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FIDH – International Federation for Human Rights

and its member organization

Human Rights Commission of Pakistan (HRCP)

Pakistan: Briefing note on the death penalty – 10 October 2022

This briefing note provides an overview of the use of the death penalty in Pakistan from 2019 to the end of August 2022. During this period, the number of death sentences and executions decreased considerably. Between January 2015 and August 2019, 2,454 people were sentenced to death.[1] From August 2019 to August 2022 the number dropped to 657. Between January 2015 and December 2019, 508 death row prisoners were executed. From January 2020 to August 2022 no executions were carried out. The end of the jurisdiction of Pakistan's 11 military courts after March 2019 and the high number of Supreme Court acquittals of defendants facing the death penalty may explain these developments. However, 32 offenses across 11 distinct pieces of legislation are still punishable by death, and Pakistan remains among the countries with the largest number of individuals under death sentence. According to the most recent official figures available, at the end of December 2021, 1,143 prisoners were on death row.

With this year's 20th World Day Against the Death Penalty[2] focusing on the link between capital punishment and torture and other cruel, inhuman or degrading treatment, it is worth reflecting on the growing recognition that the death penalty is incompatible with the prohibition of torture under international law.

1. Introduction

The International Federation for Human Rights (FIDH) and its member organization in Pakistan, the Human Rights Commission of Pakistan (HRCP), have been monitoring and analyzing developments concerning the use of capital punishment in Pakistan for several decades. After a joint mission to Pakistan was conducted in 2006, the following year FIDH and HRCP published *Slow March to the Gallows: Death Penalty in Pakistan*, their first report on this subject.[3] In 2018, FIDH and HRCP conducted a second mission to Pakistan, which looked at developments related to the death penalty over the previous decade, and published the report *Punished for Being Vulnerable: How Pakistan Executes the Poorest and the Most Marginalized in Society* (hereinafter *Punished for Being Vulnerable*) in October 2019.[4]

[1] For a breakdown of death sentences and executions by year, type of offense and province from 2015 to August 2019, see FIDH and HRCP, *Punished for being vulnerable*, Annex II (pp. 39-41).

[2] A project of the World Coalition Against the Death Penalty, of which FIDH is a founding and Steering Committee member.

[3] FIDH and HRCP, *Slow march to the gallows: Death penalty in Pakistan,* March 2007, https://www.fidh.org/en/region/asia/pakistan/Slow-march-to-the-gallows-Death

[4] FIDH and HRCP, *Punished for being vulnerable: How Pakistan executes the poorest and the most marginalized in society,* October 2019, https://www.fidh.org/en/issues/death-penalty/pakistan-poor-and-marginalized-suffer-disproportionately-from-capital

The report concluded that death sentences in Pakistan are often the result of a combination of structural flaws inherent to the criminal justice system, including a weak prosecutorial system, and an underfunded law enforcement system. The report also found that trials involving capital crimes are generally based on weak witness testimonies and forced confessions. In death penalty cases, the poorest defendants and the most vulnerable in society are less likely to be afforded adequate legal assistance, and more likely to be tortured as part of investigations that ultimately lead to convictions imposing death sentences. Despite the welcome drop in the number of executions and death sentences in recent years, poor and vulnerable prisoners are still disproportionately likely to be sentenced to death for capital crimes.

Between June and August 2022, FIDH and HRCP carried out desk research drawing on news reports, legislation passed by the federal government, and consulted Pakistani and international organizations to offer updated analysis and data. The data presented in this note reflects the situation as of the end of August 2022.

2. Developments since 2019

This section provides an overview of key developments regarding the use of the death penalty during the period August 2019 to August 2022.

2.1. Death sentences decrease, no executions recorded

Pakistan continues to be among the countries in the world where the death penalty is used with alarming frequency. Between August 2019 and August 2022, the Pakistani judicial system convicted 657 defendants who were sentenced to death. However, the number of executions fell drastically. While at least 15 executions were recorded in 2019, no executions were carried out between January 2020 and August 2022.

