed upon textbooks, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitude, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform'. Similarly in *Jaya Mala v. Home Secretary, Government of J & K*[523] the Supreme Court of India similarly opined the age ascertained by medical examination is not conclusive proof of age and merely the opinion of the doctor. The Court additionally stated that 'the margin of error in age ascertained by radiological examination is two years on each side'.

As a result of the aforementioned limitations, there is emerging jurisprudence by Courts in Pakistan that medical evidence in support of age must be approached with caution. In *Muhammad Shebaz v. The State* (2010 YLR 1812), the Lahore High Court stated that unrebutted documentary evidence could not be rebutted by the opinion made by the medical board because in the ossification test the medical board always gives a tentative opinion.

However, despite diverging jurisprudence, courts in Pakistan continue to accept age assessments as an outcome of ossification tests as conclusive evidence of age

520 UN High Commissioner for Refugees (UNHCR). Refugee Children: Guidelines on Protection and Care, 1994,
https://www.unicef.org/violencestudy/pdf/refugee_children_guidelines_on_protection_and_care.pdf
521Save the Children, UNHCR & UNICEF (2009) Separated Children in Europe Programme:
Statement of Good Practice, 4th Revised Edition, Save the Children, Denmark,
https://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf
522 AIR 2001 SC 2331
523 AIR 1982 SC 1297

determination proceedings – often in the face of credible documentary record. As mentioned above, JPP has discovered that since the enactment of the JJSO, courts have accepted medical evidence in 37 out of a total of 59 cases in which it was raised- often over unrebutted documentary record. For example, in *Ahmed Sher v. The State*[524], the Court ruled that a 'bare perusal of the section[section 7] would show that the provisions of having a medical report is mandatory in nature'. In the case, the trial court had declared the accused as a juvenile on the basis of his School Leaving Certificate. In a revision of the order of the trial court the High Court remitted the order back stating that 'it was obligatory for the trial Court to have a medical report to determine the age of the accused', despite the unrebutted School Leaving Certificate. Similarly, in *Muhammad Afzal v. The State* (2003 YLR 1983) the Lahore High Court set aside the Sessions of the High Court declaring the accused as a juvenile on the basis of a School record and opinion of the police. The Court opined that it was mandatory for the Court to set up a medical board to determine the age of the accused under the JJSO.

(iii) Juvenility pleas are only entertained at the 'correct' stage of proceedings

The Government of Pakistan in its replies to the list of issues outlined by the CRC Committee to the fifth periodic report claimed that

'the information such as 'age' can be presented or corrected at different stages i.e., i) initial statement at the time of arrest, ii) arrest certificate (huliya form), iii) first version of statements recorded under Section 161 of Cr.PC, iv) initial entry in police diary (zimni), v) recording of statements under Section 164 of Cr.PC, vi) recording of evidence, vii) statements of accused person under Sections 340 and 342 of Cr. P.C., viii appeal to High Court, ix) reference/appeal/revision petitions at Supreme Court of Pakistan'.

Contrary to the Government's claim, courts have ruled in several cases that a plea of juvenility is only admissible if it is raised at the time of investigation and trial, and that a delayed claim 'must be visited with an adverse inference against [the accused]'.[525] As a result, courts in Pakistan refuse to admit evidence of juvenility even if it is raised at the appellate stages or during post-conviction reviews.

524 2006 PCRLJ 1450
525 Muhammed Raheel v. The State (PLD 2015 SC 145); Baber Shahzad v. The State (2007 YLR 2151) [Lahore]

The Supreme Court of Pakistan in *Muhammad Raheel v. The State* stated that the 'accused had never claimed at any stage of the trial that he was a child, he had never agitated before the High Court that he was a juvenile, and he had led no evidence before any court regarding his date of birth. Any belated attempt made by the appellant in this regard before the Supreme Court may not be met with approval or acceptance'. In the *Muhammad Aslam v. The State* (PLD 2009 SC 777), the Supreme Court similarly opined that 'such a plea must be taken by the accused at the earlier possible opportunity preferably during the course of investigation so that the requisite evidence about the age of accused could also be properly collected during the said exercise of collection of evidence and any delayed claim on the said account should be met by adverse inferences'.[526]

The unwillingness of the superior judiciary to entertain inquiries into age during the appellate stages of a case or even after the appeals have been concluded has certainly led to the execution of a number of juveniles.

Faisal Mahmood was initially sentenced to life imprisonment for a crime committed when he was just 17 years old. His trial was conducted prior to the introduction of the JJSO and no specific mention of his age was mentioned in the trial judgment. Following an appeal to the High Court by the victim's family, however, Mr Mahmood's sentence was increased to death. At an appeal before the Supreme Court, Mr Mahmood's counsel, supported by the Deputy Prosecutor General, argued that since Mr Mahmood was 17 at the time of the trial, his sentence should not be increased. The Supreme Court did not challenge the fact that he was 17 at the time of his arrest but stated that since his 'minority' had not been raised at the original trial he should not receive the benefit of the JJSO.

Furthermore, the Constitution of Pakistan under Article 187 grants the Supreme Court of Pakistan 'the power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or in any matter before it'. In its Initial Report to the Human Rights Committee regarding its compliance with the International Covenant on Civil and Political Rights (ICCPR) report, submitted on 19 October 2015, the Government of Pakistan stated that under Pakistan's Constitution a conviction could be reversed on the basis of information which surfaces after conviction. The relevant paragraph of the report reads:

526 Para 11

Information which surfaces after conviction may be placed before a court under Articles 199 and 187 of the Constitution, and coupled with the court's inherent power to recall an order passed mistakenly**, a conviction may be reversed**.[527][emphasis added]

Despite this statement, experience shows that when petitions containing new information in support of juvenility are actually filed under these Articles in the cases of prisoners facing imminent execution, the superior courts refuse to admit them.

The case of Shafqat Hussain is a prime example of the failure of the courts to re-open judicial proceedings for post-conviction review on the basis of new evidence. Shafqat's execution was stayed no fewer than six times because of new evidence that had come to light since his conviction, indicating that he was a juvenile who had been convicted on the strength of a confession extracted through torture. Despite the multiple stays, Shafqat was ultimately executed in August 2015 because of the court's refusal to consider the new evidence of his torture and juvenility on the basis that all normal appeals had already been exhausted. In refusing leave to appeal the Supreme Court noted:

'Once the facts leading to conviction of the petitioner attained finality up to this court, they cannot be re-agitated through different garb and guise'. [528]

Following this judgment an application was made to the provincial statutory human rights body, the Sindh Human Rights Commission (SHRC). The SHRC reviewed all the information and evidence and concluded that despite the fact that previous courts had refused to reopen the case it had a 'duty' to consider the serious concerns in the complaint about violations of the right to life. It further concluded that there was sufficient evidence that the case should be reopened and the execution stayed. They noted 'important evidence is missing on many issues which poses an important question; can a human being be executed when there is so much confusion and the evidence is lacking to clarify the same?'. Despite these recommendations from a statutory human rights body the courts still refused to reopen the proceedings, permitting the execution to take place.

This problem is further compounded by the extremely short notice period permitted between the issuance of a warrant and the date of execution. While this period varies between the provinces and regions, it is consistently extremely short. In Punjab, prior to the lifting of the moratorium, the time between the issuance of a black warrant and the execution of a convict was between 14 to 21 days. However, ten days after the moratorium was lifted, an amendment was introduced in the High Court Rules and

527 Supra note 23, para.136

528Shafqat Hussain Versus President of Pakistan and others' Civil Petition No.1127 of 2015

Orders as a result of which the time between the issuance of the warrant and the execution of the convict was decreased to a minimum of three days and a maximum of eight days.[529] This unreasonably short timeframe places severe limits on the possibilities for resolving cases in which evidence of juvenility only arises post-conviction.

V. Safeguards For Juveniles Were Not Applied To Terrorism Trials

According to Section 14 of the JJSO, the law did not repeal other laws but applies 'in addition' to them.[530] However, the ordinance also provides juvenile courts 'exclusive jurisdictions to try cases in which a child is accused of commission of any offence'.[531] Given this contradiction, jurisprudence by superior courts was unable to uniformly address the jurisdiction of juvenile courts over crimes for which special courts have been enacted, particularly terrorism. As a result, juveniles continue to be tried as adults by special courts whose procedures fail to comply with internationally agreed fair trial standards and are sentenced to death.

The Anti-Terrorism Act (ATA) was enacted in 1997 and provides for the establishment of anti-terrorism courts to try persons charged with terrorist act, and stipulates special procedures for the conduct of trials that fall within its ambit. The definition of 'terrorist acts' under the ATA includes crimes such as rape and extortion to 'strike terror or create of sense of fear and insecurity in the people or any section of the people'.[532]

Under Section 32, the ATA is granted overriding effect over all laws currently in force. Upon reading Section 32 of the ATA in juxtaposition with Section 14 of the JJSO, courts often interpreted the provisions as meaning that for terrorism offences under the ATA, the Anti-Terrorism Courts possess exclusive jurisdictions even for juvenile offenders. In the case of *Asadullah v the State*[533], the Sindh High Court recognised that the ATA held that 'Section 14 of the JJSO strengthened the view that the court constituted under the ATA had jurisdiction over the scheduled offence, irrespective of any limit of age or any other class of offenders'. It was held that no indemnity or concession from the mandatory death sentence was to be provided to the juvenile offender. In the case of *Qamar Hussain Shah v. The State*[534] the court held that a juvenile

529 Lahore High Court, Lahore Notification No. 402/Legis/H-D-4(HD). 24.12.2014
530JJSO, Section 14
531 JJSO, Section 4(3)
532Anti Terrorism Act, 1997 (Act No. XXVII of 1997)[hereinafter ATA], Section 1(b)
533 2011 PCRLJ 1022
534 PLD 2006 Karachi 331

charged under the ATA would be charged by the Anti Terrorism Courts (ATC) and not by the juvenile courts. The Full Bench of the Sindh High Court ruled that the ATC would not be bound by the rules of procedures required for juvenile courts.

Trials conducted by anti-terrorism courts entail expedited investigations and proceedings that must each be completed within seven days. Combined with the mandatory period for completion of investigation the ATA suspends critical procedural safeguards leading to a heightened risk of torture. Section 21-H of the ATA permits the admission of confessions made before a police officer above the rank of a District Superintendent of Police as evidence against the accused persons. This essentially provides police with a license to torture suspects into providing incriminating confessions. Juveniles are most likely to be abused on account of their vulnerable position.

Similarly, the prescribed period for the completion of the trial is too short to provide defendants the right to prepare an adequate defence as provided under Article 14(3) of the International Covenant on Civil and Political Rights. Additionally, while the JJSO prohibited the death penalty for juvenile offenders, the ATA makes the death penalty mandatory for persons found to have committed a terrorist act resulting in one or more deaths.[535]

Given the above, one of the most significant features of the new JJSA is its Section 23 which states 'The provisions of this Act shall have overriding effect notwithstanding anything contained in any other law for the time being in force'. This gives it overriding effect over other laws in force, thereby making JJSA the supreme law when dealing with juvenile offenders over and above the ATA. Thus, the ambiguity and contradictions of Pakistani law are formally resolved and the loophole which left juvenile offenders vulnerable to the death penalty has been resolved.

535 ATA, Section 7

Conclusion and Recommendations

The foregoing demonstrates that despite its insistence at international fora that no executions of juveniles have taken place in the country, the Government of Pakistan continues to violate its international commitments on account of its failure to recognise structural problems inherent under the current juvenile justice legal framework. Unless fundamental problems including birth registration, age determination procedures and lack of overriding effect of juvenile law are not addressed the current juvenile justice system will keep falling short of international standards, particularly through consistently failing in identifying and extending protections to juvenile offenders and therefore executing them.

These fundamental failings and international human rights obligations necessitate that the Government of Pakistan do the following:

A. Reinstate the moratorium on the death penalty and launch investigations into cases where juvenility is alleged

The Government of Pakistan should reinstate the moratorium on the death penalty and cease issuance of any more death warrants. Once the moratorium is in place, prisoners on death row should be given the opportunity to file complaints to the National Commission on Human Rights and provincial human rights bodies including the Sindh Commission on Human Rights, alleging juvenility at the time of the commission of their alleged offences. The National Commission for Human Rights and provincial bodies should thereafter undertake a prima facie examination of the evidence provided. Cases where it is deemed that sufficient evidence has been provided in favour of juvenility should be forwarded to the Sessions Court for age determination proceedings under S. 7 of the JJSO. Sessions Court should ensure that the proceedings conform to age determination protocols (described below) and the National Commission for Human Rights should be joined as party to such proceedings. If as an outcome of such proceedings it is determined that the prisoner was a juvenile offender, then he/she should be granted automatic remission without the need to file another mercy petition.

B. Formulate and enforce Age Determination Protocols

Age determination protocols should be instituted at the level of arrest, trial, appeal, and post-conviction review to dictate the procedure for recording of age at each stage of

the proceedings. These protocols should be notified by the Ministry of Human Rights in cooperation with the national and provincial police and judicial academies and incorporated into High Court and Supreme Court Rules. These protocols should:

- Ensure that upon arrest police officers do not record a suspect's age unless the age recorded is based on identity documents and is confirmed by the accused. If no such documents are available, if the age in the documents is disputed by the suspect, or if there is any reason to doubt the age of the accused police must record this in writing and request a full age determination assessment can be conducted by a competent juvenile judge.
- Specify that the first stage of any age determination process must be a perusal of all official documentation relating to the accused's age and identity. Where documentation has been issued which corroborates the accused person's own account of their age at the time of the commission of an alleged offence, a strong presumption of correctness should attach to this documentation.
- Clarify that in cases where doubt remains following the perusal of government issued documents, or where there is conflict between government issued documents, a full psycho-social investigation involving examination of relevant witnesses must be conducted. Relevant witnesses should be taken to include, inter alia, the accused, his family, anyone present at the time of his birth such as doctors or midwives, teachers, and other members of his local community.
- Clearly set out the fact that medical evidence relating to the age of the accused person is often inconclusive and cannot be relied upon over and above documentary evidence or a full psycho-social investigation.
- Ensure that where, following an age determination process which incorporates the steps set out above, any reasonable doubt remains as to the age of the accused, such doubt must be resolved in favour of the accused person and the court must determine that the person should be treated as a juvenile in conflict with the law.
- Ensure that an age determination assessment is conducted at whatever stage of proceedings the issue of juvenility is raised, even after the exhaustion of ordinary appellate proceedings. In any case where prima facie evidence of juvenility is presented a full judicial inquiry must immediately be conducted in accordance with these protocols. If, following such an inquiry, the court determines that the accused is entitled to be treated as a juvenile in conflict

with the law, then a death sentence, if previously awarded, must be converted to life imprisonment. Where appropriate, a re-trial may be ordered and such trial should be conducted in accordance with the provisions of the juvenile justice system.

C. *Admit post-conviction reviews on the basis of new evidence*

Whilst the Government of Pakistan has alleged in its initial reports under the ICCPR that the Superior Courts hold the power to admit post-conviction reviews on the basis of exonerating evidence regarding innocence or juvenility, the courts have repeatedly refused to reopen these proceedings on account of their being out of time. The Government of Pakistan needs to ensure that an institutional remedy – executive or judicial – be available for accused persons in whose cases new evidence that could serve as a basis to mitigate his sentence is discovered.

D. *Publish data on juveniles on death row*

The Government of Pakistan should collect and make publicly available the total number of death row prisoners who were sentenced for crimes they allegedly committed when they were below the age of 18 years. This number should also include prisoners who raised a plea of juvenility that was subsequently rejected.

E. *Implementation of the Presidential Notification*

The Government of Pakistan should ensure that the Presidential Notification No. F.8/41/2001-Ptns dated 13 December 2001 is given full effect. As under the Notification, the provincial home departments should ensure that requests for juvenility inquiries for all juveniles sentenced prior to the enactment of the JJSO are forwarded to respective courts. The Courts should undertake such inquiries in accordance with age determination procedures that comply with international standards outline above. Sentences of those adjudged to be juvenile offenders should be commuted automatically without the need to re-submit a mercy petition under Article 45 of the Constitution of Pakistan.

MENTAL ILLNESS AND PHYSICAL DISABILITIES

Introduction

Mentally ill persons are among the most vulnerable group of individuals in society, yet their vulnerability is seldom recognised or afforded the appropriate level of protection in the criminal justice system. On the contrary, people with mental illness are often construed as 'inherently dangerous'[536] and are consequently subjected to cruel and unusual punishment, including, capital punishment which is strictly prohibited under national and international law.

Alarmingly, 50 million people suffer from a mental illness in Pakistan.[537] However, 'lack of mental health treatment and training in the criminal justice system, as well as in Pakistan generally, means that many individuals never even get diagnosed'.[538] The situation is further compounded by the structural and systematic problems of Pakistan's under-resourced and overstretched criminal justice system.[539] Consequently, the challenges faced within the criminal justice system, widespread use of torture to obtain confessions, and lack of access to competent counsel 'fall most heavily on Pakistan's most vulnerable'.[540]

Mental illness must be taken into account in the criminal justice system as it is directly relevant to culpability and sentencing and hinders meaningful participation in

536 American Bar Association, Death Penalty Due Process Review Project, 'Severe Mental Illnesses and the Death Penalty', (December 2016): 22, http://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf.
537 Dawn, '50m Pakistanis suffering from mental disorders', October 2016, https://www.dawn.com/news/1288880.
538 Justice Project Pakistan and Allard K. Lowenstein, 'A Most Serious Crime, Pakistan's Unlawful Use of the Death Penalty', (September 2016), https://law.yale.edu/system/files/area/center/schell/2016_09_23_pub_dp_report.pdf.
539 Ibid.
540 Ibid., 3.

the legal process. Mentally ill persons may not have the necessary 'moral culpability' or *mens rea*, and, accordingly, their ability to understand the consequences of their actions is diminished or even impaired.[541] They are also at a greater risk of making false confessions because of their reduced or diminished ability to 'accurately perceive reality'.[542]

The duty and expertise of legal professionals do not extend to diagnosing mental disorders or providing welfare services, but, they do extend to ensuring that vulnerable defendants are treated fairly and in accordance with domestic law and international obligations.[543] The need to exercise this duty becomes increasingly important in light of the fact that currently 33 criminal offences are punishable by death in Pakistan. Failure to uphold the rights of mentally ill defendants can and has resulted in in the execution of vulnerable individuals.

Defining Mental Illness

Mental disorders can adversely impact an individual's behaviour, thinking and interfere with daily functioning, such as the ability to work and maintain relationships.[544] Mental disorders can occur over a long period of time and have a severe and disabling impact on an individual's life.[545]

Mental illness refers to all mental disorders often associated with impaired mental functioning. It may be a delusion that makes a person believe that there is someone out there to harm their family and they need to eliminate the threat or a mother suffering from post-natal depression which makes her believe that she must kill herself and her new-born child to protect them from the misery that the mother believes they are facing.

No single cause has been identified which results in the development of mental illness. Mental illness can be the result of different factors, including, genetics, the environment and lifestyle factors. It is essential to emphasise that 'people do not choose

541 Ibid., 2.
542 Ibid., 34.
543 Prison Reform Trust, Mental Health and Learning Disabilities in the Criminal Courts', (2013): 6.

544 Prison Reform Trust, Mental Health and Learning Disabilities in the Criminal Courts', (2013): 6.
545 Ibid.

to have a mental illness' and mental illnesses cannot be overcome through 'will power' and are not related to a person's 'character' or 'intelligence'.[546]

The critical issue to establish when a person suffering from mental illness is appearing before a court after committing a crime is whether their actions were influenced by their mental illness, for example as a result of being commanded by hallucinations to harm someone. If this is the case it will be prudent to establish how much control and responsibility the person had on their actions.

This will guide whether the disposal should be to a secure hospital for treatment or through the criminal justice system. The other relevant issue will be to establish that at the time of the trial, is the person able to plead or not due to their mental illness. As it can be difficult and complex to establish the above factors, courts must have the assistance of trained mental health professionals to arrive at the appropriate conclusion. The court should also revisit the issue of a condemned prisoner's mental health prior to the execution date. The execution should be halted if any signs of a mental disorder or disability are present and the prisoner should be transferred to a mental health facility.

The Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM-V)547 provides the following definition for mental disorders:

> *'A mental disorder is a syndrome characterised by clinically significant disturbance in an individual's cognition, emotion regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behaviour (e.g.,*

546 See also 'USA: The Execution of Mentally Ill Offenders', Amnesty International (January 2006), https://www.amnesty.org/en/documents/ AMR51/003/2006/en/.

547 The *Diagnostic and Statistical Manual of Mental Disorders* (*DSM*) is the handbook used by health care professionals in the United States and much of the world as the authoritative guide to the diagnosis of mental disorders. *DSM* contains descriptions, symptoms, and other criteria for diagnosing mental disorders. It provides a common language for clinicians to communicate about their patients and establishes consistent and reliable diagnoses that can be used in the research of mental disorders. It also provides a common language for researchers to study the criteria for potential future revisions and to aid in the development of medications and other interventions. See; https://www.psychiatry.org/psychiatrists/practice/dsm.

political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above'.

The International Classification of Disease, tenth edition (ICD- 10)[548] provides that:

'"Disorder" is not an exact term, but it is used here to imply the existence of a clinically recognisable set of symptoms or behaviour associated in most cases with distress and with interference with personal functions. Social deviance or conflict alone, without personal dysfunction, should not be included in mental disorder as defined here'.

Section 2(m) of the Mental Health Ordinance 2001[549], defines mental disorders as:

'Mental illness, including mental impairment, severe personality disorder, severe mental impairment and any other disorder or disability of mind'.

The section also defines mental impairment as:

'A state of arrested or incomplete development of mind (not amounting to severe impairment), which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned'.

548 The ICD is the foundation for the identification of health trends and statistics globally. It is the international standard for defining and reporting diseases and health conditions. It allows the world to compare and share health information using a common language. It is the diagnostic classification standard for all clinical and research purposes. These include monitoring of the incidence and prevalence of diseases, observing reimbursements and resource allocation trends, and keeping track of safety and quality guidelines. It is similar to the DSM and is used by doctors and health care professionals to classify diseases and health care problems. See https://www.who.int/classifications/icd/en/bluebook.pdf.

549 On February 20, 2001, the Pakistan Mental Health Ordinance came into effect consequently repealing the Lunacy Act of 1912. The 2001 ordinance has brought about significant changes in the law 'relating to mentally disordered persons with respect to their care and treatment and management of their property and other related matters', as the preamble of the ordinance boldly proclaims. Available at http://punjablaws.gov.pk/laws/430a.html.

Severe personality disorder is defined as:

> *'A persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on part of the person concerned'.*

Severe mental impairment means:

> *'A state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on part of the person concerned'.*

Stages at which a defendant's mental illness are to be taken into consideration

Three stages have been identified at which a judge can give consideration to a defendant's mental illness:

I. Competency to Stand Trial

The critical issue to establish when a mentally ill person appears before a court after committing a crime is whether their actions were influenced by their mental illness, i.e. as a result of a command by hallucinations to harm someone. If that is the case, it is important to establish how much control and responsibility the person had on their actions.

This determines whether the defendant is competent to stand trial or should be shifted to a secure hospital for treatment.

The idea of going to court, spending the night in police custody is stressful for most and can result in increased levels of agitation. This can in itself result in the development of certain disorders, such as severe anxiety and depression, particularly, in the absence of informal and formal support.

It can be difficult to identify a mental health condition and it is often referred to as a 'hidden disability' because unlike physical disabilities, you cannot see such illnesses.[550]

Individuals suffering from mental disorders may not inform others of their conditions due to the stigma attached or may lack insight as a result of coming from indigent backgrounds, having never been diagnosed or not realizing they are suffering from a mental illness.

Pakistani law provides extensive protection for under trial prisoners suffering from mental illness. Chapter 34 (Sections 464-475) of the Code of Criminal Procedure, 1898 (CrPC) contains the entire procedure that has to be adopted where a trial of a 'lunatic' or a mentally ill person is concerned.

The first, and perhaps most important, step is to place the prisoner suspected of insanity under medical observation promptly. Should the case come up for trial, there will be reliable medical evidence of the accused's state of mind immediately after the incident.[551]

While the duty to raise issues concerning a defendant's mental health principally falls on the defence lawyers, Chapter 34 of the Code of Criminal Procedure Rules 1898 (CrCP) imposes a duty on judges to hold an inquiry, if they suspect that a defendant may be suffering from a mental disorder or disability. If the inquiry reveals that the defendant is of unsound mind and incapable of making his defence, the trial must be adjourned until the defendant is deemed fit to plead. During the adjournment, the Court has discretionary powers to either grant bail in accordance with section 466(1) CrPC or commit the defendant in safe custody. The Court must also report this to the Provincial Government.

As it's a special plea the burden of proof is on the defendant, however the failure of the defence counsel to raise a plea of insanity at trial does not disentitle the accused to be treated in accordance with the law. The trial under this section is not for the purpose of ascertaining the guilt of the defendant, rather, to determine whether the defendant is of unsound mind.

550 http://www.mhldcc.org.uk/contents/3-mental-health/d-how-to-recognise-when-a-defendant-might-have-a-mental-health- condition-film-clip.aspx.
551 (AIR 1960 Kerala 241 (DB)).

Both the prosecution and defence ought to be associated with full opportunity for leading evidence in support of their versions.[552] Orders under this section are open to revision.[553]

In *Abdul Wahid v The State,* the Supreme Court confirmed that the provisions of Chapter 34 are obligatory and require the court to hold an inquiry or a trial if it has 'reason to believe' that the accused is of 'unsound mind' and incapable of making his defence.[554] If the court has reason to believe the defendant may be of unsound mind, the Court must hold an inquiry into the facts of such unsoundness of mind of the accused, order the accused to be examined by the Civil Surgeon of the District or by such other Medical Officer as the Provincial Government may direct and examine the medical officer as a witness and record the examination in writing.[555] However, such inquiry is not restricted to the report of the medical officer and the court may take into consideration a broad range of independent factors in reaching its decision such as psychiatric assessment, social history and mental health jail records. The court should also summon medical records from the prison, as well as family members and members of the community in order to ascertain information regarding the defendant's mental health history and genetic disposition. Moreover, the trial is to be adjourned during the course of the inquiry.[556] When a trial is postponed under section 464 and 465, the magistrate or court can resume the inquiry or trial at any time and require the defendant to appear or be brought before the magistrate or court under section 467.

It is pertinent for the parties to rely on expert evidence and where the trial court's order is contrary to the doctor's certificate and where the court had not examined the doctor, it was held that the order was contrary to ss. 464-466 CrPC and should be set aside.[557]

In *Sirajuddin v Afzal Khan* the Supreme Court confirmed the judgment of the High Court setting aside the conviction and sentence of death and remanded the accused to a mental hospital for periodical examinations and directed a re-trial upon recovery.[558]

552 1997 SCMR 239.
553 1900 All W.N. 47. See also 1997 SCMR 239.
554 [1994 SCMR 1517].
555 Ibid., See also PLD 1980 Pesh. 103.
556 Ibid., See also 1997 SCMR 239.
557 *PLD 1985 Kar 549. See also* 1997 SCMR 239.
558 [PLD 1997 SC 847. See also *1996 PCrLJ 1366 (DB).*

If a prisoner is found to be incompetent, then there is the question of what should be done with him. This is defined by *Cr.P.C. §466:* Section 466 allows the court to release a defendant found to be of unsound mind on bail or to detain in safe custody.

In relation to granting bail, sufficient security must be given that the defendant will be properly taken care of and shall be prevented from injuring himself or any other person and for his appearance before a Magistrate or court or such officer as the magistrate of court appoints when required.

In *Asghar Ali v The State,* the Court stated that the bond should provide for the surety: to take care of the defendant, to prevent him from doing injury to himself, to prevent him from doing injury to any other person and to produce him before the magistrate or the officer the magistrate appoints in this behalf.[559]

Alternatively, the court or Magistrate can detain the defendant in safe custody in such manner as it thinks fit. The court of Magistrate should report the action taken to the provincial government.

I. *Not guilty by reason of insanity*

'Not guilty by reason of insanity' is a complete defence available to an accused suffering from mental illness. *Section 84* of the *Penal Code of Pakistan* dictates that a mentally ill person cannot be found criminally responsible for an offence: 'Act of unsound mind: Nothing 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 the law'.

Mens rea or a guilty mind is an essential ingredient of a criminal offence.[560] Criminal intention is the basis for criminality, which is to be proved by the prosecution by placing on record the evidence that the accused knew that what they were doing was illegal or that it was done with dishonesty and in a deceitful manner.[561] Under the Pakistan Penal Code, not constructive but actual intention is required.[562] Where the psychological evaluation falls within the scope of 'legal insanity', there can be no guilty mind, no intent in the commission of the offence.

559 1992 PCrLJ 2083.
560 PLD 1967 SC 1.
561 2000 P.Cr.L.J. 1105 (b).
562 1995 P.Cr.L.J 1807 (b).

Some mental health conditions can be very difficult to detect without either medical expertise or a longstanding relationship with a person. Lawyers and the judiciary are not expected to have either of these. It is therefore extremely important that the opinion of medical experts is sought when evaluating the mental health of an accused. However, it should be borne in mind that even some mental health experts are unfamiliar with the concepts of forensic psychiatry.

