



# DEATH PENALTY



## **POLICY BRIEF:**

**Pakistan's Compliance with Article 6: The Right to Life (ICCPR)**

# Analysing Pakistan’s Compliance with International Treaty Obligations relating to the Death Penalty

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## Introduction

On December 17, 2014, Pakistan lifted a seven-year moratorium on the death penalty in the wake of the tragic attack on Army Public School in Peshawar. Subsequently, Pakistan carried out 325 executions by December 2015: 88 in 2016, 66 in 2017, 15 in 2018, and 10 in 2019. Currently there are **3,226** prisoners on death row.<sup>1</sup> Capital punishment continues to be prescribed for 32 crimes, including non-lethal offences which do not meet the 'most serious crime' threshold.<sup>2</sup> Between 2017 and 2022, Pakistan has sentenced 1,337 defendants to death (**4 death sentences per week**), accounting for approximately **5%** of all death sentences reported worldwide. **As of 2022, every 20<sup>th</sup> person sentenced to death in the world is a Pakistani.** Despite the fact that there is a high rate of Pakistan's superior courts overturning death sentences passed by trial courts on appeal, Pakistan retains one of the largest death rows in the world.<sup>3</sup>

Pakistan's justice system is plagued by glaring deficiencies and pervasive abuses of authority. Torture by police and other law enforcement agencies is so endemic in Pakistan that it is largely a common practice, and courts regularly admit and rely upon confessions extracted through torture.<sup>4</sup> Poor defendants must rely on attorneys who typically provide only cursory and ineffective representation. Once convicted, death row prisoners have their constitutional right to seek pardon ostensibly effected through a clemency process that is arbitrary and rife with procedural irregularities. Since the lifting of the moratorium in December 2014, a de facto blanket policy of refusing clemency to prisoners on death row has been in place.<sup>5</sup>

Lastly, Pakistan's Antiterrorism Act 1997 (ATA), which accounts for around 16% of total executions in Pakistan wrongfully convicts and sentences to death criminal defendants for offences bearing no connection to terrorism.

The ATA offers even fewer safeguards than the ordinary criminal justice system and has the effect of suspending fundamental due process and fair trial rights, while granting police wide-reaching powers for the sake of fast-tracking convictions.<sup>6</sup>

Each of these failings separately constitutes a human rights violation, and cumulatively reveal an unreliable system that is fundamentally incapable of administering the ultimate and irreversible penalty of death.

Reducing the scope of the death penalty was one of the priority areas expressly identified by the European Union's Generalised Scheme of Preferences (GSP+)'s monitoring mission during its assessment of Pakistan for the period 2018-2019.<sup>7</sup> This policy brief will examine Pakistan's trajectory to bring its application of the death penalty in line with international human rights law and to reinforce its own constitutional safeguards and protections for citizens facing capital punishment. By examining the legal framework surrounding the death

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<sup>1</sup> Justice Project Pakistan, Death Penalty in Pakistan: Data Mapping Capital Punishment, 2022, available at: <https://jpp.org.pk/report/death-penalty-in-pakistan/>

<sup>2</sup> UN General Assembly, International Covenant on Civil and Political Rights, Article 6, paragraph 2. 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>

<sup>3</sup> The Pakistan Capital Punishment Study A Study of the Capital Jurisprudence of the Supreme Court of Pakistan, Reprieve & Foundation for Fundamental Rights; <https://reprieve.org/wp-content/uploads/sites/2/2019/04/Pakistan-Capital-Punishment-Study.pdf>

<sup>4</sup> Justice Project Pakistan has a separate brief in this series on Pakistan's Torture and Custodial Death (Prevention and Punishment). Act, 2022 and the gaps which still exist in effective enforcement.

<sup>5</sup> "Pakistan Operating a Blanket Policy of Refusing All Mercy Petitions." Daily Times, April 11, 2018. <https://dailytimes.com.pk/226884/pakistan-operating-a-blanket-policy-of-refusing-all-mercy-petitions>

<sup>6</sup> Between 2014 to 2017, 85 prisoners were sentenced to death under the Anti-Terrorism Act 1997 (ATA) Source: Justice Project Pakistan. "Trial and Terror: The Overreach of Pakistan's Anti-Terror Act". 2015. Available on: [https://www.jpp.org.pk/wp-content/uploads/2017/11/2017\\_11\\_13\\_PRIV\\_ATA-Report-Final.pdf](https://www.jpp.org.pk/wp-content/uploads/2017/11/2017_11_13_PRIV_ATA-Report-Final.pdf)

<sup>7</sup> The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') assessment of Pakistan covering the period 2018 – 2019, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0029&qid=1558636562341>

penalty and taking stock of legislative and judicial progression in recent years, the brief will highlight remaining gaps and propose strategic policy recommendations for reform.

