

# Protecting the Rights of Pakistanis Imprisoned in Malaysia

JUSTICE PROJECT PAKISTAN

## EXECUTIVE SUMMARY

The Government of Pakistan has an obligation, under international law and the Constitution of Pakistan, to protect the fundamental rights of its many citizens detained around the world.<sup>1</sup> According to official estimates, there are 299 Pakistanis imprisoned in Malaysia.<sup>2</sup>

Additionally, there are a reported 24 Pakistanis on death row in jails across Malaysia.<sup>3</sup> As confirmed in a recent Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, the application of the death penalty affects foreign nationals, including migrants, disproportionately.<sup>4</sup>

Pakistanis imprisoned abroad are at the mercy of local courts without access to adequate legal representation, impartial translators, or consular assistance from the Pakistani diplomatic missions. These destitute Pakistanis face the harshest punishments due to their lack of understanding of and assistance with the legal process, incapability to communicate directly with the court, and inability to produce evidence from Pakistan in their defence.

In light of these circumstances, there is an urgent need to formulate and implement a comprehensive consular protection policy. Furthermore, the Government of Pakistan should actively pursue the negotiation of a Prisoner Transfer Agreement with Malaysia, with the aim of repatriating Pakistani nationals and allowing them to serve out their sentences in their home country.

## POLICY RECOMMENDATIONS

### DATA ON PAKISTANI PRISONERS

- IDENTIFY all Pakistani prisoners in Malaysia, including those eligible for resentencing in light of the Malaysian Abolition of Mandatory Death Penalty Act 2023
- INVESTIGATE the circumstances of their arrest and present mitigating evidence for their resentencing hearings

### CONSULAR SUPPORT

- ENACT a uniform consular protection policy for Pakistanis facing imprisonment and/or execution abroad
- ENSURE each Pakistani prisoner on death row is provided consular support and adequate legal representation
- COORDINATE information between the Ministry of Foreign Affairs and the Ministry of Overseas Pakistanis to ensure that missions fulfil their responsibilities as stated in the Supreme Court Guidelines

### PRISONER TRANSFER AGREEMENT

- NEGOTIATE a Prisoner Transfer Agreement to facilitate the repatriation of Pakistani nationals imprisoned in Malaysia.

<sup>1</sup> Justice Project Pakistan (2024) Pakistanis Imprisoned Abroad: Interactive Webpage. <https://jpp.org.pk/overseaspakprisoners/>

<sup>2</sup> Latest figures presented by the Human Rights Commission of Malaysia (SUHAKAM), as of 14<sup>th</sup> February 2024.

<sup>3</sup> Ibid.

<sup>4</sup> A/74/318. Para 12. Pg. 4. The discriminatory application of the death penalty to foreign nationals was highlighted by the Secretary-General in his 2017 report on capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty (A/HRC/36/26). In that report, it was noted that persons facing the death penalty abroad can be disproportionately affected by the death penalty and that access to consular assistance, as provided for in the Vienna Convention on Consular Relations, is an important aspect for their protection. This position was further clarified in 2018 by the Human Rights Committee, which noted that “a failure to promptly inform detained foreign nationals of their right to consular notification pursuant to the Vienna Convention on Consular Relations resulting in the imposition of the death penalty [...] would violate article 6, paragraph 1, of the Covenant” (15 CCPR/C/GC/36.).

