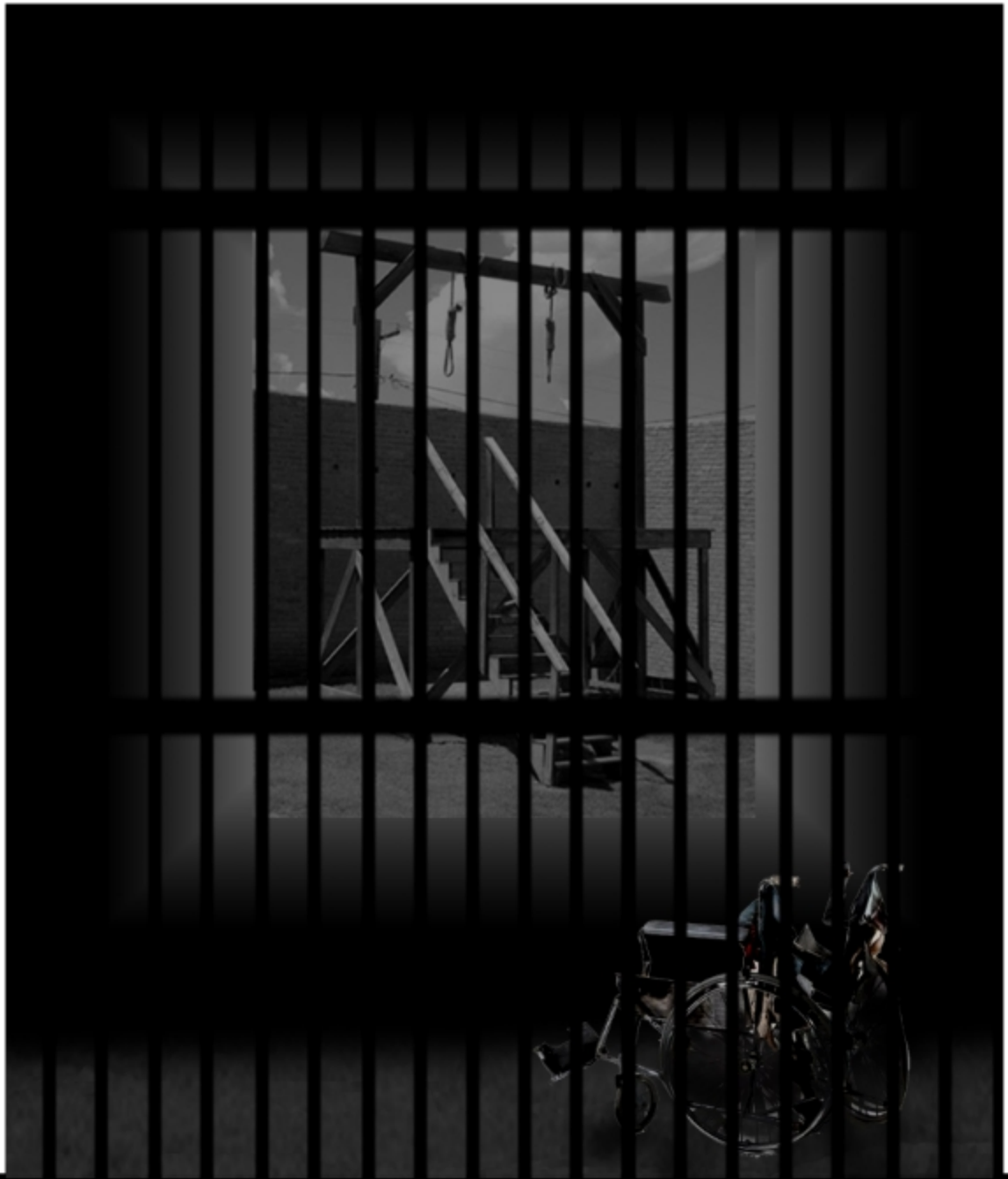

NO MERCY

A REPORT ON CLEMENCY FOR DEATH ROW PRISONERS IN PAKISTAN

JUSTICE PROJECT PAKISTAN

LOWENSTEIN HUMAN RIGHTS PROJECT, YALE LAW SCHOOL

CONTENTS

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LOWENSTEIN HUMAN RIGHTS PROJECT AT YALE LAW SCHOOL

The Lowenstein Human Rights Project is an extracurricular group at Yale Law School that allows students to work on specific human rights issues. The Project undertakes research projects usually on behalf of, and with guidance from, a human rights or other public interest NGO. Students conduct research, write memoranda, engage in advocacy activities, and organize events at the law school.

JUSTICE PROJECT PAKISTAN

JPP is a legal action non-profit organization based in Lahore, Pakistan that represents the most vulnerable Pakistani prisoners facing the harshest punishments, particularly those facing the death penalty, the mentally ill, victims of police torture, and detainees in the War on Terror.

JPP's vision is to employ strategic litigation to set legal precedents that reform the criminal justice system in Pakistan. We litigate and advocate innovatively, pursuing cases on behalf of individuals that hold the potential to set precedents that allow those in similar conditions to better enforce their legal and human rights.

Our strategic litigation is coupled with a fierce public and policy advocacy campaign to educate and inform public and policy-makers to reform the criminal justice system in Pakistan.