## Overview of Pakistan’s International Legal Obligations

Pakistan has ratified seven out of nine core United Nations conventions and treaties, which it must effectively implement to continue to benefit from the GSP+ scheme. Those which contain obligations pertaining to the application of the death penalty include the **International Covenant on Civil and Political Rights (ICCPR)**, the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)**, the **Convention on the Rights of the Child (CRC)** the **Convention on the Rights of Persons with Disabilities (CRPD)**, General Comment No. 36 on Article 6: The Right to Life issued by the Human Rights Committee<sup>8</sup>, and the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, enshrined in ECOSOC Resolution 1984/50 and ECOSOC Resolution 1989/64.<sup>9</sup>

### 2.1. Prohibition on arbitrary deprivation of life - The right to a fair trial

Article 6(1) of the ICCPR, which Pakistan ratified in 2010, demands a fair trial before the imposition of the death penalty – this has been interpreted by the Human Rights Committee to mean that a fair trial, which observes all the provisions of the ICCPR, must be held in all capital trials, without which the death penalty may not be imposed.<sup>10</sup> This includes being informed promptly and in detail of the charges; being provided translation or interpretation into one’s own language; the presumption of innocence; counsel of one’s choosing; sufficient time to prepare a defence; a trial to be held without undue delay; for the hearing to be heard by an independent and impartial tribunal; and for the right of review by a higher tribunal.<sup>11</sup> Moreover, Safeguards 4, 5, 6, and 8 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty enshrined in ECOSOC Resolution 1984/50 also pertain to the right to fair trial, and include clear evidence for guilt, fair trial safeguards, the right to appeal, and staying execution during pending proceedings.

### 2.2. The death penalty may only be imposed for the ‘most serious crimes’

Under Article 6(2) of the ICCPR, a “sentence of death may be imposed only for the most serious crimes...”.<sup>5</sup> The United Nations Human Rights Committee maintains that “‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure.”<sup>6</sup> Consequently, only intentional killings or attempted killings, and perhaps the intentional infliction of grievous bodily harm, qualify as the “most serious crimes” required in Article 6(2) of the ICCPR. Through its authoritative published opinions, the Committee has held that the various lesser offences do not constitute “the most serious crimes” and therefore cannot incur the death penalty without violating Article 6. Significantly, the Quranic standard for imposing the death penalty matches the most serious crimes threshold.<sup>12</sup> Moreover, Safeguard 1 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty enshrined in ECOSOC Resolution 1984/50 states

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<sup>8</sup> General comment no. 36 : Article 6, Right to life : Human Rights Committee; <https://digitallibrary.un.org/record/3884724?ln=en>

<sup>9</sup> E/RES/1984/50 <https://digitallibrary.un.org/record/70601?ln=en>

<sup>10</sup> Louise Arbour, In the Matter of Sentencing of Taha Yassin Ramadan, Application for Leave to Intervene as Amicus Curiae and Application in Intervention of Amicus Curiae of United Nations High Commissioner for Human Rights (Iraqi Tribunal: 8 February 2007)

<sup>11</sup> *Reid v Jamaica Communication No. 250/1987*, Views adopted on 20 July 1990 at para 11.5, U.N. Doc. CCPR/C/51/D/355/1989 (1994).

<sup>12</sup> Penal Reform International (2015). *Sharia Law and the Death Penalty*. p. 34. <https://cdn.penalreform.org/wp-content/uploads/2015/07/Sharia-law-and-the-death-penalty.pdf> ;

Human Rights Council. Biennial high-level panel discussion on the question of the death penalty, (2022) Intervention by Sarah Belal, Executive Director Justice Project Pakistan.

<https://hrcmeetings.ohchr.org/HRCSessions/RegularSessions/52/Pages/Statements.aspx?SessionId=66&MeetingDate=28/02/2023%2000:00:00>

that the scope of the death penalty “should not go beyond intentional crimes with lethal or other extremely grave consequences”.

### **2.3. Prohibition on the use of the death penalty for persons with psychosocial disabilities**

Article 7 of the ICCPR states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...”. The Human Rights Committee has observed that the issuance of a death warrant to a person known to have a psychosocial disability violates Article 7 of the ICCPR.<sup>13</sup>

Additionally, states must provide requisite procedural safeguards for defendants with mental illness or intellectual disabilities. These are critical to the fulfilment of their obligations under Articles 6 and 14 of the ICCPR as the Special Rapporteur on extrajudicial, summary or arbitrary executions has noted, due to the nature of their psychosocial disabilities, these individuals ‘are much more vulnerable to manipulation during arrest, interrogation, and confession’.<sup>14</sup>

### **2.4. Prohibition on the use of the death penalty on juvenile offenders**

Additionally, Article 37(a) of the UNCRC and Article 6, paragraph 5 of the ICCPR binds all member states not to impose the death penalty for crimes committed by persons of less than eighteen years of age. General Comments 10 and 24 of the Committee on the Rights of the Child lay down the right of all those under the age of eighteen to be treated in accordance with the rules on juvenile justice as well.<sup>15</sup> Moreover, Safeguard 3 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty enshrined in ECOSOC Resolution 1984/50 prohibits the use of the death penalty on children.

### **2.5. The right to seek pardon or commutation**

Article 6(4) of the ICCPR expressly provides for the right to seek pardon or commutation. When commenting on Article 6, the Human Rights Committee stated that state parties are required to allow individuals sentenced to death to seek pardon or commutation and to ensure that requests for commutation are meaningfully considered and conclusively decided upon according to applicable procedures.<sup>16</sup> A 1998 report by the Special Rapporteur on extrajudicial, summary or arbitrary executions reiterated this same standard.<sup>17</sup> The Human Rights Committee has also noted that Article 6(4) does not prescribe a particular procedure for the exercise of the right to seek pardon or commutation and state parties consequently retain discretion in spelling out the relevant procedures. Moreover, Safeguard 7 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty enshrined in ECOSOC Resolution 1984/50 states that all people facing capital punishment must be allowed to seek pardon, regardless of the nature of the offence.