There are several factors that may explain this decrease in the number of executions and death sentences. First, Pakistan's military courts ceased to exist in March 2019 after their mandate had expired. During the four years (2015-2019) in which these courts operated, at least 56 people were executed.[5] Second, an increase in the number of Supreme Court acquittals of defendants involved in capital crimes cases could explain the drop in the number of executions. While the lower courts—the district and sessions courts—account for more than half the number of death sentences imposed, during the appeal process the bulk of such judgments are dismissed by the Supreme Court on grounds of: unreliable witness testimony; lack of evidence or inadmissible evidence; reliance by the lower courts on coerced, involuntary, or retracted confessions; and failure of the prosecution to establish intention or motive. Third, pressure from the European Union (EU) through the Generalized Scheme of Preferences Plus (GSP+)[6] to move towards the

[5] Dawn, *View from the courtroom: Military courts-related legal issues far from being settled*, 21 December 2020, https://www.dawn.com/news/1596952

[6] Under this instrument, the European Union monitors the progress of beneficiary countries towards the implementation of 27 international conventions, including the International Convention on Civil and Political Rights.

abolition of the death penalty may have contributed to the decrease in the executions and death sentences, even though Pakistan reportedly sought a waiver to this scheme in July 2022 to overcome this requirement.[7] Lastly, in August 2019, after nearly five years during which the President of Pakistan had consistently rejected mercy petitions from death row prisoners,[8] the Ministry of Interior issued new operating procedures to evaluate mercy petitions and to make the submission process easier.[9] However, at the time of this writing, there is no publicly available evidence that indicate mercy petitions from death row prisoners were granted.

2.2. Number of offenses punishable by death remains high

As a result of the continuous imposition of death sentences by lower courts and the considerable backlog of appeal cases in the Supreme Court, death penalty cases often take years to reach their conclusion.[10] At the end of 2021, there were 1,143 prisoners on death row across Pakistan, according to official data provided by the prisons department from each province.[11] This information constitutes the most updated figure at the time of writing. None of this data is publicly available and needs to be requested from the various prison departments.

In August 2019, 32 offenses across 11 distinct pieces of legislation were still punishable by death. In August 2022, Section 9-C of the 1997 Control of Narcotics Substances Act and Section 127 of the 1890 Railways Act were amended to omit the words "death or" from these sections, thereby replacing the death penalty with life imprisonment as the maximum penalty for violators of the two laws.[12]

The range of offenses that still carry the death sentence remains very broad and includes crimes that do not meet the threshold of "the most serious crimes."[13] Under the Pakistan Penal Code, capital offenses include, among others, perjury (Section 194), stripping a woman in public (Section 354-A), kidnapping for unnatural lust (Section 367-A), blasphemy (Section 295-C), and kidnapping for ransom (Section 365-A).

[7] https://www.thefridaytimes.com/2022/07/01/pakistan-says-wont-abolish-death-penalty-rejects-gsp-condition/

[8] Under Article 45 of the Constitution, the President of Pakistan has the power to pardon, suspend or commute any sentence passed by the court.

[9] Nation, *Govt flexible on dealing with mercy appeals: Mazari*, 10 October 2019

[10] See FIDH and HRCP, *Punished for being vulnerable: How Pakistan executes the poorest and the most marginalized in society,* October 2019, Chapter 5 (pp. 26-30), for details on the appeal process in capital cases and the resulting conditions on death row.

[11] HRCP, *State of Human Rights in 2021,* p. 14. Upon a request for information made by HRCP in 2018, the four provincial prison departments in Sindh, Punjab, Balochistan, and Khyber Pakhtunkhwa provided this data in January 2022.

[12] Those two sections are the only ones in the respective laws that provide for the death penalty. Both sections already provide for an alternative punishment of life imprisonment.

[13] Capital punishment is illegal for a majority of offenses in line with Article 6 of the International Covenant on Civil and Political Rights (ICCPR), to which Pakistan became a state party in 2010, which stipulates that "a sentence of death may be imposed only for the most serious crimes." The UN Human Rights Committee (HRC) has asserted that "crimes not resulting directly and intentionally in death, such as attempted murder, corruption […] can never serve as the basis, within the framework of article 6, for the imposition of the death penalty."

