RETHINKING CAPITAL PUNISHMENT FOR MENTALLY ILL: A COMPARATIVE STUDY IN THE CONTEXT OF PAKISTAN, INDIA, AND INTERNATIONAL HUMAN RIGHTS LAW

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Contents

Abstract

This dissertation evaluates the practice of judicial execution of the mentally ill in Pakistan by analyzing Pakistan's retention of the death penalty and her reluctance in excluding the mentally ill from its scope. It compares Pakistan's case with India and discusses the trajectory that has significantly narrowed the scope of the death penalty in India. It shows that despite her international legal obligations, Pakistan continues to execute the mentally ill due to the State's noncompliance of the domestic laws, non-incorporation of international legal obligations into the domestic legal framework, and the judiciary's and executive's lack of understanding of the mental health issues. It further identifies various factors due to which this practice still prevails. It recommends uniform application of International law as well as compliance with Islamic law to safeguard Pakistan's mentally ill prisoners from being subjected to execution of their death sentences.

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Introduction

In Discipline and Punish, Foucault argues that the end of 18th century C.E. marked a major shift in the penal justice system across Europe, resulting in changing the object of the punishment from the convict's body to his soul[1]. Capital punishment, while taken for granted for hundreds of years, now attracted serious debate amongst the legal scholarship. Cesare criticized this form of punishment for utilitarian reasons by saying "a man after he is hanged is good for nothing, and that punishments invented for the good of society, ought to be useful to society."[2]Roger Hoods suggests that the enlightened ruling class of Tuscany and Austria took Cesare's idea and capital punishment was suspended for several years.[3]Pennsylvania, in line with the Kantian view of capital punishment, limited the application of the death penalty to only the most heinous of crimes, such as first-degree murder.[4] Capital punishment, however, kept on being suspended and reinstated throughout Europe during authoritarian rules of Mussolini and Hitler. The end of World War II resulted in a swift shift towards the abolition in the region.[5]

Currently, there is a global movement towards the abolition of the death penalty. To date, 104 of the 195 States of the United Nations have abolished the death penalty[6]. Globally, there is a growing consensus on exempting juveniles, pregnant women, intellectually disabled and mentally ill from capital punishment. While intellectuals like Cesare had reservations against the utility of the death penalty, in the aftermath of the Second World War, the abolitionist movement gained an organized momentum. The reason primarily being the framework of International Human Rights, which 'sacralized' the individual.[7] This progression in the direction of exclusion took

[1]Michel Foucault and Alan Sheridan, *Discipline and punish* (London: Penguin Books, 1977), 8.
[2]Beccaria Cesara, *On Crime and Punishment* (Indiana: Bobbs-Merrill, 1963), 193.
[3]Roger Hood and Carolyn Hoyle, *The death penalty: a worldwide perspective* (New York, NY: Oxford University Press, 2015), 11.
[4]Ibid 11
[5]Ibid 12.
[6]"Abolitionist and Retentionist Countries," Abolitionist and Retentionist Countries | Death Penalty Information Center,, accessed December 27, 2018, https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries.
[7]Matthew D. Mathias, "The Sacralization of the Individual: Human Rights and the Abolition of the Death Penalty," *American Journal of Sociology* 118, no. 5 (2013): , accessed December 5, 2017, doi:10.1086/669507.

place upon the realization that in certain cultures and states, the death penalty cannot be abolished altogether, which, in turn, triggered the pursuit of limiting the scope of capital punishment among the advocates of human rights. So, it can be said that growing global trend towards abolition and the subsequent narrowing of the scope of the death penalty finds its basis in the international human rights system and is embodied in the UDHR's provision of the right to life.[8]

In the realm of International Law, the prohibition of execution for various vulnerable groups has long emerged as a principle. This movement towards exempting certain groups started with the UN ECOSOC Resolution, Safeguard No. 3, *Safeguards guaranteeing protection of the rights of those facing the death penalty,* [9] prohibited the carrying out of death sentence on juveniles, pregnant women, new mothers and person who have become insane. This limitation further narrowed down in 1989, when persons above a certain age were also added to the list of those who death sentence should not be carried out[10]. In 2004, the UN Commission for Human Rights called upon all the governments that they should not execute persons suffering from any form of mental disorder. [11] Thus, it can be said that international law prohibits the execution of those suffering from mental ailments.

Importance of this undertaking

[8]Supra 3

[9] Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentencebe carried out on pregnant women, or onnew mothers, or on persons who have become insane.

[10]Supra 3

[11] 4-c Not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person;

In 2014, in the aftermath of a major terrorist attack killing at least 135 schoolchildren, Pakistan lifted the de-facto moratorium on the death penalty[12]. Ever since, Pakistan has executed 483 persons, while another 8200 are still on the death row[13]. As per a report submitted by the petitioner in the *RidaQazi* case, currently pending before the Lahore High Court, at least twenty-seven persons are suffering from serious mental disabilities the prisons of Punjab, while there is no data on the persons with mental disabilities in other provinces. Owing to the poor living conditions in the Pakistani jails, the stress resulting from languishing on the death row, and the resultant high probability of mental deterioration among these persons; this number may be higher[14].

The global trend towards the exclusion of certain groups from the scope of the death penalty, and the consequent direction that this exclusion took in every culture has its political, economic and religious explanations. For instance, in the case of Pakistan, the exclusion of juveniles from the scope of capital punishment took place in a dictatorship. One of the reasons behind his enactment of the Juvenile Justice System Ordinance, 2001 was to gain international validation. At the same time, it was convenient in the domestic social, political and legal setup as the Islamic tradition supports such exclusion. Pakistan has also amended the Pakistan Prison Manual to the effect of either postponement of execution, or its commutation to life in the case of pregnant women. Similarly, the State recognizes intellectual disability at the time of the commission of a crime, or during the trial, and exempts those with such disability from capital punishment. As per Section 84[15] of the Pakistan Penal Code, an act committed by a person by reason of unsoundness of mind does not constitute an offense. However, Pakistani criminal justice system, on a

[12]AsadHashim, "Pakistan lifts death penalty moratorium," Pakistan News | Al Jazeera, December 17, 2014, , accessed December 25, 2017, http://www.aljazeera.com/news/asia/2014/12/pakistan-lifts-death-penalty-moratorium-2014121710537499387.html.
[13]Supra 7
[14]Supra 3
[15]" Nothing is an offence which is done by a person who at the time of doing by reason of unsoundness of mind, is incapable of knowing the nature of the actor that he doing what is either wrong or contrary to law.

constitutional level, or on the level of secondary legislation, does not recognize post-conviction insanity. In the existing scheme of the penal system, neither there is a statutory provision that bars the execution of the mentally disabled, nor is there a court ruling that prohibits the States from inflicting the death penalty on these people. In the absence of any domestic legal safeguards, these people continue to face an imminent threat of execution.

India, on the other hand, excludes the post-conviction mentally ill from the scope of death penalty[16]. Despite inheriting the same legal framework and institutions, India has taken a completely different trajectory on the application and execution of death penalty because of the political and constitutional developments following her independence. For instance, unlike Pakistan, the abolition debate has existed ever since her inception[17]. The founding father, Gandhi opposed the death penalty because it violated the ideal of Ahimsa.[18]*The Bachan Singh*[19] case held that capital punishment was not unconstitutional while establishing that it should only be awarded in the 'rarest of rare' cases. Following that, in 2015, the Law Commission of India recommended the abolishment of capital punishment for all crimes except the crime of waging war against the nation and terrorism-related offenses.

In the Pakistani judicial arena, the question as to whether the mentally ill should be executed or not, had not been raised until recently. In 2016, the Supreme Court of Pakistan looked at the question of execution of death penalty to the mentally ill in the case of *SafiaBano v. The Federation of Pakistan*[20], however, the legal question was not aimed at addressing the petitioner, Imdad Ali's competency for execution; rather, it looked at his ability to make a will before he can be taken to gallows. In that context, it can be said that there is no literature on the question in the Pakistan

[16]Gautam Bhatia, "Indian Supreme Court Changes Stance on Death Penalty: Holds Delay to be a Ground for Commutation," OHRH, February 05, 2014, , accessed January 01, 2018, http://ohrh.law.ox.ac.uk/indian-supreme-court-changes-stance-on-death-penalty-holds-delay-to-be-a-ground-for-commutation/.
[17]Bikram Jeet Batra, Lethal lottery: the death penalty in India: a study of Supreme Court judgments in death penalty cases 1950-2006 (New Delhi: Asia Law House, 2007).
[18]Rajendra K. Sharma, *Criminology and penology* (New Delhi: Atlantic Publishers & Distributors (P) Ltd, 2016), 33.
[19]Bachan Singh vs State Of Punjab, AIR 1980 SC 898
[20] *SafiaBano v. The Federation of Pakistan,* PLD 2017 SC 18

domestic legal sphere. Internationally, this issue has been raised, although, not frequently. Similarly, the work of Roger Hoods provides a comparative perspective into the exclusion of various vulnerable groups from the scope of death penalty. However, in the Pakistani context, there is a complete lack of literature on this question.