## PAKISTANI NATIONALS IN MALAYSIA

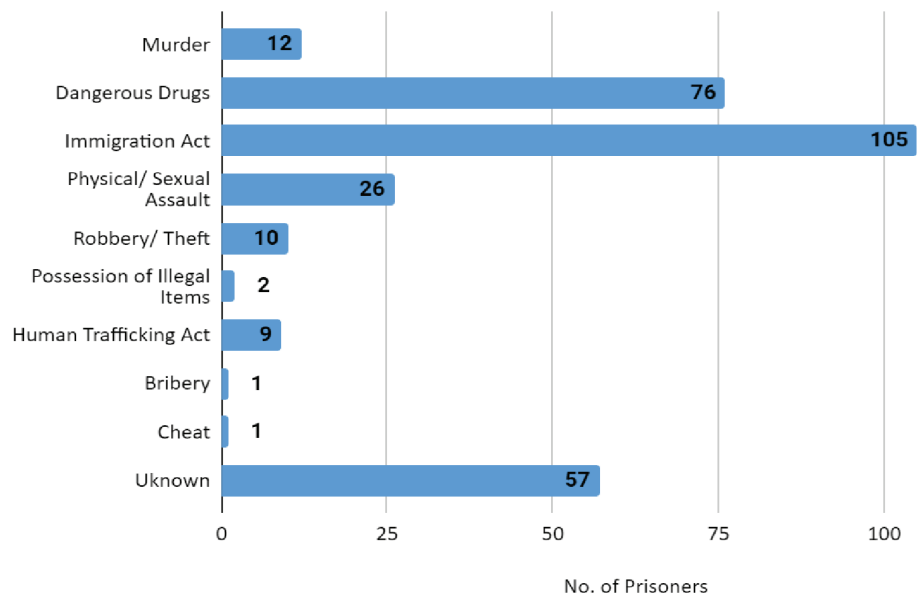
Malaysia is a popular destination for Pakistani migrants who travel to the South-East Asian country seeking employment opportunities. There are approximately 85,000 Pakistani nationals residing in Malaysia.<sup>5</sup> During FY 2024, these migrant workers have sent back over \$71 million worth remittances so far, a significant contribution to Pakistan's ailing economy.

Malaysia's immigration regime is heavily regulated, with many migrant workers living under the threat of having their visas terminated or expired. Heavy use of immigration detention, a strict work visa regime and high levels of deportation have prompted the Government of Pakistan to ramp up its efforts to protect Pakistani migrants in Malaysia by deepening relations and engaging in bilateral political consultations, which have seen both countries committing to "enhanced engagement and dialogue at all levels, revitalising existing bilateral mechanisms and establishing new areas of engagement".<sup>6</sup>

However, there remains a need to improve protections and assistance provided to Pakistani prisoners in Malaysia. As of 14<sup>th</sup> February 2024, there are **299 Pakistanis imprisoned in Malaysia** (297 male and 2 female Pakistani prisoners)<sup>7</sup>, the 13<sup>th</sup> highest population of Pakistani prisoners abroad. Of these, 190 Pakistanis are convicted, 109 are remanded awaiting disposal of their criminal trial, and a total of **24 Pakistani prisoners are on death row**.<sup>8</sup>

At least **10 death row prisoners are eligible for resentencing** under the Abolition of Mandatory Death Penalty Act.<sup>9</sup> Out of all convicted Pakistanis, **25%** prisoners have been charged and sentenced with drug trafficking under the Dangerous Drugs Act 1952. Crime-wise breakdown of the imprisoned Pakistanis is displayed in Figure 1.

Figure 1: Crime-wise Breakdown of Pakistani Prisoners in Malaysia



## ABOLITION OF THE MANDATORY DEATH PENALTY IN MALAYSIA

### Resentencing of Pakistani Nationals on Death Row

In July 2023, Malaysia removed the mandatory death penalty for 12 offences with the Revision of the Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction for Federal Court) Act 2023 and the Abolition of Mandatory Death Penalty Act 2023.<sup>10</sup> The Acts allow prisoners on death row or serving natural life sentences for crimes which previously held the mandatory death penalty to apply for resentencing by the Federal Court, which may either affirm the original death sentence or replace it with a life sentence (30 to 40 years).

In this resentencing process, the prisoners are allowed to report mitigating circumstances, which include individual and

<sup>5</sup> United Nations, Population Division. (2020) "[International Migrant Stock 2020](#)".

<sup>6</sup> Press Release by Ministry of Foreign Affairs (28<sup>th</sup> March 2023).

<https://mofa.gov.pk/press-releases/2nd-round-of-pakistan-malaysia-bilateral-political-consultations>

<sup>7</sup> Latest figures presented by the Human Rights Commission of Malaysia (SUHAKAM).

<sup>8</sup> Ibid.

<sup>9</sup> Data shared by the High Commission of Pakistan in Malaysia on Dec 28, 2023

<sup>10</sup> The Abolition of Mandatory Death Penalty Act 2023 was passed by the upper house in April and came into effect in July.

family backgrounds, socio-economic circumstances and physical and mental health issues. Therefore, early identification of these prisoners and their families is crucial for effective representation during resentencing hearings, ensuring they receive quality legal support. Further, any legal assistance being afforded to these prisoners must be a coordinated effort with representatives of these prisoners back home, given the fact that evidence of mitigating factors will largely be found through investigation and data collection carried out in Pakistan.