2.3. Jurisdiction of military courts ends

After a four-year mandate, in March 2019, Pakistan's 11 military courts finally ceased to exist, which could explain a drop in death sentences imposed from 2019.[14]

2.4. Landmark judgment on death penalty and mental disability

In February 2021, in a landmark judgment (hereinafter the "Safia Bano judgment"), the Supreme Court commuted the sentences of three individuals who had been sentenced to death after having been diagnosed with severe mental disabilities. The Court held that "*if a condemned prisoner, due to mental illness, is found to be unable to comprehend the rationale and reason behind his/her punishment, then carrying out the death sentence will not meet the ends of justice*."[15]

NGOs in Pakistan had long argued for a prohibition of the use of capital punishment against individuals with mental disabilities. This judgment serves as a precedent that could be used by lower courts as an authoritative legal source to impose alternative punishments to the death penalty for individuals who have been diagnosed with mental disabilities. However, in many cases, defendants are not subjected to medical and/or psychological examinations to determine their status, or severity, of any mental or physical disabilities, particularly in the early stages of a trial.

3. Torture and the death penalty

This section aims to establish the link between the prohibition of torture as a peremptory norm of international law and the death penalty. In addition, it shows that there are several aspects of the use of the death penalty in Pakistan that could be qualified as torture or other cruel, inhuman or degrading treatment or punishment.

3.1. Death penalty may amount to torture

Torture is forbidden in all circumstances under international law, and its prohibition is codified in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which Pakistan became a state party in 2010.[16] In contrast, the death penalty is not prohibited.

[14] These military courts were established after the passage of the 21st Amendment to the Constitution in 2015 and mandated to be operational for a period of two years. Similarly, the Pakistan Army (Amendment) Act 2015 was amended, providing the legal basis for the jurisdiction of military courts over wide-ranging offences, including abduction for ransom, waging war against the state, causing any person injury or death, creating terror or insecurity, among others. In 2017, the 23rd Amendment of the Constitution was enacted to extend the mandate of military courts for another two years to adjudicate over cases related to terrorist offenses. From 2015 to 2019, these courts tried a total of 617 cases and imposed 345 death sentences, which resulted in 56 executions.

[15] Supreme Court of Pakistan, Civil Review Petition 420_2016, 10 February 2021, https://www.supremecourt.gov.pk/downloads_judgements/c.r.p._420_2016.pdf, para. 66.

[16] CAT, (Adopted 10 December 1984, Entered into Force 26 June 1987) 1465 UNTS 85 Art 1 para. 1.

In recent years, a number of organizations, including FIDH, have begun to argue that the use of the death penalty is incompatible with the prohibition of torture.[17]

Over the past decades, various national and regional courts have made the link between torture and the use of the death penalty. For example, in 1989, the European Court of Human Rights ruled that long periods on death row can amount to a violation of the prohibition against torture.[18] Moreover, the United Nations (UN) Human Rights Committee has stated that a number of methods of executions are prohibited because they constitute torture, or cruel, inhuman or degrading punishment, and are thus prohibited by the CAT.[19]

In the Pakistani context, at various stages of the criminal justice proceedings, a link between torture and capital punishment can be made. For example, evidence and confessions in death penalty cases may be obtained through torture. In addition, prolonged appeal proceedings may amount to torture in the form of psychological trauma and extreme detention conditions.

3.2. The prohibition of torture in Pakistan

Pakistan has failed to prohibit the use of torture and to provide a definition of torture under domestic law. Therefore, no legal basis currently exists in Pakistan to argue that the practice of the death penalty is incompatible with the prohibition of torture.