I BACKGROUND

NO MERCY ON PAKISTAN'S DEATH ROW

*PAKISTAN HAS THE **WORLD'S LARGEST** RECORDED DEATH ROW POPULATION.*

*IN THE LAST THREE YEARS, PAKISTAN HAS EXECUTED ALMOST **500 PRISONERS**.*

*IN THAT TIME, THE PRESIDENT OF PAKISTAN HAS GRANTED **0 REQUESTS** FOR MERCY OR CLEMENCY* [1]

In December 2014, shortly after the tragic terrorist attack on the Army Public School in Peshawar, Pakistan lifted a six-year de-facto moratorium on the death penalty. Although the resumption of executions initially applied only to individuals convicted of terrorist offenses, in March 2015, the Government of Pakistan lifted the moratorium for all 27 death-eligible crimes without public justification. As a result, more than 8,000 individuals are now at risk of execution, many for offenses that fail to meet the standard of 'most serious crimes' stipulated under international law.[2]

In the three years since the moratorium was lifted, Pakistan has executed more than 487 individuals, bringing the country's annual rate of executions to the highest point in its history and making it among the five most prolific executioners in the world.[3] An average of 3.5 executions have been carried out every week since the death penalty was reinstated, with the highest number of executions taking place in the province of Punjab.[4] Although the implicit justification for resuming executions was to deter terrorism, most of those executed were convicted of non-terrorism-related crimes.[5]

Despite these alarming statistics, the President of Pakistan has pursued a blanket policy of refusing clemency to prisoners on death row 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 have been consistently denied since the moratorium was lifted in December 2014. As highlighted in this report, the President has consistently rejected mercy petitions submitted by prisoners including those who have reported severe humanitarian abuses and violations.

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[1] *We are aware of a number of cases in which temporary reprieve has been granted, and others in which sentences have been commuted after a "compromise" has been reached between the victim's family and the prisoner, but we are not aware of any cases in which the President's power under Article 45 has been used to permanently commute a sentence.*

[2] *There are currently no official estimates of Pakistan's death row population. The Government of Pakistan has, on different occasions, claimed that the population has ranged from 6000-8000 prisoners.*

[3] *Amnesty International, The Death Penalty in 2016: Facts and figures (April 2017), https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures/.*

[4] *Justice Project Pakistan, Counting Executions: Data Analysis by Justice Project Pakistan (June 2016), http://www.jpp.org.pk/wp-content/uploads/2017/07/2017.07.04-Death-Penalty-Fact-Sheet1.pdf.*

[5] *Id.*

In accordance with the Pakistan Prison Rules, mercy petitions are filed after all judicial appeals have been exhausted by the prisoner.[6] The Rules require prison authorities to submit a mercy petition on behalf of any prisoner unrepresented by legal counsel.[7] In order to comply with this rule, jail authorities submit a brief pro forma "petition" which is a meagre record of the appeals and time spent in prison and more often than not 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."[8] These petitions rarely mention disability status, medical conditions, behavior while incarcerated, or elaborate upon age, length of time on death row 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.

In many cases, prisoners wait years between the dismissal of their appeals and 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 over the last five years,[9] **444** of which were in the fifteen months after the resumption of executions in December 2014.[10] The Interior Ministry also informally confirmed that the Government of Pakistan has a policy in place to summarily reject all pleas of mercy.[11]

Eighty-three percent of all executions and 89 percent of all death sentences handed out since December 2014[12] have been in Punjab. Out of approximately 3,723[13] prisoners awaiting execution, mercy petitions of 41 (including one woman) have been rejected. Similarly, mercy petitions of 74 prisoners remain pending with the President of Pakistan. A total of 382 prisoners have been executed in Punjab since December 2014. [14]

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[6] *Pakistan Prison Rules, Rule 104 (1978).*

[7] *Id. Rule 104(1).*

[8] *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].*

[9] *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.*

[10] *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/.*

[11] *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*

[12] *Justice Project Pakistan (JPP), Counting Executions: Data Analysis by Justice Project Pakistan (July 2017), http://www.jpp.org.pk/report/counting-executions/ [counting executions]*

[13] *Prisons Department, Government of Punjab as on 20 July, 2017. See Appendix A*

[14] *Justice Project Pakistan, 'Counting Executions', Appendix, page 5*

In previous reports, JPP has highlighted the systemic violations in Pakistan's practice of capital punishment and has urged the Government of Pakistan to reinstate the moratorium on all executions and cease sentencing people to death.[15] This report, written by the Lowenstein Human Rights Project at Yale Law School in partnership with JPP, 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 and effective opportunity to seek pardon or commutation, and to introduce new and potentially exculpatory evidence.