In this vacuum of literature, there are three main questions that come with the emergence of this issue. Firstly, what are the processes and systemic cultural and political problems in Pakistan's legal regime that lead to the execution of the mentally ill? Secondly, why has not Pakistan incorporated the international legal standards on the subject into the domestic legislations so far? Thirdly, in the complete lack of an explicit legal prohibition to execute these mentally ill prisoners, what ought to be done to abolish this practice? These questions are not only important from a theoretical stand point, but also from a practical one, as answers to these questions may pave the way for excluding the mentally ill from the scope of capital punishment in Pakistan.

Structure

This dissertation analyses Pakistan's practice of executing the mentally ill by comparing her criminal justice framework with that of India. The third jurisdiction for this study is that of International law which, through its jurisprudential developments, has created a higher standard by barring the execution of mentally disabled persons. The first two jurisdictions have been selected to understand as to why they have taken different trajectories in the defining their scope of capital punishment even though they inherited the same justice system as well as institutions. This dissertation analyses the history as well as the political and constitutional developments in these two jurisdictions which result in these differences. The third jurisdiction, i.e., international law alongside setting a higher standard that prohibits the infliction of death penalty on the mentally ill, also provides a way forward for the abolition of this practice in Pakistan.

This thesis comprises four chapters. The first chapter looks at Pakistan's retention of the death penalty and her reluctance in excluding the mentally ill from the scope of the death penalty. The second chapter looks at Indian case and will discuss the trajectory that has significantly narrowed the scope of the death penalty in India. The third chapter focuses specifically on Pakistan and identifies various factors due to which this practice still prevails. It will show that despite her international legal obligations, Pakistan continues to execute the mentally ill due to the State's noncompliance of the domestic laws, non-incorporation of international legal obligations into the domestic legal framework, and the judiciary's and executive's lack of understanding of the mental health issues. The final chapter identifies Pakistan's inconsistent application of her international law in the domestic sphere, and the need to ensure uniform incorporation of her international legal obligations through the judiciary.

Chapter 1: Pakistan's retentionism and non-exclusion of the mentally ill from the scope of the death penalty

Pakistan's firm retentionist position, and by extension, the reluctance in excluding the mentally ill from the scope of the death penalty is firmly rooted in her constitutional and political history. Before that, one must look at the political and legal history of the Indian Subcontinent and look at the factors that motivated the creation of Pakistan in 1947. Equally important is to see if any jurisprudential developments took place in the ambit of Shariah law, which was made to take a key position in the constitution-making of the Islamic Republic. Lastly, it is important to examine the institutional tussle that leads to the endorsement of a specific form of Islam, which stands resistant, if not contrary to the normative framework of international human rights.

Political History of the Sub-Continent and the advent of Islam

More than a millennium before the inception of Pakistan, the region's first encounter with Islam happened when Mohammad Bin Qasim conquered Sindh in 712 CE. In the latter half of the eighth century, Muslim traders started settling in the north-west of India; however, Ayesha Jalal argues that at that point the movement was strictly oriented towards profit-making, with no mass inclinations of introducing the locals to Islam. [21] It was not until the eleventh-century arrival of Afghan and Turkish invaders that the local coexistence of Brahmanic and Shramanik traditions was interfered with, particularly by the Islamic profession. In the 12th century, the first Muslim sultanate was created by Qutb uddin Aibak, with various political and economic motivations. Between the 12th and the 15th century, the Indian Subcontinent was ruled

[21] Sugata Bose and Ayesha Jalal, Modern South Asia: history, culture, political economy (London: Routledge, 2011).

by Mamluks, Khiljis, Tughlaqs, and Lodhis[22]. Although the roots of an Indo-Islamic setup can be traced back to the twelfth-century occupation of Lahore by the Ghaznavis, the first true forging of an Indo-Muslim culture happened in the fourteenth century with the establishment of a local-invader alliance[23]. Just like earlier forms of hybrid forms of governments that had preceded the Muslim empire, the Delhi Sultans allowed the local non-Muslim majority to retain their customs and practices, alongside maintaining the supremacy of Shariah.

In 1526, the Moghul empire was established, which lasted until 1857. Moghuls after their futile attempts to take over Samarkand had diverted towards Punjab. Upon beating the last Lodi ruler, the first Moghul emperor of India, Zahir uddin Babur took over the throne of Delhi. Akbar, the greatest Moghul emperor, attained the throne in 1556 and remained in power until 1605. Due to his able military leadership and astute administration, he consolidated and expanded the empire. Alongside, knowing most subjects of the Moghul rule were non-Muslims, he built alliances with the Hindu population by establishing the Mansabdari system and elevating several Hindus to key positions, such as Raja Mansingh of Amber[24]. While religious diversity prevailed during Akbar's rule, in 1582, he announced his idea of a new religion, Din-e-Ilahi – the Divine Faith, which was an amalgamation of mystic ideas from both the major codes, Hinduism and Islam. Akbar, in the legal domain, followed the footsteps of the Delhi Sultans, creating a two-pronged judicial system, one run by Qanun-e-Shahi, the imperial decree, and the other managed by the tenets of Shariah. In this regard, the role of Shariah courts remained more in the ambit of moral guidance, with little legal rigidity. While Akbar was criticized by certain Islamic scholars for his outlook on faith, he continued to endorse his view of cultural and religious tolerance and pluralism. Akbar's legacy was taken forth by his son Jehangir and his grandson Shah Jahan. A major shift in the political arena took place when Aurangzeb took over the throne in 1658. His rigid theological inclinations

[22] Philip B. Calkins and Muzaffar Alam, "India," Encyclopædia Britannica, February 02, 2018, , accessed February 04, 2018, https://www.britannica.com/place/India/The-early-Turkish-sultans#ref485598.
[23] Supra 1, 29
[24] Abū Al-Faẓl ibn Mubārak et al., The A-in-i Akbari (Delhi: Low Price Publications, 2008).

and the reintroduction of Jizya – a tax collected by Muslim rulers from non-Muslim subjects created an atmosphere of antagonism between the previously co-existing Hindus and Muslim. The Moghul dynasty ruled the Subcontinent until the East-India Company took over after the revolution (referred to as the Mutiny) of 1857.

The Emergence of Religious Identity during British Raj

The British Raj in Indian Subcontinent brought with itself a new system of governance. Soon after the revolution of 1857, the British started looking for collaborators among locals to pursue their reordering of the political economy. Despite the British claim of not intervening in the private sphere of 'religion and customs', the definition of territories into religious majority and minority awakened the sense of faith-based identity[25]. This categorization led to the movements of religious revival in the case of both Hindus and Muslims. In the social sphere, while the reformers of both religious groups tried to uplift their people; among Muslims in India, a rational approach towards theology took birth.[26] The idea of Indian nationalism started to weaken, as the followers of both faiths began to use religion as a force to mobilize people. It reached a new height in the aftermath of the Khilafat movement when in Punjab and Uttar Pradesh, the anti-colonial movement was replaced by Shuddhi (purity) and Sangathan (organization) among Hindus, and by Tableegh (religious preaching) and Tanzeem (organization) among Muslims[27]. The religious divide further escalated when Mohammad Ali Jinnah's demand for Muslims separate electorates and safeguards earned him the title of a being a communalist. Ayesha Jalal argues that regardless of whether Muslims of India, in fact, were a nation or a mere by-product of the British scheme of divide and rule; the main reason behind the birth of Pakistan was the

[25] Supra 1, 109
[26] ibid, 114
[27] Ibid,142

structural peculiarities in Indian politics[28]. By 1941, Jinnah was convinced that 'as there were at least two identifiable nations in India, a transfer of power would have to involve the dissolution of the unitary center which was an artifact of the British colonialism.'[29]In Modern South Asia, it is contended that Jinnah had generally criticized Islamic clerics for touting Islam on the streets of India. While the reasons for this shift cannot be associated to one incident or event, Nehru Pact in 1928 was one of the major events that led Jinnah towards focusing on the political interests of the Muslims of the Sub-continent. Once known as the 'Ambassador of Hindu-Muslim unity,' Jinnah took the idea of religion to mobilize the Muslims of Sub-continent, in this endeavor. Ayesha Jalal claims that this maneuver rendered the idea of Pakistan ambiguous, in the sense of the State's relationship with Islam.

"Pakistan – an 'Islamic State' or 'State for Muslims'?"

Upon founding the country, Jinnah became the first Governor General of Pakistan. The speeches he made at various forums did not clear the sense of vagueness in his ideal of Pakistan. At the inauguration ceremony of the State Bank of Pakistan, in 1948, he stated[30]:

> "The adoption of Western economic theory and practice will not help us in achieving our goal of creating a happy and contended people. We must work our destiny in our own way and present to the world an economic system based on true Islamic concept of equality of manhood and social justice. We will thereby be fulfilling our mission as Muslims and giving to humanity the message of peace which alone can save it and secure the welfare, happiness and prosperity of mankind."

[28] Ibid,165
[29] Ibid, 167
[30] Aamir Butt, "Jinnah's Pakistan: Islamic state or secular democracy?" The Nation, , accessed January 28, 2018, https://nation.com.pk/25-Dec-2015/jinnah-s-pakistan-islamic-state-or-secular-democracy.