In order to establish the defence of legal insanity, three of the four conditions of section 84 P.P.C. must be satisfied:

a. Commission of an offence (in other words, if the prosecution fails to prove that the prisoner committed the act, then the mental state does not matter – he is not guilty);
b. Unsoundness of mind (this should be read in the broad context of medical mental illness as defined by the Mental Health Ordinance, 2001);
c. Incapability of knowing the nature of the act/offence; **or**
d. Distinction between right and wrong (again a *disjunctive* concept – does he know the act is wrong, **or** contrary to the law?).[563]

Thus, an individual who knows the nature of his act, but fails to understand that the act itself is wrong is relieved from criminal responsibility. Sanity should not be confused with criminal intent - *mens rea* – an essential ingredient of criminal liability.[564] By way of illustration, a person may be voluntarily intoxicated, but if he cannot develop *specific* (as opposed to general) criminal intent, then he cannot be held liable for a *specific* intent crime. This is not a 'defence' but an element of the crime which must be proven by the prosecution beyond a reasonable doubt.

II. Diminished responsibility or diminished capacity

Diminished responsibility or diminished capacity can be employed as a mitigating factor or partial defence to crimes; having a lower threshold, is applicable to more circumstances than the defence of insanity.

Under current Pakistani law, total mental insanity is recognised as a valid defence; the defence of irresistible impulse or diminished responsibility is recognised as at least a partial defence and a mitigating factor, depending on the facts of the case.[565]

563 *Mehrban v. The State [PLD 2002 SC 92].*
564 [PLD 1967 SC 1].
565 *[PLD 2000 Journal 201].*

The British Royal Commission report on the death penalty, 1953 recognised that 'in India and Pakistan, the court may regard diminished responsibility as a reason for passing a sentence of life imprisonment instead of the death sentence'.[566]

The defence of 'diminished responsibility' has been explained as '..even if a man charged with murder is not insane, still our law does recognise... that, if he was suffering from some infirmity or aberration of mind or impairment of intellect to such an extent as not to be fully accountable for his actions, the result is to reduce the quality of his offence in a case like this from murder to culpable homicide'.[567]

No capital punishment scheme imposes an automatic sentence of death; the sentence must take into account the 'diverse frailties of humankind'.[568] The law clearly permits the introduction of a broad range of mitigating circumstances, to help persuade the courts to award a lesser sentence. The court will be justified in awarding the lesser penalty when satisfied with the presence of mitigating circumstances.[569]

Intellectual Disability means difficulty learning, understanding, processing information, and problem-solving. It is a condition that is usually present from birth and is permanent, not an illness or disease. Mental Illness affects emotions, mood, perceptions, and behaviour. It can affect anyone and can appear at any age. It can be a temporary condition or recur throughout life. Mental illness is treated with medication and psychosocial support.

Both intellectual disability and mental illness affect *mens rea*, the mental element of a crime. It can mean that a person is *less criminally responsible* for his actions either because he did not intend the crime or because he was unable to conform his behaviour to the law. Their mental impairments mean they cannot meaningfully appreciate the effect of their actions, nor do they intend for certain criminal acts to occur. Just like the child, they are less criminally responsible and should be punished less severely.

Age is analogous to mental infirmity as a case of diminished responsibility. Where there are two accused, the younger should not be sentenced to death as there is a

566 Francois Lareau, *Selected Bibliography on Diminished Responsibility*, at 66 (2003), citing Report of the Royal Commission on Capital Punishment in Great Britain, 1949-1953: 413, para. 13.
567 *R. v. Braithwaite*, 1945 J.C: 55.
568 *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (any of the 'diverse frailties of humankind' constitute mitigating factors which must be considered as a matter of law in deciding punishment); *Lockett v. Ohio*, 438 U.S. 586 (1978) (sentence must consider 'any aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death').
569 *[PLD 2006 SC 109].*

possibility that he might have acted under the influence of the elder.[570] If it can be argued that youth reduces responsibility, through making the accused vulnerable to outside influence, then mental infirmity should also be read as a mitigating factor, for the same reason.

Domestic and international laws also recognise that persons with mental impairments are *more vulnerable and less criminally responsible* than others in the criminal justice system.

They are *more vulnerable*, as they are more likely: to falsely confess to crimes they did not commit, to be falsely blamed as 'ringleader' by more sophisticated co-defendants, less able to assist their lawyer with their defence, make poor witnesses for themselves, be unable to express remorse, leading to harsher sentence, be at a special risk of wrongful conviction because their impairment may be perceived as 'dangerous'.

Simultaneously they are *less criminal* as they are: less able to understand the consequences of their actions, less able to control their behaviour, less able to be deterred by threats of punishment and more likely to act impulsively and follow a criminal activity.

It is impossible to determine whether someone has an intellectual disability without an expert psychiatric mental health assessment. Many people learn how to hide their condition to avoid being teased or discriminated against and not all intellectually disabled people have obvious signs of impairment such as difficulty speaking or unusual facial features. It is pertinent for experts to administer tests to diagnose the condition.

In *Atkins v. Virginia*, the Supreme Court USA recognised that 'because of their disabilities in areas of reasoning, judgment, and control of their impulses, people with intellectual disability do not act with the level of moral responsibility that characterises the most serious adult criminal conduct. Moreover, their impairments can affect the reliability and fairness of capital proceedings'. The Court further elaborated on the *Atkins* decision in *Hall v. Florida*, reiterating that people with intellectual disability were not competent to be executed. Especially, the Court indicated that executing an individual with intellectual disability might hurt the 'integrity of the trial process for individuals who face 'a special risk of wrongful execution' because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel'.[571]

571 *Hall v. Florida,* 134 S. Ct. 1986, 1988 (U.S. 2014).

III. Competency to be executed

International law prohibits the execution of mentally ill condemned prisoners, whether the illness was present at the time of the commission of the offence or if present at the time of execution.[572]

Even though Pakistani legislation and jurisprudence does not contain an explicit bar on the execution of mentally ill prisoners; there are safeguards in place to prevent such miscarriages of justice. Under rule 444 and 445 of the Pakistan Prison Rules, 1978, the Superintendent shall obtain a report for a prisoner that may be suffering from a mental disorder and should submit the case of the Inspector-General for obtaining orders of the Government for removal to a mental health facility. However, if the case is deemed to be urgent as a result of the mental disorder, the Superintendent under Rule 447 can transfer the defendant in the absence of a Government order.

England abolished the death penalty in 1998, but Blackstone's Commentaries provide guidelines on how to understand the competency of people with a mental disability or intellectual disability. Regarding the competency to be executed, Blackstone wrote: 'If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution'.[573]

Because the accused with mental or intellectual disability would be unable to completely defend himself or herself, Blackstone asserted that the execution of such an individual would be of 'extreme inhumanity and cruelty, and [could] be no example to others'.[574]

According to the U.S. Supreme Court in *Ford v. Wainwright*, the U.S. Constitution forbids the practice of executing an 'insane', or mentally ill, person. Unlike in previous cases where the Court only considered whether the State's procedure of ascertaining sanity aligned with the State's own policy of not executing a person with mental illness, in *Ford* the Court looked at both the 'procedural and the substantive aspects of the death penalty' under the Eighth Amendment.[575] Rather, Justice Powell gave a clearer, albeit

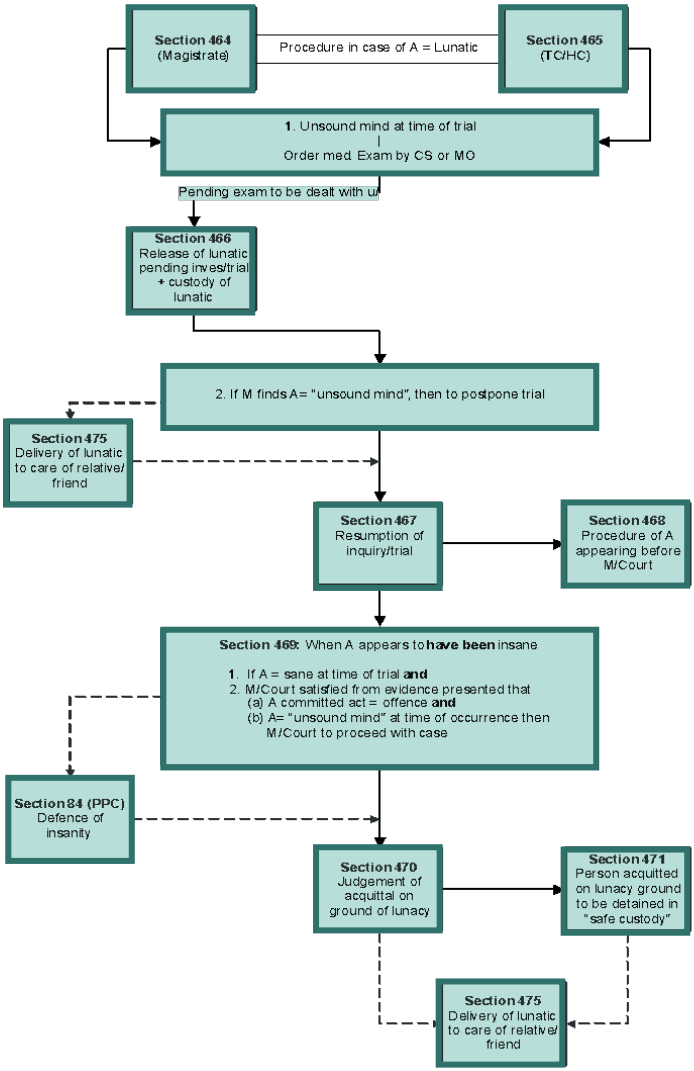
572 Ibid., 35.
573 William Blackstone, 'Commentaries on the Laws of England', Vol. 4, (Rees Welsh & Co. 1902): 24–25.
574 Ibid., 25.
575 *Ford v. Wainwright*, 477 U.S. 399, 405 (U.S. 1985).

restricted, standard on the competency to be executed in his concurring opinion, stating that 'Eight Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it'.[576] He stated that the person who seeks a stay of execution for his or her incompetency shall be granted a fair hearing with 'procedural protections afforded by the Due Process Clause', which shall include more than the 'examinations performed by state-appointed psychiatrists'.[577] After its decision in *Ford*, the Supreme Court held that the Eighth Amendment forbids the execution of intellectually disabled people as well.

Aside from the complete inhumanity of executing a mentally ill condemned prisoner, doing so serves no penological purpose or justification.[578] According to Justice William Wayne, 'if we reject the moral necessity to distinguish between those who willingly do evil, and those who do dreadful acts on account of unbalanced minds, we will do injury to these people'.

576 Ibid., 422 (Powell, J., concurring opinion).
577 Ibid., at 424.
578 Ibid., 25.

Appendix 1: Overview of a Trial of a 'Lunatic' in Pakistan.


Section 464
(Magistrate)
Procedure in case of A = Lunatic
Section 465
(TC/HC)
1. Unsound mind at time of trial
Order med. Exam by CS or MO
Pending exam to be dealt with u
Section 466
Release of lunatic pending inves/trial + custody of lunatic
2. If M finds A= "unsound mind", then to postpone trial
Section 475
Delivery of lunatic to care of relative/ friend
Section 467
Resumption of inquiry/trial
Section 468
Procedure of A appearing before M/Court
Section 469: When A appears to have been insane
1. If A = sane at time of trial and
2. M/Court satisfied from evidence presented that
(a) A committed act = offence and
(b) A= "unsound mind" at time of occurrence then
M/Court to proceed with case
Section 84 (PPC)
Defence of insanity
Section 470
Judgement of acquittal on ground of lunacy
Section 471
Person acquitted on lunacy ground to be detained in "safe custody"
Section 475
Delivery of lunatic to care of relative/ friend

Islamic Law prohibits the imposition of the Death Penalty on persons suffering from mental illness

18th century Islamic Scholar, Allamah Sayyid Muhammad Amin Ibn Abidin writes:

'If a criminal, sentenced to death for murder is diagnosed with insanity before the punishment is actually imposed, then his post-crime insanity will save him from the death penalty, but he will remain liable to pay blood money provided this be of permanent nature'.

According to Imam Abu Hanifa, the punishment of an insane person would be withheld if the offender is awarded qisas punishment and he develops insanity after the announcement of the sentence, and before his commitment to the victim's heirs for carrying out the sentence, then qisas will be commuted to dyat.

The maxim that the enforcement of the sentence is suspended by the development of insanity is based on two factors:

a. Punishment presupposes responsibility of the agent against whom the sentence is passed i.e. he should be accountable for his acts. Since the sentence is carried out when it is passed by the court, it is therefore essential that the condition of punishment should be present i.e. the offender should be mentally normal during the legal proceedings.

b. Announcement of the sentence by the court is the culmination of the judicial proceeding. As the condition of such proceeding is that the accused should be a responsible agent, it is necessary that he should also be a responsible person when the sentence is being carried out; in as much as the enforcement of punishment constitute the culmination of the whole judicial or legal proceeding. The sentence will be assumed to have been fully enforced when the offender is committed to punishment.

Thus, under Hanafi jurisprudence, corporal punishments are suspended in cases where the offender develops insanity.

It is also well established that to punish a mentally ill prisoner with death would violate the principles of the Shariah. A fatwa issued by Sheikh Dr. Gamal Solaiman, Maulana Mohammad Shahid Raza and Dr Mamdou Bocoum states:

'In Islam Muslims are held responsible for their own actions and in accordance with the Quran, will not be held accountable for the deeds of others, the Prophetic traditions also echo this view. However, when an individual loses his or her mental faculties their accountability for their actions is also removed. Thus, such a person who

is deemed to be insane is also not obliged to perform any of the religious duties…it is against the teaching of Islam to hold an insane individual accountable for their actions. It is important to note that there is no disagreement among the scholars of Islam on this issue'.

International law and the protection of people with mental illnesses

In 2007, the UN General Assembly adopted a resolution calling upon all states:

> *'To progressively restrict the use of the death penalty and not to impose capital punishment for offences committed by persons below 18 years of age, on pregnant women or on persons with mental or intellectual disabilities'*[579]

As a member state of the United Nations, the Government of Pakistan has agreed to be bound by a number of international human rights treaties that grant rights and special protections to persons suffering from mental illness. These include:

International Covenant on Civil and Political Rights (ICCPR)

Pakistan ratified the ICCPR in 2010. The civil and political rights contained in the ICCPR protect individuals from government actions that infringe on their liberty, privacy, and freedom of expression and association. Persons with mental disabilities have frequently invoked these rights and benefited from the protection they provide. For example, the prohibition of cruel, inhuman, and degrading treatment (Article 7) has empowered mentally disabled persons subject to civil commitment to argue for more humane conditions of confinement and treatment.[580] Likewise, the right not to be subject to arbitrary arrest or detention has bolstered efforts to require adequate procedural

579 Resolution of the UN General Assembly on the Moratorium on the Use of the Death Penalty (UN General Assembly A/Res/69/ 186) Para 5(d).
580 See, e.g., Ashingdane v. United Kingdom, 93 Eur. Ct. H.R. (ser. A) at 19 (1985) (discussing the contention of a mentally disabled individual who claimed that his transfer to a higher security hospital resulted in a deprivation of his liberty).

protections for persons with mental disabilities subject to civil or criminal confinement.[581]

Article 26 of the ICCPR guarantees the right to equality and non-discrimination to all persons regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The UN Human Rights Committee, established to monitor the ICCPR, issued General Comment 18 that defines the protection against discrimination against people with disabilities under article 26.[582] It affirms that equal treatment does not always mean identical treatment and that States have a duty to take steps to eliminate conditions that perpetuate discrimination.

In its comments on Article 7, the Human Rights Committee specifies that the protection against 'torture...cruel, inhuman or degrading treatment' applies to 'medical institutions, whether public or private'. In order to demonstrate compliance with Article 7, all governments that have ratified the ICCPR: should further address the conditions and procedures for providing medical and particularly psychiatric care. Information should be provided on detention in psychiatric hospitals, on measures taken to prevent abuses in this field, on appeals available to persons interned in a psychiatric institution and on any complaints registered during the reporting period.

ICCPR and Executions of Mentally Ill Prisoners

The Human Rights Committee has recognised in various judgments that the execution of mentally ill prisoners is prohibited as cruel, inhuman and degrading treatment under Article 6 and 7 of the ICCPR.

Francis v. Jamaica (Communication No. 606/1994) [U. N. Doc. CCPR/C/54 /D/606 /1994] (1995)

The HRC held that the incarceration on 'death row' and execution of a prisoner whose mental health had 'seriously deteriorated' amounted to a cruel, inhuman, and degrading treatment.

Sahadath v. Trinidad and Tobago (Communication No. 684 /1996 , CCPR/C/74 /D/684 , Apr. 15 , 2002)

581 See, e.g., Winterwerp v. The Netherlands, 33 Eur. Ct. H.R. (ser. A) at 24-25 (1979) (finding that the judicial proceedings in the Netherlands' Mentally Ill Persons Act were inadequate procedural protections under section 4 of ECHR Article 5).

582 UN Human Rights Committee, General Comment 18, Non-Discrimination, UN Official Records Suppl. No. 40 (A/45/40): 173-175.

'7.2 As to the author's claim that issuing of a warrant for the execution of a mentally incompetent person constitutes a violation of articles 6 and 7 of the Covenant, the Committee notes that the author's counsel does not claim that his client was mentally incompetent at the time of imposition of the death penalty and his claim focuses on the time when the warrant for execution was issued. Counsel has provided information that shows that the author's mental state at the time of the reading of the death warrant was obvious to those around him and should have been apparent to the prison authorities. This information has not been contested by the State party. The Committee is of the opinion that in these circumstances issuing a warrant for the execution of the author constituted a violation of article 7 of the Covenant'.

International Covenant on Economic, Social and Cultural Rights

Pakistan ratified the ICESCR in 2008. Article 12 of the ICESCR establishes '*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*'. Article 12 has been interpreted as an obligation on governments to take specific steps to protect and promote health. [583] The right to health can be viewed both as a 'positive' right to government action or services necessary to maximise health and as a 'negative' right to protection against unhealthy or dangerous conditions.[584] For further elaboration of the ICESCR's requirements, General Comment 14 recognises the UN Principles for the Protection of Persons with Mental Illness and for the Mental Health Care as a guide to State obligations under the convention, particularly with respect to protections against improper coercive treatment. [585] General Comment 5 of the Economic, Social and Cultural Rights Committee states that UN human rights standards

583 As stated by the UN High Commissioner on Human Rights, Mary Robinson, 'The right to health does not mean the right to be healthy, nor does it mean that poor governments must put in place expensive health services for which they have no resources. But it does require governments and public health authorities to put in place policies and action plans which will lead to available and accessible health care for all in the shortest possible time. To ensure that this happens is the challenge facing both the human rights community and public health professionals". World Health Organization, Q&A on Health and Human Rights

584 Ibid.

585 General Comment No. 14 (2000) (E/C.12/2000/4) on the right to the highest attainable standard of health (art. 12 of the International Covenant on Economic, Social and Cultural Rights), adopted by the Committee on Economic, Social and Cultural Rights at its twenty-second session in April/May 2000.

– such as the MI Principles and the UN Standard Rules on Equalisation of Opportunities for Persons with Disabilities – should be used to interpret a member state's obligations under the covenant. The Standards lay out the following rights for persons with mental illnesses:

UN Principles for the Protection of Persons with Mental Illness and for the Mental Healthcare

In 1991, the United Nations General Assembly adopted the 'Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care' (the MI Principles). The MI Principles have been recognised as 'the most complete standards for the protection of the rights of persons with mental disability at the international level' [586] . As mentioned above, the Principles have been used by international oversight and enforcement bodies as an authoritative interpretation of the requirements of the ICESCR.

The principles guarantee the right to 'best available mental health care' and protection from discrimination on the grounds of mental illness. It is important to note that these principles apply to all persons with mental disabilities including those who are criminal suspects and/or in prison.

Principle 4 requires that 'a determination that a person has a mental illness shall be made in accordance with internationally accepted medical standards'. Thus, domestic legislation will need to incorporate standard diagnostic processes and standards such as those contained in the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM) or the International Classification of Disease (ICD-10) as well as address the qualifications of persons who make a determination of mental illness.

Principal 20 deals with rights of criminal offenders 'who are determined to have a mental illness or who it is believed may have such an illness'. Principle 20(2) and 20(3) state:

586 The Case of Victor Rosario Congo, Inter-American Commission on Human Rights Report 29/99, Case 11,427, Ecuador, adopted in Sess. 1424, OEA/Ser/L.V/II.) Doc. 26, March 9, 1999, para. 54. The Inter-American Commission went on to say that '[t]hese Principles serve as a guide to States in the design and or reform of mental health systems and are of utmost utility in evaluating the practice of existing systems'.

> *2. All such persons should receive the best available mental health care as provided in Principle 1. These Principles shall apply to them to the fullest extent possible, with only such limited modifications and exceptions as are necessary in the circumstances. No such modifications and exceptions shall prejudice the persons' rights under the instruments noted in paragraph 5 of Principle 1.*
>
> *3. Domestic law may authorize a court or other competent authority, acting on the basis of competent and independent medical advice, to order that such persons be admitted to a mental health facility.*

Convention on the Rights of Persons with Disabilities

Pakistan ratified the CRPD in July 2011. Article 14 of the Convention guarantees the right to liberty and security of all persons with disabilities and 'especially persons with intellectual disabilities and psychosocial disabilities'.[587] Article 13, titled 'Access to justice' states:

> *'(1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.*
>
> *(2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff'*

The access to justice provision in the Convention, Article 13, both reminds us and confirms that persons with disabilities face problems with legal representation and protection. Persons with disabilities often must rely on increasingly scarce free or low-cost legal services and therefore have less choice in who represents them, and generally have less understanding and access to the legal system. It is critically important to recognise the problems involving cost and availability of competent legal services.

587 Adopted on 13 December 2006. Full text at:
www.un.org/disabilities/convention/conventionfull/shtml. The Convention on the Rights of Persons with Disabilities entered into force on 3 May 2008. (hereinafter CRPD)

The Committee on the Rights of Persons with Disabilities, the monitoring body of the Convention, has held that those criminal suspects declared to be unfit to stand trial cannot be found to be criminally responsible and/or detained. The Committee has recommended that 'all persons with disabilities who have been accused of crimes and… detained in jails and institutions, without trial, are allowed to defend themselves against criminal charges, and are provided with required support and accommodation to facilitate their effective participation',[588] as well as procedural accommodations to ensure a fair trial and due process.[589]

The Committee has stated that under the Convention deprivation of liberty, by imprisonment or other forms of detention, in criminal proceedings for persons who are mentally ill should only apply as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter future crime.[590]

The Committee has expressed its concerns for the poor living conditions in places of detention, particularly prisons, and has recommended that States parties ensure that places of detention are accessible and provide humane living conditions. More recently, it recommended 'that immediate steps are [to be] taken to address the poor living conditions in institutions'.[591] This Committee has recommended that States parties establish legal frameworks for the provision of reasonable accommodation that preserve the dignity of persons with disabilities, and guarantee this right for those detained in prisons.[592] It has also addressed the need to '[p]romote training mechanisms for justice and prison officials in accordance with the Convention's legal paradigm'.[593]

The Committee has also stated that under the Convention a party must take all relevant measures to ensure that persons with disabilities who are detained may live independently and participate fully in all aspects of daily life in their place of detention, including ensuring their access, on an equal basis with others, to the various areas and services, such as bathrooms, yards, libraries, study areas, workshops and medical,

588 CRPD/C/AUS/CO/1: para. 30.
589 CRPD/C/MNG/CO/1, para. 25, CRPD/C/DOM/CO/1, para. 29 a), CRPD/C/CZE/CO/1:para. 28, CRPD/C/HRV/CO/1, para. 22, CRPD/C/DEU/CO/1, para. 32, CRPD/C/DNK/CO/1: para. 34 and 35, CRPD/C/ECU/CO/1, para. 29 b), CRPD/C/KOR/CO/1, para. 28, CRPD/C/MEX/CO/1: para. 27, CRPD/C/NZL/CO/1: para. 34.
590 CRPD/C/NZL/CO/1:para. 34.
591 CRPD/C/HRV/CO/1: para. 24.
592 CRPD/C/COK/CO/1, para. 28 b), CRPD/C/MNG/CO/1, para. 25, CRPD/C/TKM/CO/1 para. 26 b), CRPD/C/CZE/CO/1, para. 28, CRPD/C/DEU/CO/1, para. 32 c), CRPD/C/KOR/CO/1, para. 29, CRPD/C/NZL/CO/1, para. 34, CRPD/C/AZE/CO/1, para. 31, CRPD/C/AUS/CO/1, para. 32 b), CRPD/C/SLV/CO/1: para. 32.
593 CRPD/C/MEX/CO/1: para. 28.

psychological, social and legal services. The Committee has stressed that a lack of accessibility and reasonable accommodation places persons with disabilities in sub-standard conditions of detention that are incompatible with article 17 of the Convention.

Declaration on the Rights of Mentally Retarded Persons[594]

In 1971, the UN General Assembly adopted the 'Declaration on the Rights of Mentally Retarded Persons' (MR Declaration). Under the declaration, the person with intellectual disability has 'the same rights as other human beings', which cannot be restricted without due process that 'must contain proper legal safeguards against every form of abuse'. Instead of relying simply on a medical diagnosis, the MR declaration provides every person with an intellectual disability a right to an evaluation of his or her 'social capability' by a 'qualified expert'. Any determination of incompetence must be reviewed periodically, and an individual whose rights have been limited has a right to appeal to a court.

The Declaration additionally provides under article 6 that 'The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility'.

Article 7 additionally states:

> *'Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.*

594 Declaration on the Rights of Mentally Retarded Persons, U.N General Assembly Resolution. 2586/1971.

Safeguards guaranteeing the protection of the rights of those facing the death penalty (Approved by ECOSOC Resolution 1984/50 of 25 May 1984)

The UN Economic and Social Council (ECOSOC) in 1984 adopted 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty'. In the same year, the Safeguards were endorsed by consensus by the UN General Assembly. The Safeguards guaranteeing the protection of the rights of those facing the death penalty constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment.[595]

The Third Safeguard states:

> *'3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane'.*

The third safeguard was amplified by the Economic and Social Council in 1988 with the words 'persons suffering from mental retardation or extremely limited mental competence'.

The Secretary General of the United Nations in his report on 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those facing the Death penalty'[596] to the United Nations Human rights Council in 2015 elaborated upon the safeguard as follows:

> '*The final category of persons sheltered from capital punishment by the third Safeguard consists of 'persons who have become insane'. The Economic and Social Council subsequently added the recommendation that Member States eliminate the death penalty 'for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution'. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or*

595 http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx.
596 http://repository.un.org/handle/11176/340297.

> *punishment has described imposition and enforcement of the death penalty in the case of persons with mental disabilities as particularly cruel, inhuman and degrading and in violation of Article 7 of the International Covenant on Civil and Political Rights and Articles 1 and 16 of the Convention against Torture. Likewise, the Special Rapporteur on extrajudicial, summary or arbitrary executions stated that '[i]t is a violation of death penalty safeguards to impose capital punishment on individuals suffering from psychosocial disabilities.*[597]

The Secretary General additionally stated that member states of the UN have two duties with respect to the rights of mentally ill prisoners:

> '*First, they have a duty to survey all records and information in their possession concerning the mental health of a person accused of a capital offense. Second, the State must provide any indigent person with the means necessary to have an independent mental health evaluation done in a timely manner. Moreover, when there is an indication that an accused or convicted person in a death penalty case might have a mental or intellectual disability, the State has the obligation, at any time of the proceedings, to address the claim on the merits'.*[598]

a) UN Standard Minimum Rules for the Treatment of Prisoners

The UN Standard Minimum Rules for the Treatment of Prisoners (SMRs) were initially adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the UN Economic and Social Council in 1957. On 17 December 2015 a revised version of the Standard Minimum Rules was adopted unanimously by the 70th session of the UN General Assembly in Resolution. The revised Rules are known as the 'Nelson Mandela Rules' to honour the legacy of the late President of South Africa, who spent so many years of his life in prison.

The Rules states that individuals 'who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions' should not be detained in prisons at all and should instead be transferred to mental health facilities. The Rules also require that each prison should have an interdisciplinary

597 Ihttp://repository.un.org/handle/11176/340297: Para 85.
598 Ibid., Para 86.

healthcare team, including medical personnel with experience in psychology and psychiatry to ensure that both the physical and mental health needs of prisoners are addressed. The Mandela Rules additionally prohibit placing prisoners suffering from mental or physical disabilities in solitary confinement if this would exacerbate their existing medical conditions and reiterate existing prohibitions on imposing solitary confinement and similar measures on women and children.

Case Studies

Pakistan does not have a comprehensive public mental healthcare system. For a majority of the population, especially in poor or rural areas of the country, mental health diagnosis and care is the purview of religious and traditional healers. This system is based upon 'its own popular aetiologies, such as [the removal of the] 'evil eye', bad wishes from others, and machinations of sorcery'.[599] Mentally ill people are often prescribed talismans, the recitation of holy verses, or sent on a pilgrimage to a particular holy shrine. Modern mental health care facilities are concentrated in urban centres and are economically inaccessible to the majority of Pakistanis. The mentally ill in Pakistan are often stigmatised, as mental illness is considered taboo in many parts of the country.[600] Most mentally ill persons in Pakistan remain undiagnosed and without access to effective treatment.