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<sup>13</sup> *Sahadath v. Trinidad and Tobago*

<sup>14</sup> 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>

<sup>15</sup> General Comment No. 10 (2007) CRC/C/GC/10 [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CRC\\_General\\_Comment\\_10.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CRC_General_Comment_10.pdf); General Comment No. 24 (CRC/C/GC/24) <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>

<sup>16</sup> General Comment No. 36 (on Article 6: Right to Life) (CCPR/C/GC/36) (at Paragraph 47)

<sup>17</sup> Philip Alston A/HRC/8/3 2 May 2008. Para 60

## 2.6. The right to consular assistance

Pakistan has ratified the Vienna Convention on Consular Relations (VCCR), which guarantees the right to consular assistance for foreign nationals detained in another country.<sup>18</sup> The UN Secretary-General in his 2017 Report on capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, noted that persons facing the death penalty abroad can be disproportionately affected by the death penalty and that access to consular assistance, as provided for in the Vienna Convention on Consular Relations, is an important aspect for their protection.<sup>19</sup> Moreover, the duty of the home state to provide consular assistance to its nationals detained abroad, as well as the duty of the detaining state to grant access to the imprisoned nationals is firmly established in the 2019 Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions.<sup>20</sup> The report focuses on the application of the death penalty to foreign nationals and the provision of consular assistance by the home State. It states that consular access is a human right which imposes distinct but complementary obligations on both the prosecuting State and the home State, and that the failure of the home State to provide adequate consular assistance amounts to a violation of its responsibility to protect the right to life.

## Pakistan's Trajectory towards Increased Compliance through key areas of reform

### 3.7. Reduction in the Number of Offences Punishable by Death

In Pakistan, capital punishment is prescribed for 32 crimes, including various non-lethal crimes such as treason, blasphemy, kidnapping, rape and assault on the modesty of a woman. However, in practice, individuals are usually only executed for the offences of murder and terrorism.<sup>21</sup>

The Constitution of Pakistan does not prescribe the death penalty for any offence. Moreover, the Pakistani Constitution contains safeguards and due process protections for individuals facing trials, which are poorly enforced. Pakistan's egregious application of the death penalty does not meet its own constitutional rights and neither is it in consonance with Convention rights.

The Concluding Observations issued to Pakistan by the United Nations Human Rights Committee in 2017 recommended that Pakistan reinstate the moratorium, consider abolition and ensure the death penalty is only provided for "the most serious crimes".<sup>22</sup>

The European Commission in its report on the GSP+ assessment of Pakistan for 2018-2019 expressly identified "progress on the definition of the most serious crimes as regards the death penalty" as one of its monitoring

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<sup>18</sup> Article 36, VCCR, addresses communications between consular officers and nationals of the sending state.

<sup>19</sup> A/HRC/36/26 22 August 2017

<sup>20</sup> Agnese Callamard A/74/318 20 August 2019

<sup>21</sup> Justice Project Pakistan, Executions Tracker:

[https://data.jpp.org.pk/en/library/?q=\(filters:\(current\\_status:\(values:!\(%2710480b52-bd9a-436b-8886-7985beaf6bca%27\)\)\),order:desc,sort:metadata.date\\_of\\_execution,types:!\(%275bcd692bf834e87d6dd936d6%27\)\)](https://data.jpp.org.pk/en/library/?q=(filters:(current_status:(values:!(%2710480b52-bd9a-436b-8886-7985beaf6bca%27))),order:desc,sort:metadata.date_of_execution,types:!(%275bcd692bf834e87d6dd936d6%27)))

<sup>22</sup> Human Rights Committee, 'Concluding observations on the initial report of Pakistan', 23 August 2017, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhssymRLSm3gUSDIntv8Slm%2F%2BjSkxSILEnCLYi aWS2Zt2ITQfT1Ihv40HhjfTMf8Nky906kLKaSHalcX%2Byl7%2FtFUPrUqGm8FbOBvJ6oGjzqpQw>.

priorities.<sup>23</sup> It noted that the Human Rights Committee had urged Pakistan to “limit the scope of the death penalty”.<sup>24</sup>

In compliance with the Concluding Observations issued by the HRC in 2017 to reduce the scope of the death penalty, the Federal Ministry of Human Rights (MOHR) initiated an official review of all offences punishable by death in 2018. The review found 33 offences punishable by death in Pakistan, instead of 27, as was previously believed. In the same year, Justice Project Pakistan, in collaboration with the MOHR, conducted a detailed analysis of Pakistan’s capital crimes. The research revealed that Pakistan had, in practice, only executed for the most serious crimes, with no executions, or even death sentences on record for most of the non-serious offences.

As a result, in October 2022, in a crucial development, Pakistan’s Federal Parliament passed the Railways (Amendment) Act 2022 which removed the death penalty for the offence of sabotage of the railways and replaced it with life imprisonment. The removal of this offence will live in the country’s institutional memory as proof that if approached strategically, we can bring use of the death penalty in line with international standards without public backlash. Additionally, in December 2022, the National Assembly passed the Control of Narcotics Substances (Amendment) Bill 2022, which substitutes the death penalty for narcotics offences with life imprisonment. The Bill is currently under review by the Senate Standing Committee on Law and Justice. If passed, it will further enhance Pakistan’s implementation of its obligations under the ICCPR.