While this speech focused more on his economic vision for the country, his predilection towards Islam in the state sphere cannot be ignored. At another occasion, while addressing a crowd at Edwards College Peshawar, in 1948, he said that "What more can one really expect than to see that this mighty land has now been brought under a rule, which is Islamic, Muslim rule, as a sovereign independent State[31]." Similarly, while speaking on a radio broadcast to the people of the United States, he proclaimed Pakistan to be the first Islamic state, and predicted the ultimate Constitution of the country to be democratic, with the essential principles of Islam. In another speech delivered before the public at Chittagong, in the same year, that the crowd assembled was voicing his idea that Pakistan should be based on social justice and Islamic socialism. Interestingly, all these speeches are delivered following the independence of Pakistan.

On the contrary, there is evidence to support the claim that Jinnah wanted a modern state. In 1944, it is reported that one of the Islamic organizations of the Subcontinent, Ahrar offered Jinnah their full support on the condition of the promise that Pakistan will be on Islamic principles. He reportedly refused the offer. At another occasion, it is reported that right before Jinnah left India for Pakistan, one of his companions Sikandar Mirza asked him if Jinnah wanted the newly formed polity to be an Islamic state. Jinnah responded, "Nonsense, I am going to have a modern State."[32] A major statement, in this regard, as frequently quoted by those who believe that Jinnah wanted a secular state comes from his speech before the Constituent Assembly of Pakistan, dated 11th August 1948. He said,

> "You are free; you are free to go to your temples, you are free to go to your mosques or to any other place or worship in this State of Pakistan. You may belong to any religion or caste or creed -- that has nothing to do with the business of the State. "

[31] ibid
[32] ibid

There, however, is no categorical answer to the question of whether Jinnah wanted an Islamic State or a modern state. On one hand, some speeches categorically suggest Jinnah's vision for an Islamic state, while on the other, it can be said that Jinnah's ideal was the creation of a modern state. Khan suggests that the death of Jinnah, only a year after the independence, deprived the nation of the leadership that could have emphasized and steered her direction towards constitution making[33]. Moreover, the division between the politicians on the division of power, and the reemergence of Ulema in the political sphere could be referred to as common factors leading to the "loss of liberal democratic possibility for Pakistan."[34]

Pakistan's Constitutional Crisis

Jinnah's death led to the creation of a vacuum concerning the direction this newly found nation-state was to take. On 7th March 1949, the First Constituent Assembly passed the Objective Resolution, a document that was to provide a framework for the constitution making in the country. The Prime Minister of the time, Liaquat Ali Khan, while presenting the resolution on the floor of the Assembly clearly stated that Jinnah wanted the creation of a country where Muslims could exercise lives according to the teachings of Qur'an and Sunnah, so as to demonstrate to the peoples of the world that Islam was the cure to various 'diseases' that had found their way into the human life at that point.[35] His speech endorsed the idea that owing to the idea that authority is a trust from Allah, it should be made subservient to His will. At the same time, his dismantled the notion that Pakistan will become a theocratic state, as he argued, that theocracy was a Christian notion, where power was exercised by ordained priests – a notion that had no room in Islam. He stated that the Objective Resolution codified that all sovereignty belongs to God Almighty alone, and the representative of the people may exercise the authority

[33] Hamid Khan, Constitutional and political history of Pakistan (Karachi: Oxford University Press, 2012), 49.
[34] Sadaf Aziz, The constitution of Pakistan a contextual analysis (Oxford: Hart Publishing, 2017), 2.
[35] Pakistan., Constituent Assembly, 1949., National Assembly, 5, accessed February 1, 2018, www.na.gov.pk/uploads/documents/1434604126_750.pdf.

delegated by Him as a sacred trust[36]. The motion moved before the Assembly stated the resolve that the Constituent Assembly would frame a Constitution for the country, wherein the "principles of democracy, freedom, equality, tolerance, and social justice as enunciated by Islam shall be fully observed"[37], and wherein "the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah.[38]" The resolution triggered serious debate on the nature of the future Constitution on the floor of the Assembly. One of the main criticisms was the appearance of tabling this resolution hastily. Prem Hari Barma, discussing the Resolution, stated that several members of the First Constituent Assembly were not even aware of the tabling of it, as the session in progress was on budget making, and not constitution framing, owing to which, a few the members were not even present at the time of it tabling. Therefore, he suggested that the Objective Resolution be circulated to elicit public opinion[39]. Another member of the Assembly, Sris Chandra Chattopadhyaya criticized the resolution for being devoid of eternal principles of equality, democracy, and social justice, as opposed to those enunciated by Islam. He referred to the declaration made by Jinnah in the same house in 1948 that politics and religion will not be mixed up[40]. These remarks aimed specifically at the preservation of minority rights and pluralism had the potential of altering the framework for constitution building rendering it devoid of any theological basis. However, none of them were taken into consideration. Sadaf Aziz argues that the "debate about the Objective Resolution seems the square the existence of the Quran and Sunnah with the textual authority so that authoritative pronouncements about Islamic law could be derived from them." Thus, in that regard, the Objective Resolution not only set forth the Islamic trajectory of the constitution-making process but also laid down the sources of legal precepts that were to be legislated in the future.

[36]Ibid, 7
[37] ibid
[38]Ibid
[39] Ibid, 9
[40] Ibid, 9

Despite the haste shown in passing the Objective Resolution, the actual process of constitution-making remained constantly hampered by the political turmoil in the country. In 1951, the Prime Minister, Liaquat Ali Khan was assassinated. Following that, the Governor General Khawaja Nazimuddin became the Prime Minister, while Ghulam Muhammad was made the Governor General. In 1953, Ghulam Muhammad dismissed Khawaja Nizamuddin. Mohammad Ali Bogra became the next Prime Minister. However, the Constituent Assembly was yet again dissolved in 1954. In 1955, Muhmmad Ali Bogra was dismissed by the Governor General Iskander Mirza. Following him, Chaudhry Muhmmad Ali became the Prime Minister. It was under the leadership of Chaudhry Muhammad Ali that the Constituent Assembly adopted the First Constitution of the Islamic Republic of Pakistan, on March 23rd, 1956[41].

The Constitution of 1956

The 1956 Constitution has a strong Islamic character. The Objective Resolution was put into the preamble of this Constitution, and Article 1 (1) declared the state to be an Islamic Republic[42]. Article 25[43], Part 3 (Directive Principles of State Policy) mandated the State to enable the Muslim population to order their lives with the injunctions of Islam. Article 32[44] required that only a Muslim can be the President of Pakistan. The most influential provision in this regard was

[41] G. W. Choudhury, "The Constitution of Pakistan," Pacific Affairs 29, no. 3 (1956): , accessed February 3, 2018, doi:10.2307/2753474.

[42] Article 1
(1) Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan and is hereinafter referred to as Pakistan.

[43] Article 25
(1) Steps shall be taken to enable the Muslims of Pakistan individually and collectively to order their lives in accordance with the Holy Quran and Sunnah.
(2) The State shall endeavor, as respects the Muslims of Pakistan,-
(a) to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah;
(b) to make the teaching of the Holy Quran compulsory;
(c) to promote unity and the observance of Islamic moral standards; and
(d) to secure the proper organization of zakat, wakfs and mosques.

[44] (2) Notwithstanding anything in Part 2, a person shall not be qualified for election as President unless he is a Muslim; nor shall he be so qualified-

Article 198[45] of the Constitution which prohibited the enactment of any law contrary to the injunctions of Islam laid down in Qur'an and Sunnah. However, the Constitution did not prescribe a deferral to the judiciary for the ascertainment of a law's alignment with the injunctions of Islam. It was a short-lived Constitution as on October 7th, 1958, it was suspended by the Governor General Iskander Mirza, and both the central and the provincial governments were dismissed. General Ayub Khan imposed the first martial law in the country, on October 27th, 1958. The suspension of the Constitution and the enactment of the Continuance in Force Order (a manipulated version of the Constitution of 1956 suited for military administration to run the state affairs) were challenged in the Supreme Court, however, the then Chief Justice Munir upheld both the imposition of martial law, and the enactment of Continuance in Force Order. The Supreme Court had earlier applied the 'doctrine of necessity' in legitimizing the 1954 dismissal of Constituent Assembly in *Maulvi Tamizuddin Khan v. The Federation of Pakistan*[46]. The same doctrine was invoked in the case of *State v. Dosso*[47] when the legitimacy of the first martial law was questioned[48], but in both the case the judiciary legitimized the extra-constitutional measures.