Additionally, the investigation should ensure that the accused does not belong to any category that would make them ineligible for the death penalty under international law. These include juvenility,<sup>11</sup> pregnancy, mental illness before arrest or developed over the time spent in jail, and severe physical disability.

## THE NEED FOR A CONSULAR PROTECTION POLICY

### Responsibilities of the Government of Pakistan

The Government of Pakistan has an obligation, under the Constitution and International Law, to provide consular protection to its citizens detained around the world. In the absence of a policy framework that outlines who, when and how to extend consular assistance, it is impossible for Pakistan's missions abroad to protect the rights of such a large number of Pakistani prisoners.

**Article 4(1) of the Constitution of Pakistan**<sup>12</sup> places a constitutional duty on the Government to ensure that the due process rights of Pakistanis imprisoned abroad are upheld in all circumstances. While it does not provide the Government with the right to extract a Pakistani citizen undergoing trial in a foreign criminal justice system, it does make it mandatory on the Government to make forceful representations on behalf of Pakistani citizens whose rights are being compromised in foreign jurisdictions.

Additionally, the **Vienna Convention on Consular Relations 1963 (VCCR)** defines and articulates the functions, rights, and immunities accorded to consular officers and their offices, as well as the rights and duties of host States (where the consul is based) and home States (the State the consul represents). The Convention empowers consulates to offer invaluable assistance to their nationals in navigating the complexities of unfamiliar foreign systems. This assistance is particularly important in cases where fundamental human rights are at risk, including the potential application of the death penalty.<sup>13</sup>

**Article 36, VCCR** provides that "*consular officers shall be free to communicate with nationals of the sending State and to have access to them.*" Foreign nationals who are arrested or detained be given notice "*without delay*" of their right to have their embassy or consulate notified of that arrest, and "*consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.*"<sup>14</sup>

Moreover, the duty of the home State to provide consular assistance to its nationals detained abroad, as well as the duty the detaining State to grant access to the imprisoned nationals is firmly established in the recent **Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions**. It argues that consular

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<sup>11</sup> Article 97(1) of the Child Act 2001 of Malaysia states that "a sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child."

<sup>12</sup> Article 4(1), Constitution of the Islamic Republic of Pakistan, states: "Right of Individuals to be dealt with in accordance with law, etc. To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan."

<sup>13</sup> A/74/318. Para 18. Pg. 6

<sup>14</sup> This principle was reinforced by the International Court of Justice (ICJ) in the 'Jadhav Case' (India v Pakistan) on 17<sup>th</sup> July 2019. The ICJ ruled that Pakistan has breached the obligations incumbent on it under Article 36, paragraph 1(a) and (c) of the VCCR, by denying consular officers of India access to Mr. Jadhav, contrary to their right to visit him, to converse and correspond with him, and to arrange for his legal representation.

access is a human right which imposes distinct but complementary obligations on both the prosecuting State and the home State and that the failure of the home State to provide adequate consular assistance amounts to a violation of its responsibility to protect the right to life.<sup>15</sup> It stressed that home States have an obligation to provide consular assistance under international human rights law, particularly, but not only, where there is a risk of a violation of the right to life.<sup>16</sup>

In 2010, under the direction of the Supreme Court of Pakistan, the **Ministry of Foreign Affairs (MOFA)** devised guidelines for securing the release and repatriation of Pakistani prisoners abroad.<sup>17</sup> As per these guidelines, missions have been directed to:

- i. 'Maintain close contacts with local authorities with a view to collecting all relevant information about cases of arrest/detention/imprisonment of Pakistani nationals in the country/countries of accreditation and keep the Ministry informed';
- ii. Remain in contact with the Pakistani nationals arrested/detained/imprisoned by seeking consular access and ensuring consular visits at least once per month with a view to addressing their genuine problems and keep the Ministry informed', and;
- iii. 'Maintain and regularly update a database, including a separate file for each case, containing information regarding charges, date of arrest/trial/conviction, sentence, period served and remaining and fine imposed, if any'.