Since 2010, at least five attempts made by successive governments to pass legislation that would prohibit all forms of torture and bring Pakistan in compliance with the CAT have not been successful. In its Concluding Observations concerning the review of Pakistan's periodic report in June 2017, the UN Committee Against Torture criticized Pakistan's failures to both provide a definition of torture and to criminalize its use, in line with the CAT.[20]

In July 2021, the Pakistani Senate passed the Torture and Custodial Death (Prevention and Punishment) Bill, which provides a comprehensive definition of torture and empowers the National Commission for Human Rights to investigate cases of torture.[21] However, at the time of writing, the bill had yet to be passed by the National Assembly.[22]

These gaps in the legal framework leave ample room for torture to be used with alarming frequency in Pakistan, including in capital cases. Additionally, criminal cases, including those

[17] FIACAT, FIDH et al, *La peine de mort et l'interdiction de la torture et des peines ou traitements cruels, inhumains ou dégradants,* August 2021 [in French], https://www.fiacat.org/attachments/article/3004/Note%20de%20position%20sur%20la%20peine%20de%20mort%20et%20la%20torture%20finale.pdf

[18] European Court of Human Rights, *Soering vs the United Kingdom (1989)*

[19] UN Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 30 October 2018, UN Doc. CCPR/C/GC/36

[20] UN Doc. CAT/C/PAK/CO/1.

[21] Despite significantly improving the legal framework regarding torture, it should be noted that the bill would give primary jurisdiction to investigate allegations of torture to the Federal Investigation Agency (FIA), which has been accused of committing acts of torture itself.

[22] Dawn, *'Iterum puer nobis'*, 14 August 2022, https://www.dawn.com/news/1704815/iterum-puer-nobis

dealing with offenses punishable by death, continue to be based predominantly on witness testimonies and confessions, which are often obtained by coercive means, including torture. Torture "for the purpose of extracting evidence" is prohibited under Article 14(2) of the CAT.

Based on decades of having monitored the human rights situation in Pakistan, HRCP ascertains that torture is used routinely by law enforcement and prison personnel—and rarely reported, partly because there are few reliable avenues to ensure that perpetrators are held accountable.

As a Pakistani lawyer told FIDH and HRCP in 2018, "*it is not in the client's best interest for [his/her] lawyer to press action on torture. It creates an incentive for the police to manufacture evidence*."[23]

Therefore, while the prohibition of torture in Pakistan is desirable in itself, it could also be used to argue that the death penalty is incompatible with Pakistan's legal system because it may amount to a form of torture.

3.3. Time spent on death row amounting to torture

The prolonged time spent on death row due to a violation of fair trial rights related to a speedy appeal and access to legal assistance can create uncertainty that could amount to a psychological form of torture.

While a high percentage of death penalty cases are overturned on appeal, the great majority of individuals sentenced to death by lower courts can spend years on death row. Lawyers and judges interviewed by FIDH and HRCP reported that murder cases can take from five to 15 years to complete - from the start of the trial before a lower court to the exhaustion of the last appeal – and prisoners sentenced to death spend an average of 11 years on death row. A former Inspector General of Police told FIDH and HRCP that murder cases can take as long as 25 years from start to finish.[24] This is due in part to the significant backlog in cases. This backlog is particularly pronounced at the Supreme Court level. As of December 2021, there were a reported 51,766 cases pending before the Supreme Court – an increase of 5,071 from the previous year.[25]

Moreover, due to the fact that appeal hearings in death penalty cases cannot proceed until counsel is appointed at the expense of the state when defendants cannot afford their own, many defendants can remain without a lawyer for months, or even years, while their cases are pending appeal, as lawyers often withdraw from cases and are not immediately replaced. Several family members of death row prisoners told FIDH and HRCP that their relatives' cases had not been able to progress because of the family's inability to pay for a lawyer.[26]

[23] *Punished for Being Vulnerable* (2019) at pages 28-29.
[24] *Ibid.*
[25] These figures are based on aggregated data and no further breakdown is available that provides detailed about how many of these cases are related to capital punishment.
[26] *Punished for Being Vulnerable* (2019) at pages 28-29.