[45] Article 198
(1) No law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah, hereinafter referred to as Injunctions of Islam, and existing law shall be brought into conformity with such Injunctions.
(2) Effect shall be given to the provisions of clause (1) only in the manner provided in clause (3).
(3) Within one year of the Constitution Day, the President shall appoint a Commission-
(a) to make recommendations-
(i) as to the measures for bringing existing law into conformity with the Injunctions of Islam, and
(ii) as to the stages by which such measures should be brought into effect; and
(b) to compile in a suitable form, for the guidance of the National and Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.
The Commission shall submit its final report within five years of its appointment and may submit any interim report earlier. The report, whether interim or final, shall be laid before the National Assembly within six months of its receipt, and the Assembly after considering the report shall enact laws in respect thereof.
(4) Nothing in this Article shall affect the personal laws of non-Muslim citizens, or their status as citizens, or any provision of the Constitution.
[46] *Maulvi Tamizuddin Khan v. The Federation of Pakistan* , PLD 1955 FC 240.
[47] *State v. Dosso* , P.L.D. 1958 S.C. 553
[48] The issue in the case was not specifically that of challenging the martial law of 1958, rather, it was an appeal filed by the State to reverse the judgment passed by the Lahore High Court, which rendered the Frontier Crime Regulations of 1901 contrary to the Constitution of the 1956. The hearing was scheduled three days after the enactment of the CFO (Continuance in Force Order). The Supreme Court, headed by the then Chief Justice

The Constitution of 1962

As the first martial law administrator in the country, Ayub Khan sought to find the reasons behind the abrogation of the Constitution of 1956. In 1960, a commission was constituted to find the causes behind the abrogation, and to make recommendations to stabilize the government[49]. On June 8th, 1962, keeping in view the shortcomings of the previous Constitution, the second Constitution of Pakistan was enacted. Unlike the previous Constitution, this one introduced a presidential system of Government. This Constitution carried forth the Islamic legacy of the First Constitution, with three exceptions. Firstly, in Article 1, the name of the State was changed from the 'Islamic Republic of Pakistan' to the 'Republic of Pakistan'; however, the word 'Islamic' was inserted through an amendment in 1963. Secondly, while the sovereignty still belonged to God Almighty, the Constitution did not make explicit mention of Qur'an and Sunnah. Third, this Constitution did not make not mandate that the President of the country should be a Muslim. Besides, these changes in the first draft, the Islamic character of the Constitution remained unchanged. Article 6 (2.1)[50] mandated that no law contrary to Islam shall be enacted. This Constitution enacted in 1962 indicates a shift in the sense that the Constitutional provisions warranting and facilitating the enforcement of the injunctions of Islam were made less restrictive; however, it still mandated that the laws enacted should be aligned with Islam. Aziz suggests that the authoritarian regime of Ayub Khan led to a widespread agitation and protest by student and labor organizations, and he was removed from office by another

Munir took the opinion that the 1956 Constitution was not in force anymore, thus, granting legitimacy to the extra-Constitutional act of abrogation, and enactment of the CFO.

[49] Yasmeen Yousif Pardesi∗, "An Analysis of the Constitutional Crisis in Pakistan (1958-1969) ," Post Graduate Institute of Law, , accessed February 4, 2018.

[50] 1. Islam. No law should be repugnant to Islam.

martial law administrator, General Yahya Khan, in 1969. This resulted in the abrogation of the second Constitution[51], and the enactment of the Legal Framework Order, 1970.

Yahya Khan held elections under the Framework Order of 1970, which lead to a rift between the political leadership of the then East Pakistan (now Bangladesh) and West Pakistan (current Pakistan). In the aftermath of a deadlock to resolve the issues between the winning party Awami League, and the second party with the highest votes, Pakistan People's Party, the military started an operation in the East Pakistan. Consequently, Bangladesh came into being March, 1971 after getting independence from Pakistan, following which Yahya Khan resigned from the office in December. He asked Zulfikar Ali Bhutto to take over the reins of remaining Pakistan, as the civilian Chief Martial Law Administrator. Bhutto, upon coming into power, sought to frame the third Constitution of Pakistan. On August 14th, 1973, the Third Constitution was passed and enacted.

The Constitution of 1973

The newly enacted Constitution provided for a parliamentary system of government with two houses. The Islamic character of this constitution was stronger than the ones before. Haqqani suggests that it was upon, the demand of the religious, political parties that the Objective Resolution was included as the preamble, and more Islamic provisions were inserted into it[52]. Article 1 prescribed the official name of the country to be the 'Islamic Republic of Pakistan.' Article 2[53] categorically declared Islam to be the State religion. Article 31 required the State to enable Muslims to order their lives in the light of Islamic teachings[54]. Article 37 of the

[51] Supra 15, 51
[52] Ḥusain Ḥaqqānī, Pakistan: between mosque and military (Gurgaon, Haryana: Viking, 2016).
[53] 2. "Islam shall be the State religion of Pakistan."
[54] 32.2.The State shall endeavor, as respects the Muslims of Pakistan, -
a. to make the teaching of Holy Qur'an and Islamiat compulsory, to encourage and facilitate the learning of Arabic language, and to secure correct and exact printing and publishing of the Holy Qur'an:
b. to promote unity and the observance of the Islamic moral standards; and

Constitution mandated the State to prevent the consumption of liquor among Muslims[55]. Article 227[56] mandated the State to bring all existing laws in conformity with the injunctions of Islam. It even defined terms like 'Muslim' and 'non-Muslim' in Article 260. To sum up, this Constitution further strengthened the Islamic character of the State.

Islamization of Pakistan

This Constitution, just like the ones before, was suspended when General ZiaulHaq staged a coup against the Bhutto government on July 5th, 1977. Initially, he announced that he was going to conduct an election within one year, however, in 1979, he opined:

"The present political system in which political parties flew at each other's throats had no relevance to the Islamic concept.[57]"

Instead of holding the election and returning to the military barracks, "in the greater national interest", Zia embarked upon the journey of implanting the true spirit of Islam. He, therefore, announced his plan of implementing Nizam e Islam (Islamic system) by introducing new reforms. Qureshi[58] suggests that these reforms encapsulated the following areas:

"1. Islamic penal laws

2. Islamic economic laws

3. Judicial reform in accordance with the Shariah

4. Social and educational reforms"

c. to secure the proper organization of Zakat, auqaf and mosques.

[55] "37. The State shall – (h) prevent the consumption of liquor otherwise than for medicinal and, in case of non-Muslims, religious purposes.

[56] "227. (1)All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah, in this part preferred to as the Injunctions of Islam, and no law shall be enacted repugnant to such Injunctions."

[57] Saleem Qureshi, "Islam and development: The Zia regime in Pakistan," World Development 8, no. 7-8 (1980): 568, doi:10.1016/0305-750x(80)90041-8..

[58] ibid

On the question of penal laws, he implemented the Islamic penal provisions of Hadd and Tazir. The application of Islamic penalties as prescribed by the Qur'an and Sunnah, such as Qisas (retribution), flogging, chopping hands off, stoning, etc were made mandatory. On the economic front, he introduced the mandatory deduction of Zakat, etc. The judicial reform included the declaration of Shariah to be the supreme law of the land and giving courts the powers to declare any law void if found repugnant to the injunctions of Islam. The judicial reform in this regard can be considered the most influential because it, for the first time, created an institutional mechanism for declaring acts of the legislature repugnant.

After a decade of political instability from the death of General Zia in 1988 to 1999, the Chief of Army Staff Parvez Musharraf dismissed the sitting Prime Minister Nawaz Sharif on October 12, 1999 and imposed martial law. In a televised speech on October 17th, 1999, he declared that military was to return to barracks after taking the necessary measures to pave the way for true democracy and laid out his policy objectives. Human Rights Watch Report titled '*REFORM OR REPRESSION? Post-Coup Abuses in Pakistan*'[59] suggests that in order to portray his government "as having a socially progressive agenda", Musharraf took a pledge to reform in the area of juvenile justice. In 2000, he enacted the Juvenile Justice System Ordinance of 2000. This ordinance excluded children under the age of 18 from the scope of the award of the death penalty. Section 12 of the JJSO states:

"12. Orders that shall not be passed with respect to a child…

Notwithstanding anything to the contrary contained in any law for the time being in force no child shall be: -

(a) Awarded punishment of death, or ordered to labor during the time spent in any borstal or such other institution; …"

[59] "REFORM OR REPRESSION? Post-Coup Abuses in Pakistan," Human Rights Documents online, 2000, accessed January 26, 2018, doi:10.1163/2210-7975_hrd-2261-0254.

Although there have been serious concerns regarding the implementation of this ordinance, this reform on a legislative level was applauded worldwide. On the face of it, JJSO may stand contrary to the principles of retribution. However, it was not opposed, nor revoked at the end of the Musharraf regime. This could be explained by the fact that in the Islamic law system, there does exist a safeguard for the protection of young persons from the death penalty. In Islamic law, criminal accountability is based on criminal responsibility, and children are deemed not responsible for their commissions or omissions under the Qur'an. Chapter 24[60] of the Qur'an states, "But when the children among you come of age, let them (also) ask for permission, as do those senior to them (in age): Thus, does Allah make clear His Signs to you: for Allah is full of knowledge and wisdom." This verse read together with the saying of the Prophet Muhammad makes it clear that minor cannot be held accountable. He said, "Three persons are not accountable, a child until he reaches the age of puberty, a sleeping person until he awakes and an insane person until he becomes sane."[61] The same saying of the Prophet provides Shariah legitimacy of the defense of insanity.

Looking at the historical background, one remains a skeptic of the application of Two-Nation theory over the people of the Subcontinent in the first few centuries of the Muslim rule. The way the early rulers of the Delhi Sultanate and some of the Moghul rulers conducted the affairs of state, there is no evidence to suggest that there was any sense of antagonism between the Muslims and the Hindus of the Subcontinent. Instead, following the 11th century, till the revolution of 1857, the Hindus and the Muslims of the Subcontinent show a peaceful coexistence. It was not until the beginning of the British Rule and administrative division of land into units, and people into classes, that the question of religious identity emerged in the public sphere and strengthened. It was towards the beginning of the 20th century that the two religious groups began to align their political ideals with their religious identities, and eventually, it resulted

[60] Quran, 24:59
[61] Suleman ABUDAWOOD, Sunan-e-Abu Dawood Sharif. Vol. 3. Vol. 3 (Book Centre Bradford.).

in the formation of two nation-states, India and Pakistan. It remains uncertain if religions played any other role than the mere mobilization of people. Ironically, the secular political figures used religion as a unifying factor towards a common goal, while the members of the religious organizations remained against the partition of India in the first place. It was after the independence of Pakistan that they began to pursue the implementation of an Islamic model in the country.