## Key Takeways

The Government of Pakistan has taken significant steps to reduce the number of offences punishable by death. In order to fully comply with the ‘most serious crimes’ threshold in Article 6(2) of the ICCPR, it is crucial that the Government of Pakistan consider the removal of the death penalty for various other non-lethal offences for which the death penalty is currently imposed, such as perjury, stripping a woman, and kidnapping for unnatural lust.

### 3.8. Barring the Execution of Mentally Ill Offenders

Traditionally, Pakistan’s criminal justice system has failed to provide meaningful protection to persons suffering from mental illness at all stages such as arrest, trial, sentencing, detention and execution. The situation is further compounded by the structural problems of Pakistan’s under-resourced and overstretched criminal justice system. A lack of access to mental health care in Pakistan, particularly among indigents, means that most mentally ill persons remain undiagnosed and thus without effective proof to raise their illness during trial.<sup>25</sup>

In 2017, during Pakistan’s state review of compliance with the ICCPR, the UN Human Rights Committee noted with concern that “persons with psychosocial or intellectual disabilities are reportedly sentenced to death and executed” in Pakistan.<sup>26</sup> The Committee recommended that no one with serious psychosocial disabilities be

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<sup>23</sup> The EU Special Incentive Arrangement for Sustainable Development and Good Governance (‘GSP+’) assessment of Pakistan covering the period 2018 – 2019, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0029&qid=1558636562341>

<sup>24</sup> Ibid

<sup>25</sup> A Most Serious Crime, supra note 11, at p. 31; Justice Project Pakistan, Safeguarding the Rights of Mentally Ill Defendants: The Supreme Court of Pakistan’s Landmark Judgment

<sup>26</sup> Human Rights Committee, ‘Concluding observations on the initial report of Pakistan’, 23 August 2017, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhssymRLSm3gUSDIntv8Slm%2F%2BJSkxSILEnCLYi aWS2Zt2ITQfT1Ihv40HhjfTMf8Nky906kLKaSHalcX%2Byl7%2FtFUPrUqGm8FbOBvJ6oGjzqpQw>.

sentenced to death and a review of cases where there is credible evidence that death row inmates may be suffering from psychosocial disabilities.

This recommendation was echoed in the European Commission's report on the GSP+ assessment of Pakistan for 2018-2019, where it noted that the Human Rights Committee had urged Pakistan to ensure no juvenile or disabled person may be executed.<sup>27</sup>

In February 2021, the Supreme Court delivered a landmark ruling titled *Safia Bano v. Home Department*. It barred the execution of individuals who are severely mentally ill and commuted the death sentences of the first two petitioners, Kanizan Bibi and Imdad Ali, to life imprisonment. Both prisoners suffered from schizophrenia and had spent 30 and 18 years respectively in prison prior to this ruling. Not only did the Court establish key safeguards for severely mentally ill defendants on death row and bar their execution, it reiterated and upheld protections that must be afforded to persons with psychosocial disabilities at every stage in the criminal justice system: at the time of arrest, during investigation and at trial and sentencing, to ensure due process. The Court issued directions to the Federal and Provincial Governments to establish forensic mental health facilities for the assessment, treatment and rehabilitation of under trial prisoners and convicts with mental ailments. The judgement brought Pakistan one step closer to implementing the recommendations of the UN Human Rights Committee. The United Nations released a statement welcoming the judgement, which was endorsed by eight leading UN experts.<sup>28</sup>

Two years later, however, there are few signs of the judgement's implementation on the ground. While some commendable measures have been taken to train prison authorities and judges on mental illness at the provincial level in Sindh, there remains no tangible change on the federal level.<sup>29</sup>

In 2022, in a crucial development, the draft Criminal Law Reforms Bill 2022 drafted by the Federal Ministry for Law and Justice proposed fundamental protections that must be afforded to persons with psychosocial disabilities at every stage in the criminal justice system. The Bill incorporated the standards established by relevant jurisprudence into the Code of Criminal Procedure and aligned it with the Provincial Mental Health Acts. It also sought to establish the procedure for the constitution, composition and functions of a state-appointed medical board and stipulated minimum standards for conducting a mental health evaluation. While the Reforms received Cabinet approval and it was expected that the Bill would subsequently be tabled in the National Assembly, the change in government in April 2022 caused the legislative agenda of the previous government to lapse.

## Key Takeways

The Supreme Court of Pakistan's ruling in *Safia Bano* did bring Pakistan one step closer towards compliance with its international legal obligations under the ICCPR. However, the efforts made to comply with directions

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<sup>27</sup> The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') assessment of Pakistan covering the period 2018 – 2019, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0029&qid=1558636562341>

<sup>28</sup> The statement is endorsed by eight leading UN experts Agnès Callamard, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; Gerard Quinn, Special Rapporteur on the Rights of Persons with Disabilities; Nils Melzer, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Elizabeth Broderick (Chair), Melissa Upreti (Vice Chair), Dorothy EstradaTanck, Ivana Radačić, and Meskerem Geset Techane, the Working Group on Discrimination Against Women and Girls. [https://www.ohchr.org/en/press-releases/2021/02/pakistan-un-experts-welcome-death-penalty-ban-individuals-mental-health#:~:text=GENEVA%20\(18%20February%202021\)%20%E2%80%93,%2C%E2%80%9D%20said%20the%20experts.](https://www.ohchr.org/en/press-releases/2021/02/pakistan-un-experts-welcome-death-penalty-ban-individuals-mental-health#:~:text=GENEVA%20(18%20February%202021)%20%E2%80%93,%2C%E2%80%9D%20said%20the%20experts.)