[15] *A Most Serious Crime, supra note 7.*

II LEGAL PATHWAYS TO MERCY

A THE PRESIDENT'S CONSTITUTIONAL POWER TO PARDON

Article 45 of the Constitution of Pakistan grants the President of Pakistan the authority to pardon death row defendants by accepting mercy petitions.[16] Under Pakistan's Penal Code, 1860 (PPC) and Criminal Procedure Code, 1898 (CrPC) the President or a Provincial Government may commute a sentence of death.[17] However, this power is subject to certain limitations – the Provincial Government and President cannot "suspend, remit or commute any sentence "for any offence within the scope of Chapter XVI of the Pakistan Penal Code without the "consent of the victim" or his "heirs" .[18] This includes *"qatl-e-amd"* i.e. "whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person"[19] and *"qatl-i-khata"* i.e. "whoever, without any intention to cause death of, or cause harm to, a person causes death of such person, either by mistake of act or by mistake of fact" .[20]

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*[21] offenses, although the President retains the power to commute sentences given as *ta'zir*[22] punishments.[23] 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 from specific cases where relief is by way of grace alone - where relief or clemency is for the honour of the State.*[24]

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[16] *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").*

[17] *Pakistan Penal Code § 54; Pakistan Code of Criminal Procedure § 402.*

[18] *Code of Criminal Procedure 1898, Section 402-C*

[19] *Pakistan Penal Code, Section 300*

[20] *Pakistan Penal Code, Section 318*

[21] *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.*

[22] *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.*

[23] *Hakim Khan v. Government of Pakistan, PLD 1992 SC 595.*

[24] *Abdul Malik vs. The State & others, PLD 2006 SC 365.*

The Supreme Court's ruling categorically establishes the vast scope of the President's constitutional power of pardon. The only context in which it may be limited is that of *qisas* offences, which are punishable by "causing similar hurt at the same part of the body of the convict as he has caused to the victim" or by "causing his death if he has committed *qatl-e-amd*" in exercise of the "right of the victim or a Wali".[25] However, the standard of proof for *qatl-e-amd* to be liable to *qisas* i.e. punishable by death is an exceptionally stringent one – the accused must make a "voluntary and true confession" of the commission of the offence before "a Court competent to try the offence" or "evidence" must be provided in accordance with Article 17 of the *Qanun-e-Shahadat*.[26] Thus, in practice, a vast majority of the death sentences awarded in Pakistan are of the *ta'zir* category- where the "proof" stipulated in Section 304 is not available, qatl-e-amd may be punished with "death or imprisonment for life as *ta'zir* having regard to the facts".[27] In such cases, it is important to note that the President can exercise his constitutional power of pardon.

Despite the Supreme Court's definitive ruling, lower rungs of the administration exhibit some confusion about the scope of the presidential power of pardon, often creating discrepancies. A Punjab Home Department official stated in 2006 that "[a]ccording to the law, a death penalty can only be pardoned by relatives of victims."[28]

The Juvenile Justice System Ordinance (JJSO) was enacted in 2000, prohibiting the sentencing and the application of the death penalty to juvenile offenders.[29] In 2001, the President of Pakistan issued a notification under his Article 45 power to pardon, granting special remission to juveniles sentenced to death prior to the passage of the JJSO.[30] 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 provision of the JJSO.[31] 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 had been juveniles at the time of the commission of a *ta'zir* offence, regardless of whether a mercy petition had been submitted.[32] Attached with the letter was a list of juvenile offenders incarcerated in Punjab who were entitled to remission of their sentences. However, since the lifting of the

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[25] *Pakistan Penal Code, Section 299*

[26] *Pakistan Penal Code, Section 304*

[27] *Pakistan Penal Code, Section 302*

[28] *FIDH Slow March, supra note 18, p. 32.*

[29] *A Most Serious Crime, supra note 7, p. 23.*

[30] *President of the Islamic Republic of Pakistan, Grant of Special Remission Under Article 45 to Juvenile Condemned Prisoners, (13 December 2001); Id.*

[31] *Ziaullah v Najeebullah, PLD 2003 SC 656.*

[32] *Government of the Punjab Home Department, Grant of Special Remission Under Article 45 of the Constitution to Juvenile Condemned Prisoners, (Aug. 18, 2003).*

moratorium on death penalty in 2014, the President has not granted a single pardon to juveniles covered by the Notification. According, to a recent report by JPP *'Trial and Terror: The Overreach of Pakistan's Anti-Terrorism Act, 1997'*, out of the 28 prisoners who were included in the list provided by the Government of Punjab at least 4 have been executed, 3 have been released following compromises with the families of the victims and at least one continues to serve his sentence.[33]

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 6 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 Honorable 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 effectively contravened the order of the Supreme Court in *Ziaullah v Najeebullah*.

As a result, none of the 6 juvenile offenders identified by the Government of Sindh as eligible for the remission of their sentences have been granted mercy.[34]

[33] *Justice Project Pakistan. Trial and Terror: The Overreach of Pakistan's Anti-Terrorism Act. (November 2017), p. 26-27, http://www.jpp.org.pk/wp-content/uploads/2017/11/2017_11_13_PRIV_ATA-Report-Final.pdf [Trial and Terror]*

[34] *Ibid*

PROCEDURE FOR THE SUBMISSION OF MERCY PETITIONS

The applicable procedure governing the submission and process of clemency petitions in Pakistan is laid down under Rules 101 to 107 of the Pakistan Prison Rules, 1978 (Prison Rules).