Following the independence, Jinnah's death, the power struggle, issues with determining the mode of government and most importantly, the mobilizing effect of religion as inherited from the independence movement, and most importantly, a powerful military were the factors that constantly hindered the process of constitution building. In the course of her first 60 years as a country, more than 60 percent of it was spent under the military rule. Three constitutions had been introduced and abrogated. During this entire process, at some junctures the people of the country were manipulated and deceived in the name of religion, in order to legitimize personal political motives. Consequently, the political arena remains charged with the rhetoric of religion. The Constitution of 1973 requires for the President of the country to be a Muslim and to be a Sadiq and Amen (two of the attributes of the Prophet of Islam). Above this entire narrative-building exists an institution created by General Zia under Article 203 of the Constitution, called the Federal Shariat Court, which can declare any act repugnant to the injunctions of Islam. Holistically, Pakistani system in entirety has been made subject to Islamic Shariah, and in the presence of the institutional safeguards in place, it is next to impossible to introduce a law or a practice that stands contrary to the injunctions of Islam.

The question arises if the Islamic law allows the abolition of the death penalty or not. Mumisa claims that under the Islamic law, there are three kinds of offenses; firstly, Qisas (retaliation or

retribution), Hadd (offenses against God), and Ta'zir (offenses against the State).[62] Under Shariah, the position on Qisas and Hadd remain mostly unchallenged. In Chapter 2 of Qur'an, it is stated[63]:

"Believers, just retribution is prescribed for you in cases of killing: a free man for a free man, a slave for a slave, and a female for a female. If something [of his guilt] is remitted to a person by his brother, this shall be pursued with fairness, and restitution to his fellow-man shall be made in a goodly manner. This is an alleviation from your Lord, and an act of His grace. He who transgresses thereafter shall face grievous suffering. There is life for you, men of understanding, in this law of just retribution, so that you may remain God-fearing"

Several other verses in the Qur'an emphasize on the importance of forgiveness even when retribution is an option, the right to forgive or not remains with the heirs of the victims, and therefore, the state has no power to exercise in this domain.

Similarly, on the front of the offenses against God, a category that has recently become more relevant than ever, is that of FasaadfilArd (mischief on earth). It directly falls in the subcategory of Hirabah under the Hadd classification. It has been argued that this also includes acts of terrorism, alongside rape, silencing political authority, etc.[64] The punishment prescribed for such acts as prescribed by the Qur'an is as follows:

"The punishment of those who wage war against Allah and His Messenger and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands

[62] Micheal Mumissa, "Sharia law and the death penalty Would abolition of the death penalty be unfaithful to the message of Islam?" Penal Reform International, July 2015, , https://www.penalreform.org/wp-content/.../07/Sharia-law-and-the-death-penalty.pdf.
[63] Quran, 2:178-179
[64] Supra 44, 25

and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter.[65]"

The Islamic law position on the death penalty is therefore categorical. There do exist other instructions in the Qur'an and Hadith that can be used to restrict the application. However, it will require considerable effort on the part of Islamic scholars and jurists to reshape the common narrative created around the penalty. As of now, this penalty exists as a valid legal practice, and in the case of Pakistan there is little likelihood of its abolition without a complete revamping of the system. In the political sphere, a legislative reformer will not be allowed to express his or her vision of abolition, and one does so, one runs the risk of losing political power. Omar argues that in 2008, during the government of the Pakistan People's Party, the Prime Minister Gilani attempted to get a Presidential commutation to the entire death row of around 7000 people, however, in the face of the political pressure from the religious parties, and an explanation sought by the Chief Justice of Pakistan, the government changed its course of action[66]. A member of the parliament will not be able to pass the law owing to the pressure of the religious political parties such as the Jamaat e Islami and Jamiat Ulema e Islam, as they have previously opposed some legislations that have apparently been contrary to the injunctions of the Qur'an and Sunnah. In the hypothetical scenario, that such legislation takes place and the law is enacted, the Federal Shariat Court, a constitutional body with its power of review will find it repugnant to the injunctions of Islam, and will, therefore, be declared void. The Federal Shariat Court did the same thing in the *Qazilbash Waqf*[67] *case* regarding land reform, where the underlying issue was not as obviously rooted in the text of the Qur'an. It is due to these reasons that Pakistan continues to retain the death penalty, and by extension, the exclusion of the mentally ill peoples from its scope.

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[65] Quran 5:33

[66] Shagufta Omar, "Abolition of Death Penalty with Special Reference to Pakistan Part 2," *SSRN Electronic Journal*, 2010, , doi:10.2139/ssrn.1713101.

[67] *Qazilbash Waqf* and others Vs. *Chief Land Commissioner Punjab and others*. PLD 1990 SC 99

Chapter 2: The case of India; narrowing the scope of the death penalty

India and Pakistan came into being at approximately the same time. They inherited the same legal framework as well as the same institutions from British. Alongside they inherited death penalty from the pre-independence period and so far, Pakistan and India fall in the category of the nations that retain capital punishment. Some of the offenses punishable by death in India include aggravated murder, rape, terrorism, espionage, etc.[68] Pakistan's death row comprises of around 8200 persons[69]. The death row of India comprises of around 383 persons currently[70]. The death row of India comprises of around 383 persons currently[71]. It is evident that while both the countries continue to retain the death penalty, the two States have taken the opposite direction in the application of capital punishment. India has shown constraint in awarding and executing capital punishment. The anti-death penalty sentiment has long existed in the Indian political sphere, and the voice for abolishment found its way into both the legislative and the judicial sphere.

Developments in the legislative sphere

The role of Indian legislature in determining India's death penalty trajectory cannot be ignored. India inherited several statutes from the British Raj such as the Code of Criminal Procedure Code of 1898 and the Indian Penal Code of 1860. Under this framework, six offences were punishable by death, which was mandatory in nature. Section 367(5) of the Code of Criminal

[68]"Death Penalty Database," The Death Penalty in India, , accessed January 01, 2018, https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=India.
[69]Supra 7
[70]Center for Death Penalty, National Law University, Delhi India, "Center for Death Penalty, National Law University, Delhi India," Deathpenaltyindia.com, , accessed December 26, 2017, http://www.deathpenaltyindia.com/Death-Penalty-Research-Project.jsp.
[71]Center for Death Penalty, National Law University, Delhi India, "Center for Death Penalty, National Law University, Delhi India," Deathpenaltyindia.com, , accessed December 26, 2017, http://www.deathpenaltyindia.com/Death-Penalty-Research-Project.jsp.

Procedure of 1898 required Courts to state reasons for not awarding death penalty for offences punishable with death, thus, capital punishment carried a norm-status.

Following independence, the Constituent Assembly not only gave India her Constitution in 1950 which gave India a stable legal and political take-off; the debates of this Assembly gave the following law makers and judges a sense of direction. Batra argues that during the drafting of Indian Constitution, some members of the Constituent Assembly articulated the abolition of the death penalty on humanitarian grounds, as according to them, leaving death penalty to the subjective satisfaction of individual judges created an inherent sense of arbitrariness[72]. Prof. Shibbanlal Saksena appealed to the Constituent Assembly that an inherent right to appeal to the Supreme Court be created so that, those who cannot afford a counsel in the optional petition for leave to appeal before the Supreme Court may be safeguarded from wrongful execution. These concerns resulted in the creation of the right to an automatic appeal before Supreme Court once a convict was sentenced to capital punishment by the High Court. Dr. Ambedkar, however, stated that he rather supported an altogether abolition of death penalty, as it stood contrary to the principle of non-violence – a principle, which as per Ambedkar, was believed in by India by and large[73]. The matter of abolition was however left to the future legislatures.

Batra, in his report, refers to many attempts for abolition in both houses of the parliament, notably the private member bills introduced by Mukund Lal Agarwal, Prithvi Raj Kapur, Savitry Devi Nigam, and Raghunath Singh[74]. Although, these attempts failed in abolition; they did succeed in compelling the government to seek the opinion of the Law Commission. In 1971, the Law Commission released its 35th report and recommended retention. The primary justification, provided by this report, for retention was that of deterrence. It stated:

[72] Supra, 12
[73] "Constituent Assembly Debates On 3 June, 1949.
[74] Supra, 12

"Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment[75]."

Although this report recommended retention, it did not block the pathway for future abolition, as it kept it finding limited to the then state of the country. On the question of discretionary powers given to the judges, it stated that the system in place was working satisfactory and that the vesting of such discretion was necessary.[76] While the report focused on the deterrent object of the death penalty, and the necessity of discretion in awarding it, the scope of its award was being narrowed down by the legislature. In 1955, the Parliament had repealed Section 367 (5) of CrPC 1898, which required judges to state reasons for not awarding the death penalty for an offense punishable by death.[77] The repeal took away the norm status of the death penalty. In 1973, through an amendment to Section 354 (3), judges were mandated to state special reasons for awarding death sentences, where alternatives existed, thus creating a sense of exception in the award of death penalty. Thus evidently, the legislative sphere remained open to abolitionist voices, and attempts towards abolition, although unsuccessful, left a mark on lawmaking in India. Although the goal of abolition could not be achieved, the CrPC reforms in 1955 and 1973, the private member bills for abolition in both houses of the Parliament, and the Indian Law Commission Report indicate a cognizance of the threats the death penalty posed and the ideal of abolition.