<sup>29</sup> Justice Project Pakistan, with the support of the Australian Government, has created manuals for criminal justice stakeholders (police, prison authorities, judges and mental health professionals) and carried out capacity-building trainings for them in Sindh.

therein by the Federal and Provincial governments have been piecemeal and fragmentary. In order to create comprehensive protections for persons with psychosocial disabilities in line with Pakistan's commitments under the ICCPR and the CRPD, the Government must enact legislation in line with the directions of the Supreme Court in the *Safia Bano* judgement.

### 3.9. Reforming Pakistan's Mercy Petitions Procedure

Although the President of Pakistan possesses the constitutional authority to pardon death row defendants,<sup>30</sup> in practice such petitions are always denied.<sup>31</sup> Moreover, reviewing mercy petitions in Pakistan is a perfunctory practice, plagued with glaring omissions, lack of transparency and due process violations.<sup>32</sup> All these factors violate Pakistani death row prisoners' constitutional right to have their clemency petitions meaningfully considered. Since the moratorium was lifted, the President has granted no pardons or commutations. At least 444 people have had their mercy petitions rejected.<sup>33</sup>

During Pakistan's state review by the UN Human Rights Committee in July 2017, the Committee found that the "policy of blanket refusals of clemency petitions" stood in violation of the Government's obligations under the ICCPR.<sup>34</sup>

"Simplifying the procedure for granting mercy petitions" was also one of the priority areas expressly identified by GSP+'s monitoring mission during its assessment of Pakistan for the period 2018-2019.<sup>35</sup>

In early 2019, after extensive consultations the Ministry of Human Rights obtained Cabinet approval to reform the mercy petitions procedure. In October of the same year, the Ministry of Interior issued new SOP's for the consideration of mercy petitions. Thereafter in its state follow-up report Pakistan submitted that "a committee to review mercy petitions has been notified under Article 45 of the Constitution."<sup>36</sup> These were not implemented uniformly and failed to meet international standards. Thereafter, mercy petitions with strong evidence of humanitarian abuses and violations continued to be wrongfully rejected under the revised SOP's.<sup>37</sup>

The Supreme Court of Pakistan has also recently reaffirmed and reiterated the importance of the submission of mercy petitions which are comprehensive and contain the entirety of a prisoner's records through the *Safia Bano* case. In its directions regarding the resubmission of a mentally ill prisoner's mercy petition, the Court judicially reviewed the mercy petition of the death row prisoner Ghulam Abbas, and effectively delineated the minimum guidelines that must be followed in the consideration of mental illness as a ground for clemency. The Court also ruled that any mercy petition must contain a comprehensive record of a convict's medical history and record.

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<sup>30</sup> Article 45, Constitution of the Islamic Republic of Pakistan

<sup>31</sup> According to the Ministry of Interior, the President's office rejected 513 mercy petitions of condemned prisoners over the last five years, 444 of which were in the first fifteen months after the resumption of executions in December 2014

<sup>32</sup> Justice Project Pakistan. (2019) *No Mercy: A Report on Clemency for Death Row Prisoners in Pakistan*.

<https://jpp.org.pk/report/no-mercy-a-report-on-clemency-for-death-row-prisoners-in-pakistan/>

<sup>33</sup> "SC rejects petition for formation of larger bench to hear mercy petitions" *Pakistan Today* (Islamabad, 23 March 2016)

<https://www.pakistantoday.com.pk/2016/03/23/sc-rejects-petition-for-formation-of-larger-bench-to-hear-mercy-petitions/>

<sup>34</sup> Human Rights Committee Concluding Observations to Pakistan (July 2017), No. 17

<sup>35</sup> The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') assessment of Pakistan covering the period 2018 – 2019, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0029&qid=1558636562341>

<sup>36</sup> CCPR/C/PAK/CO/1/Add.1)

<sup>37</sup> The mercy petitions of Ghulam Abbas and Ismail Parvez, severely mentally ill defendants, remain pending. Link to JPP Policy Briefing on Mercy Petitions: [https://docs.google.com/viewerng/viewer?url=https://jpp.org.pk/wp-content/uploads/2022/02/2020\\_11\\_30\\_PUB\\_Mercy-Petition-SOPs\\_Brief.pdf&hl=en](https://docs.google.com/viewerng/viewer?url=https://jpp.org.pk/wp-content/uploads/2022/02/2020_11_30_PUB_Mercy-Petition-SOPs_Brief.pdf&hl=en)

The draft **Criminal Law and Justice Reforms Bill 2022**, drafted by the Federal Ministry for Law and Justice, revamped the procedure through which mercy petitions are reviewed in Pakistan in line with the recommendations of the UN Human Rights Committee. The Reforms outlined a clear criterion for evaluation of mercy petitions including demarcation of mitigating factors that must be considered by provincial committees e.g., procedural lapses, delays, mental illness, solitary confinement, etc. The Reforms received Cabinet approval and it was expected that the Bill would subsequently be tabled in the National Assembly. However, this did not happen because of the change in government in April 2022.