Following the rejection of a condemned prisoner's final appeal to the Supreme Court of Pakistan, the relevant Prison Superintendent must inform him that the mercy petition must be submitted in writing within a period of 7 days of the dismissal, per Rule 104(i), of the Pakistan Prison Rules. However, according to Rule 104(iii), prisoners may submit mercy petitions until the evening on the day preceding that fixed for execution. Rule 104 of the Pakistan Prison Rules delineates that mercy petitions can be submitted "from or on behalf of condemned prisoner." Rule 104(viii) further stipulates the process for mercy petitions submitted "on behalf of a prisoner...by his relative or friend."

Subsequent mercy petitions can be submitted only in two other instances: (i) where a mercy petition has been submitted under the procedure proscribed by Rule 104(i) but the petitioner has not received notice of the outcome, or (ii) a mercy petition is submitted under the procedure proscribed by Rule 104(i) and there are fresh grounds to submit a mercy petition.

If the mercy petition is submitted within the prescribed period, according to Rule 104(ii), the Superintendent dispatches the mercy petition to the Provincial Home Secretary with a covering letter, stating the date fixed for execution and certifying that execution is pending till the orders of the Provincial Government. In the event that the petition is submitted after the period of 7 days after dismissal has lapsed, per Rule 104(iii), the Prison Superintendent forwards the petition to the Provincial Government confirming that, pending a reply to the petition, the execution will not be carried out.

Under Rule 107(iv) of the Prison Rules, where a petitioner is of unsound mind or of ill-health, two copies of the medical report shall also be submitted to the Provincial Government. In addition, Rule 107(v) stipulates that where the Prison Superintendent and Medical Officer believe the prisoner was below 18 years of age at the time of offence, his or her record of birth must also be submitted to the Home Secretary, Provincial Government.

According to Rule 104(iv), regardless of whether the Provincial Government considers the petition, it has to forward it to the Ministry of Interior and simultaneously postpone execution pending the receipt of the orders of the President. If the Provincial Government decides to commute the sentence, the petition to the President is withheld and the petitioner and Prison Superintendent duly informed. However, if after consideration the Provincial Government rejects the petition, it is forwarded to the Ministry of Interior, along with records of the case to forward to the President of Pakistan.If the mercy petition was submitted after the requisite period of 7 days following the Supreme Court's rejection of the prisoner's appeal, Rule 104(iv) states that it is at the Provincial Government's discretion to consider and to postpone execution. It may withhold a petition addressed to the President if, per Rule 104(v), a petition containing a similar prayer has already been submitted to the President. The petitioner shall be informed of the fact of withholding the petition and of the reason thereof.

Thereafter, the Ministry of Interior forwards the petition to the President of Pakistan along with a recommendation regarding whether the mercy petition should be accepted or rejected. The President has, as mentioned above, under Article 45 of the Constitution of Pakistan, the power to pardon. Once a petition has been rejected by the President, no second or subsequent petition shall be forwarded to the Provincial Government for consideration unless there are fresh grounds. Upon receipt of the President's orders, the Provincial Government shall immediately send an acknowledgement in the same manner as is used for communicating the order. Upon rejection, the orders are communicated by a duly registered, express letter.

B INTERNATIONAL LEGAL STANDARDS TO SEEK PARDON

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 stringent punishment. 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.*"[35] Pakistan has ratified the ICCPR, and in doing so, has an obligation to adopt all articles and ensure that they are not violated.[36]

According to the United Nations 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.*" [37] 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.[38] 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."[39] 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."[40]

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 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.[41] 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. [42]

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[35] *International Covenant on Civil and Political Rights [ICCPR], Art. 6 § 4.*

[36] *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.*

[37] *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]*

[38] *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].*

[39] *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.*

[40] *Report of the Special Rapporteur, supra note 28, § 67.*

[41] *Id. § 65.*

[42] *Id. § 66.*

In its initial report to the UN Human Rights Committee regarding its compliance with the provisions of the ICCPR, the Government of Pakistan stated that the existence of the President's power to pardon under Article 45 of the Constitution satisfies the requirements of international law.

However, the Human Rights Committee, in July 2017, during its consideration of the Initial Report found the Government of Pakistan to be clearly in breach of these obligations. 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."[43]

C 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.[44] Article 161 of the Constitution expands upon these powers by also giving Indian state governors the power to pardon. [45]

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.[46]

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.[47]

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.

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[43] *Human Rights Committee, Concluding observations on the initial report of Pakistan, U.N. Doc. CCPR/C/PAK/CO/1 (August 2017), § 17.*

[44] *Constitution of India, art. 72.*

[45] *Id. art. 161.*

[46] *Constitution of India, art. 74.*

[47] *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).*

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."[48] 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.[49] 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.

The judgment in *Shatrughan* emphasizes the significance of the power of presidential pardon vested in the executive. As the Supreme Court of India stated in *Kehar Singh vs. Union of India & Anr.*, as quoted in *Shatrughan Chauhan & Anr. Versus Union of India & Ors*, "...it is open to the President, in the exercise of the power vested in him by Article 72 of the Constitution, to scrutinize the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him..."