[75] Law Commission of India, 35th Report, 1967, at para 293, available at http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf (last viewed on 26.08.2015).
[76] Law Commission of India, 35th Report, 1967, at para 295, available at http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf
[77] Report 262- page 17

Developments in the judicial sphere

In the judicial sphere too, unlike Pakistan, death penalty as was challenged on the grounds of it being unconstitutional. It began with the case of *Jagmohan Singh v. State of U.P*, which challenged the death penalty for its violation of Article 14, 19 and 21 of the Indian Constitution.[78] Since the case was decided before the 1973 reform to CrPC; the Supreme Court declared death penalty to be constitutionally permissible. Following that *Ediga Anamma v. State of Andra Pradesh* was brought before the Supreme Court; Justice Krishnaiyer in his landmark judgment, while addressing the issue of individual discretion in the award of capital punishment stated that the 'legal policy on life or death' cannot be left to individual mood, rather, it should be objectified and retributive ruthlessness in this regard ought to be abandoned[79]. In 1979, another case *Rajendra Prasad v. State of Uttar Pradesh*[80] addressed as to what could be those special reasons for the award of capital punishment as required by Section 354(3) of the Criminal Procedure Code. This case held that while sentencing, judges should consider the criminal as an individual alongside the crime so that the reformatory object of punishment is also met.

One of the most important and impact bearing cases on the question of the constitutionality of the death penalty is that of *Bachan Singh v. The State of Punjab*[81]. Decided by Indian Supreme Court in 1980, it addressed the question of the constitutionality of death penalty and coined the 'rarest of the rare' doctrine for the award of death penalty. The Supreme Court ruled that while the award of death penalty remained permissible the Constitution, the court had to consider the mitigating and aggravating circumstances of the commission of the offense in question while sentencing. It stated:

[78] *Jagmohan Singh v. State of U.P,* 1973 AIR 947
[79] *Ediga Anamma vs State Of Andhra Pradesh,* 1974 AIR 799
[80] *Rajendra Prasad Etc. Etc vs State Of Uttar Pradesh,* 1979 AIR 916
[81] *Bachan Singh vs State Of Punjab,* AIR 1980 SC 898

"*A real and abiding concern for the dignity of human life postulates resistance to taking a life through law instrumentality. That ought not to be done except in rarest of rare cases where the alternative opinion is unquestionably foreclosed*[82]".

Justice Bhagwati's dissenting opinion, however, discussed the issue of arbitrariness arising out of the judicial discretion, and the capital's punishment's inability to meet any of its popularly perceived aims, i.e., retribution, deterrence, and reformation. While the majority judgment declared capital punishment to be constitutional, Justice Bhagwati declared it to be in violation of Article 14 and 21 of the Constitution. The majority, however, while upholding the death penalty to be constitutional, set forth the doctrine that it be applied in the rarest of the rare cases. This doctrine remains at the very center of legal debates on the issue of death penalty in the country, and it summarily proposes that firstly, death penalty should only be imposed in the gravest cases of extreme culpability; secondly, the circumstances of offender should also be taken into account along with the circumstances of the offense; thirdly, it should be perceived to be as an exception to the rule of life imprisonment; fourthly, a just balance should be struck between the aggravating and mitigating circumstances.

Mithu v. State of Punjab[83] looked at the constitutionality of mandatory capital punishment under Section 303 of the Indian Constitution and held it to be in violation of Article 14 and 21 of the Constitution, and hence invalid. This declaration of unconstitutionality dismantled the notion that certain criminals were beyond reformation, and therefore, do not deserve to be left alive. Following that, in *Macchi Singh* v. *State of Punjab,* the Court further developed the doctrine of the 'rarest of the rare cases' and stated that death penalty may be awarded when the crime is committed 'extremely brutal, grotesque, diabolical, revolting or dastardly manner', or the motive is such that it 'evinces depravity and meanness', and the nature of the crime is 'anti-social or

[82] ibid
[83] *Mithu Etc vs State Of Punjab Etc,* 1983 AIR 473

socially abhorrent'[84]. In *Allauddin v. State of Bihar*[85], the Court reiterated that the basis of choosing the death penalty over life imprisonment should be explained and justified by the awarding judge, otherwise, he should award the lower sentence. *Panchhi and Ors.* v. *State of Uttar Pradesh* fu*rther* held that brutality of the crime was not the sole criterion while applying the 'rarest of rare doctrine'[86]. Another major landmark case on the subject of death penalty was that of *Santosh Kumar v. State of Maharashtra*, in which Court reduced the earlier validated death sentences of 13 persons, by the same court, guilty of kidnapping a person for ransom, and later murdering him, on taking their lack of criminal history into account. The Court further held that their sentences were earlier confirmed *per incuriam* of the jurisprudence laid down in the Bachan Singh case[87]. All these cases focus on the utilitarian side of the death penalty, i.e., the goals it aims to achieve. The jurisprudential debates that these judgments carry look at the issues of arbitrariness and judicial discretion in the award of the death penalty, as well as if it meets the aims of deterrence and retribution and whether factors other than the gravity and manner of the crime are to be considered when awarding death penalty. These discussions have clearly narrowed the ambit in which judges could award the death penalty.

There have been significant developments on the front of execution as well, where courts have started to consider post-sentencing circumstances such as delay in executions and solitary confinements as grounds of commutation into life sentence. For instance, in the case of *T.V. Vatheeswaran v. State of Tamil Nadu*[88], the Court acknowledged that more than two years of delay in execution violates the 'procedure' required by Article 21 of the Constitution. *Sher Singh v. State of Punjab*[89], although reiterated that delay in execution is a ground for invoking Article 21 of the Constitution, it refused to treat delay as a rule warranting commutation. *Triveniben v. State of*

[84] *Machhi Singh And Others vs State Of Punjab*, 1983 AIR 957
[85] *Allauddin Mian & Ors. vs State Of Bihar*, 1989 AIR 1456

[86] *Panchhi And Ors. vs State Of U.P*, 1998 CriLJ 3305
[87] *Santosh Kumar v. State of Maharashtra*, (2009) 6 SCC 498

[88] *T.V. Vatheeswaran vs State Of Tamil Nadu*, 1983 AIR 361
[89] *Sher Singh v. State of Punjab*, 1983 AIR 465

Gujarat[90] specified that only executive delay could be considered relevant in post-conviction Article 21 proceedings, while *Shatrughan Chauhan v Union of India*[91] and *Navneet Kaur v. Union of India*[92] awarded commutations on the grounds of mental health and inordinate delays.

The 262nd Law Commission Report on Death Penalty took all these debates into account and held that issue of arbitrariness continues despite the various safeguards and limitations set up the development in jurisprudence on the subject. It further noted that the death penalty does not actually serve the deterrent aim that it is said to serve, and hence should be abolished[93]. This call for abolition comes with the exclusion of terrorism and waging war-related offenses, however, the report itself acknowledges that such exclusion on the grounds of national security is unjustifiable.

Summarily, it can be argued that, unlike Pakistan, India has shown openness towards the abolition of the death penalty, on both fronts, i.e., the legislative as well as the judicial. On the legislative front, the abolitionist voices not only succeeded in the introduction of a mandatory appeal; they have also succeeded in reversing the norm status of the death penalty, thus making it possible for the death penalty to be treated as an exception. Similarly, it was the parliamentary movement for abolition that triggered the 35th Law Commission Report, which although recommended retention of capital punishment; the reasons for retention were time-bound, and hence, it left room for future abolition[94]. On the other hand, the judicial sphere too exhibited a reasoned discourse on the death penalty, which led to the development of the 'rarest of rare' doctrine, and the narrowing of discretion in the award of death penalty. While death sentencing continues in India, its scope has been significantly reduced. Same is the case with its execution,

[90] *Triveniben v. State of Gujarat* 1989 AIR 1335
[91] *Shatrughan Chauhan v. Union of India,* (2014) 3 SCC 1
[92] *Navneet Kaur v.* State (NCTof Delhi), (2014) 7 SCC 264
[93] *The Death Penalty*, report no. 262, Law Commission of India, Government of India (2015).
[94] *Capital Punishment,* report no. 35, Law Commission of India, Government of India (1967).

where many grounds such as inordinate delays, solitary confinement and insanity have been taken to commute death sentences into life imprisonment. It is due to these developments that, as of December 2017, there are only 377 people on the death row[95].

[95] "Death Penalty in India: Annual Statistics," Project 39A, , accessed June 5, 2018, https://www.project39a.com/annual-statistics.

Chapter 3: Why does Pakistan continue to execute the mentally ill?