In the absence of a concrete policy articulating the Government's decision to halt executions, the President's office rejected seven mercy petitions of death row prisoners and the first executions were scheduled for October 13<sup>th</sup> 2022.<sup>38</sup> Nevertheless, not only did the Government of Pakistan spring into action to stop these executions, it also noted in official communication that in light of international obligations, use of the death penalty should remain on hold until further notice.

## Key Takeways

While the Government of Pakistan has taken some steps towards reforming the procedure through which clemency is sought, gross miscarriages of justice remain prevalent precisely because the criteria through which mercy petitions are filed, processed, evaluated and decided have not been clearly set out through rules framed by the Government in accordance with international law. The Government must create a "meaningful procedure" through which applications can be submitted and reviewed to ensure transparency, certainty, due process and objectivity, in line with the ICCPR. Recent legislative progressions such as the **Criminal Law and Justice Reforms Bill 2022**, drafted by the Federal Ministry for Law and Justice, aimed to create such a procedure in line with the recommendations of the UN Human Rights Committee.<sup>39</sup>

### 3.10. Reforming the Anti-Terrorism Act (1997)

The Anti-Terrorism Act (ATA), Pakistan's primary anti-terrorism legislation, was promulgated in 1997. The ATA 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" of offences triable under the ATA. Despite the government's predominant narrative claiming that the death penalty is a necessary measure to curb terrorism, only 30% of those executed between 2014 and 2019 were convicted for crimes of terrorism.<sup>40</sup>

A fundamental flaw within the ATA is the vague and overly broad definition of "terrorism" under its provisions.<sup>41</sup> Multiple due process rights are curtailed under this Act, such as police not requiring a warrant for search and arrest, admissibility of confessions made in detention which lead to heightened police torture, extremely short deadlines for investigation and trial, and non-compound ability of offences. The arbitrary manner in which the

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<sup>38</sup> Dawn News, Mercy petitions of five death row prisoners rejected, 6th October 2022 <https://www.dawn.com/news/1713716>

<sup>39</sup> Justice Project Pakistan, Explainer: The Criminal Law and Justice Reforms 2022, 16.02.2022

<sup>40</sup> Analysed through JPP database available at <https://t.ly/gvcu/>

<sup>41</sup> Section 6(1) of the ATA, as most recently amended in March 2013, defines terrorism as follows:

In this Act "terrorism" means the use or threat of action where:

(a) The action falls with the meaning of sub-section (2) and

(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 terrorising 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.

ATA is applied to cases in which there is no perceivable element of terrorism is concerning, both in light of the curtailment of fundamental rights, and in the misdirection of resources which should instead be truly focused on those responsible for perpetrating acts of terror in Pakistan.<sup>42</sup>

Executions for persons sentenced to death by the ATC's accounted for 78% of total executions in Sindh, 43% in Balochistan, 14% in Punjab and 0% in Khyber-Pakhtunkhwa between the period December 2014 to May 2017.

A study by Justice Project Pakistan and Reprieve in December 2014 discovered that as many as **80%** of those convicted of terrorism related offences under the ATA were accused of offences that had nothing to do with terrorism as it is commonly understood.<sup>43</sup>

The Supreme Court of Pakistan issued a judgement in 2019 reviewing the definition and scope of the term 'terrorism'.<sup>44</sup> The judgement, authored by then Chief Justice of Pakistan Justice Asif Saeed Khosa, emphasised the need to distinguish between ordinary crimes and acts of terrorism. It established that acts of revenge or disputes did not qualify as terrorism and physical harm to the victim alone was not enough to classify an act as terrorism. The Supreme Court further recommended that the Parliament bring changes to limit the application of the term "terrorism" which is currently too wide and to bring it in line with the international perspective of the term.

## Key Takeways

The Government of Pakistan must enact specific legislative amendments to narrow the definition of terrorism under the ATA, thereby preventing ordinary crimes from being wrongfully tried by Anti-Terrorism Courts. It should further repeal provisions granting extraordinary powers to police to ensure procedural safeguards in line with the ICCPR.

### 3.11. Protecting Pakistanis Facing the Death Penalty Overseas

According to official estimates, there are over 9,300 Pakistanis languishing in foreign jails.<sup>45</sup> Pakistanis imprisoned abroad are at the mercy of local courts without access to lawyers, impartial translators, or adequate consular assistance from the Pakistani diplomatic missions. These destitute Pakistanis face the harshest punishments due to their lack of understanding of and assistance with the legal process, incapability to communicate directly with the court, and inability to produce evidence from Pakistan in their defence.

In an alarming development, and after a period of 3 years with no execution of Pakistanis in Saudi Arabia, the Kingdom has beheaded 5 Pakistani nationals for drug trafficking since November 2022. This is despite the Saudi Commission for Human Rights having announced a moratorium on executions for drug related crimes in January 2021. In February 2022, Pakistan and Saudi Arabia finalised an agreement for the transfer of offenders, but its implementation has remained limited, a fact made all the more troubling given the high number of Pakistani nationals imprisoned in the country.<sup>46</sup>

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<sup>42</sup> Justice Project Pakistan. 'Trial and Terror: The Overreach of Pakistan's Anti-Terrorism Act' (Nov 2017) <https://jpp.org.pk/report/trial-and-terror-the-overreach-of-pakistans-anti-terrorism-act/>

<sup>43</sup> Justice Project Pakistan & Reprieve. 'Terror on Death Row' (Dec 2014) Available at [https://www.reprieve.org.uk/wp-content/uploads/2014/12/2014\\_12\\_18\\_PUB-Pakistan-Terror-Courts-Report-JPP-and-Reprieve.pdf](https://www.reprieve.org.uk/wp-content/uploads/2014/12/2014_12_18_PUB-Pakistan-Terror-Courts-Report-JPP-and-Reprieve.pdf)

<sup>44</sup> PLD 2020 Supreme Court 61

<sup>45</sup> As per a reply submitted by the Ministry of Foreign Affairs in the National Assembly.