#### **A consular assistance policy must include provisions for:**

- Training consular officers to adequately equip them for the provision of consular assistance
- Providing clear, adequate information to the detainee on their legal rights, local laws, and resources for legal aid and support
- Promptly engaging with the detaining State upon being notified of any arrest, detention or incarceration of a Pakistani national
- Establishing and maintaining regular contact with the detainee and their legal representative
- Monitoring detainees for signs of torture or ill-treatment, with protocols for determining whether medical examination is required
- Facilitating communication between the detainee and their family
- Maintaining a list of reputable local lawyers to represent Pakistani nationals, and facilitating communication between the detainee and their legal representatives
- Engaging the detaining state for repatriation of Pakistani nationals, when applicable

While Pakistani embassies and consulates do strive to provide assistance to migrants, there is currently **no uniform consular policy** that regulates how this assistance is provided. In 2017, the **Lahore High Court directed the Ministry of Foreign Affairs to draft a consular policy for its overseas citizens who are imprisoned abroad and/or facing execution.**<sup>18</sup> The Honourable Chief Justice Mansoor Ali Shah reviewed MOFA's Guidelines and found them to be inadequate, stressing the need to devise a policy on consular protection.

On 20<sup>th</sup> February 2024, the Senate Standing Committee on Human Rights directed MOFA to devise a consular protection policy within 90 days, highlighting the urgency of the situation and the need to protect overseas Pakistani prisoners.

## **THE NEED FOR A PRISONER TRANSFER AGREEMENT**

### **Repatriation of Pakistani Prisoners**

Given the high rate of migration and the crucial role Pakistanis in Malaysia play in strengthening commercial ties and boosting remittances, an adequate regime for the transfer of sentenced persons is a practical necessity. There is an urgent need to finalise a Prisoner Transfer Agreement (PTA) to allow for vulnerable Pakistanis to serve the remainder of their sentences at home, close to their families. Malaysia and Pakistan have enjoyed a close collaborative relationship with regard to the transfer of offenders. In 2019, over 8000 undocumented Pakistani immigrants were brought to Pakistan

<sup>15</sup> A/74/318. Summary. Pg 2.

<sup>16</sup> A/74/318. Para 14. Para 16-17: States are under a due diligence obligation to undertake reasonable positive measures that do not impose on them disproportionate burdens, in response to credible foreseeable threats to life.

<sup>17</sup> Full title: 'Guidelines For Streamlining The Institutional Mechanism For Implementing The Directive Of The Honourable Supreme Court On Securing Release and Repatriation Of Pakistanis Detained/ Imprisoned Abroad'.

<sup>18</sup> Asma Shafi etc. Versus the Federation of Pakistan etc (W.P No. 32288/214). Order date: 02.06.2017

under the “Back4Good Amnesty Scheme” initiated by the Malaysian government.<sup>19</sup> The scheme’s purpose is to facilitate voluntary repatriation of those in immigration detention centres.<sup>20</sup>

The Transfer of Offenders Ordinance (2002) has established a framework for the Government of Pakistan to enter into numerous bilateral Prisoner Transfer Agreements with countries including Saudi Arabia, the UAE, the United Kingdom, Iran, and others.<sup>21</sup> Prisoner transfer agreements strengthen cooperation and promote friendly ties between states, and are of significant importance since they allow Pakistanis who are serving long sentences in foreign countries to serve their remaining sentences back home and support their reintegration into society upon release.



Justice Project Pakistan is a non-profit organization based in Lahore that represents the most vulnerable Pakistani prisoners facing the harshest punishments, at home and abroad. JPP investigates, litigates, educates, and advocates on their behalf. In recognition of our work, in December 2016, JPP was awarded with the National Human Rights Award, presented by the President of Pakistan

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<sup>19</sup> The Express Tribune. 'B4G' amnesty scheme: 'Over 8,000 Pakistanis repatriated from Malaysia in five months'. (December 31, 2019). <https://tribune.com.pk/story/2128138/b4g-amnesty-scheme-8000-pakistanis-repatriated-malaysia-five-months>

<sup>20</sup> According to the High Commission of Pakistan in Malaysia, in 2022-23, 1,216 Pakistani prisoners were repatriated from Malaysia after completion of their prison terms.

<sup>21</sup> Justice Project Pakistan (2024) *Pakistanis Imprisoned Abroad: Interactive Webpage*. <https://jpp.org.pk/overseaspakprisoners/>