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 [50] 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 out of a total of 437 mercy petitions. [51] President Pratibha Patil, who took office in 2007, accepted 34 mercy petitions and rejected five.[52] Although the next President, Pranab Mukherjee, set a precedent for speedy processing of mercy petitions, almost 90 percent of these were rejected.[53]

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[48] *Madhu Mehta vs Union of India, 1989 SCR (3) 774 (August 1989).*

[48] *Shatrughan Chauhan & Anr vs Union Of India, 3 SCC 1 (January 2014).*

[50] *Devender Pal Singh Bhullar & Anr vs State Of Nct Of Delhi, 6 SCC 195 (April 2013).*

[51] *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.*

[52] *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.*

[53] *Id*

However, it is important to note that the rate of execution has been minimal in India – in 2016, at least 136 people were sentenced to death,[54] but there were no executions, while in 2015, 75 people were sentenced to death and only one was executed.[55]

According to Anup Surendranath, director of the Death Penalty Research Project at the National Law University in Delhi, "*In India, the problem is not the act of hanging; it is asking people to live under the sentence of death.*"[56] This contravenes the Supreme Court's judgment in *Shatrughan*, which established that "undue long delay" in the execution of a death sentence would entitle the condemned prisoner to plead for commutation of his sentence.[57] The Court stated that the "agonizing delay" and "psychological stresses" caused to the prisoner cannot be excused only on the basis of the "gravity of the crime."[58]

India clearly has a long way to go in implementing a fair and just clemency system. However, despite the inconsistencies among Presidents in granting mercy to death row prisoners, they have been committed to upholding legal precedent in processing mercy petitions efficiently.

D COMPARATIVE LAW: 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."[59] 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. [60]

However, some of the Bangladeshi judiciary's past decisions to issue the death penalty have 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 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."[61]

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[54] *Amnesty International, 'Death sentences and Executions 2016', page 5 https://www.amnesty.org/en/documents/act50/5740/2017/en/*

[55] *Amnesty International, 'Death sentences and executions 2015', page 6 https://www.amnesty.org/en/documents/act50/3487/2016/en/*

[56] *https://qz.com/374310/india-is-slowly-killing-its-death-row-prisoners-without-actually-hanging-them/*

[57] *Shatrughan Chauhan & Anr vs Union Of India, 3 SCC 1 (January 2014).*

[58] *Shatrughan Chauhan & Anr vs Union Of India, 3 SCC 1 (January 2014).*

[59] *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.*

[60] *Cornell Center on the Death Penalty Worldwide, Death Penalty Database:Bangladesh, (April 2011), http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Bangladesh.*

[61] *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.*

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.[62] 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." [63]

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 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.[64]

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 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.

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[62] *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*

[63] *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.*

[64] *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/.*

III SYSTEMIC FLAWS

ROUTINE MISCARRIAGES OF JUSTICE UNDER THE CURRENT SYSTEM

A DE FACTO 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, in clear violation of its domestic and international law obligations. Despite egregious violations in several cases, including the ones highlighted in this report, leading to wrongful convictions, the executive has failed to exercise the constitutional power of pardon as a means of redressing these wrongs.

CASE SUMMARY

DR. ZULFIQAR ALI KHAN

MERCY PETITION REJECTED
EXECUTED: 16 MAY 2015

> *I just want to live and continue what I'm passionate about – educating prisoners.*

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 in 1999. 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 48 degrees, including an MA in political science from Punjab University and 33 diploma courses, but he also educated more than 400 of his fellow prisoners. Amongst them, 27 have earned university degrees, 48 graduated from high school and 51 have completed their matriculation, while many others are due to appear in future examinations. 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, highlighting a blanket policy of refusal where mercy petitions are outrightly and summarily rejected without any comprehensive examination of their substantive content and the merits of individual cases. His contributions as a prison educator, showed his incredible assets to the State. Furthermore, the victims of his execution, his two daughters, now face society as orphans as 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. Editorials published in several newspapers in 2009 and 2010 had recommended clemency be granted to Zulfiqar. Articles published in the aftermath of his death highlighted his invaluable contributions as an educator, which would have continued had he been allowed to live and teach.[65]

[65] *https://www.dawn.com/news/1366493*

KANIZAN BIBI

MERCY PETITION REJECTED

Kanizan Bibi suffers from severe schizophrenia and has spent over 26 years on death row. Due to her mental condition, she was transferred from Lahore Central Jail in 2016 to the Punjab Institute of Mental Health where until recently she had been receiving treatment for her mental illness. She is unable to speak coherently and has not said anything for the last 12 years. She has lost the ability to understand her surroundings and her condition often deteriorates to the extent that she is unable to feed or clothe herself. A medical report by the Medical Officer, Central Jail Lahore, dated 28 July, 2015, declared that she is unfit to be executed.

Kanizan was sentenced to death for murder in 1999. She and her family have always maintained her innocence. According to Kanizan's father (now deceased) the real culprits were initially arrested by the police. However, following the payment of a bribe they were released by the police who filed a false report implicating Kanizan. Thereafter she was arrested and severely tortured into making a confession. The torture was so severe that she was eventually admitted to the hospital. However, her confession was relied upon by the courts despite her plea that it was involuntary.

Despite her ill-health, Kanizan Bibi's mercy petition was summarily rejected by the President of Pakistan along with those of 65 other prisoners in February 2015,[66] right after the moratorium was lifted.