<sup>46</sup> Of these 2,531 prisoners, nearly 700 are convicted for drug related crimes, which carry the death penalty in Saudi Arabia.

Article 4 of the Constitution of the Islamic Republic of Pakistan places a duty on the Government of Pakistan to ensure that the due process rights of Pakistanis imprisoned abroad are upheld in all circumstances.<sup>47</sup> It does not provide the Government with the right to extract a Pakistani citizen undergoing trial in a foreign criminal justice system, however, it makes it mandatory on the Government of Pakistan to make forceful representations on behalf of Pakistani citizens whose rights are being compromised in foreign jurisdictions.

In 2010, under the direction of the Supreme Court of Pakistan, the Ministry of Foreign Affairs devised 'Guidelines For Streamlining The Institutional Mechanism For Implementing The Directive Of The Honourable Supreme Court On Securing Release and Repatriation Of Pakistanis Detained/Imprisoned Abroad'.

In 2017, the Chief Justice of the Lahore High Court, pursuant to litigation filed by Justice Project Pakistan on behalf of the families of 10 prisoners facing execution in GCC, noted that guidelines did not amount to a policy and directed the Ministry of Foreign Affairs to draft a consular policy for Pakistanis who are imprisoned abroad and/or facing execution within two months.<sup>48</sup>

Despite being under orders of the Lahore High Court, the Ministry of Foreign Affairs has yet to devise a consular policy which ensures that missions follow through on their responsibilities to Pakistani citizens arrested or detained abroad. Resultantly, the fate of imprisoned Pakistanis rests at the discretion of individual embassies. Although the government's advocacy resulted in the repatriation of 1,200 prisoners from the United Arab Emirates and 41 prisoners from Sri Lanka in 2020, these efforts have been sporadic and have since then waned. Moreover, in order to ensure effective implementation of policies regarding imprisoned Pakistanis, it is crucial to establish cross-departmental harmony and cooperation between the Ministry of Foreign Affairs and the Ministry of Overseas Pakistanis and Human Resources Development, delineating their respective responsibilities and mandates.<sup>49</sup>

The lack of a uniform policy that outlines to whom, when, and how Pakistani missions must provide consular assistance means that efforts to ensure justice for Pakistanis imprisoned in foreign criminal justice systems are arbitrary at best. Lack of awareness of the rights guaranteed under the Vienna Convention as well as capacity issues such as funding, understaffing and a general disregard for Pakistanis caught in the foreign criminal justice system results in consular assistance being seen as a matter of the "host state's discretion rather than a legal obligation."<sup>50</sup>

Thus, while more than 90% of overseas Pakistanis are employed in GCC countries, the country has shirked its responsibility to adequately protect them. According to official statistics submitted by the Ministry of Foreign Affairs in the Lahore High Court, there were 8,597 Pakistanis imprisoned in 63 countries in 2015.<sup>51</sup> By 2020, the number soared to 10,896 prisoners in 28 countries, with the highest number of prisoners in the United Arab Emirates and Saudi Arabia, respectively.<sup>52</sup> The number of Pakistani prisoners in Saudi Arabia increased from 1,509 in 2015 to 3,248 in 2020.<sup>53</sup> In the absence of a policy framework that outlines to whom, when, and how to extend consular assistance, it is impossible for missions abroad to protect the rights of such a large number of Pakistani prisoners.

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<sup>47</sup> Article 4: Right of individuals to be dealt with in accordance with law, etc 1. To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

<sup>48</sup> Asma Shafi etc Versus the Federation of Pakistan etc (W.P No 32288/214). Order date: 02.06.2017

<sup>49</sup> Sana Farrukh, 'Emigrant policies of Pakistan: Recommendations for improving the consular protection regime' 25th March 2022

<sup>50</sup> Through the Cracks - the exploitation of Pakistani Migrant Workers in the Gulf Recruitment Regime' Justice Project Pakistan. Pg 16. Retrievable from: <https://data.jpp.org.pk/ur/document/zecwsxcg5z?page=26>

<sup>51</sup> Ministry of Foreign Affairs, Government of Pakistan

<sup>52</sup> Daily Pakistan, 'Details of Pakistanis imprisoned abroad have come to light' 13th January 2020 <https://dailypakistan.com.pk/13-Jan-2020/1077769>

<sup>53</sup> On the other hand, other countries have successfully managed to reduce the number of prisoners abroad. There were 15,149 Bangladeshi nationals imprisoned abroad in 2017, but by 2019 the number dropped to 8,848 — showing a decrease of 41.60%.