As per the statistics provided by the Federal Ombudsman of Pakistan, Pakistan's death row population stands at 4688[96]. In 2012, this population stood at 7,164 while 1,692 people have been sentenced to death since 2013[97]. Considering the number of executions carried out, i.e. 496, this death row should stand around 8,400, but the official count released in 2018 shows a surprise reduction in the death row population, which has been received with great skepticism by Pakistan's human rights defenders. Keeping the suspicious drop in the reported death row statistics aside, the number 4,688 still stands extremely high in comparison to its Indian counterpart[98]. The reason for this primarily being the large number of offences that are punishable by death, alongside the extremely flawed criminal justice system filled with issues such an ineffective legal representation, compromised investigations by the police, prevalent culture of torture and forced confessions, lack of knowledge of the rights of the accused on part of courts and delays in the adjudication etc, and as a consequence, Pakistan has a large number of people awaiting their executions. This violation of rights is, however, not limited to during trial or pre-sentencing phase; it continues post-conviction and sentencing as well. There have been reported cases of Pakistan's execution of juveniles, as well as of the mentally ill whose executions were narrowly postponed. Due to an absolute lack of accessibility to prisons, the exact number of prisoners who may be mentally ill is unknown, however, knowing Pakistan's prison situation which is marred with over-crowding, inadequate hygiene and extreme systemic delays on death row, this number could be very high. The following part of this chapter analyses the cases of two mentally ill prisoners, Imdad Ali and Khizar Hayat who continue to be a part of Pakistan's death row.

[96] Dawn.com, "Every 8th Person Executed in the World Is Pakistani: Report," DAWN.COM, October 05, 2018, , accessed October 23, 2018, https://www.dawn.com/news/1436367.
[97] ibid
[98] Daniyal Yusuf, *Counting the Condemned*, report, Justice Project Pakistan.

The case of Khizar Hayat

Khizar Hayat was sentenced to death by the Additional District & Sessions Court, Lahore, in April 2003. His conviction and sentence were further confirmed by the Lahore High Court, in January 2009. The Supreme Court rejected his appeal in January 2011. His mercy petition was also rejected by the President of Pakistan, and his death warrants were issued for June 2015[99]. His death warrant was suspended by the Lahore High Court till the adjudication of an application regarding the appointment of his guardian. He remains incarcerated in Central Jail, Lahore.

Regarding Khizar's mental health, he was diagnosed with as a "psycho" case through a jail medical evaluation in 2008. Ever since, all his medical records indicate that he has been declared to be psychotic, and schizophrenic. One of the reports categorically states that "due to his disturb mental status, it is recommended that he may be shifted in Punjab Institute of Mental Health, if the Honorable Court so permits for further specialized treatment" . At another instance, his doctors have observed, "for the last two years I notice the following features – loosening of association present; he keeps distorted speech; he keeps irrelevant talk to the extent that his neighboring prisoners become hostile [because] of his aggressive anti-religious talks…". His symptoms, diagnosis and his medication suggest that he has psychosis and paranoid schizophrenia. He has been in and out of hospitals outside of the prisons multiple times, however, since 2012, he has spent most of his term in the Prison Hospital. As of 2018, Khizar has been imprisoned for more than 15 years and has been mentally ill for ten years. Since 2012, owing to his mental condition and safety, he has been in solitary confinement.

[99] Rimmel Mohydin, "Pakistan's Courts Are Failing to Acknowledge Mental Illness," Open Society Foundations, , accessed August 22, 2018, https://www.opensocietyfoundations.org/voices/pakistan-s-courts-are-failing-acknowledge-mental-illness.

The case of Imdad Ali

Imdad Ali was sentenced death under Section 302 of the Pakistan Penal Code by the Trial Court in Vehari, in 2002. His death sentence was confirmed by the Lahore High Court, Multan Bench in 2008. His leave to appeal was also rejected by the Supreme Court in 2015. His mercy petition was also rejected by the President of Pakistan. Following the confirmation of his death sentence, warrants for his execution have been issued thrice, however, the last of these warrants was suspended by the Supreme Court in September 2016[100].

The first of these warrants was issued in 2009 following the confirmation of his death sentence by the High Court; however, since he sought a leave to appeal before the Supreme Court, the death warrant was suspended. Following the rejection of the said appeal, and his mercy petition in 2015, his death warrant was issued for July 2016. Imdad's family filed an application for the suspension of the death warrant till the appointment of a guardian under Pakistan's Mental Health Ordinance 2001. The court of the first instance rejected this plea, and the Lahore High Court also rejected the subsequent writ petition. The Supreme Court also dismissed the appeal against the earlier proceedings on the issue, following which a review petition was filed[101]. In the review petition, the Supreme Court ordered the constitution of a medical board. The case has been pending before the Supreme Court since November 2016. As of 2018, Imdad has spent 16 years in prison, out of which for more than ten years he has been mentally ill.

Imdad Ali has a long and documented history of severe mental illness, as reflected in his jail medical records from District Jail, Vehari. He has been diagnosed with paranoid schizophrenia showing symptoms of *inter alia* auditory hallucinations, lack of insight, self-talk, grandiose and paranoid delusions. His medical report from 2012 stated that "…[Imdad Ali] *is a case of*

[100] Usman Amin Hotiana, "Imdad Ali and the Law," World | Thenews.com.pk |, , accessed August 16, 2018, https://www.thenews.com.pk/print/205489-Imdad-Ali-and-the-law.

[101] Supra, 22

'PARANOID SCHIZOPHRENIA' which is a chronic and disabling psychiatric illness. This illness significantly impairs the person's rational thinking and decision-making capabilities." His medical records from the various prisons of his incarceration, as well as the opinions of independent medical practitioners, he has been suffering from persecutory of paranoid delusions and auditory hallucinations. Another medical report reads, " [Imdad] *was already taking antipsychotic medications, and after reviewing my previous notes, I consider the person has not shown any improvement in his symptoms. He appears to me a treatment-resistant case.*" Despite his condition, he continues to be on the death row in Central Jail, Adiala.

Noncompliance with the provisions of the domestic law

These two prisoners have spent considerably long terms in prison; which amounts to punishments they were not sentenced to in the first place. The reason primarily is the delays that are perceived as a routine part of the Pakistani criminal justice system. In 2016, Mazhar Hussain was acquitted by the Supreme Court after 12 years of being on death row, only to discover he had died in prison of natural causes[102]. A study conducted by the Supreme Court of Pakistan suggests that the average time taken for a case starting from the court of the first instance for its final adjudication by the Supreme Court is around 25 years[103]. Criminal cases, compared to civil cases, are dealt with 'swiftly' as the latter may take twice as much time. A trial, in the Pakistani criminal justice system, is marred with delays from the onset. It begins with the late submission of investigation reports by the police and follows on the nonproduction of accused, the absence

[102] Sahar Bandial, "Delayed Justice," The Express Tribune, February 16, 2018, accessed July 25, 2018, https://tribune.com.pk/story/1635971/6-delayed-justice-3/.
[103] Malik Asad, "Over 1.8 Million Cases Pending in Pakistan's Courts," DAWN.COM, January 21, 2018, accessed July 13, 2018, https://www.dawn.com/news/1384319.

of witnesses, and dilatory tactics from lawyers.[104] As a consequence, a simple murder trial, like Imdad's and Khizar's go on for a year or more.

Once an accused has been convicted and sentenced to death, the Court of Session is required by the law to submit its judgment before the High Court for its confirmation.[105] The convict's sentence is not carried out till the decision of the High Court. While this allows the convict to have this conviction and sentence reconsidered, the delay resulting in the process can be extremely detrimental to the mental health of the prisoner. The High Courts, being the highest courts of the province, are always overburdened and understaffed. According to a study, the total number of judges in the High Courts of the four provinces is 103, while the number of pending cases exceeded 0.1 million. It, therefore, takes years for certain cases to be placed before a bench after its institution, and can take even longer in the decision as this period has been around six years in the case of each, Imdad and Khizar.

After the confirmation of the sentence from the High Court, an accused is entitled to file an appeal before the Supreme Court. The apex court, in a fashion no different than the High Court, is overworked and understaffed. Moreover, the Pakistani Supreme Court's excessive exercise of its Suo-Moto powers increases it workload, creating an extra hurdle in the adjudication of matters brought before it in its appellate jurisdiction. Consequently, matters remain pending for years before the first hearing, and usually, do not exceed a single hearing for adjudication. The case of Imdad Ali shows that his appeal was dismissed after 6 years of filing, while that of Khizar Hayat was decided after two years. Moreover, these appeals before the Supreme Court, made on behalf of the economically vulnerable prisoners are made through Jail Petitions, which serve the sole purpose of fulfilling a formality, instead of presenting the legal issues emanating out of the

[104] Muhammad Daniyal Khan, " THE WEARINESS OF JUDICIAL SYSTEM IN PAKISTAN AND ITS IMPACTS ON COMMON MAN," Punjab Law Journal, , accessed September 4, 2018, https://www.pljlawsite.com/2011art10.htm.
[105] Section 374 CrPC

High Court judgment. Therefore, while statistics remain unavailable on the subject, most of these jail petitions are dismissed.