Mentally ill persons who are often pushed to the fringes are particularly vulnerable to 'various behavioural infringements that could fall foul of [the] laws in place in Pakistan'.[601] It is important to note that mental illnesses are diverse and affect a defendant's interactions with the criminal system in disparate ways. Particular mental illness leaves people vulnerable to human rights violations in different ways: a person who suffers from psychotic disorders such as schizophrenia can have delusions, 'of being of divine origin, behavioural disinhibition and lack of insight, which place them at risk of prosecution', especially under blasphemy laws.[602] Persons with intellectual disabilities or autism, however, are at higher risk of abuse or coercion at the hands of police. Forced or false confessions to police are of particular concern with this group of persons.[603]

599 Safdar A. Sohail, 'Mental Health in Pakistan: Yesterday, Today and Tomorrow' in Harry Minas, Milton Lewis (eds), *Mental Health in Asia and the Pacific: Historical and Cultural Perspectives* (2017): 26.
600 Ibid.
601 Muzaffiar Husain 'Blasphemy laws and mental illness in Pakistan' *The Psychiatric Bulletin* (2014): 42.
602 Ibid., 41.
603 Ibid.

CASE STUDY: KHIZAR HAYAT

Khizar Hayat, a mentally ill death row prisoner, passed away on March 22, 2019, at Jinnah Hospital Lahore after being critically ill. He had spent 16 years on death row.

Before his imprisonment, Khizar Hayat worked as a police officer in a village where he lived with his wife and children. Those who knew him described him as a kind man, but 'very slow' and easily manipulated. In the months leading up to the incident that would determine the rest of his life, Khizar had fallen under the influence of a local 'pir' — a spiritual healer who fraudulently convinced Khizar to sign over his lands and property to him. Under his influence, Khizar was eventually implicated for fatally shooting his friend and fellow police officer, Ghulam Ghous.

Khizar was sentenced to death in 2003. He was first diagnosed with 'treatment-resistant' paranoid schizophrenia by jail authorities in 2008. His mental health record consistently referred to his delusions, psychosis, and his mental illness, and showed that he had been prescribed powerful anti-psychotic medication.

Khizar pleaded not guilty during his trial, but his lawyer failed to introduce any evidence or call a single witness in his client's defence. He was eventually sentenced to death in 2003 and, after spending 16 years on death row, passed away on March 22, 2019 in Jinnah Hospital Lahore after being critically ill. Despite documentary evidence of Khizar's mental illness, the courts repeatedly dismissed his appeals.

In January 2019, after Khizar's fourth death warrant was suspended by the Supreme Court, his case was referred to a larger bench of the Supreme Court. But he passed away before his case could be heard in the SC.

CASE STUDY: KANIZAN

Kanizan Bibi was born into a very poor family and worked as a housemaid to help make ends meet. In 1989, her employer's wife and children were found murdered, for which Kanizan and her employer were subsequently arrested and convicted. According to her family, the real culprits, who were engaged in a longstanding land dispute with Kanizan's employer, had been arrested but were later released after they bribed the police. They then filed a false police report accusing Kanizan.

Kanizan has repeatedly insisted on her innocence. The only evidence presented during her trial was also highly suspect. She was sentenced to death by Additional Sessions Judge, Toba Tek Singh in 1991, and her subsequent appeals in the Lahore High Court and the Supreme Court have been dismissed.

Despite her long history of mental illness, the President dismissed her petition for mercy along with those of over sixty others in 1999.

CASE SUMMARY: IMDAD ALI
MERCY PETITION PENDING

Imdad Ali, a mentally ill man who began showing symptoms of schizophrenia to his family in 1998, was sentenced to death by the Lahore High Court in 2002 for the murder of a religious scholar/teacher. He has been on death row for sixteen years, and has spent three of those years in solitary confinement, which is not permitted under Pakistani law.

Continually experiencing paranoid delusions, manic episodes, and hallucinations, he was first diagnosed with psychosis in 2009 by a Medical Officer and then with paranoid schizophrenia in 2012. His illness was exacerbated by overcrowded conditions of death cells. His mercy petition pending before the President was summarily dismissed in 2015, and an execution warrant was issued scheduling his execution for 26 August 2016. His lawyers challenged the warrant, arguing that despite Imdad's long history of mental illness, which is confirmed in the jail's medical records, he was not evaluated by a medical board as required under the Mental Health Ordinance of 2001. They also argued that Imdad was kept in a jail hospital rather than in a psychiatric facility, a violation of Pakistan Prison Rules, 1978. The High Court dismissed the petition, and the Supreme Court dismissed the appeal.

On the same day as the Supreme Court dismissal, Human Rights experts of the UN issued a statement calling on Government of Pakistan to halt execution of Imdad and retry him in accordance with international human rights principles. UN experts termed the imposition of capital punishment on 'individuals with a psycho-social disability' as a 'violation of death penalty safeguards' and that his execution was unlawful and could amount to 'a form of cruel, inhuman or degrading treatment. A review petition challenging this order was submitted, and on 14 November 2016, the Supreme Court stayed his execution, ordering the formation of a medical board to assess the state of Imdad's mental illness, which confirmed that Imdad was mentally ill.

In April 2018, the Supreme Court took suo motu notice of another mentally ill prisoner, Kanizan Bibi, and clubbed Imdad's case with hers. Ordering fresh medical examinations of both the prisoners, the apex court stated that this case will set a precedent for all mentally ill prisoners on death row. The medical board has since confirmed that Imdad is mentally ill.

Furthermore, the President has continued to ignore Imdad's plea despite constant pressure from the international community to grant mercy.

PAKISTANIS ON DEATH ROW OVERSEAS: ACCOUNTS FROM SAUDI ARABIA

'[The Saudi justice system] is like a web. Once you are caught in it, it is difficult to get out'.
-Ghulam

Introduction

At 1.6 million people, Pakistanis make up the second-largest migrant community in Saudi Arabia, most of whom travel to the country as labour workers. For some of these migrants, however, the search for a better life ends up in a fight for life. Saudi Arabia executes more Pakistanis than any other foreign nationality annually — nearly all for heroin smuggling. At least 20 nationals were executed in 2014, 22 in 2015, seven in 2016, 17 in 2017, and 30 in 2018.

Human rights organizations and UN human rights bodies have criticized Saudi Arabia's criminal justice system for many years. The systemic and fundamental violations of defendants' rights under the Saudi criminal justice system in its current state are irreconcilable with the basic principles of the rule of law and international human rights standards. These violations derive from deficiencies in Saudi Arabia's law and practices. The Kingdom has not promulgated a penal (criminal) code, previous court rulings do not bind judges, and there is little evidence to suggest that judges seek to apply consistency in sentencing for similar crimes. Accordingly, citizens, residents, and visitors have no means of knowing with any precision what acts constitute a criminal offense. The Saudi criminal justice system imposes the death penalty after patently unfair trials in violation of international law and imposes corporal punishment in the form of public flogging, which is inherently cruel and degrading.

The situation is further complicated by the fact that Saudi criminal procedures permit judges to shift roles between adjudicator and prosecutor, which indicates that, in

practice, there is no presumption of innocence for defendants. Unless the crime is considered 'major' under Saudi law, the trial judge dons the mantle of both judge and prosecutor. In all criminal cases, the judge can change the charges against the defendant at any time and, in the absence of a written penal code, it appears that judges in some cases set out to prove that the defendant has engaged in a certain act, which they then classify as a crime, rather than proving that the defendant has committed the elements of a specific crime as set out in law. In other cases, defendants recounted how a judge refused to proceed with a trial unless the defendant disavowed and withdrew the claim that his confession was extracted under torture, effectively holding the defendant hostage until he reaffirmed a confession obtained under duress.

Due process violations were most consequential for defendants involved in serious cases such as drug smuggling and murder. In Saudi Arabia, judges apply a 1987 ruling by the country's Council of Senior Religious Scholars prescribing the death penalty for any 'drug smuggler' who brings drugs into the country, as well as provisions of the 2005 Law on Combating Narcotic Drugs and Psychotropic Substances (NDPS Act), which prescribes the death penalty for drug smuggling. The law allows for mitigated sentences in limited circumstances.

In 2014, Justice Project Pakistan filed a petition in the Lahore High Court on behalf of 10 families representing 10 men imprisoned in Saudi Arabia. Through its litigation, JPP documented the failures of the government in protecting Pakistanis overseas and established the duties of the government towards its citizens in a foreign country. As documented in the JPP report 'Through the Cracks: The Exploitation of Pakistani Migrant Workers in the Gulf Recruitment Regime', all 10 men were tricked and deceived by fraudulent actors. They went through all the stipulated, bureaucratic procedures but at no point was any official authority alert to their situation. In all of the cases in JPP's petition, there are overarching themes that demonstrate the harrowing consequences of the gaps in Pakistan's labour recruitment regime and in it's regulation of the provision of support post arrest. All the migrant worker prisoners mentioned in the report came from vulnerable backgrounds, had little to no education, were in troubling financial circumstances, and sought better employment opportunities to provide for their families. They were able to acquire travel credentials through legal, authorized channels. The frequency of these cases and the similarities of their experiences suggest an urgent need for an effective and viable system of checks and balances.

In an interview with Time magazine in April 2018, Crown Prince of Saudi Arabia Mohammed Bin Salman claimed that Saudi Arabia has 'tried to minimize' executions and that 'His Majesty, the King, doesn't wake up and just sign whatever he wants to sign.

He works by the law, by the book'.[604] In reality, the problem lies not just with the number of executions Saudi Arabia carries out every year, which increased in 2018, but also with Saudi laws and the way they are implemented.

JPP's investigation on migrant labour on death row in Saudi Arabia, laid out in detail in the report published by Human Rights Watch called 'Caught in a Web: Treatment of Pakistanis in the Saudi Criminal Justice system', found multiple instances of negligence and misconduct on the part of Saudi authorities. The accounts of prisoners and family members mentioned below come from the interviews JPP conducted for the report.

Justice Project Pakistan researchers interviewed 12 Pakistani citizens detained and put on trial in Saudi Arabia in recent years, as well as seven family members of nine other defendants. All interviews took place in Pakistan apart from two telephone interviews with Pakistani inmates in Saudi prisons. Researchers interviewed these individuals between November 2015 and September 2016. Interviews were conducted in Urdu and Punjabi. The criminal cases involved a total of 21 defendants in 19 separate cases that ranged from minor crimes such as petty theft and document forgery to serious offenses, including murder and drug smuggling, which are often capital offenses in Saudi Arabia.

Inability to Inform Others Following Arrest

Saudi Arabia's Law on Criminal Procedure grants that any detainee should be advised of the reasons of his detention and shall be entitled to communicate with any person of his choice to inform him of his arrest'.[605] In practice, however, Saudi authorities do not provide the means or opportunity for Pakistanis to inform others of their arrests in a timely manner. Multiple Pakistanis that JPP interviewed for its report said that Saudi officials held them for a week or longer following their arrest without allowing them to contact family members or seek consular services from the Pakistani embassy. Most said that they were only able to contact family members eventually by paying other detainees to use contraband phones smuggled into prisons and detention centers. This not only prevents prisoners from reaching out to their families, but also in finding the appropriate legal counsel.

604 'Crown Prince Mohammed bin Salman Talks to TIME About the Middle East, Saudi Arabia's Plans and President Trump', Time, April 5, 2018, http://time.com/5228006/mohammed-bin-salman-interview-transcript-full/ (accessed February 4, 2019).
605 Law of Criminal Procedure, Art 36. http://fac.ksu.edu.sa/salissa/blog/70885 (accessed February 5, 2019).

Abbas, who served an 11-month sentence in Jeddah's Buraiman Prison for holding a forged work permit, said he had no contact with his family members until seven days after his arrest. 'While I was in the CID [Criminal Investigation Department] detention center', he informed JPP, 'I had no means of contacting my family. When the officials shifted me to the central police station, I took a phone from another cellmate who had it in his possession illegally. I called my family from that phone and informed my brother about my arrest'.[606] Ejaz, who served a 10-month sentence in Jazan Central Prison for transporting drugs in his taxi, said that Saudi authorities arrested him in November 2014 at a checkpoint as he was transporting a Saudi man's luggage from Jeddah to the southern province of Jazan. He did not know that the luggage contained drugs. Following his arrest, he had to wait 20 days before he could inform his family members.[607]

> *I called my family 20 days after my arrest because I didn't know anyone who could lend me a phone to call my family or friends. I couldn't meet anyone from the Pakistani embassy either during this time, because they visit jail once in a month [sic]. Also, I didn't have money to pay for making phone calls from someone's phone during the first 20 days. After about 18- 20 days, I asked a fellow inmate to make a phone call to my family, who allowed me to call.*[608]

Rashid, a former detainee, informed us that following his drug-related arrest authorities did not allow him to contact his family members for 16 days. When he finally managed to contact his family, he said they were conducting his memorial service, assuming he had died.[609]

Detention Without Charge

Saudi authorities often hold detainees for long periods of time without bringing them before a Saudi judge. Article 117 of Saudi Arabia's criminal procedure law allows criminal justice authorities to hold detainees in detention for up to six months without

606 Justice Project Pakistan interview with Abbas, Faisalabad, January 12, 2016.
607 Justice Project Pakistan interview with Ejaz, Faisalabad, November 10, 2015.
608 Ibid.
609 Justice Project Pakistan interview with Rashid, Khushab, December 23, 2015.

seeing a judge, after which they must transfer their case to a competent court.[610] Detentions beyond six months without charge or trial or without an appearance before a judge are arbitrary and violate Saudi law.

The six-month detention period allowed by Saudi law represents a violation of international standards. Principle 11 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988 states that a detainee must be 'given an effective opportunity to be heard promptly by a judicial or other authority', and that a judicial or other authority should be empowered to review the decision to continue detention.[611] The Arab Charter on Human Rights (ACHR), which Saudi Arabia ratified in 2009, also guarantees the right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or other officer of the law, and to have a trial within a reasonable time or be released: 'Pre-trial detention shall in no case be the general rule'.[612]

Human Rights Watch and Justice Pakistan Project analysed a regularly updated online Saudi Interior Ministry database that purports to list cases of detainees in Saudi detention centers, without identifying them, and the status of their cases. The database, as it appeared on 30th August, 2017, showed 83 Pakistanis in Saudi detention.[613] Of the 83, 61 appeared to have remained in detention for periods longer than six months without having their cases referred to Saudi courts. Of these 61, 50 were 'under investigation', six had the case status 'under processing to move to bureau of investigation', and five had the status 'case at bureau of investigation'. In other words, the data shows that Saudi criminal justice officials appear to have held most detained Pakistani citizens for far longer than the six-month maximum period allowed without referring them to a Saudi court.

Multiple informants reported that they were held for extensive periods of time before their case was presented in court. One former detainee reported that authorities held him in Jeddah's Buraiman Prison for four-and-a-half months before bringing him before a judge in a case involving a fake work permit.[614] The father of another current

610 Law of Criminal Procedure, Art. 117

611 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted December 9, 1988, GA res. 43/173, annex, 43 UN GAOR Supp. (No. 49) at 298, UN Doc. A/43/49 (1988).

612 League of Arab States, Arab Charter for Human Rights, adopted May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force March 15, 2008, art 14.5.

613 'Published Inmate List,' Nafetha Tawassul, Saudi Ministry of Interior, https://www.nafethah.gov.sa/web/guest/inmate-list (accessed August 30, 2017).

614 Justice Project Pakistan interview with Abbas, January 12, 2016.

detainee said his son was detained for drug smuggling when he landed in Saudi Arabia, but authorities did not bring him to a court hearing until eight months later.[615] A third former detainee, whose 10-year sentence for drug distribution was commuted when King Salman issued a general amnesty in early 2015 after he became king, said that authorities held him for six months before bringing him to attend his first court hearing, and that his second hearing was one year and three months after the first.[616]

Prison Conditions

The conditions of prisons in Saudi Arabia are inhumane. Current and former Pakistani detainees in Saudi jails and prisons as well as family members of current detainees recounted poor prison conditions ranging from overcrowding, unsanitary conditions, and a lack of adequate healthcare. Ghulam described his experience in Jeddah's Buraiman Prison:

> *It was overcrowded and the conditions of the prison were deplorable. Often there was no availability of water for days and there was no proper sewerage system. The bathrooms were so unhygienic and filthy that we dreaded using them. There was no access to sunlight and prisoners developed different diseases, especially skin-related ones. Many prisoners had fallen into depression because of stress.*[617]

Ejaz claimed to have faced similar conditions in the detention facility in Jazan province where he served his sentence. While the facility had a capacity for 200-250 detainees, the actual number of detainees was closer to 500. Prisoners had to share a bed with other prisoners, taking turns sleeping. This forced some detainees to stay awake at night and sleep during the day.[618] Fahad also had to deal with the stress of an overcrowded prison: 'Prisoners slept on the floor and had no blankets. Many used to rip apart the mattress covers and used it as a blanket. The prison cell was almost four marlas [approximately 100 square meters] large and contained around 100 prisoners'. He too saw prisoners who were suffering from skin diseases because of poor hygiene.[619]

615 Justice Project Pakistan interview with father of Babar, Sargodha, July 20,2016.
616 Justice Project Pakistan interview with Naveed, Sargodha, December 6, 2015.
617 Justice Project Pakistan interview with Ghulam, Faisalabad, November 17, 2015.
618 Justice Project Pakistan interview with Ejaz, Faisalabad, November 10, 2015.
619 Justice Project Pakistan interview with Fahad, Gujranwala, November 12, 2015

Abbas described the small cell where the authorities held him for six days following his arrest for holding a fake work permit as 'very tiny, almost the size of a small bed with an attached bathroom which had no door. There was an air conditioner right in front of my cell, due to which I felt very cold, but the officers never turned it off. I did not have any blankets or bed and also, there was no water available in the cell. The officer on duty in the morning had a very pleasant personality and on request, he used to give me a small water bottle that I had to use for the whole day'.[620] Qatif Prison was not any different either, according to Kamran. He remarked that 'the room was very small with a dirty [toilet area] inside the room. They gave me one blanket and a pillow to sleep in that room. The room was so dirty that I couldn't sleep for more than four hours in three days. After three days, the prison police shaved my head and transferred me to the first floor of the jail.'[621]

Four of the 21 current and former detainees whose cases were documented in JPP's report recounted that they experienced torture or ill-treatment at the hands of Saudi authorities. Two former detainees and one current detainee said that authorities tortured them during interrogations in order to obtain confessions. The family member of another detainee said that her husband told her that authorities had beaten him with sticks after arresting him on drug smuggling charges. 'He had been detained for 16 days', recounts the family member, 'and during those days he was badly tortured. The Saudi police beat him with sticks'.[622] Ghulam was tortured as well. He remembers that:

> *The police officials asked me who I worked for, how long had it been, how many times have I smuggled drugs before and other such questions. During one of these interrogations they beat me with a belt and a wire too. This beating was not very severe but lasted for almost 30 minutes.*

The torture is not limited to sticks, belts and wire. At least one prisoner was electrocuted by the authorities, which exacerbated his already deteriorating mental condition.[623]

The living conditions that detainees were subjected to were considerably worsened by the lack of adequate medical care and the refusal of authorities to intervene when

620 Justice Project Pakistan interview with Abbas, Faisalabad, January 12, 2016.
621 Justice Project Pakistan interview with Kamran, Narowal, November 19, 2015.
622 Justice Project Pakistan interview with Salma, Karachi, September 5, 2016.
623 Justice Project Pakistan telephone interview with Murtaza, June 3, 2016.

necessary. Three said that when detainees did not receive any medical treatment, they developed skin problems. 'The jail authorities don't care if someone is sick', Abbas claimed, 'unless the person is close to dying…. I fell sick in jail one time and I was not given medicine by the authorities even though I told an official about my condition'. Ejaz, echoing a similar point, said, 'Prison officials take prisoners to the hospital only when they realize that someone is going to die'. Ghulam said that he saw an inmate die in Jeddah's Buraiman Prison following a fight because no one came to offer him medical assistance. 'A man of African origin', said Ghulam, 'once intervened in a fight between two cellmates and got badly injured. No one came to his aid and he died. Three to four hours after he died, his body was removed from the cell.'[624]

Kamran remembered that he fell ill for a week while in detention but prison officials did not give him any medicine. He finally received medicine from a fellow inmate.[625] Iqbal, the son of a current detainee said that his father, whom Saudi authorities detained over sleeping pills and painkillers he carried with him to Saudi Arabia to treat complications from a broken leg, did not receive medicine regularly from prison officials: '[My father] is having a hard time. His old age demands that he should have some sort of assistance, but no arrangements have been made. His cellmates take care of him'.[626] Pakistani detainees said they were at a disadvantage vis-à-vis Saudi prisoners and others regarding medical care, because they did not receive many visitors who could alert Saudi authorities to urgent medical conditions or bring medication to relatives in prison.

No Consular Assistance

In the cases reviewed by Justice Project Pakistan and Human Rights Watch, it did not appear that Saudi officials had complied with the obligation to promptly inform Pakistani consular officials about the arrests of the Pakistani citizens. Ultimately, it was the detainees and their family members that had to reach out to the Pakistani authorities. But even in cases where detainees and family members were able to find the relevant information and contact Pakistani officials, their pleas for assistance were met with silence.

JPP wrote to Pakistani Ministry of Foreign Affairs officials about all of the Pakistani detainees they learned about, but did not receive any response to their inquiries. Furthermore, JPP researchers found that the family members they interviewed generally

624 Justice Project Pakistan interview with Ghulam, November 17, 2015.
625Justice Project Pakistan interview with Kamran, November 19, 2015.
626 Justice Project Pakistan interview with Iqbal, Lahore, September 8, 2016.

did not know which government agency to contact when their relatives were arrested in Saudi Arabia. Most of the Pakistanis involved in criminal cases did not seek consular services from the Pakistani embassy in Riyadh or the consulate in Jeddah at any point during their detentions because they did not believe Pakistani officials would offer any assistance, and they did not want to waste limited money on such phone calls. According to them, Pakistani officials rarely, if ever, visited Saudi prisons, unlike representatives of other countries.

Four of the defendants who did contact Pakistani embassy officials said they did not provide any assistance other than deportation processing procedures following prison sentences. Only one of the defendants, who is currently serving a 20-year sentence for drug smuggling, said he met with a Pakistani consular official during his trial. Ejaz argued that he did not believe he could seek assistance from the embassy to file an appeal contesting his six-month sentence for transporting drugs in his car. He said, 'Who could I ask for help for the appeals process? Our embassy doesn't even come to see Pakistani citizens in jail, why would they help us in an appeals process? They just don't have time'.[627]

Convictions and Sentences Presented at First Hearing

Nearly all detainees and their family members said that Saudi courts do not give detainees any meaningful opportunity to argue their side of the case before Saudi courts. For all non-serious cases, detainees said that judges did not attempt to establish the facts of a case with input or feedback from Pakistani defendants. Rather, the judge had prepared their convictions and sentences in advance when they attended their first hearing. They said that judges gave detainees an opportunity to contest the rulings by submitting an Arabic-language written defense often written by hand in prison without legal assistance. In none of the cases did these defense arguments alter the rulings, which were presented again and again before defendants as they attended hearings, no matter what evidence the defendant tried to present. In all cases, detainees either immediately or eventually accepted their sentences, fearing that continuing to contest the rulings would result in indefinite detention.

627 Justice Project Pakistan interview with Ejaz, November 10, 2015.

One former detainee who served a one-year sentence for attempting to leave Saudi Arabia with a forged passport, and arrived in Pakistan in September 2015 following his deportation, described his experience at his first hearing:

> *The judge asked me to sign a confession letter which was in Arabic. I was given eight months of imprisonment. I was working in [Saudi Arabia] for about three-and-a-half years so I could understand Arabic thus I did not ask for a translator. The judge did not tell me anything apart from my crime. Judges do not usually talk to anyone except for prisoners involved in very serious crimes. He did not talk to me…. I just silently accepted what was written in the letter because I wanted to get over the whole thing quickly. I had seen in the prison that prisoners who refused to sign the letter stay in the jail for a longer time. The judge keeps sending them back to jail every time they refuse; thus, this prolongs their stay in prison. I did not want that to happen with me. Apart from the judge, two other men were present in the room. One was the reader and one was writing something…*[628]

Ghulam also eventually accepted his six-month sentence for transporting drugs in his taxi after the judge presented the same option again and again over four separate court hearings:

> *I was asked to sign a confession letter, which stated that I was transporting the drugs, and I was guilty as the drugs were mine. This letter was presented to me on my first day of trial.... I refused to sign it by stating that I had nothing to do with the drugs and they were not mine so I was not guilty. [Over] two more hearings the judge asked me to sign the confession letter again. I eventually gave in [during] my fourth hearing and signed the confession letter…. I had already received a sentence of six months imprisonment and four months had passed by that time. I thought there is no harm in signing it now as only a little time of my sentence was left.*[629]

Kamran claimed that he accepted his 10-day sentence for fighting and drinking alcohol during his first hearing because he feared contesting the ruling would only

628 Justice Project Pakistan interview with Fahad, Gujranwala, November 12, 2015.
629 Justice Project Pakistan interview with Ghulam, Faisalabad, November 17, 2015.

prolong his detention. He said, 'I had seen in the prison that prisoners who refused to sign the [document] stay in jail for a longer time, so I signed it at that time. The judge keeps sending them back to jail every time they refuse thus this prolongs their stay in prison. I did not want that to happen with me'.[630]

Naveed said that other prisoners instructed him to accept his sentence as soon as possible: 'On reaching the jail the other prisoners told me to confess, as my case was not a big offense. Otherwise, they would keep doing this to me and would not give me a proper sentence. Therefore, it was better to get a sentence as soon as possible'.[631]

Lack of Adequate Translation Services

It can be difficult for many Pakistani prisoners to navigate Saudi prisons and courts because of a difference in language as well as a lack of proper translation services available to them. Former Pakistani detainees and family members of current detainees said that translation services provided by Saudi courts were poor, and, in some cases, translators intentionally misrepresented what defendants said, sometimes admitting to an offense on behalf of a defendant or apologizing and asking for mercy.

According to Amir, who served a one-year sentence for allegedly stealing scrap metal, the translator misrepresented his side of the story, telling the judge that he admitted to the crime. He said, 'the translator played the main role … he told the judge that we had accepted our crime and as a result of that the court is giving us a one-year sentence'. [632] Younus, who eventually obtained a lawyer, also complained about misleading translation during the early stages of his trial. Younus said, 'I realized that the translator gave an incorrect statement before the court that I did not say. The translator was stating before the court that the accused told him that he brought these drugs from Pakistan and he is sorry for his act. At this, I directly addressed the judge in Arabic and told him that the translator was giving a false statement. I also told the judge that I didn't trust that translator. At this, judge sent me back to jail'. Hafiz claimed that his wife is serving a 20-year sentence for drug smuggling after she signed an Arabic-language court ruling she could not read. He said the translator urged his wife to sign it without revealing that it contained a 20-year sentence, saying only that it contained the story she told the judge. She later found out about her sentence from a prison guard.[633]

630 Justice Project Pakistan interview with Kamran, Narowal, November 19, 2015.
631 Justice Project Pakistan interview with Naveed, December 6, 2015.
632 Justice Project Pakistan interview with Amir, Sargodha, April 8, 2016.
633 Justice Project Pakistan interview with Hafiz, September 16, 2016.

No Legal Assistance

Under Saudi Arabia's Law on Criminal Procedure, a defendant has the 'right to seek the assistance of a lawyer or a representative to defend him during the investigation and trial stages'.[634] In addition, the ACHR, which Saudi Arabia ratified in 2009, guarantees the right to free lawyers and interpreters.[635] However, in only one of the 19 criminal cases documented by Justice Project Pakistan and Human Rights Watch did the defendant have access to a defense lawyer during part of his criminal case. Saudi Arabia does not have a public defender service nor any state support to lawyers who assist those who cannot afford private lawyers. Not only do vulnerable Pakistanis have to contend with being imprisoned in a foreign country, but they also have to reckon with a criminal justice system as complex and unfair as that of Saudi Arabia almost entirely on their own.

In most cases interviewees said that it was difficult to obtain legal representation because, unlike Saudi detainees, they had no access to individuals on the outside who could facilitate contact with a lawyer. In addition, most lacked financial resources. Even individuals facing the death penalty for drug-related offenses did not have legal representation or someone to assist them during the legal process. Likewise, Pakistani defendants without lawyers almost never had access to trial documents or court records. Abbas said that he was not provided with any defense lawyer: 'There is no arrangement for defense lawyers. The legal personnel submit your story and the police records to the judge who reads it and then decides your case and sentences you accordingly'.[636]

The lack of legal assistance sometimes caused defendants to sign confessions or agree to verdicts which they did not read or review carefully and sometimes directly harmed their interests. For example, Kamran accepted a verdict and sentence of 10 days and 80 lashes without knowing that it also contained a deportation order. Wishing to return to work as soon as possible Kamran agreed not to contest the sentence, only to find out later that he agreed to his own deportation:

> *Judges do not usually talk to anyone except for prisoners involved in very serious crimes. He did not talk to me much. After that [he] asked me to sign the confession letter in such a hurry that I did not get a chance to read it. I just silently*

634 Law of Criminal Procedure, Art. 4. http://fac.ksu.edu.sa/salissa/blog/70885 (accessed February 4, 2019).
635 Arab Charter for Human Rights, art 16.4.
636 Justice Project Pakistan interview with Abbas, January 12, 2016

> *accepted what was written in the letter because I wanted to get over the whole thing quickly. I was thinking that I am given just 10 days of imprisonment and after that I would be released. But when I reached Qatif police station, a policeman who gave me his phone to call my cousin told me that the judge gave deportation orders for me. I was very upset after that. I asked the head of Qatif police station that I want to appear before the judge once more to tell him that I didn't deserve such a harsh sentence. But the head of police station said that he could not take me.*

Hafiz, mentioned earlier, said that his wife and his sister were accosted by two other women at the airport in Pakistan before flying to Saudi Arabia to perform *Umrah* (religious pilgrimage).[637] The two women said that they were poor and wanted to send medicine to relatives in Saudi Arabia but couldn't afford to send it. They asked Hafiz's wife and sister to carry it instead, to which they agreed. Saudi authorities detained them at Jeddah's King Abdulaziz International Airport, shortly after their arrival during the summer of 2015, for carrying drugs. 'When they reached Jeddah airport,' Hafiz recounts, 'the Saudi police [who] checked their luggage told them that those tablets were not for medication but they were drugs. The police … asked the women police to take the two women to the police station'.[638] Hafiz said that after the women narrated the true story, the police detained them. His wife eventually received a 20-year sentence while his sister received a seven-year sentence.