B PRESIDENT'S UNFETTERED POWERS

After a mercy petition is filed, the Presidency has near unilateral power when it comes to granting clemency. This becomes clear in the implementation of the Juvenile Justice System Ordinance (JJSO). Despite efforts of the families of the condemned, the courts, the legislative branch, and other government officials to persuade 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.

[66] *Imran Gabol, 'Mentally unstable' woman among 65 whose mercy pleas rejected' Dawn (23 June 2015).*

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 after holding an age-determination inquiry, 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 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 over six months and the President of Pakistan has so far failed to grant clemency to Iqbal, despite pressure from internal and external stakeholders. His first mercy petition, submitted by jail authorities on his behalf, was explicitly rejected in 2016. It is unclear if it contained any mention of Iqbal's juvenility, despite the jail authorities being in possession of those records.

CASE SUMMARY

MUHAMMAD SARFRAZ

MERCY PETITION REJECTED
EXECUTED: 10 MAY 2016

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 eyewitness account of his birth by the daughter of the midwife who delivered Sarfraz – whose name appears on the birth register. Safraz's juvenility was not raised at his trial as the 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 being conducted by an Additional Sessions Judge (ASJ), the file was misplaced by a member of the court staff and the juvenility inquiry was never conducted. The staff member was only reprimanded for this in 2012 when the senior most judge (Sessions Judge) of the Sessions Court wrote to the ASJ inquiring about the juvenility proceedings, but the Court then erroneously concluded that it was no longer competent to conduct the inquiry. This decision was sent to the Punjab Home Department, as a consequence of which Sarfraz's mercy petition was dismissed. Neither Sarfraz nor his family were informed of the Court's decision. 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.

C INCOMPLETE AND DEFICIENT PETITIONS

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. Even more egregious are concerted attempts by prison officials to conceal critical mitigating evidence, such as medical records demonstrating mental illness, as in the case of Imdad Ali.

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.

On account of the lack of standards in place, mercy petitions are routinely rejected for technical defects, simply because the jail authorities fail to provide accurate records. An example of this is the case of Abdul Basit, a paraplegic prisoner on Pakistan's death row who became paralyzed from the waist-down as a result of contracting tuberculosis meningitis (TB) in the deplorable condition of the "punishment ward" in Central Faisalabad Jail.[67] A mercy petition for Basit on grounds of his ill-health and disability was filed in 2013. Eventually this petition was refused in 2015 on the purely administrative grounds that the jail had failed to provide certified copies of government medical records regarding Basit's condition to the Ministry of Interior. Despite being unable to stand, and reliant on a wheelchair, Abdul Basit has been scheduled for execution three times since July 2015; coming within hours of execution on each occasion.

It is important to note that the President granted a stay of execution when Basit's disability was brought to light, and subsequently ordered an inquiry into his condition. Despite the findings of the inquiry confirming that Basit was permanently paralyzed, the President has, to date, failed to accept his mercy petition. Basit continues to languish in a state of limbo on the floor of the Faisalabad jail.

[67] *Detailed case summary of Abdul Basit can be found in Section D*

Another stark example of the negligence of jail authorities can be found in the case of Imdad Ali, a mentally ill prisoner who has spent 16 years on death row. In 2009, whilst in District Jail, Vehari, he was examined by the Medical Officer and diagnosed with psychosis. On 20 November, 2012, a medical evaluation was conducted upon the request of the Superintendent of District Jail Vehari, which diagnosed him to be severely mentally ill. The medical report states he has paranoid schizophrenia which is a "chronic and disabling psychiatric illness. This illness significantly impairs the person's rational thinking and decision making capabilities. Hence, in my opinion he is an insane person."

Despite this clear evidence of mental illness, it appears from the Supreme Court judgment that this medical report was not included in the evidence before the Court during Imdad's appeal as the judgment states, "There is no iota of evidence to suggest that the appellant was suffering from any type of lunacy." Imdad's appeal, therefore, appears to have been lost due to the ineffectiveness of his counsel to introduce this report, as well as the failure of the jail authoritiesto disclose data to the court, which they were obligated to do, resulting in a serious miscarriage of justice. In addition, his mercy petition was dismissed by the President of Pakistan in 2015, signalling the failure of the jail authorities to include his medical records, in contravention of the statutory duty placed on them by the Pakistan Prison Rules, despite Imdad being kept in a jail hospital.

D INORDINATE DELAYS

The mercy petition process in Pakistan isinefficient 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,sometimes leading to irreversible psychological damage. Similarly, the Indian Constitution also does not contain a time limit for deciding 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. The cases of Abdul Basit, Imdad Ali and Muhammad Iqbal, in which the state has failed to decide fresh mercy petitions for years, all demonstrate the tangible costs associated with such inordinate delays. These prisoners remain in legal limbo, as a result of the state's ambiguity about the existing legal framework, as well as fear of backlash from victims' families and right-wing elements.

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 applications to hold an age determination inquiry 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 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 23 years in prison, nearing the total term of 25 years for a life sentence; 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.