3.4. Detention conditions on death row amounting to torture

Conditions in Pakistani jails are well below international standards, partly due to their severe overcrowding. Prisoners who have been sentenced to death and have exhausted all appeals are housed in so-called "death cells." The death cells, measuring on average 2.5 by 3.5 meters and designed to house one or two prisoners, often house six to eight inmates. Kept away from the general population, the inmates are allowed out of their cells for one hour a day - 30 minutes in the morning and 30 minutes in the evening. Prison overcrowding has a direct correlation with the speed with which prisoners on death row are executed. Prisons with the highest rates of overcrowding have also the highest rates of executions. According to some NGOs and lawyers working with defendants on death rows, in the past, some jails that were severely overcrowded accelerated executions to make space for inmates.[27]

3.5. Executions of mentally disabled persons amounting to torture

Of particular relevance is the Supreme Court's Safia Bano judgment [See above, *Section 2.4.*] concerning mental disability. This judgment creates a legal precedent for interpreting the imposition of the death penalty to mentally disabled defendants, as well as their execution, amounts to cruel, inhuman, or degrading punishment. Specifically, the Court referred to the Resolution 2000/65 adopted by the UN Commission on Human Rights in 2000, which called on states to refrain from imposing the death penalty on mentally ill persons, as well as executing them. Moreover, the Court recalled Pakistan's obligations as state party to both the ICCPR and the Convention on Rights of Persons with Disabilities (CRPD) that prohibit the imposition of cruel, inhuman or degrading punishment.[28]

3.6. The "death row phenomenon"

The effect of being held on death row is known as the "death row phenomenon" and refers to the emotional distress felt by prisoners in this situation, particularly those who spend long years behind bars, awaiting execution. The death row phenomenon can amount to a violation of Article 7 of the ICCPR, and of Articles 1 and 16 of the CAT, depending on the length of isolation and severity of conditions. The psychological trauma created by the threat of execution combined with a prolonged stay on death row, along with other detention conditions, constitutes a violation of the prohibition of torture.

For example, Junaid Hafeez, a young university lecturer in Multan, was charged with blasphemy in March 2013, including under Section 295-C of the Pakistan Penal Code, which carries the death penalty. In December 2019, a trial court imposed the death sentence on him, despite concerns over the independence and fairness of the judicial process. Mr. Hafeez has been kept in solitary

[27] *Ibid*., at page 29.
[28] Supreme Court of Pakistan, Civil Review Petition 420_2016, 10 February 2021, https://www.supremecourt.gov.pk/downloads_judgements/c.r.p._420_2016.pdf, para. 65.

confinement virtually throughout his incarceration for security reasons. Speaking to the press in 2019, one of his lawyers said that he had become "very agitated" and could not talk "coherently."[29]

4. Recommendations to the government of Pakistan

- Exclude from the list of capital crimes those that do not meet the threshold of the "most serious crimes," in accordance with Article 6 of the ICCPR, with a view to fully abolish the death penalty for all crimes.
- Overturn death sentences imposed for offenses that do not meet the threshold of "the most serious crimes" and implement legal procedures for such resentencing.
- Immediately establish an official moratorium on executions.
- Ratify the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.
- Introduce a comprehensive Anti-Torture Act that is consistent with Pakistan's obligations under international law and that is compliant with the provisions of the CAT.
- Criminalize and abolish the use of torture to obtain confessions and evidence in line with Article 14(2) of the CAT.
- Prohibit the use of capital punishment against individuals with mental disabilities and make the determination regarding the status and severity of the mental disability of defendants mandatory, particularly in the early stages of a trial.
- Take the necessary steps to guarantee fair trial rights to defendants in cases involving capital offenses, and in particular the right to speedy appeal to reduce the time spent on death row, thereby avoiding torture in the form of psychological trauma.
- Respect the fair trail rights of those facing capital punishment and death row prisoners by barring evidence obtained through torture and ensure that the evidence meets the standard of proof "beyond reasonable doubt" in line with Article 14(2) of the CAT.
- Take the necessary steps for judges to be able to use judiciary discretion when considering sentencing defendants in cases involving capital offenses, by accounting for the situation of each accused and death row prisoner i.e. by considering mitigating factors before handing down the sentence.
- Guarantee conditions for death row prisoners, and in particular for those that are placed in "death cells," that are in line with Pakistan's obligations under the ICCPR and other relevant international standards.
- Regularly publish updated and disaggregated data on the use of the death penalty by gender, ethnicity, province, and crimes.

[29] Al Jazeera, *Pakistani academic Junaid Hafeez sentenced to death for blasphemy*, 21 December 2019, https://www.aljazeera.com/news/2019/12/21/pakistani-academic-junaid-hafeez-sentenced-to-death-for-blasphemy