Rashid, a former Pakistani detainee who served three years of a five-year sentence for transporting drugs in his taxi said that he signed a confession and agreed to his sentence after his Saudi work sponsor pressured him to do so.[639] He said:

637 Justice Project Pakistan interview with Hafiz, Karachi, September 16, 2016.

638 Justice Project Pakistan interview with Hafiz, September 16, 2016.

639 Saudi Arabia's restrictive kafala (sponsorship) system, which ties migrant workers' employment visas to their employers, or sponsors, also fuels exploitation and abuse. Under this system, an employer or sponsor assumes responsibility for a hired migrant worker and must grant explicit permission before the worker can enter Saudi Arabia, transfer employment, or leave the country. The kafala system gives the employer immense control over the worker. Human Rights Watch documented numerous cases where workers were unable to escape from abusive conditions or even to return home upon completion of their contracts because their employer denied them permission to leave the country. See Human Rights Watch, 'As If I Am Not Human': Abuses against Asian Domestic Workers in Saudi Arabia, July 2008, https://www.hrw.org/reports/2008/saudiarabia0708/index.htm.

> *I was presented before the judge and he sentenced me to five years of imprisonment. The officials asked me to sign a paper but I refused to do so. Later on, my [Saudi] sponsor came and he asked me to sign the papers because he knew that [the court process] was going to make me spend this much time imprisoned anyway. I do not know whether it was a confession letter or anything else because I was given no time to read it. As I stated, everything happened in such a hurry that I do not know what was written on the paper. I learned about my confession [later] when the judge told me about it.*[640]

Out of all the Pakistani defendants, only one, Younus, managed to obtain a lawyer, who assisted him in reducing a death sentence for drug smuggling to 15 years: 'Fortunately, two of my friends, one from Saudi Arabia and another from Syria, hired a lawyer for me for 50 thousand Saudi riyals [(US$13,332)]. He fought my case in court and fortunately, on a third hearing sentence, [the sentence] was commuted to 15 years with a 50 thousand riyal [($13,332)] fine and 1,500 lashes'.[641]

As Younus' case demonstrates, a lack of legal representation likely led to harsher outcomes for Pakistanis in the Saudi criminal justice system. Without lawyers, detainees had limited ability to understand court procedures or obtain court documents, and in many cases signed confessions or agreed to sentences that directly harmed their interests.

Drug Executions in Saudi Arabia

Rampant due process violations in the Saudi criminal justice system carried the gravest consequences for individuals facing drug charges, especially for cases in which Saudi authorities accuse individuals of crossing an international land border with drugs or attempting to bring drugs in through an international airport. In contravention of international human rights standards, which only allow for capital punishment for the 'most serious crimes', Saudi Arabia regularly executes individuals for nonviolent drug crimes. Since the beginning of 2014, Saudi authorities have executed 163 individuals for drug crimes, including 61 Pakistanis.[642]

As mentioned before, Saudi authorities execute more Pakistani citizens annually than any other foreign nationality, most for heroin smuggling. Drug smuggling

640Justice Project Pakistan interview with Rashid, December 23, 2015.
641Justice Project Pakistan interview with Younus, Khushab, May 8, 2016.
642 Records of Saudi Press Agency Execution Announcements on file with Human Rights Watch.

executions are tied to a 1987 decision by the Saudi Arabia's Council of Senior Religious Scholars prescribing the death penalty for any 'drug smuggler' who brings drugs into the country.[643] The ruling states, 'Regarding the smuggler of drugs, his punishment is death, for the smuggling of drugs and bringing them into the country causes great corruption not limited to the smuggler himself as well as serious damage and great danger to the nation as a whole'.[644] The 2005 NDPS Actprescribes the death penalty for drug smuggling, but allows for mitigated sentences in limited circumstances.[645] Saudi landing cards state in bold letters 'Warning: Death for Drug Traffickers'.[646]

643 Council of Senior Scholars Decision 138, 1987, http://www.alifta.net/Fatawa/fatawaChapters.aspx?View=Page&PageID=3101&PageNo=1&BookID=2 (accessed August 30, 2017).
644 Ibid.
645 Royal Decree M/39, Law on Combating Narcotic Drugs and Psychotropic Substances, August 2005. https://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=31&VersionID=39 (accessed February 5, 2019).
646 Copy of Saudi landing card on file with Human Rights Watch.

Treatment of those alleged to be carrying drugs at borders contrasts sharply with those caught possessing or transporting drugs internally. Of the 13 drug-related cases involving Pakistani detainees, those caught transporting drugs inside the country received sentences of between six months to ten years, while those caught bringing drugs from outside the country received the death penalty or sentences of four years or more. For example, Iqbal's father, who was arrested for drug smuggling at Jeddah's King Abdulaziz International Airport in 2016 because he carried painkillers and sleeping pills with him, eventually received a sentence for four years in prison.[647]

According to the United Nations Office on Drugs and Crime country profile for Pakistan, 'prominent transnational criminal industries operating from, in and through Pakistan include drug trafficking, precursor trafficking, arms smuggling, human trafficking and migrant smuggling. Despite efforts to curb criminal activity, increasingly high volumes of trade and traffic, coupled with potential corruption, facilitate the movement of contraband and allow exploitation by criminal groups'.[648] Among the 19 criminal cases involving 21 Pakistani individuals documented for this report by JPP and HRW, 13 were drug-related cases involving 15 individuals. Authorities charged 11 of these individuals with bringing in drugs at an international airport. Of the 11, Saudi courts handed three men death sentences, four individuals had prison sentences ranging between 15 and 20 years, one had a prison sentence of four years, and three remained on trial.

According to family members, four of the 11 were forced under threat of violence by drug traffickers in Pakistan to serve as drug mules. They stated that courts were not interested in the circumstances under which individuals brought drugs into the country and did not attempt to investigate or appear to consider trafficking claims during sentencing as exculpatory evidence.[649] In several cases, detainees and family members

647 Justice Project Pakistan interview with Iqbal, Lahore, September 8, 2016.
648 'Country Profile: Pakistan,' United Nations Office on Drugs and Crime, 2017, https://www.unodc.org/pakistan/en/country-profile.html (accessed August 30, 2017).
649 Justice Project Pakistan interview with Babar, Sargodha, June 17, 2016; Justice Project Pakistan telephone interview with Latif, December 24, 2015; Justice Project Pakistan interview with Aisha, Faisalabad, July 13, 2015; Justice Project Pakistan interview with Amal, Karachi, May 14, 2o16; Justice Project Pakistan telephone interview with Murtaza, June 3, 2016; Justice Project Pakistan interview with Iqbal, September 8, 2016; Justice Project Pakistan interview with Salma, Karachi, September 5, 2016; Justice Project Pakistan interview with Ismail, Gujranwala, September 6, 2016; Justice Project Pakistan interview with Hafiz, Karachi, September 16, 2016.

alleged that men involved in the recruiting firms that sent Pakistanis to Saudi Arabia forced them to traffic drugs to Saudi Arabia.[650]

A Pakistani who was arrested on a heroin smuggling conviction in February 2011, told JPP on a telephone call from Dammam Prison in December 2015 that prior to his departure to Saudi Arabia, a group of men affiliated with the agency through which he had obtained his visa entered his Karachi hotel room and forced him to swallow heroin capsules, beating him with guns and threatening to kill him and his family if he did not comply. He said he was too fearful to report this to Pakistani authorities before he left: 'I got the feeling [the drug traffickers] might have someone working for them at the airport, too. I was scared that if I informed any authorities about what I was being made to do, the people would harm me or my family'. Saudi authorities apprehended him in February 2011 when he landed at Dammam's King Fahd International Airport. He said that a court convicted him after four court hearings, and he did not dispute a 15-year sentence handed down by a Saudi judge because it was better than the death penalty. Later, however, officials informed him that an appeals court had increased his sentence to the death penalty.[651] Saudi authorities executed him on October 18, 2017.

Another current detainee serving a 20-year sentence for drug smuggling, Murtaza, recounted his experience by phone from prison: I just remember that when I was sent to [Saudi Arabia] by [an agent who] had injected me with something and I was not in my right mind. When I reached Dammam airport, I don't know but somehow I ended up in the wrong line and staff asked me who I was and why I was standing there. They realized that I was not cognizant and took me to scanning room, where they found [the drugs] in my stomach. They kept asking me about that object inside me and I had no answer. I was shut in a small room for 10 days and I didn't know when they took that object out of me'.[652] Murtaza said that Saudi authorities did not attempt to investigate his claim that he smuggled drugs involuntarily.

Babar, the father of another Pakistani detainee currently on death row for drug smuggling, said that his son spoke to him by phone from Riyadh's Malaz Prison, telling him that men affiliated with the agency that obtained a visa for him to enter Saudi Arabia held him at a hotel in Karachi prior to his trip and forced him to swallow drug capsules.

650 'Families mourn drug mules beheaded in Saudi Arabia,' AFP, December 4, 2014, https://www.dawn.com/news/1148749 (accessed August 30, 2017).
651 Justice Project Pakistan telephone interview with Latif, December 24, 2015.
652 Justice Project Pakistan telephone interview with Murtaza, June 3, 2016.

He said the men kept him under observation the entire flight. Saudi authorities detained his son immediately upon landing and sentenced him to death within two months.[653]

Remaining in Jail Following Expiry of Sentence

Human Rights Watch has previously documented cases in which Saudi authorities did not release prisoners who had completed their sentences, leaving them in prison for additional months and years. Often these extended arbitrary detentions were the product of bureaucratic mistakes.[654] Four of the Pakistani former detainees interviewed said that Saudi authorities held them in detention for periods longer than their sentences. Ghulam recounted that he remained in prison for 14 months even though he was serving a six-month sentence:

> *I was sentenced to six months of imprisonment but I had to spend 14 months in prison. I was unaware of what was going on and had no idea when I would be released. Prison officials are very negligent and often do not regularly review the files of the prisoners so they don't always find out on time that a prisoner's punishment has ended. A prisoner may be subjected to delay in his release because of this. I remember the jail authorities once misplaced the file of a prisoner and by the time they discovered the file the prisoner had spent an extra six months in jail. Only after that did they inform the embassy to deport him. After fourteen months, the authorities shifted me to Jeddah's Buraiman Prison, where I stayed three to four days before being deported to Karachi.*[655]

Amir also said that Saudi authorities held him several months over his one-year sentence for scrap metal theft. 'Many people are stuck in jail even after they have served their sentences', Amir said. 'We were lucky that we got released from the jail in the end, after spending a few months more than a year.'[656]

653 Justice Project Pakistan interview with Babar, June 17, 2016.
654 Human Rights Watch, Precarious Justice: Arbitrary Detention and Unfair Trials in the Deficient Criminal Justice System of Saudi Arabia, March 2008, https://www.hrw.org/reports/2008/saudijustice0308/.
655 Justice Project Pakistan interview with Ghulam, November 17, 2015.
656 Justice Project Pakistan interview with Amir, April 8, 2016.

Recommendations

The following recommendations to the governments of Saudi Arabia and Pakistan are based on the research by JPP and HRW. If they are implemented by their respective governments, we can ensure that migrants that travel to Saudi Arabia from Pakistan in search for a better life for themselves and their families, sometimes under duress, are protected in their most vulnerable moments.

To the Government of Saudi Arabia

- Adopt a written penal code in compliance with international standards.
- Enact new and amend existing legislation to reinforce protections against arbitrary arrest, due process, and fair trial violations.
- Instruct prosecutors and judges to dismiss cases or overturn verdicts where serious due process and fair trial violations have occurred.
- Set up a program affording all indigent access to a lawyer.
- Outlaw the death penalty and all forms of corporal punishment in all circumstances, starting with non-serious crimes such as nonviolent drug smuggling.
- Actively investigate claims of coerced drug trafficking and other exploitation.
- Notify the Pakistani Embassy immediately when a Pakistani citizen is arrested or detained pending trial.
- Grant Pakistani officials access to Pakistani citizens in detention.
- Allow adequate time for detainees to prepare their defense, including granting adequate time to Pakistanis accused of drug trafficking to gather evidence from Pakistan indicating that they were coerced.
- Improve Arabic translation services available to Pakistani detainees and ensure that they are communicating the defendants' words and intentions accurately.

- Consider negotiating a prisoner transfer agreement with Pakistan in light of the high number of Pakistani citizens in Saudi detention.
- Allow for the dead bodies of those executed to be returned home for burial.
- Implement clear and transparent rules governing royal pardons, including an application system available to all detainees without prejudice.

To the Government of Pakistan

- Provide adequate consular services for Pakistani detainees in Saudi Arabia.
- Help ensure that Pakistani detainees in Saudi Arabia have access to legal representation.
- Investigate and prosecute all agencies and individuals involved in forcing Pakistanis traveling to Saudi Arabia as drug mules.
- Educate Pakistani migrant workers about the flaws in Saudi Arabia's criminal justice system prior to their departure.

MERCY PETITIONS

Introduction

The President of Pakistan has implemented a blanket policy of refusing to grant clemency to prisoners and has made it effectively impossible for prisoners on death row to obtain pardons or commutations of death sentences. Although the President possesses the constitutional authority to pardon death row defendants by accepting mercy petitions under Article 45 of the Constitution, in practice, such petitions are always denied. As highlighted in this report, the President has consistently rejected mercy petitions submitted by prisoners who have persuasive cases for relief.

In accordance with the Pakistan Prison Rules, mercy petitions are filed after all judicial appeals have been exhausted by the prisoner.[657] The Rules require prison authorities to submit a mercy petition on behalf of any prisoner unrepresented by legal counsel.[658] In order to comply with this rule, jail authorities submit a brief pro forma 'petition' which contains no real information about the individual prisoners and their personal circumstances. As JPP documented in a prior report, 'most mercy petitions contain just three perfunctory lines: 'The prisoner's Supreme Court decision has come through. He has been sentenced to death. Please consider his case for mercy'.[659] These petitions rarely mention age, disability status, medical conditions, length of time on death row, behavior while incarcerated, or any other mitigating circumstances that would justify a lesser sentence. Often, when a prisoner has a compelling jail medical record, which might give grounds for mercy to be granted, these records are not included. Overwhelmingly, these jail mercy petitions are simply dismissed out of hand.

657 Pakistan Prison Rules, Rule 104 (1978).
658 *Id*. Rule 104(I).
659 Justice Project Pakistan and Allard K. Lowenstein International Human Rights Clinic, *A Most Serious Crime: Pakistan's Unlawful Use of the Death Penalty* (September 2016), p. 23, https://law.yale.edu/system/files/area/center/schell/2016_09_23_pub_dp_report.pdf. [A Most Serious Crime].

In many cases, prisoners wait years between the dismissal of their appeals , the submission of their jail mercy petition, and their actual execution. In the intervening years, circumstances may arise which might give good grounds for clemency: the prisoner might develop a serious illness, they might establish their good character through contributions to society while in prison, or they might even have simply already served the equivalent to a life sentence. There is an obligation on the Government to give due consideration to the request and to make a reasonable and fair decision on whether or not to grant mercy in the case. At present however, these rudimentary standards of fairness are not accepted in Pakistan and even where prisoners have attempted to raise such circumstances in requests for mercy, they have been ignored.

According to the Ministry of Interior, the President's office rejected 513 mercy petitions of condemned prisoners from 2012 to 2016,[660] 444 of which were in the fifteen months after the resumption of executions in December 2014.[661] The Interior Ministry also informally confirmed that the Government of Pakistan has a policy in place to summarily reject all pleas of mercy.[662]

In previous reports, JPP has highlighted the systemic violations in Pakistan's practice of capital punishment and has compelled the Government of Pakistan to reinstate the moratorium on all executions and suspend all capital sentencing.[663] This chapter documents the ways in which Pakistan's clemency process is in breach of both domestic and international law. As the cases examined in this report illustrate, the systemic problems described above fall most heavily on Pakistan's most vulnerable members—the poor, juveniles, and persons with physical and mental disabilities.

The death penalty is an irreversible punishment. Given the many procedural failings in Pakistan's criminal justice system, it is imperative that individuals on death row be provided with a fair opportunity to seek pardon or commutation, and to introduce new and potentially exculpatory evidence.

660 Raza Khan, President turned down 513 mercy petitions over the last five years: Interior Ministry, Dawn (15 April 2016), https://www.dawn.com/news/1252257.
661 Hasnaat Malik, *Over 350 death row prisoners hanged since Dec 2014, govt informs SC*, Express Tribune (22 March 2016), https://tribune.com.pk/story/1070486/over-350-death-row-prisoners-hanged-since-dec-2014-govt-informs-sc/.
662 Syed Irfan Raza, *President rejects mercy appeal of 17 death penalty* convicts, Dawn (18 December 2014), http://www.dawn.com/news/1151758/president-briefed-on-decision-to-end-moratorium
663 A Most Serious Crime, *supra* note 7.

Legal Standards

Domestic Law

Article 45 of the Constitution of Pakistan grants the President of Pakistan the authority to pardon death row defendants by accepting mercy petitions.[664] Under Pakistan's Penal Code and Criminal Procedure Code, the President or a Provincial Government may commute a sentence of death.[665] Therefore, the President seemingly has unqualified influence on granting mercy to those suffering on death row.

Despite the clarity of the Constitution, rulings by the Federal Shari'at Court (FSC), which was created to evaluate the conformity of Pakistani laws with shari'a, and the Supreme Court may have undermined the ability of death row prisoners to seek pardon and commutation by the President. In a 1992 judgment, the Supreme Court held that the President had no power to commute death sentences resulting from *hudud* or *qisas*[666] offenses, although the President retains the power to commute sentences given as *ta'zir*[667] punishments.[668] However, in 2006, the full bench of the Supreme Court held that the President's power to grant clemency is unrestrained:

> *Under article 45 of the Constitution, the President enjoys unfettered powers to grant remissions in respect of offences and no clog stipulated in a piece of subordinate legislation can abridge this power of the President. The Exercise of discretion by the President under art. 45 of the Constitution is to meet at the highest level the requirements of justice and clemency, to afford relief against undue harshness, or serious mistake or miscarriage of the Judicial Process, apart*

664 Pakistan Constitution, art. 45 ("The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority").
665 Pakistan Penal Code § 54; Pakistan Code of Criminal Procedure § 402.
666 Under Islamic criminal law, *qisas* (retribution) provides the victim or the legal heir(s) the right to inflict comparable injuries to the perpetrator as he inflicted on the victim, including causing his death in the case of murder.
667 *Ta'zir* refers to offenses for which the Quran does not specify a fixed punishment, unlike for *hudud* crimes. As such, *ta'zir* punishments are sometimes referred to as "discretionary" punishments because they are decided by judges rather than being predetermined by the Quran. *Hudud* punishments are also subject to more stringent evidentiary requirements than *ta'zir* punishments.
668 *Hakim Khan v. Government of Pakistan*, PLD 1992 SC 595.

> *from specific cases where relief is by way of grace alone - where relief or clemency is for the honour of the State.*[669]

Notwithstanding the Supreme Court's ruling, in certain cases, the President's constitutional power may be limited. The FSC ruled that the legal heirs of a murder victim are the sole persons entitled to grant mercy to the culprit.[670] It is unclear what effect this specific ruling has had and neither the Government nor the courts have clarified whether the President's power to pardon is limited for murder offenses. Pakistan's Penal Code adds to the ambiguity by stating that a prisoner sentenced to death for an offence of *qatl* or murder shall not have his sentence commuted without the consent of the heirs of the victim.[671] Furthermore, a Punjab Home Department official stated in 2006, '[a]ccording to the law, a death penalty can only be pardoned by relatives of victims.'[672] Suffice it to say, there is some confusion among judges and officials regarding the President's power to grant mercy under domestic law.

Yet, even in some cases where the heirs of the victim have consented to granting mercy, the President may not exercise his constitutional power and deny mercy to the prisoner. The Anti-Terrorism Act (ATA) explicitly bars commutations or pardons for individuals convicted of terrorism related crimes: '[N]o remission in any sentence shall be allowed to a person who is convicted and sentenced for any offence [under the Act].'[673] As a result, many death row prisoners are denied the post-conviction rights to which they are entitled under the Constitution of Pakistan.

While the ATA excludes the possibility of relief by commutation or pardon, Pakistan has, at least theoretically, mandated the commutation of sentences for all juvenile offenders on death row. The Juvenile Justice System Ordinance (JJSO) was enacted in 2000, prohibiting the sentencing and the application of the death penalty to juvenile offenders.[674] In 2001, the President of Pakistan issued a notification under his Article 45 power to pardon, granting special remission to juveniles sentenced to death

669 *Abdul Malik vs. The State & others*, PLD 2006 SC 365.
670 Human Rights Commission of Pakistan, *Slow March to the Gallows: Death Penalty in Pakistan* (January 2007), https://www.fidh.org/IMG/pdf/Pakistan464angconjointpdm.pdf. [FIDH Slow March].
671 Pakistan Penal Code, § 54.
672 FIDH Slow March, *supra* note 18, p. 32.
673 Anti-Terrorism Act of 1997 (XXVI of 1997) § 21(F).
674 A Most Serious Crime, *supra* note 7, p. 23. In 2018, the JJSO was repealed and replaced by Juvenile Justice System Act (JJSA). The law prohibits executions of juveniles and makes provisions regarding separate courts, trials, and detention centres from judges and lawyers.

prior to the passage of the JJSO.[675] Accordingly, the death sentences of all juveniles would be commuted to life sentences upon a positive determination of juvenility.

In the decision in *Ziaullah v Najeebullah*, the Supreme Court held that the benefit of the Notification would apply on the 'basis of determination by a trial court' under the provisions of the JJSO.[676] The Government of Punjab issued a letter to the registrar of the Lahore High Court on August 2003, which stated that the benefit of the President's notification should 'apply automatically' to all death row defendants who were juveniles at the time of the commission of a *ta'zir* offence, regardless of whether a mercy petition had been submitted.[677] However, since the lifting of the moratorium on death penalty in 2014, the President has not granted a single pardon to juveniles covered by the Notification.

The Government of Pakistan is currently looking to reform the process of reviewing mercy petitions by reforming the format and implementing an open-committee structure to review them. A committee structure benefits from more actors being involved in the clemency process and resists 'capture' of the clemency mechanism by law enforcement or prosecutorial interests. Although they vary widely in practice, open-committees may help provide consistency and institutional memory in the exercise of the mercy power and, compared to a bureaucracy, may be resistant to political influence.[678]

International Law

Under international law, any person sentenced to death has the right to seek a pardon or to seek the commutation of a death sentence to a less draconian one. Article 6(4) of the International Covenant on Civil and Political Rights (ICCPR) states, 'Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases'.[679]

675 President of the Islamic Republic of Pakistan, Grant of Special Remission Under Article 45 to Juvenile Condemned Prisoners, (13 December 2001); *Id*.
676 *Ziaullah v Najeebullah*, PLD 2003 SC 656.
677 Government of the Punjab Home Department, Grant of Special Remission Under Article 45 of the Constitution to Juvenile Condemned Prisoners, (Aug. 18, 2003).
678 Andrew Novak, Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States, 49 U. Mich. J. L. Reform 817 (2016).
679 The International Covenant on Civil and Political Rights [ICCPR], Art. 6 § 4.

Pakistan has ratified the ICCPR, and in doing so, has an obligation to adopt all articles and ensure that they are not violated.[680]

According to the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, the right to a pardon suggests 'no entitlement to receive a positive response, but it does imply the existence of a meaningful procedure through which to make such an application'.[681] This implication is paramount because it forbids countries from making this procedure a mere formality, as it is in Pakistan. This is also echoed in the UN Safeguards guaranteeing protection of the rights of those facing the death penalty approved by Economic and Social Council.[682] As the UN Human Rights Committee observed in *Thompson v. St Vincent and the Grenadines* (806/1998), the failure to consider mercy petitions in good faith amounts to a violation of Article 6(4) ICCPR.

According to other international jurisprudence, the clemency process must 'guarantee condemned prisoners with an effective or adequate opportunity to participate in the mercy process'.[683] The procedural guarantees implicit in Article 6(4) 'include the right of the condemned person to affirmatively request pardon or commutation; to make representations in support of this request referring to whatever considerations which might appear relevant to him or her; to be informed in advance of when that request will be considered; and to be informed promptly of whatever decision is reached'.[684]

In an attempt to remedy any procedural violations, the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions suggested that states are responsible to provide the condemned person with basic information concerning the process of

680 The Second Optional Protocol of the ICCPR, adopted by the UN in 1989, commits its members to the abolition of the death penalty within their borders. Despite pressure from the international community, Pakistan has yet to accede to the Optional Protocol and join the 85 other signatories. *See* Centre for Civil and Political Rights, *Pakistan: Counter-terrorism measures, including use of torture and re-introduction of death penalty in violation of ICCPR*,
http://ccprcentre.org/ccprpages/pakistan-counter-terrorism-measures-including-use-of-torture-and-re-introduction-of-death-penalty-in-violation-of-iccpr.

681 Philip Alston, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, U.N. Doc. A/HRC/8/3, § 60 (May 2008). [Report of the Special Rapporteur].

682 U.N. Office of the High Commissioner for Human Rights, *Safeguards guaranteeing protection of the rights of those facing the death penalty*, Economic and Social Council resolution 1984/50 (May 1984), § 7. [ECOSOC Resolution].

683 *Baptiste v. Grenada,* Case 11.743, Inter-Am. C.H.R., Report No. 38/00 (April 2000), § 120, http://cidh.org/annualrep/99eng/Merits/Grenada11.743a.htm.

684 Report of the Special Rapporteur, *supra* note 28, § 67.

clemency; information such as the date of consideration of the clemency plea and notice of the decision reached in order to protect the integrity of the process.[685] The Special Rapporteur emphasized the importance that individuals have the opportunity to relay any information that might appear relevant to him or her to the body reviewing their plea as to ensure all relevant information is heard.[686]

Pakistan is clearly in breach of these obligations. In July 2017, the UN Human Rights Committee considered Pakistan's compliance with the ICCPR. During the review, Pakistan's delegation was unable to name a single instance where mercy had been granted by the President to a death row prisoner since the moratorium was lifted in 2014. Regarding the use of the death penalty, the Committee noted in their concluding observations that they were 'particularly concerned that. . . a policy of blanket refusal of clemency applications is allegedly in place and no clemency applications have been granted'.[687]

Comparative Law

India

India's laws related to presidential pardons vest power in the nation's president as well as the governors of states. The Head of State has the power to 'grant pardon or commute the sentence…in all cases where the sentence is a sentence of death', according to Article 72 of India's Constitution.[688] Article 161 of the Constitution expands upon these powers by also giving Indian state governors the power to pardon.[689]

The Constitution also provides a mechanism to limit the president's power. Although Article 72 gives the president unfettered powers of pardon, the President's exercise of that power under the Indian Constitution is subject to Article 74, which requires the President to act with the aid and advice of the Council of Ministers while exercising his functions.[690]

685 *Id*. § 65.
686 *Id*. § 66.
687 Human Rights Committee, *Concluding observations on the initial report of Pakistan*, U.N. Doc. CCPR/C/PAK/CO/1 (August 2017), § 17.
688 Constitution of India, art. 72.
689 *Id*. art. 161.
690 Constitution of India, art. 74.

Most importantly, Indian courts play a crucial role in presidential pardons. Although the President's power is derived from the Constitution and is independent from the judiciary, the Supreme Court of India has held that exercise or non-exercise of the pardoning power by the President or Governor is subject to judicial review in certain circumstances, including when exercised arbitrarily or based on considerations of religion, caste, color, or political loyalty.[691]

In addition to the role of judicial review, the courts have intervened when mercy petitions have been delayed due to bureaucratic inefficiencies. Over time, a number of landmark cases have served to add some semblance of efficiency to India's mercy petition process. In *Madhu Mehta v. Union of India*, the Supreme Court noted that 'speedy trial is part of one's fundamental right to life and liberty'.[692] The case focused on executive delays in processing mercy petitions. The prisoner had been awaiting a decision for eight years, leading to deterioration of his mental health. The Supreme Court eventually commuted his death penalty due to the exorbitant delay.

Furthermore, the 2014 Supreme Court decision in *Shatrughan Chauhan v. Union of India* held that 'undue, inordinate, and unreasonable delay' in carrying out death sentences causes psychological torture.[693] Notably, the Court ruled that inordinate and unexplained delay by the President is sufficient in itself to entitle the convict to a commutation. While the ruling did not propose a hardline rule for the number of years above which undue delay would amount to torture, the Court commuted the sentences of 13 prisoners in the case, ranging from delays of 6 years and 5 months to 12 years and 2 months.

In the same case, the Court stated that prisoners have a right to legal aid to prepare legal challenges to the clemency process and to be informed of the result of their mercy petition in writing. In addition, the Court overruled a 2013 Supreme Court judgment[694] which held that those sentenced to death for terrorism-related offenses could not seek commutation for their sentence because of undue delay.