E LACK OF MERCY FOR VULNERABLE PRISONERS

Pakistan's death row population holds members from the most vulnerable populations including juvenile offenders and people with physical and mental 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.[68] 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.[69] 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."[70] 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

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 the jail Medical Officer and then with paranoid schizophrenia in 2012 by Dr. Naeemullah Leghari, Head of Department of Psychiatry at Nishtar Hospital in Multan. His illness was exacerbated by the overcrowded condition of death cells. His mercy petition pending before the President

[68] *ICCPR, art. 6(6).*

[69] *See, e.g., ECOSOC Resolution, supra note 29 (the death penalty shall not be carried out on persons who have become insane).*

[70] *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).*

was summarily dismissed in 2015, and an execution warrant was issued scheduling his execution for 26 August 2016. Despite prison authorities being obligated to attach medical records confirming Imdad's mental illness to the mercy petition, it is unclear if these were included. 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 grounds that "schizophrenia is a curable disorder" and not a mental illness. This case caused a huge public uproar in all segments of society, including psychiatrists. One newspaper editorial criticized the verdict for being "controversial and inhumane."[71]

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 the execution of Imdad Ali 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."[72] A review petition challenging this order was submitted, as well as a review by the Punjab Government. 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. The Supreme Court has yet to rule on this case despite the clear evidence of mental illness. Furthermore, the President has continued to ignore Imdad's clemency plea despite constant urging from the international community to grant mercy.

[71] *https://www.dawn.com/news/1293079*

[72] *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#.WmQI-JM-efQ.*

ABDUL BASIT

MERCY PETITION PENDING

> *Mr President, how can you hang a man who cannot even stand?*
>
> *– Mussarrat Nausheen, wife of Abdul Basit*

Abdul Basit, a former administrator at a medical college, was sentenced to death in 2009. On 1 August 2010, whilst detained in a punishment ward in Central Jail, Faisalabad, following prison riots against the use of torture by authorities, Basit contracted tubercular meningitis due to the ward's unhygienic condition. Due to the failure of the jail authorities to provide him with treatment, Basit's condition deteriorated gravely. It was not until he was found unconscious for one week that he was finally shifted to the jail hospital, and subsequently to DHQ Hospital, Faisalabad, as an emergency case. He spent thirteen months at the hospital, during which time his condition deteriorated, and he became paralysed from the waist down, destined to never walk again. A Medical Board conducted an assessment in April 2012 and concluded that he was suffering from paraplegia and long term complications of spinal atrophy. More recently a new medical board was convened at the order of the Lahore High Court. In a report dated 1 August, 2015, the Board concluded that Basit was "*permanently disabled... He is 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 from his hanging. Following the last stay of execution, on 24 November, 2015 the President of Pakistan promised an inquiry into Basit's cases, noting that "basic human rights will be upheld at all costs." A Medical Board tasked with the inquiry issued its findings on 24 December, 2015 and unanimously found Basit to be permanently paralysed. Thereafter the Presidential 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.

KHIZAR HAYAT

MERCY PETITION PENDING

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 hallucinations and "active symptoms of severe 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. Despite being prescribed powerful antipsychotics for years, his condition deteriorated to the point where, according to a report by the Medical Officer of Central Jail, Lahore in 2010, Khizar was suffering from "active symptoms of severe psychosis" and uttering words which could "provoke and harass other prisoners." The report recommended that he be shifted to a lunatic asylum until such time as he recovered. 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 cell in the jail hospital. His mother's requests that he be transferred to a proper medical facility in 2009 have been repeatedly 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 in light of the jail authorities' submissions 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, psychiatrists and lawyers, it nonetheless formed the basis on which a new warrant for his execution was issued.

In response to the warrant, UN experts[73] appealed to the Pakistani government regarding Khizar Hayat's execution, torture and ill-treatment, as well as his deteriorating psycho-social condition. They urged the government to "halt the execution of Mr. Khizar Hayat, which if carried out, would be inconsistent with acceptable standards of international human rights law."[74] In January 2017, Khizar's execution was stayed by the Lahore High Court. Since then, there has been no hearing, with the next date of hearing scheduled for 25 March, 2018. Khizar's mercy petition remains pending before the President of Pakistan.

[73] *Mandates of the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on extrajudicial, summary or arbitrary executions; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.*

[74] *UN Office of the High Commissioner for Human Rights 'Mandates of the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on extrajudicial, summary or arbitrary executions; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' REFERENCE: UA PAK 6/2015 (28 July 2015).*

CASE SUMMARY

MUHAMMAD SALEEM AHMED

MERCY PETITION PENDING

Mohammad Saleem Ahmed was convicted and sentenced to death under Section 302(b) PPC in 2004 for a crime that took place three years before his sentencing on 22 July, 2001. He has spent 16 years in jail, 14 of them on death row. Despite the trial judge observing that Mohammad Saleem was "insane" and "did not have any orientation about time and space," the medical board at the Punjab Institute of Mental Health, Lahore (PIMH), declared him fit for trial under Section 302(b) of the PPC. In September 2013, Saleem was diagnosed by the Medical Officer of the Central Jail, Lahore "as a case of psychiatric illness" and has been regularly prescribed anti-psychotic drugs ever since.