Consequently, Pakistanis are also a significant part of the death row population in countries that carry out the death penalty, such as Saudi Arabia and Iran. There has been an increase in the number of Pakistanis on death row abroad and the number of executions carried out globally since 2014. While only 4% of residents of Saudi Arabia are Pakistani, Pakistanis constitute 15% of total death sentences.<sup>54</sup> Moreover, 94% of all South Asians executed in Saudi Arabia are Pakistani.<sup>55</sup>

## Key Takeaways

To avoid the needless executions of Pakistanis imprisoned overseas, it is imperative that the Government take immediate steps to pass and implement a consular protection policy, negotiate new Prisoner Transfer Agreements, and negotiate the repatriation of prisoners under pre-existing ones.

### 2. *Policy Recommendations to Improve Pakistan's Compliance with Treaty Obligations under the GSP+ Framework*

#### Reducing the scope of the death penalty

- Initiate a legislative process to revise the list of offences punishable by death and consider the removal of the death penalty for non-lethal offences such as perjury, stripping a woman, and kidnapping for unnatural lust in order to bring Pakistan's application of the death penalty one step closer to the 'most serious crimes' threshold.

#### Preventing the execution of offenders with mental illness and juvenile offenders

- Enact legislation explicitly prohibiting the imposition of the death penalty against persons with severe psychosocial disabilities, even if the disability is diagnosed post-conviction and sentencing, in line with the Supreme Court's directives in *Safia Bano*.
- Establish independent medical boards in all provinces to look into assertions of psychosocial disability by defendants and to ensure that a defendant or prisoner with such a disability receives reasonable accommodations in judicial proceedings and in detention.
- Conduct comprehensive mental health evaluations, in line with international best practices, of all prisoners on death row who exhibit signs of mental illness, with a view to commuting their sentences in line with the decision in *Safia Bano*.
- Conduct age determination of all juvenile offenders still languishing on death row in line with the Presidential Notification No. F.8/41/2001-Ptns dated 13 December 2001, the Juvenile Justice Systems Ordinance 2000, the Juvenile Justice Systems Act, 2018, and the precedents of Superior Courts in the cases of *Muhammad Iqbal* and *Muhammad Anwar*, with a view to commuting their sentences to life imprisonment.

#### Reforming the Anti-Terrorism Act (1997)

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

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<sup>54</sup> Carolyn Hoyle, Jocelyn Hutton, and Lucy Harry, 'A Disproportionate Risk of Being Executed: Why Pakistani Migrants Are Vulnerable to Capital Punishment in Saudi Arabia', *The British Journal of Criminology*, 7 January 2023, azac100, <https://doi.org/10.1093/bjc/azac100>.

<sup>55</sup> *Ibid.*

- Initiate an inquiry into all cases wherein the defendant has been sentenced to death under the ATA with a view to commuting the sentences in the event that a misapplication of the law is discovered. During the course of such an inquiry the moratorium on the death penalty should be reinstated.
- Repeal provisions awarding powers of search and seizure to police without warrants and ensure that procedural safeguards in line with the ICCPR are introduced.
- Repeal Section 21-H of the Act, and introduce provisions barring the admissibility of confessions/statements recorded in the custody of police.
- Introduce guidelines for judges to ensure that a compromise in a coordinate compoundable offence is treated as a mitigating factor when considering the compounding of offences under the ATA, and that where any other mitigating factor co-exists, the prisoner is given the benefit of the commutation of his sentence.

### **Reforming Pakistan's mercy petition procedure**

- Formulate comprehensive rules for the mercy petition submission and review procedure, in line with international standards, which provide prisoners with a meaningful opportunity to seek clemency to ensure transparency, certainty, due process and objectivity.
- Make mandatory the inclusion of complete and updated medical records of death row convicts in all mercy petitions by jail authorities.
- Table the now lapsed draft Criminal Law Reforms Bill 2022 as a new Bill in Parliament to enact the mercy petition reforms proposed therein into the law.
- Initiate a review of all cases where outstanding questions regarding the juvenility, mental illness and physical disability of the accused have been raised with a view to commuting their sentences.
- Repeal the Antiterrorism Act 1997 provision that bars persons convicted under the Act from seeking remissions in order to counter the blanket policy of refusing clemency that has been put in place in the aftermath of the ATA.

### **Protecting Pakistani citizens from the death penalty overseas**

- Pass a uniform consular protection policy to ensure that the rights of Pakistani citizens imprisoned abroad and/or facing execution are upheld and that every possible effort is made to secure their release/repatriation.
- Implement existing Prisoner Transfer Agreements to secure the repatriation of Pakistani nationals imprisoned in foreign jails.
- Negotiate Prisoner Transfer Agreements with all countries where a large number of Pakistanis reside.

### **Data on the Death Penalty**

- Publish data on the number of offences carrying the death penalty, in line with the ECOSOC Resolution 1989/64.

- Maintain and publish disaggregated data on the use of the death penalty, including the number of persons sentenced to death, the number of executions carried out, the number of death sentences reversed or commuted on appeal, and the number of instances in which clemency has been granted.
- Document the extent to which the safeguards for rights of people facing the death penalty are incorporated in national law.



Justice Project Pakistan (JPP), is an award winning legal action non-government organization dedicated to representing the most vulnerable Pakistani prisoners facing the harshest punishments at home and abroad. Our work combines strategic litigation, fierce domestic and international public and policy advocacy campaigns, and building the capacity of stakeholders to bring systemic reform to the criminal justice system in Pakistan.

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