As a result, Indian presidents have been making efficiency a priority with regard to mercy petitions. Since 1950, the death sentences of 306 convicts have been commuted

691 *Epuru Sudhakar & Anr vs Govt. Of A.P. & Ors*, INSC 638 (October 2006); *Maru Ram vs Union of India*, INSC 213 (November 1980); *Kehar Singh vs Union of India*, INSC 370 (December 1988).
692 *Madhu Mehta vs Union of India*, 1989 SCR (3) 774 (August 1989).
693 *Shatrughan Chauhan & Anr vs Union Of India*, 3 SCC 1 (January 2014).
694 *Devender Pal Singh Bhullar & Anr vs State Of Nct Of Delhi*, 6 SCC 195 (April 2013).

out of a total of 437 mercy petitions.[695] President Pratibha Patil, who took office in 2007, accepted 34 mercy petitions and rejected 5.[696] Although the next President, Pranab Mukherjee, set a precedent for speedy processing of mercy petitions, the unintended consequence of the *Shatrugan* case seems to be swift rejections of petitions. Mukherjee has rejected pleas for mercy in almost 90 percent of the cases before him.[697]

India clearly has a long way to go in implementing a fair and just clemency system. However, despite the inconsistencies among Presidents in the granting mercy to death row prisoners, they have been committed to upholding legal precedent in processing mercy petitions efficiently.

Bangladesh

The People's Republic of Bangladesh has maintained a retentionist policy toward capital punishment since its independence in 1971. Bangladeshi criminal justice laws have shown signs of slowly adopting the human rights norms of the ICCPR with regards to the death penalty. In 2015, the Supreme Court ruled that mandatory death penalties were unconstitutional, and that the courts had 'legitimate jurisdiction to exercise its discretion not to impose the death sentence in appropriate cases.[698] At the end of 2014, there were at least 1,235 individuals on death row in Bangladesh. Ten executions took place in 2016, and thus far, three have taken place in 2017.[699]

However, some of the Bangladeshi judiciary's past decisions to issue the death penalty have often been partisan, and have been met with both support and outrage by the population. In 2013, a court sentenced 152 people to death and 161 others to life in prison for a mutiny in Dhaka in which rogue Bangladesh Border Guard officers murdered 74 people and sexually assaulted 'numerous women'. Abolitionists criticized

695 Pradeep Thakuri, *Of 437 mercy pleas since 1950, 306 commuted to life*, The Times of India (2 September 2015), https://timesofindia.indiatimes.com/city/delhi/Of-437-mercy-pleas-since-1950-306-commuted-to-life/articleshow/48766226.cms.

696 Dev Goswami, *No Mercy: Pranab Mukherjee rejected 30 mercy petitions as President*, India Today (18 July 2017), https://www.indiatoday.in/india/story/president-pranab-mukherjee-mercy-petitions-1025001-2017-07-18.

697 *Id*.

698 Andrew Novak, *The Abolition of the Mandatory Death Penalty in Bangladesh: A Comment on Bangladesh Legal Aid and Services Trust v. Bangladesh*, Oxford University Commonwealth Law Journal, vol. 15, no. 2, July 2015, pp. 277–85.

699 Cornell Center on the Death Penalty Worldwide, *Death Penalty Database: Bangladesh*, (April 2011), http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Bangladesh.

this mass death penalty trial, alleging that the sentences were 'designed to satisfy a desire for cruel revenge' rather than to 'reinforce trust in the rule of law'.[700]

Article 49 of Bangladesh's Constitution states that the President has the power to 'grant pardons, reprieves, and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. The President's decision to grant clemency is also often influenced by politics. Over the course of his presidency from 2009 to 2013, Zillur Rahman granted clemency to 21 death row inmates, 20 of whom were activists in Rahman's Awami League party involved in the 2004 murder of a local leader of the rival Nationalist Party.[701] The other person whom President Rahman pardoned during his term had murdered three people; he commuted his sentence to two ten-year imprisonments in 2012. The Asian Human Rights Commission criticized this act, claiming that 'the criminal justice apparatus in the country is wholesomely misused by the political parties'.[702]

On the other hand, the current President of Bangladesh, Abdul Hamid, has repeatedly refused to exercise his pardon powers. After an investigation of war crimes that took place during the 1971 independence war was conducted by the International Crimes Tribunal (ICT), two senior members of Jamaat-e-Islami were executed, their clemency appeals having been rejected by President Hamid despite UN human rights experts' concerns regarding the fairness of the trials.[703]

Capital punishment in Bangladesh, including pardoning death row prisoners, has often taken the form of political maneuvering and showmanship, and the debate surrounding the issue has continually evolved into violent protests and riots. As Pakistan

700 Emile Carreau, *Abolitionist community appalled at Bangladeshi court ruling*, World Coalition Against the Death Penalty (8 November 2013), http://www.worldcoalition.org/bangladesh-152-death-penalty-sentences-torture-mutiny.html.
701 Hands Off Cain, *Bangladesh: President Pardons Twenty Death Row Convicts* (7 September 2010), http://www.handsoffcain.info/archivio_news/201009.php?iddocumento=13312647&mover=2
702 Asian Human Rights Commission, *Bangladesh: Clemency Must Not Be a Political Game* (29 February 2012), http://www.humanrights.asia/news/ahrc-news/AHRC-STM-037-2012.
703 Julfikar Ali Manik and Jim Yardley, *Riots in Bangladesh Over Islamist's Death Sentence*, The New York Times (28 February 2013), https://www.nytimes.com/2013/03/01/world/asia/islamic-leader-sentenced-to-death-in-bangladesh.html; Reuters Staff, *Bangladesh President Rejects Clemency Appeal by Opposition Leaders*, Reuters (21 November 2015), https://www.reuters.com/article/us-bangladesh-warcrimes/bangladesh-opposition-leaders-to-hang-for-war-crimes-idUSKCN0TA0DJ20151121; Amnesty International, *Bangladesh 2016/2017*, https://www.amnesty.org/en/countries/asia-and-the-pacific/bangladesh/report-bangladesh/.

conforms with its domestic and international legal obligations to provide a meaningful mercy petition process, it must ensure that its system is impartial and apolitical.

Flaws in Pakistan's Mercy Petition System

A Policy of Rejecting All Mercy Petitions

The Pakistani Constitution grants the President the sole power to pardon any individual sentenced to death. However, since the lifting of the moratorium in 2014, the President has not granted a single pardon, despite receiving multiple cases in which a pardon was warranted. Pardons serve as the last-line of defense against injustice, and when unused, unjust executions are bound to occur. Mercy petitions in Pakistan have become a mere formality, a last-ditch effort that is never approved. The absence of pardons undermines the Pakistani legal system and perpetuates the travesty of justice. Having approved no mercy petitions since the reinstatement of the death penalty, Pakistan is in clear violation of its domestic and international law obligations. Many prisoners currently on death row, including the ones highlighted in this report, have viable arguments for a pardon. Therefore, Pakistan's policy of blanket refusal to grant pardons to this vulnerable segment of the population highlights the failings of the current system.

CASE SUMMARY: MUHAMMAD SARFRAZ
MERCY PETITION REJECTED

Sarfraz was 17 years old when he was arrested for the murder of a friend over a dispute concerning the repayment of a debt. His age at the time of the arrest was evidenced by a contemporary entry in the birth register and a government-issued birth certificate, as well as an eye witness account of his birth by the daughter of the midwife who delivered Sarfraz – whose name appears on the birth registration. Safraz's juvenility was not raised at his trial as the Juvenile Justice System Ordinance (JJSO), barring juveniles from being sentenced to death, had not yet been promulgated.

Following the enactment of the JJSO and the Presidential Notification that granted retroactive remission to juvenile offenders, in 2008, the Punjab Home Secretary wrote a letter to the Superintendent of Sarfraz's jail about holding a juvenility inquiry for Sarfraz pending consideration of his mercy petition. During the inquiry conducted by the Sessions Court, Sarfraz's file was misplaced by a member of the court staff and the juvenility inquiry was never conducted. The Court erroneously told the Punjab Home Department that it was no longer competent to conduct the inquiry, as a consequence of which Sarfraz's mercy petition was dismissed. In further attempts to conclude the requisite inquiry, the Sessions Court placed the burden of proof solely on Sarfraz to prove his juvenility, and dismissed compelling government-issued birth registration documents in favor of a legally deficient and unreliable school record, in violation of international and domestic law.

In March 2016, Sarfraz's counsel filed a renewed mercy petition with the President of Pakistan, requesting that he grant Sarfraz mercy on the basis of Sarfraz's juvenility, including the new eye-witness testimony noted above. However, the President refused to grant mercy to Sarfraz, despite the failings of the judicial branch in the case. Ultimately, his counsel was able to obtain a stay of his execution from the Supreme Court, but while his execution was stayed pending a hearing, a black warrant was issued scheduling his execution for three days before his hearing. Having spent over 18 years on death row after his conviction as a minor, Sarfraz was executed on May 10, 2016.

CASE SUMMARY: DR. ZULFIQAR ALI KHAN
MERCY PETITION REJECTED

In 1998, Dr. Zulfiqar Ali Khan and his younger brother were held up in an armed robbery outside of Islamabad. Fearing for his life and that of his brother, he shot the two thieves in self-defense. Due to severe poverty, Zulfiqar's family

was unable to afford a lawyer. As a result, he relied on state-appointed lawyers whose incompetence severely undermined his case. Zulfiqar was sentenced to death by firing squad by an Anti-Terrorism Court. His sentence was confirmed by the High Court in 2001 and his Supreme Court appeal was rejected in 2002.

Zulfiqar had served the State throughout his life. Before his incarceration, he served his country in the Pakistani Navy. Furthermore, during his 18 years on death row, Zulfiqar was a model prisoner. Not only did he complete 33 diploma courses, but he also educated more than 50 of his fellow prisoners. He was even referred to as 'the educator' at the Adiala Jail.

As one of Zulfiqar's students described him, 'When I was put on death row I was completely uneducated. Thanks to his hard work, I am now preparing for my bachelor's degree. He was like an angel in my life. Another fellow prisoner said of Zulfiqar, 'He has spent the last 14 years of his life imparting the message of peace, patience, and piousness… He is a source of inspiration and deserves to be honoured'.

Despite his compelling story, the President refused to grant Zulfiqar any relief. His outstanding contributions as a member of the Navy, and later as a prison educator, showed his incredible assets to the State. Furthermore, the victims of his execution, his 2 daughters, now face society as orphans because their mother passed away to leukemia during Zulfiqar's imprisonment. The rejection of his mercy petition, despite genuine contributions to society, his case for self-defense, his incompetent counsel, and service to the Pakistani State, exhibit the deficiencies in the President's application of Article 45 of the Constitution.

The President has Unchecked Power

After a mercy petition is filed, the President has near unilateral power when it comes to granting clemency. When the President chooses not to grant mercy petitions when it is warranted, other political and legal players cannot work to expedite the process or to influence the president. This became clear in the implementation of the now defunct Juvenile Justice System Ordinance (JJSO). Despite the efforts of the courts, the legislative branch, and other government officials to compel the President to grant mercy to juvenile offenders, the President has not commuted the sentence of any juvenile offender sentenced to death since lifting the moratorium.

CASE SUMMARY: MUHAMMAD IQBAL
MERCY PETITION PENDING

Muhammad Iqbal was 17 years old when he was arrested for a fatal shooting which took place in 1998. In its judgment, the Trial Court confirmed that Iqbal was less than 18 years old, i.e. a juvenile, at the time of the shooting. Despite the protections of the JJSO to which Iqbal was entitled, the Lahore High Court upheld his death sentence, and the Supreme Court dismissed his appeal in 2002. Even though both appellate courts recognized that he was a minor at the time of the crime, Iqbal has spent half his lifetime in prison and is still awaiting his execution.

On July 3, 2017, the National Commission for Human Rights (NCHR) took up Iqbal's case and expressed concerns regarding the denial of appropriate relief to which he was entitled under the JJSO, advising that until a proper inquiry is held by the government, authorities must abstain from issuing his execution warrants. During Pakistan's first ever ICCPR review just a few days later, the Human Rights Committee noted that Iqbal should be granted clemency by the President. Even though the Government of Punjab withdrew its request for the issuance of a warrant, no age determination inquiry has taken place and, despite being a juvenile, Iqbal remains on death row. His case has been under 'review' for nearly two years and the President of Pakistan refused to grant clemency to Iqbal, despite pressure from internal and external stakeholders.

Petitions Often Lack Adequate Details

While the President of Pakistan ultimately decides whether or not to grant mercy, the system's flaws do not fall exclusively on him, as the petitions themselves often lack accurate, thorough depictions of the case. The current petition system is deeply flawed, with prison officials writing up the mercy petitions for those unrepresented by legal counsel without contacting the families of the prisoners during the process. When writing these petitions, the prison officials tend to provide little context about the case and rarely articulate a comprehensive description of the case's facts, instead writing a curt request. There are no standards in place for what information should be included in the petition and prison officials have very little incentive to write detailed reports. The resulting effect is prison officials with far more power than designed, essentially holding the prisoner's last attempt at justice in their hands. This imbalance of power also represents an opportunity for corruption within the prison system.

Prisoners Endure Excessive Delays

The mercy petition process in Pakistan is inefficient and time-consuming. Given that Article 45 of the Constitution of Pakistan does not stipulate a fixed time limit for making a decision related to mercy petitions, the President can choose to wait to dispose of petitions indefinitely. In the meantime, convicted defendants can spend decades on death row, leading to irreversible psychological damage. Similarly, the Indian Constitution also does not contain a time limit for deciding on mercy petitions. However, after death row prisoners languished in prison for years awaiting the decision on their petitions, the Indian Supreme Court ruled that mercy petitions can be lessened to life imprisonment if the President has significantly delayed the decision without an adequate reason. The clemency process in Pakistan can be made more effective and systematic if India's example is followed, and lengthy delays regarding clemency pleas are made unconstitutional.

CASE SUMMARY: ABDUL BASIT
MERCY PETITION PENDING

Abdul Basit was convicted and sentenced to death for murder in May 2009. Basit was detained at the Central Jail, Faisalabad, where he along with many other prisoners were confined to the jail's infamous 'punishment wing' where they were held in filthy and unhygienic conditions. Basit soon got ill with a fever, and his condition went unchecked for several weeks before he finally fell into a coma. He had contracted tubercular meningitis while living in these conditions, and was left paralyzed from the waist down due to neglect by the jail authorities. A Medical Board report in 2015 found that he was 'permanently disabled' and was 'likely to remain bed-bound' for the rest of his life.

A mercy petition, citing Basit's ill-health and disability, was filed in 2013. Eventually, this petition was rejected in 2015, despite the fact that ill-health is grounds for commutation of a prisoner's sentence under Pakistani law. Although no written reasoning for the rejection was provided, it appears to have been based on purely administrative grounds as the jail had failed to provide certified copies of government medical records to the Ministry of Interior (uncertified copies were provided by the family). Basit's execution was stayed three times in 2015, each time after uproar from the international community at the gross human rights violations that would result for his hanging. Following the last stay of execution, the President of Pakistan promised an inquiry into Basit's cases, noting that 'basic human rights will be upheld at all costs'. This stay expired in January 2016 without any further progress in the resolution of the case, and a further stay was ordered. However, no decision has been made on the several requests for mercy from Basit's family. It is clear that Basit's execution cannot lawfully proceed. Presently, he remains in legal limbo as the President continues to avoid deciding his mercy petition. The Government now looks set to simply continue to postpone Basit's execution indefinitely, rather than granting him a full commutation of his sentence.

Vulnerable Prisoners Are Not Being Granted Mercy

Pakistan's death row population holds members from the most vulnerable populations including juvenile offenders and people with disabilities. Pakistan has both international and domestic obligations to ensure that the death penalty is not applied to such individuals. The ICCPR emphasizes that no person under the age of 18 when committing the crime shall face the death penalty.[704] As a party of the ICCPR, Pakistan is bound by international law to ensure no child receives such a sentence, and that the sentence is only rendered on the most serious of crimes. The enactment of the JJSO in 2000 enshrined that principle in domestic law. However, even when specifically ordered to grant mercy by a Presidential Notification and a Supreme Court ruling, the President has refused to act on his obligation to grant mercy to all juvenile offenders on death row.

Furthermore, customary international law prohibits the execution of prisoners who are intellectually disabled.[705] The UN Commission on Human Rights has adopted several resolutions urging all states not to execute any person "suffering from any form of mental disorder."[706] These principles apply whether or not the person was mentally ill at the time of the alleged offence. Despite widespread acceptance that the execution of the mentally ill and juvenile offenders is unacceptable, the President has not granted a single pardon for juveniles or mentally ill prisoners since the lifting of the moratorium in 2014.

CASE SUMMARY: MUHAMMAD ANWAR
MERCY PETITION PENDING

In 1998, Muhammad Anwar was sentenced to death by a Sessions Court for a crime he allegedly committed when he was 17 years old. His case has continually fallen through the cracks of Pakistan's deeply ineffectual death penalty system. Anwar's family has spent the past two decades filing age determination applications with the Home Secretary, the Sessions Court, and the Ministry of the Interior to confirm Anwar's juvenility at the time of the crime. Despite these

704 ICCPR, art. 6(6).

705 *See, e.g.*, ECOSOC Resolution, *supra* note 29 (the death penalty shall not be carried out on persons who have become insane).

706 *See, e.g.*, U.N. Office of the High Commissioner for Human Rights, *The Question of the Death Penalty*, U.N. Doc. E/CN.4/RES/2003/67 (April 2003).

endeavors, a warrant was scheduled for his execution for 19 December 2015 even though the proceedings relating to Anwar's juvenility were pending before the High Court. His execution was stayed at the very last minute by the court after a considerable effort by his team of lawyers.

The question of Anwar's right to a juvenility inquiry and special remission under the Presidential Notification now lies before the Supreme Court. Anwar has served almost 24 years in prison; far longer than he would have served if his sentence had been commuted to life imprisonment in 2002 when the issue of his age was first raised with the authorities. The President of Pakistan refuses to correct this injustice by granting Anwar's mercy petition.

CASE SUMMARY: IMDAD ALI
MERCY PETITION PENDING

Imdad Ali, a mentally ill man who began showing symptoms of schizophrenia to his family in 1998, was sentenced to death by the Lahore High Court in 2002 for the murder of a religious scholar/teacher. He has been on death row for sixteen years, and has spent three of those years in solitary confinement, which is not permitted under Pakistani law.

Continually experiencing paranoid delusions, manic episodes, and hallucinations, he was first diagnosed with psychosis in 2009 by a Medical Officer and then with paranoid schizophrenia in 2012. His illness was exacerbated by overcrowded conditions of death cells. His mercy petition pending before the President was summarily dismissed in 2015, and an execution warrant was issued scheduling his execution for 26 August 2016. His lawyers challenged the warrant, arguing that despite Imdad's long history of mental illness, which is confirmed in the jail's medical records, he was not evaluated by a medical board as required under the Mental Health Ordinance of 2001. They also argued that Imdad was kept in a jail hospital rather than in a psychiatric facility, a violation of Pakistan

Prison Rules, 1978. The High Court dismissed the petition, and the Supreme Court dismissed the appeal.

On the same day as the Supreme Court dismissal, Human Rights experts of the UN issued a statement calling on Government of Pakistan to halt execution of Imdad and retry him in accordance with international human rights principles. UN experts termed the imposition of capital punishment on 'individuals with a psycho-social disability' as a 'violation of death penalty safeguards' and that his execution was unlawful and could amount to 'a form of cruel, inhuman or degrading treatment.[707] A review petition challenging this order was submitted, and on 14 November 2016, the Supreme Court stayed his execution, ordering the formation of a medical board to assess the state of Imdad's mental illness, which confirmed that Imdad was mentally ill.

In April 2018, the Supreme Court took suo motu notice of another mentally ill prisoner, Kanizan Bibi, and clubbed Imdad's case with hers. Ordering fresh medical examinations of both the prisoners, the apex court stated that this case will set a precedent for all mentally ill prisoners on death row. The medical board has since confirmed that Imdad is mentally ill.

Furthermore, the President has continued to ignore Imdad's plea despite constant pressure from the international community to grant mercy.

707 UN News Centre, *UN rights experts urge Pakistan authorities to halt execution of man with disability* (27 September 2016), http://www.un.org/apps/news/story.asp?NewsID=55142#.WmQl-JM-efQ.

CASE SUMMARY: KHIZAR HAYAT
DECEASED

Khizar Hayat was sentenced to death for the murder of his friend and fellow police officer, Ghulam Ghous, in 2003. He has since spent 15 years on death row.

Khizar's jail medical records state that he started exhibiting 'psychiatric symptoms' in February 2008, although the seeds of Khizar's illness – paranoid schizophrenia – were present since birth. Medical authorities and psychiatrists have confirmed multiple times over the years that Hayat has severe mental illness, and that he experiences intense delusions and psychosis. These afflictions have made him the target of horrid abuse and attacks by other prisoners, at one point beaten so badly that he was hospitalized for head injuries. He has spent his time in total isolation ever since, effectively living in solitary confinement, which is not permitted under Pakistani law. By 2012, he had become so delusional that it was no longer possible to house him among the rest of the jail population, and he was moved to a jail hospital. His mother's requests that he be transferred to a proper medical facility in 2009 and be screened by a forensic psychiatrist have been ignored.

On 10 June 2015, the Lahore Sessions Court issued a black warrant for Hayat and scheduled him to be hanged six days later. His lawyers petitioned, questioning the legality of his execution in light of his mental illness, but this petition was dismissed by jail authorities, who reported that Khizar was 'somewhat oriented in time and space'. Although this statement is contradicted by the wealth of medical evidence in Khizar's case, and the observations of his family and lawyers, it nonetheless formed the basis on which a new warrant for his execution was issued. In January 2017, Khizar's execution was stayed by the Lahore High Court, but his mercy petition remained pending for years.

In December 2018, the Lahore High Court dismissed a petition seeking Khizar's transfer to a mental health facility, stating that 'emotional disorders of like nature were not viewed as factors sufficient enough to impede execution',

making way for another execution warrant. The National Commission for Human Rights (NCHR) then ordered the relevant authorities to refrain from issuing Khizar's black warrant until the matter was decided by the Supreme Court. However, jail authorities issued his execution warrant on January 10, 2019, in clear violation of NCHR's orders.

Public outrage and timely intervention by the Supreme Court saved Khizar's life. His execution was stayed and his case was referred to a larger bench of the SC, currently hearing the precedent-setting case of two other mentally ill death row prisoners Imdad Ali and Kanizan Bibi. Unfortunately, Khizar fell critically ill before his case could proceed in the

Supreme Court. He was shifted to Jinnah Hospital, Lahore, on March 15, 2019, in critical condition, and passed away in the early hours of March 22.

Anti-Terrorist Act Universally Denies Mercy

The Anti-Terrorism Act of 1997 (ATA) explicitly bars commutations or pardons for individuals convicted of terrorism related crimes: '[N]o remission in any sentence shall be allowed to a person who is convicted and sentenced for any offence [under the Act]'. [708] This provision directly contravenes the Constitution and Supreme Court precedent that provide the President with uninhibited authority over mercy petitions. Furthermore, the expansive definition of 'terrorism' under the ATA effectively covers most, if not all, death eligible crimes.[709] The wide scope of the ATA's application means that a person convicted of murder, for example, may be sentenced under both the Pakistan Penal Code and the ATA for causing 'a sense of fear and insecurity in the people of [the] locality'.[710] If sentenced under the ATA, that person would be ineligible for the grant of mercy. As a result, many death row prisoners are denied the post-conviction rights to which they are entitled under the Constitution of Pakistan.

708 Anti-Terrorism Act of 1997 (XXVI of 1997) § 21(F).
709 Justice Project Pakistan, *Trial and Terror: The Overreach of Pakistan's Anti-Terrorism Act* (2017), p. 11.
710 *Supra* note 55.

CASE SUMMARY: SHAFQAT HUSSAIN
MERCY PETITION REJECTED

Shafqat Hussain was arrested on suspicion of involvement in the kidnapping of another child, who lived in the Karachi apartment building where he worked as a guard and caretaker. In the days that followed, Shafqat underwent nine days of brutal torture to elicit a confession, which proved to be the sole piece of evidence used against him at trial. His execution was stayed seven times on the basis of new evidence relating to Shafqat's juvenility, his innocence, the allegations of torture and his original counsel's gross incompetence.

Prior to the announcement of Shafqat's final execution date, a fresh mercy petition was submitted to the President requesting commutation of his death sentence or a stay of his execution on the basis of recommendations from the Sindh Human Rights Commission, a human rights watchdog established by statute. The Commission recommended that the case be opened, following its 'careless' handling by the courts. These recommendations were supported by a letter from the President of the Azad Jammu and Kashmir region, where Shafqat's family lived, which also called for a stay of execution and a reconsideration of the case.

No response was ever received to the mercy petition submitted by Shafqat's lawyers, the letter from the President of AJK, or the Sindh Human Rights Commission and Shafqat was executed on 4th August 2015. Because Shafqat was sentenced by an Anti-Terrorism Court for the charge of kidnapping, filing a mercy petition was futile. This blanket policy under the ATA, as highlighted by Shafqat's case, is a clear violation of domestic and international law.

Conclusion and Recommendations

The failure to comply with international standards relating to the rational exercise of the power of pardon is just one area in which Pakistan has fallen short in relation to its resumption of executions. It is, however, one that is easily remedied. If the Government of Pakistan is serious about demonstrating a real commitment to bringing Pakistan's death penalty system in line with international law, then they must immediately take action on the following points:

1. The Government of Pakistan should immediately and publicly disavow the policy decision not to grant mercy petitions, in addition to publishing data relating to the exercise of the President's power under Article 45 since December 2014.
2. The Government of Pakistan should reform the process of submission of mercy petitions by prison authorities on behalf of death row prisoners who lack legal representation, ensuring at the very least that the petitions are detailed and that the families of prisoners on death row are consulted by the prison authorities during the process of submission of mercy petitions.
3. The Government of Pakistan should work with provincial authorities to educate prisoners about their rights under this Article, and to establish a clear and transparent process for the consideration of all mercy petitions, which provides reasonable opportunities for the participation of the prisoner and their representatives.
4. The Government of Pakistan should commit to providing written reasoning for all decisions relating to the exercise of the power to pardon under Article 45.
5. The Government of Pakistan should commit to deciding mercy petitions within a reasonable time frame. In cases of undue delay, the prisoners' sentences should be automatically commuted.
6. The Government of Pakistan should carefully consider the mercy petitions submitted on behalf of prisoners with serious mental and/or physical ill-health with a view to commuting their sentences.
7. The Government of Pakistan should initiate a review of all cases where there are outstanding questions regarding the age of prisoners convicted prior to the

introduction of the Juvenile Justice System Ordinance and work with the judiciary to ensure that an adequate inquiry into the prisoner's age is immediately conducted so that they can receive the benefit of the 2001 Presidential Order. Where evidence is lacking, or where there is contradictory evidence, any doubt as to the prisoner's age must be resolved in the prisoner's favor.

8. The Government of Pakistan should formulate conclusive legislation on the scope of the President's power to grant pardons and commutations under Article 45 of the Constitution of Pakistan. This legislation should clarify which types of offences the President may exercise this power in respect of, to resolve the ambiguities created by rulings of the Federal Shari'at Court and the Supreme Court of Pakistan.
9. The Government of Pakistan should repeal § 21(F) of the ATA, allowing the President to exercise his full clemency powers under Article 45 of the Constitution of Pakistan.
10. The Government of Pakistan should implement an open-committee structure to review mercy petitions in order to make the process more informed, transparent, and fair.

EPILOGUE: 3 STORIES FROM DEATH ROW

Introduction

This chapter provides a conclusion to the book as it encapsulates the systemic problems with the criminal justice system pertaining to the death penalty in Pakistan through the lens of those who suffer the most from it - those sentenced to death.

The facts and incidents illustrated are all factual and true. The names have been changed for confidentiality purposes. The stories are from the interviewees' point of view.

The interviewees gave their consent and were explained in detail about the purpose of the interview. Each interview was conducted in an unstructured manner to allow for openness and dialogue. Each story was voice recorded and completed in one interview session which lasted approximately between two and a half and three hours. Their stories have been edited for continuity, clarity, length and translation. The interviewees were given no compensation for their time, however, they were willing to have their tale heard and recorded. Arshad's story was recorded in Urdu whilst the others were in Punjabi. As the interviewer and author is not fluent in Punjabi, Muhammad Ayaz Roy translated them from Punjabi to English. The interviewees were made to feel comfortable and chose where their interviews should be recorded. Two were recorded in their homes, Arshad's story was recorded at a garden café next to Head Marala (a dam in Sialkot).

Recounting their stories was difficult for the interviewees, however all of them said it was important that people learn from their stories so that others don't suffer.

Justice Project Pakistan would like to thank Ashraf, Safeer and Zeeshan for allowing the organisation into their lives and writing about them for this book. The author, Andalib Aziz, would also like to thank Sohail Yafat, M. Ayaz Roy and Muhammad Shoaib for their help and contribution.

Safeer

I was born in 1979 to a loving family and had a happy childhood. I have five brothers and sisters. My father was in the fruit business. He would be leased gardens to pick fruit from on a contract basis. We all lived a humble life. We had enough for a home. I loved playing football and still watch matches on TV. My mother called me *Bhola* (Punjabi: innocent) because of my childish ways. I was good at school and my parents encouraged me to do well. I dropped out of school in 1993 because I just did not want to continue. After that I started working in a car workshop.

18th July was just another ordinary day in 2001 when the murder took place. To date, I still don't know all the details of that fateful day. I had no connection to the offence. I don't even know what the motive behind it was but I know it was the result of a quarrel.