Despite the jail authorities of Central Jail, Lahore acknowledging that Mohammad Saleem is mentally ill, they nevertheless requested the Learned District and Sessions Judge to issue his execution warrant. The jail authorities failed to mention that he was admitted in the psychiatric cell of the jail hospital, in violation of Pakistan's domestic laws and international human rights obligations. Despite his affirmed mental illness, on 31 October, 2017, the District and Sessions Judge in Lahore issued an execution warrant scheduling his execution on 9 November, 2017. [75]

On 4 November, 2017, Saleem's lawyers filed an application before the Learned District and Sessions Judge to cancel his execution warrant, and to constitute a medical board to examine and evaluate his mental illness. The Judge suspended Saleem's execution warrant, and directed the Superintendent Central Jail, Lahore to submit a comprehensive report, along with the medical record, and latest medical report of Saleem by 8 November, 2017. At the last date of hearing, held on 7 February, 2018, it was learned that the jail has submitted a cursory medical report, in which they revised their earlier report, stating that Saleem is only 'depressed.' However, the attached medical register shows that Saleem has been on powerful doses of antibiotics since his initial diagnosis in the jail. The Court also ordered for Saleem to be examined by a medical board.

[75] *Justice Project Pakistan, 'Mercy Petition for Mohammad Saleem Ahmed s/o Abdul Latif' Internal Document.*

CASE SUMMARY

SHAFQAT HUSSAIN

MERCY PETITION REJECTED
EXECUTED: 4 AUGUST 2015

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, the provincial human rights watchdog established by statute. The Commission recommended that the case be re-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 lives, which also called for a stay of execution and offered to conduct an inquiry at the level of the Government of AJK into the matter of his juvenility.

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 4 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.

IV CONCLUSION AND RECOMMENDATIONS

The failure to comply with international standards relating to the rational exercise of the power of pardon, as well as the lack of transparency inherent in the current framework, rendering it practically meaningless in its current iteration,are salient flaws that must be remedied. If the Government of Pakistan is serious about demonstrating a real commitment to bringing Pakistan's death penalty system in line with its constitution and international law, there are several recommendations that can be made to reform the existing framework:

1. The Government of Pakistan should publically 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 urgently reform the process of submission of mercy petitions by prison authorities on behalf of death row prisoners who lack legal representation. It must ensure that the petitions are detailed and the process is clear and transparent, with prisoners' entire jail record, containing reports about their physical and mental health, being included. The families of prisoners on death row, as well as their legal counsel, should be 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 institute standardized templates for mercy petitions that are to be followed by jail authorities preparing and submitting mercy petitions on behalf of death row prisoners. The templates should include all information that should be included in the petition and outline all records and documents that are to be submitted along with the petition as annexures.

5. The Government of Pakistan should constitute an executive committee designated with the consideration of mercy petitions, comprising of members from the Ministries of Interior and Human Rights, the Presidency, the Federal Treaty Implementation Cell and the Office of the Attorney General of Pakistan. The Committee should be forwarded all requests for mercy from prisoners by the Superintendent Prisons along with the complete jail and judicial record. It should also have the authority to ask for additional information from the respective authorities and others who may be well-versed with the facts of the mercy petition to inquire into facts alleged in the petition.

The Committee should make a determination regarding whether or not the current case merits the exercise of mercy by the President of Pakistan on the basis of the available record, witness testimonies, and on the basis of its inquiry. All members should record their recommendations for each particular case for consideration by the President. Thereafter, the Committee should forward all cases to the President of Pakistan for exercise of his constitutional power of pardon.

Various other jurisdictions have an additional layer of review of mercy petitions submitted by condemned prisoners. In Bangladesh, for example, the President must "act in accordance with the advice of the Prime Minister" in the exercise of "*all his functions*", with the exception of appointing the Prime Minister and Chief Justice.[76] The Ministry of Law, Justice and Parliamentary Affairs is the body responsible for the transmission of the Prime Minister's advice to the President- the Rules of Business 1996 thus offer valuable insight in this regard. Rule 14(3) states that the Law and Justice Division must be consulted prior to "tendering advice on a mercy petition against an order of death sentence and pardon, reprieve, respite, remission, suspension or commutation of any sentence."[77] In Canada, the role of the Parole Board of Canada (PBC) is a significant one is reviewing applications for clemency. According to Section 110 of the Corrections and Conditional Release Act, requests for the Royal Prerogative of Mercy for federal offences may be investigated by the PBC.[78] The PBC reviews applications, conducts investigations and makes recommendations to the Minister as to whether the power of clemency should be exercised in a particular case.[79]

6 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.

7 The Government of Pakistan should urgently consider the mercy petitions submitted on behalf of prisoners with serious mental and/or physical ill-health with a view to commuting their sentences.

8 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

[76] *Constitution of the People's Republic of Bangladesh, Article 48(3)*

[77] *Rules of Business 1996, Rule 14*

[78] *https://www.canada.ca/en/parole-board/services/clemency/how-are-requests-for-clemency-reviewed.html*

[79] *https://www.canada.ca/en/parole-board/services/clemency/how-are-requests-for-clemency-reviewed.html*

V SUBMITTING A MERCY PETITION

A MERCY PETITION MUST BE SUBMITTED WITHIN SEVEN DAYS OF THE REJECTION OF AN APPEAL TO THE SUPREME COURT