The reason I got involved in the case was because the accused person, Tanveer, in the case was my friend. Tanveer told the police I was involved. In total five people were accused — Tanveer, me, the deceased's wife Qainat, Khalid, and Junaid. We were accused of having illicit relations with Qainat and killing her husband. I was roped into this so that the others in the case could place the blame on me, so that I am the one who is investigated and tortured.

Two days after the event, the police raided my house. I am an innocent man who has never been any trouble for anyone. I was frightened. I ran away to a relative's house but I was arrested from there. I was in their custody for two days. I was tortured for the entirety of those two days. The police wanted me to confess to the murder but I did not. They did not get further physical remand[711] because the body was found in the canal before my arrest and had completed the formalities. After that they had me remanded to judicial lockup and I was sent for trial.

During my trial everyone was concerned about me; I was worried as well. I was first produced before the court in handcuffs. It was a horrible experience. My family members saw me in handcuffs for the first time. Meeting them was wonderful and pleasant as I missed them very much but it felt terrible as well because of the circumstances. There were so many people there and it felt like they were looking down on me and judging my family because of how I was presented. Other relatives were also there which was embarrassing for me.

711 physical remand is the technical term for being in police custody to obtain further physical remand the police have to approach the magistrate and formally ask for it generally on the grounds that the investigation is still ongoing.

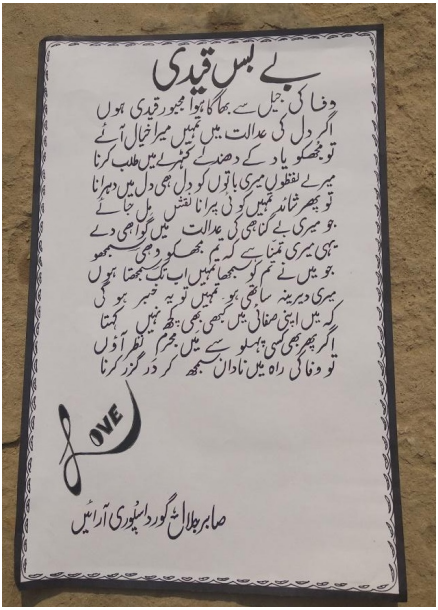
I was at home at the time of the offence and my lawyer raised this argument in court but the judge did not consider this fact. My father hired the lawyer for me. My lawyer argued my case brilliantly and was hopeful that I would get acquitted. However the complainant party had approached[712] the judge because they knew the case against me was weak. During the trial my innocence was also bought into evidence. The SHO[713] falsely stated in court that I was arrested from the scene of the crime and was armed with a *danda*[714] at the time. The judge berated him for his false statement. During the trial no one deposed against me. Qainat received bail three months after her arrest.

My bail was dismissed by the trial court but the judge encouraged that I appeal the decision. Later on, he advised that I should not appeal as the complainant party was on friendly terms with a judge in the appeals court so I decided not to. The deceased person was a powerful person; he was a landlord. The trial lasted two and a half years. Another defendant and I were sentenced to death and the remaining two in the case were given life imprisonment.

Upon hearing the verdict I became extremely distressed. My mother was there when the verdict was given but she did not understand what was being said. It was only when she reached home and someone explained to her that she realized what had happened. She couldn't stop crying.

712 This is a commonly used phrase to denote bribery.
713 Station House Officer – in charge of the police station
714 Wooden stick

When I was in jail, I knew that this would be a waste of my time, so I thought I might as well do something. During this time I decided I should better myself and complete my education. I first started by learning the Quran and completed *tarjama tafseer* (Urdu: translation and exegesis).[715] I then finished my schooling. I completed my matriculation and intermediate [716] . I then completed my undergraduate degree and started my Masters of Arts in Islamic Studies. I am hoping to complete my masters soon. I taught myself calligraphy and still practice it to this day. I also started writing poetry. These hobbies provided some solace and hope.



Helpless Prisoner By Sabir Shah

I was forced to escape the prison of devotion
If you spare me a thought in the Court of Heart
Call me to take stand for the fading memories
As you recall my words inside your heart
You may discoverer some old impression
That bears witness to my innocence
I only desire you think of me the same way
As I have always thought of you
As a longtime comrade, you must know
I never utter a word in my defense
Still, if you find me to blame, from any position
Do pardon me for being naive in my devotion

Translated by Idrees Babar

I could not allow myself to have feelings while I was inside. I needed to have a heart of stone to be able to survive in jail on death row. Being on death row made me truly understand the concept of death. During my incarceration I witnessed so many executions; I think it was about 50 executions. Being on death row changes you.

I used to pray five times a day in my death cell. As I knew I would be spending a lot of time there, I knew I had to be patient. I would eat when it was time. I would get to walk as well. But I was only allowed to walk, in the block of the death cells. There was about 40 feet of space in the block. I had to spend 22 hours of the day in the

715 Exegesis
716 Both are equivalent to High School

death cell. Death cells are very small in size.

During my time in prison there were two riots. The first riot happened in 2001 when I was in court for my hearing. It was a rebellion that had erupted because of the injustice in the prison; the jail guards would loot the food and money from the prisoners. This led to the prisoners forming groups, which evolved into a rebellion.

Bashir, a prisoner, tragically died from the torture inflicted on him for rebelling. Bashir's death led to the revolt getting stronger. The prisoners started breaking the locks of the jail. The jail guards then proceeded to a *lathi*[717](Urdu: baton, stick) charge. More prisoners died as a result. The situation eventually had reached its tipping point and the jail administration had to get involved. A compromise was reached between the jail administration and the prisoners, who committed to an oath. A few jail guards were fired. This infuriated the guards. So at night they would open the lock up and grab a person from one of the barracks and would beat him up with their *lathi*. They did not care about the broken bones and other injuries the prisoner endured.

My history with Junaid, one of the co-accused, has been difficult. When he got out on bail, his brother went to mine demanding that he give him PKR400,000 to file my bail application. But my brother rightly refused. Jawaid would do his best to involve me in jail offences. He complained to the superintendent that I had received PKR10,000 as a bribe. But the superintendent did not believe it and defended me arguing saying that Junaid was reporting on an individual who would not even accept water from someone as a favour. This added stress and harassment would make me angry but I knew I could not do anything about it and had to just bear with it.

Khawar, another co accused, died while in confinement. He had a heart attack in the winter. It has a lot to do with jail negligence and the failure to treat him. I got hepatitis while I was confined but thankfully I recovered.

I became a religious teacher in the jail so I was called *ustaad*[718]. I soon started working as a *munshi*[719] in the jail. This was because my handwriting was neat. I was also trusted with being the *munshi* because I was not corrupt. I could have easily gotten more than PKR 5000. I had respect from the prison staff and other prisoners for not being corrupt. My family was also very proud of me for this. They would send blankets for the other prisoners in the winter.

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717 A long, heavy iron-bound bamboo stick used as a weapon, especially by police (Oxford Dictionary)
718 Literally means teacher. Is used as a sign of respect for someone who imparts knowledge.
719 Office clerk

By the time my case reached the High Court, I had spent six and a half years in the death cell and I had spent a total of eight and a half years in confinement. The High Court converted my sentence from death to life imprisonment. I knew I was innocent and wanted to fight so I filed an appeal in the Supreme Court. Given I am out of prison now, I am not hopeful that my case will be taken up soon. To date, my appeal in the Supreme Court has been pending for nine years. I applied for suspension of sentence and being released on bail as the co-accused in the case had received it before me, hence I got it too.

On the day I received my bail, my brother called to inform me. I told him to bring food for 60 people. I wanted to celebrate my release with my friends in prison. I was so happy when I heard the news that I felt like I levitated two feet over the ground. Upon learning of my release, the jail administration ordered that I be released immediately. Everyone was so happy for me, including the jail administration. They announced my release over the loudspeaker and ordered that I should not be stopped in meeting anyone.

I was greeted by many prisoners and jail officials. Everyone came up to the main gate of the jail to see me off. As per the rules, the main gate is only opened for high ranking officials. However, they made an exception for me because of my good behaviour inside prison. Even the superintendent jail came to congratulate me. I had spent 18 years in jail. The Assistant Superintendent had said in the entire duration of my incarceration, I was the only prisoner who never violated any rule.

When I left the jail, it felt like the air was different on the outside. I couldn't do anything in prison without being told. Whenever I was ordered to do anything, I would have to follow. Now the freedom of being myself, being in control of my life was so overwhelming. When I came out, my brother was there to greet me and take me home. I don't remember when I reached home. I came home to a crowd of happy relatives who were crying with joy to see me, congratulating me on my release. The rest of the day was spent in celebrations and laughter. It was surreal.

I cannot begin to describe what life now feels like. Knowing that I can do whatever I want, whenever I want. It's the little things that matter. I used to sleep on the floor and now I sleep on my *charpai*. I can't wait for the winter so that I can sleep cozy and warm under my duvet; that feeling is something that I have not had since my incarceration.

Readjusting to life has been difficult. Most people around me are frightened of me because I was in prison for murder. They don't understand what I have been through or what happened. They continue to believe that I am a murderer. However, when the incident took place everyone in the village was on my side. The complainant party also

visited the village inquiring about me and my character. Everyone told them that I had not committed the offence and have been falsely accused because of Junaid.

This entire case ruined my life. I spent 18 years in jail. It took away the best years of my life. I have had to rebuild my life and it's been so difficult. I was angry and resentful. I wanted revenge from those who wronged me. My father and other close relatives died while I was in prison. But my brother gave me strength and I promised him that I would try and find peace with everything that happened.

I want to get married but in order for me to do that I need to build an extension to the house. I also need to find a job first before I can think about marriage. Jobs prospects for me aren't promising given my jail time.

Our legal system is in dire need of change. For example, if a person has committed one offence he will be involved in 50 cases. During my time in prison I met a man who had a property dispute but with the help of the *maulvies*[720] he was involved in a blasphemy case just so that the original dispute would get side-lined. I felt like 99% of the people in prison were innocent. I think that the police are the main culprit in the high number of innocent people in prison because they do not investigate cases properly. This is due to the fact that the police do not dispute the victim's story and will arrest whoever the victim accuses instead of carrying out a detailed investigation on the matter. It becomes a problem later on as the judge then relies on the faulty investigation in convicting. The police only receive their bribe and don't actually struggle to find the truth. The judge also does not give much value to the eye witness testimonies.

The system needs to change because it has been incarcerating innocent people for too long; its ruining peoples' lives.

Zeeshan

I come from a small town just outside Faisalabad city called Tandlianwala. I grew up with two brothers and five sisters. My father's brother used to also live with us. He did not have any children.

My father was a land-owning farmer. My parents used to send us to school but we used to skip our classes and spend the day wandering about. I studied till the third grade but could not progress further. I did manage to do well and learned Maths and Urdu. I learnt tailoring after dropping out of school and opened a general store in 1988 when I

720 Muslim clerks

was 14 years old. After completing his matriculation, my younger brother also joined me in running the store.

On that fateful day, 10th March 2002, my brother was in the shop at sunset. I had gone to attend a wedding. My brother was owed PKR 300(about USD 4) from a boy. The boy got annoyed by the persistence and demanded he stop asking for the money. The situation got exacerbated and led to a fight. This was the days before mobile phones, so the boy used a public call office (PCO)[721] and called someone to come and help him. The boy's uncle came to the shop and started beating up my brother. It was close to Eid-ul-Adha[722], so we had knives in the store for sale. My brother's hand reached out and he grabbed a knife and attacked them in self defence with it. Each person received an injury. There were three people of which two died on the spot.

While I was on my way from the wedding to my shop, I was stopped on the way by people who told me to reach the shop quickly. I did not ask them why they were saying that but I rushed towards the shop. While I was about one kilometre away, I heard the announcement from the local mosque that someone had died. I called the *lambardar*[723] from a PCO on his landline inquiring about what had happened. He informed me that my brother had killed two people and one was injured. During the registration of the FIR, I requested the complainant party to register the case against one person as only one person was involved. They refused to listen to reason. That night, the police came to our house. My family and I, including the children, fled from the house and went to the neighbour's house. My brother stayed in the upper portion of the house for three days. I remained in touch with my brother. On the third day after the occurrence, we took my brother to the local police station. The FIR was registered against three people; one person was accused of criminal conspiracy and my brother and I were accused of murder. I was shown to have played an active part in the murder and that I stabbed one of the people. After 20 days I produced myself before the deputy superintendent to plead my case of innocence. My brother in the meantime had been sent to the judicial lock up.

It is the duty of the police to thoroughly investigate the matter when the FIR is lodged and discover the truth, but the police file a case and accuse everyone mentioned by the complainant in the case. Although only those should be taken into custody who

721 A public call office (PCO) is a telephone facility located in a public place in India and Pakistan.
722 Eid-ul_Adha, also called Feast of Sacrifice, is one of the two Islamic holidays. Those able to comfortably afford are obligated to sacrifice an animal (cow, goat, camel, sheep, ram) and the meat is distributed amongst family and the poor. In Pakistan it is a national holiday and celebrated vivaciously.
723 Village headman. This is a product of colonial times in India and Pakistan. The title is generally given to the landlord of the area. They used to facilitate the financial and social order in the village however with time it has become a social status and powers are no longer exercised.

have committed the crime, however the reality is that the entire family is dragged into the matter which causes severe hardship.

I was kept in custody for about two to three days without arrest. I was then produced before the magistrate who gave the police 14-day physical remand. The police noted my innocence in the chargesheet[724]. The police also noted in the charge sheet that this was a case of self-defence. I was produced before the magistrate again and was sent to judicial lock.

My father had seven acres of property. My brother in law had to sell the property at a very cheap rate of PKR 155,000 (USD 2583 then) to be able to finance the expenses for the case. The leftover money was put aside in a Qaumi Bachat Scheme[725].

Our trial proceeded before a session's court judge and the trial took 16 months to complete. Self-defence was taken up during the trial and argued by our lawyer. However, the complainant party had manipulated the case stating that they were on their daily rounds of collecting money for the milk that they had sold, when we raised a hue and cry about the money and attacked them. We had also given the police 15-16 affidavits and statements including by a rickshaw driver and the PCO operator present on the scene, stating what had happened. They did not consider any of it. My brother and I were sentenced to death but the third person accused of conspiracy was acquitted. We were sent to the death cells.

When I came back to jail after receiving my death sentence, it was a very difficult time for me. During my confinement I had not wept. But when I saw the death cell and its condition, I could not stop weeping.

Our appeal was taken up six years later in 2009 by the Lahore High Court. This was the time when the PCO[726] judges were operating under the rule of General Pervez Musharraf. We had appointed Advocate M. Bhatti as our lawyer and paid him PKR 300,000 (USD 3,659 then). Our judgement was announced on 27th July 2018. The High Court acquitted me but upheld the decision and sentence of my brother. We have filed for an appeal before the Supreme Court regarding my brother. The complainant party has challenged the decision of the High Court regarding my acquittal. The cases before the Supreme Court are still pending.

724 Charge sheet is the report submitted by the police detailing their investigation. It is a crucial piece of evidence.

725 A scheme offered by government similar to prize bonds. They sell out special saving certificate, defence saving certificate etc.

726 Provisional Constitutional Order

I was incarcerated for more than ten years and during that time I did not bother anyone and no one bothered me. It was painful being in prison. I used to miss my family very much. I had to leave behind my wife and children. My mother died while I was in prison. There were so many mosquitos in prison that we could not sleep at night. I think about 40% of those in prison are innocent and should not be there and the other 60% are only there because they have a relative or friend who committed a crime and they have been falsely implicated.

While I was in prison, there was a case in which five people were executed. The case was from a small village outside Faisalabad. Two people were culprits but the remaining three were completely innocent. Two of them were declared juveniles when Gen. Musharraf introduced the Juvenile Justice System Ordinance, 2000. They were considered juveniles for one year, but afterwards with mala fide intentions of the complainant party and the union counsel administration, they were proven to be adults. They had no one who was able to help them. They were all executed in 2005.

Reform in the criminal justice system is very much needed. Those who are innocent should be released and the real culprits should be punished. There needs to be a bar in admitting fake cases and bribery needs to be eliminated.

We were advised to reach a compromise with the complainant party. We offered them PKR 5,000,000 as a *diyat*[727] payment and were trying our best to resolve this matter.

After I was released from prison, I lived in Lahore in order to manage my brother-in-law's properties as he lives in South Africa. I was only in Lahore for six months and had to return to the village to make arrangements for the compromise. I could not go to the complainant party's house because of the enmity between us. I had to arrange for a prominent personality like a parliamentarian to do that. Riaz Fatyana and Ch Muhammad Sarwar visited the complainants and tried convincing them to take the compromise. The brother of the deceased was also approached many times to accept the deal. They have continued to reject our offers even though there is no enmity between us anymore and this was a one-time, sudden incident.

My goal in life is to contribute as much as I can to better the lives of people around me, more so now that I am out of prison. To do my part in society, I was elected as a member of the district council three times. The first time was in 2001 during Musharraf's era; I was recently re-elected. I regularly aid others in the problems they have.

I have been blessed with a wonderful uncle. As he was childless, he had 3.5 acres which he transferred into my name. I sold the property and got almost PKR 3,300,000

727 Compensation

($ 27,273 then). With that money I started a business of Installment Corporation and it is the source of my earning now.[728] My sons also contribute to the household expenses. I also bear the expenses of my brother's family and they live in the upper portion of my house. His daughters are studying in Punjab College, Tandianwala.

Through my business, I am able to provide rickshaws and bikes to those in need on a regular basis. I have also had to sell land for me to be able to continue this. I buy rickshaws for people, transfer ownership to them and in return, they have to give me PKR 200 (USD 1.4 now) a day till the rickshaw has been paid for. I also provide labourers and those who have difficulty going to work with motor bikes. They have to give me a daily installment of PKR 70 (USD 0.5 now). I have to sell these vehicles to them with interest but I try to minimise it as much as I can.

From the income I earn, I invest it in society and help others in need. When there is a death in the village I make the funeral arrangements. I also aid poorer families with their daughters' weddings by buying them things such as fans, irons, washing machine etc. for their dowry. Just before this interview was recorded, I gave PKR 2000 (USD 14 now) to a man who told me that he had not earned anything in two days and was unable to give food to his hungry children. I have a small car which, in my village, is a privilege. I have told those who have borrowed from me that if they are in trouble or are injured I will come to their aid as soon as possible. Recently, I helped a laborer near my village. He had called upon me because he was injured. I took him to Gajwani Hospital. He was referred to Samundri Hospital and I took him there. I also bought him medicine worth PKR 300 (USD 2.14). The added fuel cost was PKR 500 (USD 3.5) which I bore. When I dropped him home, I also gave him wheat for his family.

I also try to play a role in difficult family matters. One of the matters I got involved in was that of Ahmed's. Latif and Ahmed were in a fight that lead to Latif being shot. Latif was rushed to a hospital in Faisalabad and was there for 10 to 15 days but his injuries were so severe that he died. After the FIR was registered, Ahmed was arrested. He was sent to jail pending the trial.

I tried my best for the parties to reach a compromise. I gave Latif's children PKR 5000 (USD 41 then) to make funeral arrangements. I tried to convince his family that life has its ups and downs and that they should be forgiving as ordained by Allah. One of Latif's brothers was the complainant and another brother was a witness. There was also a third witness.

728 a business in which the borrower gets a loan and pay back the loan in installments.

One night they agreed to a compromise and demanded PKR 1,000,000 (USD 8,197 then) as *diyat* payment from me. I told them that I did not have that much money at that moment. That annoyed them and they started coming to me every day to demand the money. I told them that I have two shops and that they can be transferred to their name as a guarantee till I could arrange the money. Once I arrange the *diyat*, they would give me back my shops. I have a car and agreed to give it to them to sell. The car would have sold for PKR 700,000 (USD 5,738 then). I had the car's documents with me and drafted an agreement to transfer the title of the car to them. My cousin who was living in Faisalabad was able to lend me the remaining amount. I gave them my car at 2 am in the night and on the same night we went to Faisalabad and got the remaining money from my cousin. Thankfully, Latif's sons went to court and had their statements recorded, after which Ahmed was released. Eid was around the corner and we wanted him to be able to spend Eid with his family. Spending Eid away from one's family is difficult. If one is in jail during Eid one will spend the day crying and one's loved ones will be spending the day crying at home. After my experience in prison, I would not want anyone to spend their Eid away from their family.

I made a *madrasa*[729] in the village of the complainant party's and named it after my brother. It is attached to a mosque because donations from the *madrasa* are fixed. I bought land and had the *madrasa* built on it so that Allah may forgive my brother for his sin.

My brother is still on death row and we all miss him very much.

Ashraf

I live in Marakiwal, Sialkot. I am now 50 years old. Growing up, we had a television at home. It was the only television in the whole village. My paternal grandparents used to take care of me but they died when I was still very young. My grandfather was a *pehlwan* (Urdu / Punjabi: Wrestler), which is what piqued my interest in sports.

I joined the army when I was 19 years old after finishing my matriculation (10th grade) and served for seven years. There was an All Pakistan Tournament and I had gone to get sports supplies. I met the army coach while I was there and he told me to join the team. I played all types of sports for the army, including gymnastics and football. I was the right midfielder in football but can play at any position. I am also a fighter and have

729 Specific type of religious school for the study of Islam.

a great shot. I got a lot of respect during my time in the army. I used to be called 'cheetah' and 'ironman' by those in my unit. I loved being in the army. During my time there, I received awards for best artist and sportsman. The general's wife loved music and would call upon me to sing for her and those at home.

I had gone back to Sialkot on holiday to meet my family. I was waiting at the bus stop to go to Cantt. I got a lift and they dropped me to my destination. The people I had gotten a lift from got into a fight after dropping me off. There were five people involved in the incident. During the interrogation, someone mentioned that there were originally six people in the car, me being the sixth person. Because of that minor slip, I got dragged into this case.

It felt like I had been dragged to hell. The police came to my house and claimed I was involved. The accused were charged with dacoity and murder. The deceased was an army general's cousin, which meant that there was pressure from him and made the complainant a strong party.

When the police arrested me, they beat me up because I am Christian. Even though the main culprit wanted to include me in the case, the others said I was not involved and that I should be left alone. My arrest was not recorded for two days. I was beaten into admitting guilt. Only God could have saved me then. The police wanted to 'get rid of us' through a police 'encounter' but the DIG refused and had us remanded.

After a month's remand, the trial started in April 1997. The case was first sent to the sessions court in Sialkot and was then transferred to and tried by the Anti-Terrorism Court in Gujranwala after three months. The complainant party put pressure to make this a terrorism case even though we had no weapons on us. We did not get bail.

I had a state-appointed lawyer because my family could not afford private legal help. I was the only one. Everyone else got their private lawyers.

During the testimony of the medical officer, a medical report was submitted stating that there was no bullet in the body and the deceased died from a heart attack. The judge started arguing with the doctor, stating, 'There is nothing in the medical report! How will I punish them?'. He covered his face in embarrassment, looked at us and said that he has orders from the high command to convict all of us and could thus not release us. He said the high court would release us. One of the accused persons got into a fight with the judge about what he had said and demanded justice. The judge replied saying that he was under duress to do so.

The son and wife of the deceased were presented as witnesses. The only police officer that gave his testimony was the Station House Officer of the Cantt Police Station who was also the investigation officer.

I understood what was happening during the proceedings. I was in court in shackles and handcuffs. There was a lot of security there. When we went to court, we thought we would get killed in an encounter but after the trial finished, we knew we were safe. The trial took six months to complete. I, along with two other people, was given the death penalty and three others were handed life imprisonment.

I received a copy of the judgement and read it too.

An appeal was filled in 1997 but the case was taken up in 2003. By the time the appeal was taken up, I had spent six years in prison with five and a half of them on death row. The appeal was heard by a bench of four judges in the Lahore High Court. A lawyer was appointed for me by the state. I never met the lawyer nor was I allowed to go to the high court for my appeal. I knew about the court dates because my family would tell me whenever I spoke to them on the phone. I wish I could have gone to the court to hear my appeal because I did not know what was happening. My lawyer never visited me in jail. I only knew about the lawyer because I received a paper stating that he was my legal counsel. My sentence was converted to life imprisonment and further imprisonment on non-payment of fines. Ghulam's death sentence was the only one that was confirmed. Ghazi, the main accused who allegedly shot the victim, was executed about two years ago in 2016-2017. I knew Ghulam because we were from the same village.

The high court judgement was in English and I had someone read it out to me. I can't read English and wished it was in Urdu so that I could read it.

One of the many passions I have is singing. I sing many different types of classical songs including those of Mehdi Hassan, Lata Mangeshkar, Mohammed Rafi, and Noor Jehan. I used to sing in the church choir and also professionally.

I used to be called *ustaad* in jail because everyone in jail loved me. I used to keep everything clean. While in jail I used to make carpets and was in charge of the prison church. In the church we had a choir which I was very fond of. We had a *tabla*[730] and a harmonium. I would also sing at important events in prison, particularly the national anthem. I would also sing at non-Christian congregations during *Muharram.*[731] I learnt

730 an Indian musical instrument consisting of a pair of small drums that you play with your palms and fingers (Cambridge Dictionary)

731 The tenth day of Muharram is known as the Day of Ashura, part of the Mourning of Muharram for Shia Muslims and a day of fasting for Sunni Muslims

about herbal medication during my incarceration. In the evening I would teach sports to the other inmates. There was enough space in the barrack to do so. I used to get sports equipment donated to us; the jail administration did not provide us with any.

The first night in prison was called 'hell on Earth'. I could not sleep the entire night. People have lost their minds during their first night. They resort to taking narcotics to help them sleep. Some people take powder (heroin). I did not take narcotics because I knew if I did it would have killed me. The first three days inside jail, I mentally prepared myself for my time in prison. When I used to look at the high walls of the prison, I used to wonder how I could spend so much time behind them. But then I got used to the walls. My family pressured me to get married but I did not because I was in jail.

I spent six years in District Jail, Sialkot and the rest were spent in Kot Lakhpat Jail, Lahore. When I went to the jail in Sialkot, there was no church for Christian prisoners. The jail authorities were not bothered about this problem. T. Siraj, a lawyer and prisoner, started advocating with the prison officials for a church and was eventually successful. We then slept inside the church.

The church in Kot Lakhpat was in a deplorable state as the walls were crumbling and had holes in it and people would litter there. It was also behind the mosque so you could not see it. We started a fund to aid in the development of the church to which Muslims also contributed. In Sialkot, the convicted Christian population was 50 while 200 were under-trial prisoners. In Kot Lakhpat jail, there were 100 to 150 convicted and about 500 to 600 under-trial Christian prisoners.

We gathered enough money from the fund to get tiles installed inside the church. Outside, marble was placed on the front and in the courtyard. We had the holes plastered. We had flowers and plants in the courtyard. We also made a washroom next to the church so that women who came to visit the prison could use it as there was no other facility available. The church looked beautiful. When visitors would come to the prison, they would take pictures of the church because of how lovely it looked.

I felt I came closer to God during my time in prison and felt that He was looking out for me. God has improved my spiritual life and has kept me away from evil. In prison, there were people who practiced black magic. They would stay away from me because to them I did not seem human because I was so pure. I am said to have *noor*.[732] God uses me for his work. God saved me. God was with me when I was in prison. I loved spending my time in the service of God while in prison.

732 Can be understood to mean light of God.

I would spend my mornings cleaning and maintaining the church. We would sing to pass the time till lunch. We would get cleaned up and have lunch. We were given coal and a coal burning cooker to cook food. We would also add *tadka*[733] to our food to give it more flavour. At about 4.30pm we would start getting locked in our rooms. We used to say to each other that even chickens don't get locked up this early. When I was on death row, we would say that dogs are lucky because they could sunbathe and we couldn't. While on death row in Sialkot jail, we would get half an hour in the morning as recreation time, but we were handcuffed. Every evening we would have to change our cell.

During my time in prison, there were a few positives. For example, outside prison there would only be one type of food available at home at dinner time, but in jail we had seven because other prisoners would make food and we used to share it with each other. Apart from the flu, I never got sick when I was there.

Only my father would visit me during my time in prison and he would do so as an obligation. I did not ask my family for anything. My family sold my half of the property and wasted it on themselves while I was in prison. They don't particularly care about me.

I used to work in the carpet factory inside the jail. Many people would get tuberculosis from the dust from the carpet making process and we would not be paid but we still had to work. We would get trained on how to make carpets for 15 days. I became the 'mapper' so I would instruct the others on the patterns, colours and designs of the carpets.

I completed my sentence of life imprisonment in 2014, the 18th year of my sentence. I then served a sentence for not being able to pay the fine. I had to spend three years in prison due to a default on the payment. The imprisonment because of defaulting on my fines was the hardest. It was a harsh reminder that I was poor. The others who were sentenced with me were all out of prison because they could afford to pay their fines.

One day I was called to the office. There were people sitting there waiting for me. I asked them who they were but they did not tell me and said they were here to take me out of prison. I think they were angels. They said they were going to pay my fine and that I should get ready to leave prison. They insisted that they were going to stay there and would leave with me. Upon hearing this I was so happy that I thought I would get a heart attack. My prayers had finally been answered. I rushed to the church and prayed. While I was there someone came up to me because they were concerned that I was crying. I told him about what had happened and he went and told everyone. People started coming up

733 Whole spices are roasted briefly in oil or ghee to liberate essential oils from cells and thus enhance their flavours, before being poured, together with the oil, into a dish

to me and I received presents from people including new clothes and shoes. I packed my things and went to the angels. They insisted on dropping me wherever I chose in Lahore or would give me money for a ticket but I declined.

I called a friend when I came outside and he came to pick me up and took me to his house. When I reached, he introduced me to everyone and told them how I did not bother anyone and how I would resolve others disputes. They were very hospitable and I stayed with them for a few days. I called home that evening and told them I was coming home in a few days. I called up Tariq Siraj and stayed with him during Eid-ul-Adha. After that I went home to Sialkot.

When I went back home, I found out that the family home had been sold and the current house needed major repair work. I wanted to contribute to the house so I got a job cutting gloves at a factory in Lahore. I also got money from a committee[734] I was a part of. With this money I had enough to have the house plastered. My family does not want me to get married because it will be an added financial burden and my partner will take up more space in the small house. I sleep in my parents' room because there is not enough room. To get married I need to make money. I opened my own clothing shop about two months ago. I also do odd house work for others. I was also a physical trainer in a local school for a while. I help those who want to be more physically active and lose weight. Running the shop is nice mostly because the day passes by quickly, even when I don't get any customers. I want to start my own sports academy and train women as well, but I don't have the money to do this.

I don't know what to do with my life. The problems I have now are worse than the problems I had in prison. I was frightened when I came out of prison because so much changed during my time in incarceration. I don't really consider myself to be alive; it seems like I am just waiting for death to come. Many people stay away from me because I was imprisoned, but after two years their opinion has changed. The police used to arrest me unnecessarily and would say I did not present myself before them. About 50 people intervened and stated on a stamp-paper that I was an honourable person and if I did something wrong, they would be responsible. The police stopped bothering me after that.

Pakistan should abolish the death penalty just because life imprisonment itself is so brutal and destroys a person. There needs to be some other society for those who have

734 In Pakistan, one of the most popular ways of saving is Ballot Committee (BC), more commonly known as committee. This is an informal and effective method of saving money. Every month each participant of the committee contributes a specific amount to the pool which goes to a pre-decided member. This cycle is repeated so that every member receives the collected amount.

been imprisoned. There should be some sort of scheme to aid freshly released prisoners restart their life.

Jails also need to be considerably reformed. They are very dirty and infested with flies and lice everywhere. We should also be provided sports equipment. A specific time in prison for recreation and sports will keep everyone fresh and healthy.

In the end I want to quote Hebrews 13:3[735],

"Remember them that are in bonds, as bound with them; and them which suffer adversity, as being yourselves also in the body."

735 King James Version

ANNEXURE A: LIST OF OFFENCES PUNISHABLE BY DEATH

LIST OF OFFENCES PUNISHABLE BY DEATH

NATURE OF THE CRIME	OFFENCE	COMMENTS
PERJURY	1. Giving or fabricating false evidence with intent to procure conviction of capital offence **– s.194 PPC**	
SABOTAGE OF THE RAILWAY	2. Hurting persons travelling by railway and damaging property of railway **– s.127 Railways Act 1890**	
STRIPPING A WOMAN IN PUBLIC	3. Stripping of women in public **– s.354-A PPC**	
KIDNAPPING FOR UNNATURAL LUST	4. Kidnapping for unnatural lust **- s.367A PPC**	*Added to PPC by Protection of Women Act 2006*
RAPE	5. Punishment for Rape **– s.376 PPC**	Sub-divided: ss. (1) rape, (2) gang rape
NARCOTICS	6. Punishment for contravention of sections 6,7 &8 **s.9 Control of Narcotic Substances Act 1997**	**s. 13 & 14** of the **Dangerous Drugs Act 1930** was repealed by s.78 of the CNS Act 1997
KIDNAPPING	7. Kidnapping for ransom **– s.365-A PPC** 8. Kidnapping child under age of 14 **– s.364-A PPC**	
MUTINY	9. Successful mutiny **– s.132 PPC** 10. Mutiny – **s.31** of the **Pakistan Army Act** 11. Offences of mutiny – **s.36** of the **Pakistan Navy Ord. 1961** 12. Failure to supress mutiny – **s.37** of the **Pakistan Navy Ord. 1961** 13. Mutiny – **s.37** of the **Pakistan Air Force Act 1953**	
HIJACKING	14. Airplane Hijacking **– s.402-B PPC** 15. Harbouring Hijacking – **s.402-C PPC**	
WAGING AND ABETTING WAR	16. Waging and abetting war against Pakistan **– s.121 PPC**	

NATURE OF THE CRIME		OFFENCE	COMMENTS
ZINA	17.	Zina – **s.5** of **Offences of Zina (Enforcement of Hudood) Ord. 1979**	Hadd offence Zina-bil-jabr – s.6 & 10(4) of Offences of Zina (Enforcement of Hudood) Ord 1979 omitted by **Protection of Women Act 2006**
HARAABAH AND DACOITY WITH MURDER	18.	Decoity resulting in Murder **– 396 PPC**	
	19.	Punishment of Haraabah – **s. 17(4) Offences Against Property (Enforcement of Hudood) Ordinances, 1979**	Hadd offence
TREASON	20.	**s.2 High Treason (Punishment) Act 1973**	
OFFENCES IN RELATION TO THE ENEMY AND PUNISHABLE WITH DEATH	21.	**s.24** of the **Pakistan Army Act**	
	22.	**s.34** of the **Pakistan Air Force Act**	
MISCONDUCT IN ACTION BY PERSONS IN COMMAND	23.	Misconduct in action by persons in command – **s.29** of the **Pakistan Navy Ord. 1961**	
MISCONDUCT IN ACTION BY OTHER OFFICERS AND MEN	24.	Misconduct in action by other officers and men – **s.30** of the **Pakistan Navy Ord. 1961**	
OBSTRUCTION OF OPERATION	25.	Obstruction of operation – **s.31** the **Pakistan Navy Ord. 1961**	
CORRESPONDING WITH, SUPPLYING OR SERVING WITH THE ENEMY	26.	Corresponding with, supplying or serving with the enemy – **s.32** of the **Pakistan Navy Ord. 1961**	
DISCLOSURE OF PAROLE OR WATCHWORD	27.	**s.26** of the **Pakistan Army Act**	
ARMS TRADING	28.	**s.13A(c)(1)** of **Pakistan Arms Ordinance 1965**	
EXPLOSIVES ACT	29.	**s.3** of the **Explosives Act**	Triable by Anti-Terrorism Courts as per s.6(3) and 3rd schedule of the Anti-Terrorism Act 1997
HOMICIDE	30.	Unintentional murder - **301 PPC**	
	31.	Qatal-e-Amad – **302 PPC**	
TERRORISM	32.	Punishment for acts of terrorism – **s.7 of the Anti-Terrorism Act 1997**	
BLASPHEMY	33.	Blasphemy **– s.295-C PPC**	

ANNEXURE B: OUR CLIENTS

KHIZAR HAYAT (late)

YEARS ON DEATH ROW: 16

MENTAL ILLNESS: PARANOID SCHIZOPHRENIA

CURRENT STATUS

Khizar passed away soon after the SC took suo motu of his case. The case is still pending before a larger bench of the Supreme Court

Khizar Hayat in his police uniform, shortly before his arrest in 2001

CASE TIMELINE

2001

23rd Oct: Khizar Hayat **arrested** for fatally shooting his fellow police officer

2003

2nd Apr: **Khizar sentenced to death** by the District and Sessions Court, Lahore under S.302 of the Pakistan Penal Code

2008

29th Oct: Khizar **diagnosed with schizophrenia** by Medical Officer of Central Jail, Lahore and physicians at Services Hospital, Lahore

2009

19th Jan: **LHC dismisses appeal**

2011

5th Jan: Supreme Court **dismisses appeal**

2015

10th Jun: **First black warrant issued** by Sessions Court in Lahore, setting 16th June as his execution date

13th Jun: Khizar's mother **submits a mercy petition** to the president for his sentence to be commuted in light of his mental condition

Continued on Page 2

Khizar Hayat, a mentally ill death row prisoner, passed away on March 22, 2019, at Jinnah Hospital Lahore after being critically ill. He had spent 16 years on death row.

Khizar was sentenced to death in 2003 for fatally shooting a fellow police officer and was first diagnosed with "treatment-resistant" paranoid schizophrenia by jail authorities in 2008. His mental health record consistently referred to his delusions, psychosis, and his mental illness, and showed that he had been prescribed powerful anti-psychotic medication.

In January 2019, after Khizar's fourth death warrant was suspended by the Supreme Court, his case was referred to a larger bench of the Supreme Court. But he passed away before his case could be heard in the SC.

BACKGROUND

Khizar worked as a police officer in a village where he lived with his wife and children. Those who knew him described him as a kind man, but "very slow" and easily manipulated.

In the months leading up to the incident, Khizar had fallen under the influence of a local *'pir'* — a spiritual healer who fraudulently convinced Khizar to sign over his lands and property to him. Under his influence, Khizar was eventually implicated for fatally shooting his friend and fellow police officer, Ghulam Ghous.

Khizar pleaded not guilty during his trial, but his lawyer failed to introduce any evidence or call a single witness in his client's defence. Khizar was eventually sentenced to death in 2003. Despite documentary evidence of Khizar's mental illness, the courts repeatedly dismissed his appeals.

RECENT CASE UPDATES

In December 2018, the Lahore High Court dismissed a petition seeking Khizar's transfer to a mental health facility, stating that "emotional disorders of like nature were not viewed as factors sufficient enough to impede execution", making way for another execution warrant. The National Commission for Human Rights (NCHR) then ordered the relevant authorities to refrain from issuing Khizar's black warrant until the matter was decided by the Supreme Court. However, jail authorities issued his execution warrant on January 10, 2019, in clear violation of NCHR's orders.

Public outrage and timely intervention by the Supreme Court saved Khizar's life. His execution was stayed and his case was referred to a larger bench of the SC, currently hearing the precedent-setting case of two other mentally ill death row prisoners Imdad Ali and Kanizan Bibi.

Unfortunately, Khizar fell critically ill before his case could proceed in the Supreme Court. He was shifted to Jinnah Hospital, Lahore, on March 15, 2019, in critical condition, and passed away in the early hours of March 22.

KHIZAR'S MENTAL ILLNESS

Jail medical records show that Khizar first started exhibiting 'psychiatric symptoms' in February 2008, although the seeds of paranoid schizophrenia were sown long before that. By September, his illness had become severe enough to warrant a month-long hospital stay in the jail. Since then, he had constantly been prescribed powerful anti-psychotic medications such as Risperidone.

Khizar's mental health deteriorated to the point where he believed that the world was coming to an end because the Americans had landed on the moon, and the moon was now having a dire effect on the world. He believed that the solutions to the world's problems were to be found in the toilet in his cell, through its special connection to the Earth. In his last years, Khizar was unable to take care of his body, often dressing in filthy clothes, disrobing completely, or throwing food and faeces out of his cell.

Khizar's mental illness had caused him considerable physical suffering too. Jail records show that in 2009, he was admitted to a public hospital with severe head injuries requiring urgent surgery. Khizar's cellmates – cooped up 24 hours a day in a cell with a delusional and confused individual – had violently attacked him. Khizar's lawyers frequently recorded seeing him injured during their visits. Eventually in 2012, the attacks became so frequent and severe that Khizar was moved to an isolated cell in the jail hospital.

In early 2009, Khizar's mother requested that her son be transferred to a proper medical facility to receive treatment. Her requests fell on deaf ears.

Khizar spent the last six years of his life alone in his cell in the hospital, effectively living in solitary confinement, despite the fact that punishment for the mentally ill is not permitted under Pakistani law; not even for the most heinous offences.

"IF A PERSON IS MENTALLY ILL, HOW CAN YOU HANG THEM?"

– FORMER CHIEF JUSTICE SAQIB NISAR,
during the hearing of mentally ill death row prisoners Kanizan Bibi and Imdad Ali

Continued from Page 1

15th Jun: LHC grants him **a last-minute reprieve**

23rd Jul: **Second black warrant** issued, setting 28th July as the execution date

25th Jul: Execution stayed

28th Jul: Four Special Rapporteurs of the UN urge Pakistan to halt Khizar's execution as it would be inconsistent with international human rights law

2016

18th May: A court-sanctioned examination by the medical board concludes unanimously that **Khizar suffers from "psychosis" and "schizophrenia"**

2nd Nov: **NCHR initiates an inquiry** into Khizar's case on a complaint filed by JPP on the grounds of his severe mental illness

2017

10th Jan: Khizar's **third black warrant issued**, scheduling his execution for 17th January

12th Jan: LHC **grants him a stay**

2018

6th Dec: LHC Divisional Bench **dismisses petition** seeking Khizar's transfer to a mental health facility

18th Dec: NCHR orders the authorities to **abstain from issuing his execution warrants** until the matter is decided by the Supreme Court

2019

10th Jan: Khizar's **4th execution warrant issued**, scheduling execution for 15th Jan

12th Jan: CJ takes suo motu notice following public outcry and **halts Khizar's execution**

13th Jan: UN experts urge Pakistan to halt execution of person with disability

14th Jan: Two-member bench of SC hears JPP's petition, refers Khizar's case to a larger bench currently hearing the Kanizan-Imdad case; also orders his fresh medical examination by a Special Medical Board

15th Mar: Khizar shifted to Jinnah Hospital, Lahore, in critical condition. He had stopped eating and taking his medication

22nd *Mar:* Khizar passes away in the hospital

BASIS OF COMMUTATION

Mentally ill defendants repeatedly slip through the cracks in Pakistan's criminal justice system. The lack of mental health treatment and training in the criminal justice system, as well as in Pakistan generally, means that many individuals never even get diagnosed. In fact, for many indigent mentally ill defendants, their first contact with a mental health professional is in jail. As a member state of the United Nations, the Government of Pakistan has ratified a number of international human rights treaties that grant rights and special protections to persons suffering from mental illnesses. These include:

ICCPR

The United Nations Human Rights Committee has recognized in various decisions, including in *R.S v Trinidad and Tabago* (684/96), that the execution of mentally-ill prisoners is prohibited as cruel, inhuman and degrading treatment under Article 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR), to which Pakistan became a party in 2010.

In July 2015, four Special Rapporteurs of the UN urged the Government of Pakistan to halt Khizar's execution as it would be inconsistent with international human rights law. Remarking on Khizar's plight, the UN Special Rapporteur on the right to health, Dainius Pûras, said: "We call on the authorities of Pakistan to protect the right to health of ... Khizar Hayat, and other inmates in death row with severe psychosocial disabilities, irrespective of their legal situation, guaranteeing their access to the health services required by their situation."

SAFEGUARDS GUARANTEEING PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY

The UN Economic and Social Council (ECOSOC) in 1984 adopted "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty." In the same year, the Safeguards were endorsed by consensus by the UN General Assembly. The safeguards guaranteeing protection of the rights of those facing the death penalty constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment.

The Third Safeguard states:

> *"Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane."*

The third safeguard was amplified by the Economic and Social Council in 1988 with the words "persons suffering from mental retardation or extremely limited mental competence."

JUSTICE PROJECT PAKISTAN

Justice Project Pakistan is a non-profit organization based in Lahore that represents the most vulnerable Pakistani prisoners facing the harshest punishments, at home and abroad. JPP investigates, litigates, educates, and advocates on their behalf.

In recognition of our work, in December 2016, JPP was awarded with the National Human Rights Award, presented by the President of Pakistan.

For more information, email: communications@jpp.org.pk

IMDAD ALI

YEARS ON DEATH ROW: 17

MENTAL ILLNESS: PARANOID SCHIZOPHRENIA

IMPRISONED AT:
DISTRICT JAIL, VEHARI

CURRENT STATUS
Case pending before a larger bench of the Supreme Court

CASE TIMELINE

2001

21st Jan: The alleged offence takes place

2002

29th Jul: Trial Court **sentences Imdad to death** under Section 302(b) of the PPC

2008

7th Nov: LHC dismisses appeal

2015

19th Oct: SC dismisses appeal

17th Nov: Mercy petition rejected

2016

23rd Jul: **Black warrant issued**; execution set for 26th July

25th Jul: Writ petition filed in Sessions Court by Imdad's wife; **stay granted**

23rd Aug: Petition dismissed by Sessions Court

16th Sept: **Second black warrant issued**; execution scheduled for 20th Sept

19th Sept: Mercy petition submitted along with Imdad's medical report. **Death warrant suspended**

27th Sept: SC dismisses petition stating that schizophrenia is not a mental illness

27th Oct: **Third black warrant issued**; execution scheduled for Nov 2

31st Oct: **SC stays execution**

12th Nov: Civil review petition filed in SC

14th Nov: SC orders formation of a medical board

2018

21st Apr: SC takes suo motu notice of mentally ill prisoner Kanizan Bibi and clubs Imdad's case with it

23rd Oct: SC orders fresh medical examination of Imdad and Kanizan

Imdad Ali, a mentally ill prisoner, has spent 17 years on death row without proper treatment. He was sentenced to death in 2002 for fatally shooting a religious teacher.

During the course of his incarceration, he has been repeatedly diagnosed with paranoid schizophrenia, with several medical reports confirming over the years that he is actively suffering from psychotic symptoms and is "a treatment-resistant case".

Imdad has spent the last four years in solitary confinement in the hospital cell of district jail, Vehari, owing to the nature of his mental illness.

BACKGROUND

Imdad comes from an extremely poor family. His relatives first noticed his mental illness in 1998 after he returned from a work trip from Saudi Arabia. According to them, he would be found talking to himself or to objects. After he was convicted of shooting a religious teacher in 2001, Imdad could not afford private medical consultants who could detail his mental illness in court and was eventually sentenced to death.

Imdad's wife raised his mental condition in the trial court but the prosecution claimed he was able to respond rationally to questions put forward to him. The judge, too, failed to mention Imdad's mental illness in his conclusion when sentencing him to death.

Despite clear evidence of mental illness, Imdad's appeals have been repeatedly dismissed by the courts. His mercy petitions have been rejected and his death warrants were issued thrice in 2016.

RECENT CASE PROCEEDINGS

Imdad's case came into the limelight in 2016 when the Supreme Court dismissed his appeal stating that "schizophrenia is a curable disease" and not a mental illness. His third execution warrant, however, was stayed following public outcry, a fresh petition from his lawyers and a review filed by the government of Punjab.

In April 2018, the Supreme Court took suo motu notice of another mentally ill prisoner, Kanizan Bibi, and clubbed Imdad's case with hers. Ordering fresh medical examinations of both the prisoners, the apex court stated that this case will set a precedent for all mentally ill prisoners on death row.

"Neither reason nor sensibility allow me to believe that we can execute a mentally ill or disabled person," then chief justice Mian Saqib Nisar remarked during the proceedings, recalling that international legal systems have unequivocally forbidden the execution of mentally ill prisoners.

"IF A PERSON IS MENTALLY ILL, HOW CAN YOU HANG THEM?"

– FORMER CHIEF JUSTICE SAQIB NISAR,
during the hearing of mentally ill death row prisoners Kanizan Bibi and Imdad Ali

IMDAD'S MENTAL ILLNESS

Imdad Ali was first diagnosed with paranoid schizophrenia by jail authorities in 2012, even though his medical records from as early as 2009 have consistently shown him to be exhibiting psychiatric problems. Those who know him, including his family and neighbours, state that the symptoms of his mental illness had been present for many years before the incident even took place. Imdad's jail medical records show that he has continuously been treated for serious mental illness following his diagnosis; he has been regularly visited by a consultant psychiatrist and prescribed strong anti-psychotic medicines.

It is clear from the records that his mental illness has led to not just extreme mental anguish and suffering, but also physical pain, caused in part by his own delusional behaviour and also by the physical abuse and torment he has suffered at the hands of other inmates.

BASIS OF COMMUTATION

Mentally ill defendants repeatedly slip through the cracks in Pakistan's criminal justice system. The lack of mental health treatment and training in the criminal justice system, as well as in Pakistan generally, means that many individuals are never even diagnosed. In fact, for many indigent mentally ill defendants, their first contact with a mental health professional is in jail. As a member state of the United Nations, the Government of Pakistan has ratified a number of international human rights treaties that grant rights and special protections to persons suffering from mental illnesses. These include:

ICCPR

The Human Rights Committee has recognized in various judgments that the execution of mentally ill prisoners is prohibited as cruel, inhuman and degrading treatment under Article 6 and 7 of the ICCPR.

The HRC held that the incarceration on "death row" and execution of a prisoner whose mental health had "seriously deteriorated" amounted to a cruel, inhuman, and degrading treatment.

SAFEGUARDS GUARANTEEING PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY

The UN Economic and Social Council (ECOSOC) in 1984 adopted "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty". In the same year, the Safeguards were endorsed through a consensus by the UN General Assembly. The Safeguards constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment.

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ABDUL BASIT

YEARS ON DEATH ROW: 10

ILLNESS: PARAPLEGIA

IMPRISONED AT:
CENTRAL JAIL, FAISALABAD

CURRENT STATUS

Basit is on a presidential stay on grounds of his physical disability

CASE TIMELINE

2008

31st Mar: Incident occurs

2009

19th May: Basit **sentenced to death** under Sections 302/449/34 PPC

2010

1st Aug: Basit subjected to **extreme inhumane and unsanitary conditions** in the jail, leaving him in a coma. Eventually he was diagnosed with TB meningitis and was **paralysed waist down**

2011

30th Dec: Report by medical board shows that Basit is permanently paralysed with minimal chances of recovery

2012

29th Mar: Medical board concludes that Basit is suffering from paraplegia and long-term complications of spinal atrophy

12th Jun: Lahore High Court dismisses appeal

13th Dec: Supreme Court dismisses appeal

2013

30th Jan: Basit's family files a mercy petition

Continued on Page 2

Abdul Basit, a former administrator at a medical college, was sentenced to death in 2009. In August 2010, Basit contracted tubercular meningitis in Central Jail Faisalabad which, due to lack of action on behalf of the jail authorities, left him paralysed from the waist down.

Despite his paralysis, he is still on death row and in prison – in contravention of Pakistan's domestic and international legal obligations.

BACKGROUND

Abdul Basit was tried, convicted, and sentenced to death in May 2009 in a murder case but has always maintained his innocence. His subsequent appeals were rejected by the Lahore High Court in 2012 and the Supreme Court in 2012.

In 2010, whilst imprisoned in Central Jail Faisalabad, Basit was subjected to extremely inhumane and unsanitary living conditions for a prolonged period. On 1 August 2010, Abdul became severely ill with a fever but did not receive medical attention for several weeks. His condition was so severe that he fell into a coma for approximately three weeks and he was eventually transferred to hospital, where he was diagnosed with TB meningitis.

The illness, and the negligence of the jail authorities in treating him, caused him to lose all movement in his lower limbs, permanently confining him to a wheelchair. A Medical Board concluded in April 2012 that he was suffering from paraplegia and long-term complications of spinal atrophy.

Abdul's disability is permanent. In August 2015, a further Medical Board – convened by the Lahore High Court – reported that he had '0/5 power in lower limbs' and was 'permanently disabled…[and] is likely to remain bed-bound for the rest of his life'.

He is confined to lying in his cell and is reliant on officers to assist him with his personal hygiene. He suffers from bedsores and is entirely incontinent, unable to urinate without the assistance of a catheter. Various requests for Abdul Basit to be transferred to a medical facility so that his condition can be properly treated have been unsuccessful.

PRESIDENTIAL STAY

Despite Basit's physical disability, his mercy petitions were rejected and his execution warrants were issued four times in 2015. His condition compelled the Presidency to issue a temporary stay on his execution.

In January 2016, the stay order issued by the President's office expired and was extended for another three months. The second stay however, expired on 23 April, 2016, and no permanent decision regarding the commutation of Abdul Basit's sentence has been taken so far. As a result, he remains in a state of legal limbo which is the cause of great stress and apprehension to him and his family. On 27 July, 2017, the Deputy Secretary (Prisons) submitted another fresh mercy petition in respect of Abdul Basit on the grounds of his ill-health.

THE LEGAL BASIS FOR COMMUTATION

The execution of a disabled prisoner, especially one who has already suffered years in prison, would constitute cruel and unusual punishment, contravening the Pakistan Prison Rules and violating Abdul Basit's fundamental rights guaranteed by the Constitution of Pakistan.

> **Article 9:** 'no person shall be deprived of life or liberty save in accordance with law'

> **Article 14:** 'Inviolability of dignity of man, etc.— (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.'

The execution of a paraplegic would represent a gross violation of the 'inviolable dignity of man' under Article 14 of the Constitution, which has been confirmed by the courts:

> 'According to this provision, the dignity and self-respect of every man has become inviolable and this guarantee is not subject to law but is an unqualified guarantee. Accordingly in all circumstances the dignity of man is inviolable'

The Courts have also emphasized the standards expected regarding the treatment of prisoners, noting that 'it may be legally justified for the State to detain prisoners pending execution of sentence but there is no lawful reason to subject such a conflict to humiliation' and that 'Disgrace and agony is alien to the concept of justice'.

On 27th July 2018, then chief justice of Pakistan Saqib Nisar issued an order directing 'all Provincial Governments to take appropriate steps for release of terminally ill and indisposed prisoners in accordance with proper rules and Standard Operating Procedures (SOPs) so that such prisoners are released on the basis of a structured procedure rather anybody's whim and caprice and in an arbitrary manner'. The Chief Justice's order is in line with Rule 146 of the Pakistan Prison Rules (1978) which states that 'The Superintendent may recommend a prisoner for premature release who owing to old age, infirmity or illness is permanently incapacitated from the commission of further crime of the nature of that for which he has been convicted'.

Furthermore, Rule 107 of the Pakistan Prison Rules (1978) makes clear the importance of physical ill-health as a relevant ground on which to request mercy from the Presidency and the Prison Rules set down no procedure for the execution of a disabled person. In fact, the jail authorities have admitted to the Lahore High Court that they do not know how they will carry out the sentence, suggesting that they may hang Basit from his wheelchair or even from a stool placed on the gallows.

Abdul Basit's execution would also constitute a breach of Pakistan's obligations under international law. In particular, the execution would constitute a grave violation of the prohibition on cruel, inhuman and degrading treatment guaranteed under international law including under Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and under Article 16 of the United Nations Convention Against Torture (CAT); both ratified by Pakistan on 23 June 2010.

Continued from Page 1

2015

29th May: Mercy petition rejected

10th Jun: **First black warrant** issued; execution scheduled for 16th June

15th Jun: Execution warrant suspended

22nd Jul: Second mercy petition submitted

25th Jul: **Second black warrant** issued; execution scheduled for 29th July

28th Jul: **Execution stayed** by LHC, w another medical board convened

1st Aug: Medical board reports Basit is likely to remain bed-bound for the rest of his life

1st Sept: LHC dismisses petition

18th Sept: **Third black warrant** issued; execution scheduled for 22nd Sept. Civil petition filed in Supreme Court to set aside execution

21st Sept: SC dismisses civil petition

22nd Sept: Execution stayed by judicial magistrate

20th Nov: **Fourth execution warrant** issued; execution scheduled for 25th Nov

24th Nov: **President stays execution** for two months; orders medical inquiry

24th Dec: A medical board, constituted in compliance of the President's orders, confirms that "the patient is suffering from paraplegia as a sequel of tuberculosis meningitis"

2016

9th Jan: Writ petition filed before LHC

23rd Jan: Presidential stay expires; execution postponed for another three months

23rd Apr: Second Presidential stay expires

2017

26th Jul: Fresh mercy petition submitted by Deputy Secretary (Prisons) in respect on grounds of Basit's ill-health

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KANIZAN BIBI

YEARS ON DEATH ROW: 28

MENTAL ILLNESS: SCHIZOPHRENIA

IMPRISONED AT: PAKISTAN INSTITUTE OF MENTAL HEALTH

CURRENT STATUS:
Kanizan's case is pending before a larger bench of the Supreme Court

CASE TIMELINE

1989

28th Jul: Kanizan Bibi is charged under Section 302/324 of the Pakistan Penal Code for the murder of six individuals

1991

7th Jan: Trial court **sentences Kanizan Bibi and Khan Muhammad to death**

1994

1st Mar: Lahore High Court dismisses appeal

1999

2nd Mar: Supreme Court dismisses appeal

2nd Nov: Mercy petition submitted

2000

19th Feb: Mercy petition rejected

1st Apr: **Black warrant issued**, scheduling execution for 19th April

18st Apr: Kanizan receives a presidential stay **halting her execution**

9th May: Kanizan "found to be **suffering from schizophrenia**"; admitted to a government hospital for psychiatric diseases in Lahore

2006

21st Jan: Kanizan temporarily transferred to Punjab Institute of Mental Health (PIMH)

2015

18th Mar: Medical board declares Kanizan to be suffering from schizophrenia and suggests treatment

2018

21st Apr: SC takes suo motu notice of Kanizan's case; orders constitution of medical board and to shift Kanizan to PIMH

23rd Oct: Supreme Court orders fresh medical examination of Kanizan Bibi and to shift her to PIMH

Kanizan Bibi suffers from severe schizophrenia and has spent nearly 30 years in prison. She was arrested in 1989 as a juvenile and sentenced to death in 2001 as an accomplice in the murder of six individuals. She has always maintained her innocence.

She was shifted from Lahore Central Jail (Kot Lakhpat) to Punjab Institute of Mental Health (PIMH) in 2006 and then again in 2018 and is being treated for her mental illness.

During the course of her incarceration, her medical condition has deteriorated so much that she has not spoken a word in eight years.

BACKGROUND

Kanizan Bibi was born into a very poor family and worked as a housemaid to help make ends meet. In 1989, her employer's wife and children were found murdered, for which Kanizan and her employer were subsequently arrested and convicted. According to her family, the real culprits, who were engaged in a longstanding land dispute with Kanizan's employer, had been arrested but were later released after they bribed the police. They then filed a false police report accusing Kanizan.

Kanizan has repeatedly insisted on her innocence. The only evidence presented during her trial was also highly suspect. She was sentenced to death by Additional Sessions Judge, Toba Tek Singh in 1991, and her subsequent appeals in the Lahore High Court and the Supreme Court have been dismissed.

Despite her long history of mental illness, the President dismissed her petition for mercy along with those of over sixty others in 1999.

RECENT CASE PROCEEDINGS

The Supreme Court of Pakistan took suo motu notice of Kanizan Bibi's case which was heard on April 21, 2018 by a two-member bench headed by former chief justice Saqib Nisar.

During the hearing, the then-chief justice observed that it is "beyond sense or reason that we execute mentally ill individuals". The court then ordered to shift Kanizan Bibi to PIMH and provide her the best possible treatment and care. It also ordered the constitution of a board to evaluate her mental health. Her case will be heard by a five-member larger bench after the medical board submits its report to the court.

With the case of another mentally ill prisoner, Imdad Ali, now clubbed with hers, Kanizan's case is likely to set a precedent that can save the mentally ill from being executed in Pakistan.

"IF A PERSON IS MENTALLY ILL, HOW CAN YOU HANG THEM?"

– FORMER CHIEF JUSTICE SAQIB NISAR,
during the hearing of mentally ill death row prisoners Kanizan Bibi and Imdad Ali

BASIS OF COMMUTATION

Mentally ill defendants repeatedly slip through the cracks in Pakistan's criminal justice system. The lack of mental health treatment and training in the criminal justice system, as well as in Pakistan generally, means that many individuals never even get diagnosed. In fact, for many indigent mentally ill defendants, their first contact with a mental health professional is in jail. As a member state of the United Nations, the Government of Pakistan has ratified a number of international human rights treaties that grant rights and special protections to persons suffering from mental illnesses. These include:

ICCPR

The Human Rights Committee has recognized in various judgments that the execution of mentally ill prisoners is prohibited as cruel, inhuman and degrading treatment under Article 6 and 7 of the ICCPR.

The HRC held that the incarceration on "death row" and execution of a prisoner whose mental health had "seriously deteriorated" amounted to cruel, inhuman, and degrading treatment.

SAFEGUARDS GUARANTEEING PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY

The UN Economic and Social Council (ECOSOC) in 1984 adopted "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty." In the same year, the Safeguards were endorsed through a consensus by the UN General Assembly. The Safeguards constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment.

The Third Safeguard states:

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The third safeguard was amplified by the Economic and Social Council in 1988 with the words "persons suffering from mental retardation or extremely limited mental competence".

KANIZAN'S MENTAL HEALTH

Kanizan's mental health began to deteriorate soon after she was sentenced to death. Increasingly concerned about her condition, jail authorities referred her case to the Home Department and, in 2006, she was transferred to the Punjab Institute of Mental Health (PIMH) where her diagnosis of schizophrenia was confirmed by successive medical boards.

Kanizan's illness has caused her to lose any ability to understand her surroundings. At times, she has been unable to even feed and clothe herself. As the hospital staff has confirmed, **she has not spoken a word in the eight years** she has spent in their care.

TORTURE IN CUSTODY

Kanizan Bibi's conviction largely rested on a testimony she gave after being tortured in police custody for 20 days. According to her family, the abuse was so severe that she had to be admitted to a hospital at one point. She was beaten severely and was electrocuted. She was hung from a ceiling and mice were let loose in her *shalwar*. Although Kanizan challenged the 'confession' saying it was involuntary, the court nonetheless relied on it while sentencing her to death.

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SHERAZ BUTT

YEARS ON DEATH ROW: 7

MENTAL ILLNESS: SCHIZOPHRENIA

IMPRISONED AT: HOSPITAL CELL, CENTRAL JAIL, LAHORE

CURRENT STATUS

Sheraz's criminal appeal is pending before the Supreme Court

CASE TIMELINE

2008

29th Jan: Alleged offence takes place

2012

20th Feb: Trial Court **sentences Sheraz to death** under Section 302(b) of the Pakistan Penal Code

2013

9th Oct: Consultant from Services Hospital visits Sheraz and reports abnormal behaviour, auditory hallucinations, delusions and irrelevant speech

2014

29th Jan: Central Jail Hospital prescribes anti-psychotic medication Resperidone

2016

20th Jun: Lahore High Court dismisses subsequent appeal

Aug: Appeal filed in Supreme Court

19th Nov: Central Jail, Lahore conducts another medical test on Sheraz, which reports hallucinations, irrelevant talk, sleep deprivation and poor self-care ability

Sheraz Butt was sentenced to death in 2012 for fatally stabbing his mother four years earlier at his residence in Lahore. Signs of his mental illness were apparent long before the incident occurred, but he was first diagnosed with schizophrenia by jail authorities in 2016.

Despite multiple medical examinations confirming Sheraz's mental illness over the years, he continues to remain on death row.

He is currently incarcerated in Central Jail, Lahore (Kot Lakhpat Jail).

BACKGROUND

Sheraz Butt was sentenced to death in 2012 for fatally stabbing his mother at his residence in Lahore in 2008. Though he was diagnosed with schizophrenia much later, signs of his mental illness were apparent earlier. Sheraz had attempted another knife attack on his parents a week before the incident. His parents had reported it to the police and had also referred him to the Pakistan Institute of Mental Health (PIMH) but he had refused to take any medications. Sheraz repeatedly claimed that a *"junoon"* had taken over him that had led him to commit the crime.

He has spent seven years on death row even though multiple medical tests have confirmed him to be suffering from acute mental illness. Despite his condition, the Lahore High Court turned down his criminal appeal in 2016 and upheld his death sentence.

His subsequent appeal is currently pending before the Supreme Court.

SHERAZ'S MENTAL ILLNESS

According to Sheraz's jail medical records, he has been visited seven times by psychiatrists from Punjab Institute of Mental Health (PIMH). This series of medical diagnosis and examinations, carried out between the years 2013 and 2017, consistently points to Sheraz's mental health as a classical representation of a patient suffering from 'Schizophrenia'.

Over the years, dismal detention conditions and strong anti-psychotic medications have adversely affected Sheraz's health. He continues to experience auditory and visual hallucinations, has lost orientation of time and space, and often speaks about himself in third person. He also says he hears voices that give him information about his family members.

Sheraz is a severely mentally ill man who belongs in a mental health facility, not strung up on the gallows in violation of Pakistani and international laws.

"IF A PERSON IS MENTALLY ILL, HOW CAN YOU HANG THEM?"

– FORMER CHIEF JUSTICE SAQIB NISAR,

during the hearing of mentally ill death row prisoners Kanizan Bibi and Imdad Ali

BASIS OF COMMUTATION

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MUHAMMAD ANWAR

YEARS ON DEATH ROW: 21

AGE AT THE TIME OF ARREST: 17

IMPRISONED AT:
DISTRICT JAIL, VEHARI

CURRENT STATUS

Civil petition pending before the Supreme Court

CASE TIMELINE

1993

6th Mar: Incident occurs. FIR registered against Muhammad Anwar, Abdul Ghani and Abdul Haq

1998

27th Jun: Trial court **sentences Muhammad Anwar to death**

Criminal appeal filed in Lahore High Court, challenging Anwar's death sentence on the basis of his juvenility

2000

1st Jul: **Juvenile Justice System Ordinance (JJSO) passed** prohibiting execution of juveniles

2001

25th Jul: LHC dismisses appeal

13th Dec: **Presidential notification** issued granting remission to juvenile offenders whose death sentences had been confirmed prior to the enactment of the JJSO

2007

11th Oct: SC dismisses appeal

21st Oct: Criminal review petition filed in SC

2015

6th Aug: Writ petition filed in LHC, Multan bench

17th Dec: SC dismisses petition**. Black warrant issued**, setting execution date for 19th Dec

18th Dec: Lahore High Court **stays execution** at the very last minute

2016

11th Feb: Petition dismissed by LHC

15th Feb: Civil petition filed in SC, seeking remission for Anwar

Muhammad Anwar was only a teenager when he got involved in an argument during a football game in his village in Vehari in 1993. One of the boys succumbed a month later to injuries sustained during the brawl. While all other accused were acquitted, Anwar was convicted and handed the death penalty.

Anwar was just 17 years old at the time of his arrest. He has spent more years than that on death row awaiting execution. He has also suffered multiple heart attacks during his time in District Jail, Vehari, leaving him paralysed with limited mobility.

Since 2001, his family has made numerous attempts to get the authorities to recognise his status as a juvenile and commute his death sentence. But his case has continually fallen between the cracks of Pakistan's criminal justice system.

BACKGROUND

Mohammad Anwar was arrested in 1993 along with his brothers, Abdul Haq and Abdul Ghani. An FIR was registered against the three boys after an argument broke out during a football match in their village. The same evening, around 15 people arrived at Anwar's house and a fight ensued. Three people were injured in the fight and about a month later, one of them succumbed to his injuries.

Anwar's birth registration certificate reveals that he was only 17 years old when the incident took place, yet he was sentenced to death.

Two years after his conviction, Pakistan introduced the Juvenile Justice System Ordinance (JJSO) that was designed to bring Pakistan's juvenile justice system in line with international law and practice. The law prohibits the imposition of the death penalty on anyone who was under the age of 18 at the time of the offence.

Anwar's family has repeatedly appealed to the Supreme Court, Sessions Court, Lahore High Court, the Presidency, the Supreme Court's Human Rights Cell, and the Ministry of Interior to consider Anwar's juvenility. Each time, it has been either ignored or rejected.

In 2015, a warrant scheduling Anwar's execution was issued, despite the fact that proceedings relating to his juvenility were pending before the Lahore High Court. His execution was stayed at the very last minute by the high court.

Anwar has served almost 26 years in prison, far longer than what he would have if his sentence had been commuted to life imprisonment in 2002 when the issue of his age was first raised with the authorities.

THE LEGAL BASIS FOR COMMUTATION

JUVENILE JUSTICE SYSTEM ORDINANCE (JJSO)

Section 12 of the Juvenile Justice System Ordinance (JJSO) prohibits the sentencing to death of any person who was under 18 at the time of his/her alleged offence. The JJSO came into force in 2000 – almost two years after the issuance of Muhammad Anwar's death sentence by the Trial Court. In 2018, the JJSO was replaced with the Juvenile Justice System Act.

PRESIDENTIAL NOTIFICATION

In 2001, the President of Pakistan issued Notification No. F.8/41/2001-Ptns, in exercise of his powers under Article 45 of the Constitution of Pakistan, 1973, granting remission to those juvenile offenders whose death sentences had been confirmed prior to the enactment of the JJSO on the basis of an inquiry into their juvenility.

UN CONVENTION ON THE RIGHTS OF THE CHILD

The United Nations Convention on the Rights of the Child (CRC), ratified by Pakistan in November 1990, dictates under Article 37 (a) that *"neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age."*

ICCPR

Pakistan is also a party to the International Convention on Civil and Political Rights (ICCPR), wherein Article 6, Paragraph 5 of the ICCPR provides explicitly *"Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age."*

Both the JJSO and the Presidential Notification were enacted in light of these international obligations. Therefore, Anwar's death sentence and execution warrant are in violation of Pakistan's obligations under the CRC and the ICCPR.

ANWAR'S JUVENILITY

After the Presidential Notification granting remission to juvenile offenders was issued in 2001, Anwar's family made numerous efforts, including filing a petition to the Home Department, to ensure that Anwar's age is recognised and he benefits from the change in the law.

In early 2002, the Home Secretary Punjab requested and obtained copies of Anwar's birth certificate and Union Council record. **The Home Secretary also ordered a medical test to determine his age, which concluded that Anwar was indeed a juvenile.**

MEDICAL CONDITION

During his 26 years in prison, Anwar has developed severe heart problems, which were first diagnosed in 2009. Since then, he has suffered three heart attacks which have left him partially paralyzed.

Following the most recent heart attack in 2014, he has suffered from loss of movement in the left side of his body. This has affected his mobility severely.

THE GOVERNMENT OF PAKISTAN MUST HOLD AN URGENT INQUIRY INTO ANWAR'S CASE IN ACCORDANCE WITH PAKISTAN'S INTERNATIONAL OBLIGATIONS AND UNDER THE JJSA READ ALONG WITH NOTIFICATION NO. F.8/41/2001, AND ACCORD HIM THE BENEFIT OF THE SPECIAL REMISSION ALLOWED TO JUVENILE PRISONERS.

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MOHAMMAD SALEEM

YEARS ON DEATH ROW: 14

MENTAL ILLNESS: SCHIZOPHRENIA

IMPRISONED AT:
CENTRAL JAIL, LAHORE

CURRENT STATUS

Case pending before the District and Sessions Judge, Lahore

CASE TIMELINE

2001

22nd Dec: Saleem Ahmad **arrested**

2002

16th Jan: Trial court orders medical examination

8th Jun: Report from psychiatric hospital declares Saleem fit to stand trial

2004

30th Oct: Saleem convicted and **sentenced to death** under Section 302(b) of Pakistan Penal Code

2013

8th May: LHC **dismisses appeal**

25th Sept: Saleem **diagnosed with schizophrenia**; prescribed anti-psychotic drugs including Risperidone

2017

24th May: **Supreme Court dismisses appeal**

19th Oct: President **rejects mercy petition**

31st Oct: **Black warrant issued**, scheduling execution for 7th Nov

2nd Nov: Appeal filed with NCHR to halt execution

4th Nov: **Execution stayed** by Sessions Judge on the grounds of Saleem's mental illness. Court also appoints medical board to look into Saleem's health

2018

12th Jun: Medical board at Punjab Institute of Mental Health (PIMH) states that Saleem is suffering from chronic schizophrenia

26th Nov: Court-appointed medical board confirms that Saleem "suffers from chronic schizophrenia"

Mohammad Saleem Ahmad, a mentally ill prisoner, has been on death row for 14 years. He was accused of fatally shooting his sister Nasreen Begum, after she allegedly refused to lend him money in July 2001. Even though the investigation officer testified of having knowledge of his mental illness and the trial court acknowledged that he was "insane" and "did not have any orientation about time and space," he was sentenced to death in 2004.

Saleem was first diagnosed "as a case of psychiatric illness" in 2013 and has since then been prescribed strong anti-psychotic drugs.

A court-appointed medical board recently confirmed his mental illness again and suggested that he be shifted to Punjab Institute of Mental Health (PIMH), yet he remains in the hospital cell of Central Jail (Kot Lakhpat) Lahore.

BACKGROUND

Mohammad Saleem Ahmad has an extensive history of mental illness. He was first diagnosed with schizophrenia in 2013 by jail authorities, although seeds of his mental illness were sown long before that. Saleem's family had been aware of his mental health prior to his arrest and had made him visit psychiatric facilities where he was once subjected to electroshock therapy.

In 2001, Saleem was arrested in Lahore for fatally shooting his sister. After the incident, Saleem's family abandoned him and he had to engage a state-appointed lawyer. While the prosecution presented 10 witnesses, Saleem's state-appointed counsel presented none. His attorney also failed to mention that Saleem's family had previously known of his mental illness.

From the onset, doubts about his mental health were apparent at every stage of trial and sentencing. The investigating officer testified that he was aware of Saleem's mental illness and even the trial court noticed on several occasions that he was "talking insane" and "did not have any orientation in time and space". Based on these observations, Saleem was referred to a medical board at Mental Hospital, Lahore that nevertheless declared him fit to stand trial in 2002.

Despite his plea of insanity, the court sentenced him to death in 2004.

Saleem came within inches of the gallows in 2017 when his death warrant was issued. But he was granted a last-minute reprieve by the District and Sessions Court on a petition filed by Justice Project Pakistan, on the basis of his mental illness. The court also ordered the constitution of a medical board to examine Saleem.

In November 2018, the medical board confirmed that Saleem "suffers from chronic schizophrenia" and "requires regular medical treatment", and suggested that he be immediately shifted to Punjab Institute of Mental Health for treatment.

Saleem's health continues to deteriorate with every passing day due to his frail medical condition and the harsh conditions of confinement. He belongs in a mental health facility, not strung up on the gallows in violation of Pakistani and international laws.

"IF A PERSON IS MENTALLY ILL, HOW CAN YOU HANG THEM?"

– FORMER CHIEF JUSTICE SAQIB NISAR,
during the hearing of mentally ill death row prisoners Kanizan Bibi and Imdad Ali

BASIS OF COMMUTATION

Mentally ill defendants repeatedly slip through the cracks in Pakistan's criminal justice system. The lack of mental health treatment and training in the criminal justice system, as well as in Pakistan generally, means that many individuals never even get diagnosed. In fact, for many indigent mentally ill defendants, their first contact with a mental health professional is in jail. As a member state of the United Nations, the Government of Pakistan has ratified a number of international human rights treaties that grant rights and special protections to persons suffering from mental illness. These include:

ICCPR

The United Nations Human Rights Committee has recognized in various judgments, including in *R.S v Trinidad and Tabago* (684/96) that the execution of mentally-ill prisoners is prohibited as cruel, inhuman and degrading treatment under Article 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR), of which Pakistan became a party in 2010.

The HRC held that the incarceration on "death row" and execution of a prisoner whose mental health had "seriously deteriorated" amounted to a cruel, inhuman, and degrading treatment

SAFEGUARDS GUARANTEEING PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY

The UN Economic and Social Council (ECOSOC) in 1984 adopted "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty." In the same year, the Safeguards were endorsed by consensus by the UN General Assembly. The Safeguards guaranteeing protection of the rights of those facing the death penalty constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment.

The Third Safeguard states:

> *"Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane."*

The third safeguard was amplified by the Economic and Social Council in 1988 with the words "persons suffering from mental retardation or extremely limited mental competence."

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For more information, email: communications@jpp.org.pk

MUHAMMAD IQBAL

YEARS ON DEATH ROW: 19

AGE AT THE TIME OF ARREST: 17

IMPRISONED AT:
DISTRICT JAIL, GUJRAT

CURRENT STATUS

Case pending before the Lahore High Court

CASE TIMELINE

1998

10th Jul: Incident occurs at 12:30am in Mandi Bahauddin, Punjab

1999

28th Jun: Iqbal's ossification test confirms that he was a juvenile at the time of the alleged offence

5th Jul: Trial Court **sentences Iqbal to death under the ATA**; and determines his age to be 17 years

16th Sept: Criminal Appeal filed in LHC

2000

1st Jul: **Juvenile Justice System Ordinance (JJSO) passed** prohibiting execution of juveniles

2001

13th Dec: **Presidential Notification** issued granting remission to juvenile offenders whose death sentences had been confirmed prior to the enactment of the JJSO

2002

20th Mar: LHC dismisses appeal

11th Sept: SC dismisses appeal

2004

9th Jun: **Petitioner withdraws Criminal Review Petition** in Supreme Court due to compromise between the parties

Muhammad Iqbal was just 17 years old when he was convicted of a fatal shooting in Mandi Bahauddin in 1999. The Special Court, Gujranwala determined his age to be 17 following a court-mandated ossification test, confirming that he was a juvenile. Yet, he was sentenced to death under the problematic Anti-Terrorism Act (ATA).

He has spent well over half his life in prison and his death sentence is in gross violation of the Juvenile Justice System Ordinance and Presidential Notification. The complainants in the case, i.e. the victim's family, have forgiven him and do not want him hanged. But Iqbal's sentence remains non-compoundable because of the nature of the ATA.

BACKGROUND

Muhammad Iqbal, also known as Bali, comes from a poor family hailing from a village near Mandi Bahauddin. Friends and neighbours describe him as mild-mannered, with deep-rooted respect for authority.

Iqbal was only 17 years old when he was sentenced to death in 1999 for fatally shooting a man. He has spent more than half his life on death row. The FIR states that Iqbal and four others surrounded a wagon near Mandi Bahauddin. Upon being surrounded, the driver of the vehicle reversed the car in an attempt to escape. As a reaction, shots were fired that smashed the windscreen, and injured the driver and three passengers. They were moved to a hospital, where one of the four injured parties succumbed to their injuries.

Iqbal was arrested two months after the incident and a Special Court judge in Gujranwala sentenced him to death. Suspecting that he was a juvenile, the prosecution moved an application before the trial court to determine Iqbal's age through an ossification test. It was subsequently determined that his age was 17 years at the time of the alleged offence. The trial court also held in its judgment that Iqbal was a minor at the time of the occurrence.

In fact, ossification tests were conducted on all five of the accused which determined three to be juveniles. All but Iqbal were given life sentences, including the ones found not to be juveniles. Iqbal remains the only accused on death row – despite his juvenility being recognized. The basis for his sentence is dubious eyewitness testimonies, made even more problematic by the fact that the offence took place at 12:30am, in a street with no lights.

FORGIVEN BY COMPLAINANTS

In Pakistan, the accuser and accused can reach a compromise of forgiveness or financial settlement and a pardon may be issued.

In 2004, the complainants in Iqbal's case – i.e. the victim's family – withdrew their petition and forgave Iqbal. The son of the victim, Waheed Ahmad, said that they believe Iqbal has already spent several years in imprisonment and that alone is punishment enough. They have categorically stated that they do not want Iqbal hanged.

However, due to the non-compoundable nature of the problematic Anti-Terrorism Act (ATA), under which Iqbal was convicted, all his appeals have been rejected and he remains on death row.

THE LEGAL BASIS FOR COMMUTATION

JUVENILE JUSTICE SYSTEM ORDINANCE (JJSO)

Section 12 of the Juvenile Justice System Ordinance (JJSO) – now repealed and replaced by Juvenile Justice System Act (JJSA) – prohibits the sentencing to death of any person who was under 18 at the time of his/her alleged offence. The JJSO came into force in 2000 – almost two years after the issuance of Iqbal's death sentence by the trial court.

PRESIDENTIAL NOTIFICATION

In 2001, the President of Pakistan issued Notification No. F.8/41/2001-Ptns, in exercise of his powers under Article 45 of the Constitution of Pakistan, 1973, granting remission to those juvenile offenders whose death sentences had been confirmed prior to the enactment of the JJSO on the basis of an inquiry into their juvenility. In fact, **Iqbal was listed as one of the prisoners that would benefit from this notification** as he fulfilled the criteria for retrospective force.

UN CONVENTION ON THE RIGHTS OF THE CHILD

The United Nations Convention on the Rights of the Child (CRC), ratified by Pakistan in November 1990, dictates under Article 37 (a) that *"neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age."*

ICCPR

Pakistan is also a party to the International Convention on Civil and Political Rights (ICCPR), wherein Article 6, Paragraph 5 of the ICCPR provides explicitly: *"Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age."*

Both the JJSO and the Presidential Notification were enacted in light of these international obligations. Therefore, Iqbal's death sentence and execution are in violation of Pakistan's international obligations under the CRC and the ICCPR.

2005

16th Jul: Anti-Terrorism Court, Gujranwala, dismisses application for acquittal on grounds of compromise

22nd Jul: Writ petition filed in LHC against order of the trial court

2006

13th Nov: LHC dismisses petition stating that no illegality was committed by the trial court

2007

21st Feb: Supreme Court dismisses appeal on the ground that offences under the ATA are non-compoundable

2016

16th Mar: Mercy petition rejected

26th Mar: **Black warrant issued**, scheduling execution for 30th March

28th Mar: Civil review petition filed in SC on basis of compromise, juvenility under JJSO and double punishment; **execution stayed**

2017

28th Apr: SC dismisses civil review petition

3rd Jul: National Commission for Human Rights orders interim relief for Iqbal, on a complaint filed by JPP on Iqbal's behalf

2018

13th Febr: Writ petition filed in Lahore High Court under Article 199 for enforcement of fundamental Rights

18th May: Juvenile Justice System Act (JJSA) 2018 comes into force, overcoming the shortcomings of the JJSO

THE GOVERNMENT OF PAKISTAN MUST ACCORD IQBAL THE BENEFIT OF THE SPECIAL REMISSION ALLOWED TO JUVENILE PRISONERS IN ACCORDANCE WITH PAKISTAN'S INTERNATIONAL OBLIGATIONS AND UNDER THE JJSO READ ALONG WITH NOTIFICATION NO. F.8/41/2001.

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MUHAMMAD AZAM

YEARS ON DEATH ROW: 19

AGE AT THE TIME OF ARREST: 17

IMPRISONED AT: CENTRAL JAIL, KARACHI

CURRENT STATUS

Petition pending before the Sindh High

CASE TIMELINE

1998

11th Oct: FIR registered against Moin-ud-din and Muhammad Azam

1999

8th Jul: Azam **sentenced to death** under 302 PPC read with section 7 of the Anti-Terrorism Act (ATA)

26th Oct: Sindh High Court dismisses appeal

2000

1st Jul: **Juvenile Justice System Ordinance (JJSO) passed,** prohibiting execution of juveniles

2001

12th Sept: Supreme Court dismisses appeal

13th Dec: **Presidential Notification** issued granting remission to juvenile offenders whose death sentences had been confirmed prior to the enactment of the JJSO

2002

18th Dec: Criminal Suo Motu Review Petition dismissed by SC

2015

14th Apr: **Mercy Petition rejected**

16th Apr: **Black warrant issued**; execution scheduled for 23rd April

27th Apr: Last-minute **stay of execution** granted

2017

25th Sept: Petition filed before the NCHR

22nd Nov: **NCHR orders stay** on issuance of Azam's black warrant

2018

22nd Apr: Petition filed in Sindh High Court under Article 199 for the enforcement of fundamental rights

Abd-ur-Rehman (known as Muhammad Azam in police records) was arrested at the age of 17 and has spent over half his life on death row.

Arrested as a juvenile, his conviction for a fatal shooting and dacoity (armed robbery) was questionable as confessions and witness statements were extracted using torture and fabricated evidence. Azam was tried in an Anti-Terrorism Court and sentenced to the harshest possible punishment: death.

Frequent appeals have failed to get him justice for over 19 years.

BACKGROUND

When Abd-ur-Rehman was arrested by the police in 1998, he told them his name was "Muhammad Azam" to hide his detention from his family. Twenty-one years later, he is still known to prison authorities as Muhammad Azam.

Merely a boy at the time of his conviction, Azam was booked for an accidental death that happened during a row with his friend's debtor. He was charged under the problematic Anti-Terrorism Act (ATA) along with Section 302 of the Pakistan Penal Code. This guaranteed him a harsher sentence, with very little safeguard.

During investigation, Azam was severely tortured by the police. As a result, he repeatedly claimed to be "Muhammad Azam" and confessed to this and other crimes to avoid the physical abuse. His father later submitted an affidavit stating that this was not his son's name.

There are also allegations that fabricated evidence was submitted by a head constable in order to get the case tried in an Anti-Terrorism Court where the likelihood of harsher sentences is higher. Azam's co-accused Moin-ud-din claimed that he was asked to pay a bribe to the judge. Further 'evidence' extracted through torture was presented in court and ultimately led to Azam's conviction in July 1999.

As Azam was 17 years old at the time, he spent the first eight months in a juvenile facility. He was then moved to an adult facility and handed the death penalty.

The Juvenile Justice System Ordinance (JJSO) was passed in 2000, prohibiting the use of the death penalty for juveniles. Jail authorities and a government doctor then lodged an appeal in 2004 to have Azam's sentence reduced on the basis of his age. The appeal, however, was rejected by an Anti-Terrorism Court as his age had not been raised in the original trial and was thus deemed irrelevant.

THE LEGAL BASIS FOR COMMUTATION

JUVENILE JUSTICE SYSTEM ORDINANCE (JJSO)

Section 12 of the Juvenile Justice System Ordinance (JJSO) 2000 prohibits the sentencing to death of any person who was under 18 at the time of his/her alleged offence. The JJSO was later repealed by the Juvenile Justice System Act, 2018 which also prohibits the execution of minors.

PRESIDENTIAL NOTIFICATION

In 2001, the President of Pakistan issued Notification No. F.8/41/2001-Ptns, in exercise of his powers under Article 45 of the Constitution of Pakistan, 1973, granting remission to those juvenile offenders whose death sentences had been confirmed prior to the enactment of the JJSO on the basis of an inquiry into their juvenility. In fact, **Azam was listed as one of the prisoners who would benefit from this notification** as he fulfilled the criteria for retrospective implementation.

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Both the JJSO and the Presidential Notification were enacted in light of these international obligations. Therefore, Azam's death sentence and execution are in violation of Pakistan's international obligations under the CRC and the ICCPR.

FORGIVEN BY COMPLAINANT

In Pakistan, the accuser can reach a compromise of forgiveness or financial settlement and a pardon may be issued to the accused.

A compromise was reached between Azam and Moin-ud-din and their complainant in 2008 and a pardon was resultantly granted. This should have resulted in the dismissal of the case but because their sentences were given under the non-compoundable Anti-Terrorism Act, no pardons can be granted.

ANTI-TERRORISM ACT (ATA)

There is no evidence that Azam was ever involved in a terrorist group or that he has ever committed a terrorist act of any kind yet he was tried in an Anti-Terrorism Court.

He was a juvenile when he committed a crime, confessed it under torture, and has made peace with those accusing him. But because he was tried under Pakistan's broad anti-terrorism laws, his settlement with the complainant is meaningless and he remains under the threat of imminent execution.

THE GOVERNMENT OF PAKISTAN MUST ACCORD AZAM THE BENEFIT OF THE SPECIAL REMISSION ALLOWED TO JUVENILE PRISONERS IN ACCORDANCE WITH PAKISTAN'S INTERNATIONAL OBLIGATIONS AND UNDER THE JJSO READ ALONG WITH THE NOTIFICATION NO. F.8/41/2001

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