The dismissal of a Supreme Court appeal marks the end of the judicial remedies available to the accused as of right. The accused may file an application for leave to appeal before the Supreme Court, during which his execution shall remain suspended. However, after the dismissal of the appeal or the leave to appeal, or the breaking down of her application for leave to appeal, the Superintendent of the prison informs the convict of his right to submit a mercy petition before the President[106]. Once, the mercy petition is also rejected by the President. Between 2008 and 2014, when there was a de-facto moratorium on the execution of death penalty[107], the cases of most of the death row prisoners were stuck at this stage, where their mercy petitions had been communicated to the President, however, there was no response from the President, and hence, the execution of their sentences become de facto suspended. Khizar's mercy petition was rejected after four years of its institution, while that of Imdad's took a relatively shorter time. It is pertinent to mention that the mercy petitions submitted, by prisons, to the President are merely a formality and generally comprise of a few-liners, which does not illustrate the actual circumstances of the prisoner. Because of this formality, death row prisoners must languish in prisons for extra time.

Besides, these procedural and administrative delays, another issue that perpetuates the practice of taking the mentally ill to the gallows is that of noncompliance with existing legal obligations of the government and rights of the convicted. Article 9 of the Constitution of the Islamic Republic states that " No person shall be deprived of life or liberty, save by law[108]". Similarly, Article 14(1)

[106] Rule 104, Pakistan Prison Manual
[107] Human Rights Watch, "Pakistan: Execution Ends Moratorium on Death Penalty," Human Rights Watch, November 21, 2012, , accessed June 20, 2018, https://www.hrw.org/news/2012/11/20/pakistan-execution-ends-moratorium-death-penalty.
[108] Article 9, Constitution of the Islamic Republic of Pakistan, 1973

enshrines human dignity to be inviolable, except in accordance with law[109]. The essence of these fundamental rights is the promotion and protection of human life, dignity, and integrity from arbitrary deprivation. While the state institutions follow the obligation created by these provisions during the adjudication of criminal matters, there appears a categorical failure in compliance post-adjudication and post-conviction.

The Prison Rules of 1978, through implicit provisions, create safeguards that protect mentally ill prisoners from execution. Rule 107 of the Rules provides instructions regarding the submission of mercy petition before the President. It mandates the Superintendent of the prison to submit copies of the medical report with the mercy petition if the prisoner decides to take the plea of mental illness. This rule not only recognizes mental illness as a ground of commutation with juvenility and old age, but it also empowers the death row prisoners to take this plea for commutation even on the eve of execution.

Similarly, Rule 362 of Pakistan Prison Rules states:

"The Superintendent and Deputy Superintendent will visit the condemned prisoner in his cell a few minutes before the hour fixed for execution. The Superintendent shall first identify the prisoner as the person named in the warrant and read out a translation of the warrant and sequence of rejection of appeal and mercy petitions in national or regional language to the prisoner in the presence of the Coordination Officer. Any other document requiring signature by the prisoner, such as his will, shall thereafter be signed by him and attested by the Coordination Officer. The Superintendent will then proceed to the scaffold; the prisoner remaining in his cell.

[109] Article 14, Constitution of the Islamic Republic of Pakistan, 1973

In the presence of the Deputy Superintendent the hands of the prisoner will next be pinioned behind his back and his fetters (if any) removed.[110]"

This rule enshrines two procedural rights which, if applied properly, can delay or suspend the execution of death penalty because it mandates the Superintendent to read out the warrant as well as to get his signatures on required documents including his will. However, under Section 29 and 30 of the Mental Health Ordinance 2001 (as amended by the Punjab Mental Health (Amendment) Act 2014), a person suffering from mental illness cannot sign a will (or otherwise dispose of property) without a guardian being appointed by the Court of Protection[111]. The procedures in Rule 362 envision the prisoner being sufficiently mentally competent to understand the nature of their sentence and to order their affairs before their execution. In the case of prisoners suffering from severe mental illness, these requirements simply cannot be followed.

Beside this, Rule 444 of the Manual requires the transfer of a convicted prisoner of unsound mind to a mental health facility. Moreover, Rule 450 requires that if a prisoner relapses into insanity, he should be moved back to a mental health facility. Similarly, Rule 451 states that when a recovered mental patient is returned to the prison, he should be treated in accordance with the instructions of the Medical officer. The entire manual makes no mention of a prisoner returned from a facility without recovery, which implies that no prisoner be returned until recovered. These provisions of the manual point clearly towards the obligation of the state to keep a mentally ill patient at mental health facility until his recovery, thus, a death row's convict sentence is de facto suspended.

[110] Rule 362, Pakistan Prison Rules
[111] Section 29 and 30, Mental Health Ordinance 2001

The implementation of these rules, however, is not seen through properly, and therefore, many mentally ill people like Imdad and Khizar continue to languish in prisons. Two things are seen to happen. Firstly, these prisoners are not moved to a mental health facility at all because their mental illnesses are not recognized as ailments falling in the ambit of these rules. Secondly, the institutional setup requires that a prisoner be moved from a prison in a remote city to the provincial capital – a city where such a mental health facility may be located. The case files of Imdad indicate that he was moved to a mental health facility in Lahore after he was transferred from District Prison Vehari to Camp Prison Lahore. Due to a lack of full knowledge of his ailment on Camp Jail, after giving temporary treatment and medication, he was moved back from the Punjab Institute of Mental Health to Camp Jail. This situation may have been different if he were to be moved back to his prison directly from the facility, where the prison administration may have sought his stay in the facility until his full recovery. However, this did not happen in the case of Camp Jail, where he was received from the facility, and then transferred back to District Jail, Vehari.

The current scheme of things points at two major issues that play a key role in depriving the mentally ill of getting their due protection of the law. The less significant of the two in this regard is that of a severe shortage of mental health facilities. There are only four major mental health facilities in the entire country while there is only one psychiatrist for 10,000 people.[112] The number of child psychiatrist is even lower, which is one psychiatrist for four million children. For a country like Pakistan, which has had a background of serious insecurity, violence, unstable economy, political uncertainty, and other socio-economic problems, the number of these facilities and practitioners does not correspond to their growing need.[113] As a consequence,

[112] Inamullah Ansari, "Mental Health Pakistan: Optimizing Brains," OMICS International, November 30, -0001, , accessed November 11, 2018, https://www.omicsonline.org/open-access/mental-health-pakistan-optimizing-brains-1522-4821-17-160.php?aid=37919.
[113] International Journal of Emergency Mental Health and Human Resilience, Vol. 17, No.1, pp. 288, ISSN 1522-4821, Mental Health Pakistan: Optimizing Brains
Inamullah Ansari

people in all spheres of life, including those in incarceration have their mental ailments ignored or not properly attended to.

Lack of understanding of mental health issues

The second, the more relevant issue at hand, is that of a lack of understanding of mental health issues, especially at the end of state institutions. On the legal front, Pakistan continued the application of the Lunacy Act, 1912.[114] This act from the pre-partition era focused more on detention than treatment and was devoid of any developments in the field of psychiatry[115]. Although a mental health draft was proposed in 1992, it was not until 2001 when the Lunacy Act was repealed, and the Mental Health Ordinance was promulgated.[116] However, following the Eighteenth Amendment, which delegated various powers from the center to the provinces, the implementation of the MHO 2001 has become problematic. In the absence of central authority on mental health, even basic issues such as proper definitions of various mental ailment and their categorization remain in abeyance. Mufti argues that the non-implementation of MHO remains the biggest challenge for practitioners of psychiatry in the country.[117] In the lack of a recognized body to provide for the well-being of those with such ailments in general, but also to disseminate information on the subject, state institutions continue to act upon archaic definitions and categorization of mental illnesses, and result in the serious violations of the rights those suffering from them. In 2016, Imdad's family filed a petition before the Supreme Court for a stay in his execution, on the grounds that he has not executed his will under the Prison Manual and that he cannot make a will until he recovers from his mental ailment. The Supreme Court dismissed the petition and stated in its order stated that schizophrenia did not fall within the definition "mental

[114] Malik S. & Bokharey I. (2001) Breaking the chains. *Psychiatric Bulletin*, 25, 273–275.
[115] Rehman A. (1994) Forensic psychiatry in Pakistan. In *Current State of Psychiatry in Pakistan* (eds Tareen I., Chaudhry M. & Javed A.), pp. 47–52. Pakistan Psychiatric Society.
[116] Tareen A, Tareen KI.I(2016) Mental health law in Pakistan. *BJPsych Int*. 2016;13(3):67-69
[117] Mufti K. (2010) Implementation of mental health policy in Pakistan. Journal of the Postgraduate Medical Institute, 24, 246.

disorder" as it is defined under the Mental Health Ordinance 2001 as "a recoverable disease"[118]. In reaching this conclusion, the Supreme Court of Pakistan relied upon a decision of the Indian Supreme Court *Ram Narain Gupta v. Smt Rameshwari Gupta*[119]. In that case, the Indian Court had sought to address the question regarding whether the respondent suffered from a mental disorder that warranted dissolution of her marriage under the Hindu Marriage Act, 1955. Under the relevant section (Section 13(1)(ii)) the mere existence of a mental illness is not enough rather it must be of a degree and intensity enough to justify the dissolution of a marriage. The Supreme court stated in paragraph 9 of the operative judgment "The point, however, to note is that Section 13(1)(iii) does not make the mere existence of a mental- disorder of any degree sufficient in law to justify the dissolution of a marriage."

Section 13 (1) (iii) provides that a marriage may only be dissolved on the ground that the other party:

> "(iii) has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.[120]"

A mere reading of the text of Section 13 shows that intensity required to dissolve the marriage under the Hindu Marriage Act must be of an incurable nature and must, therefore, be permanent. Additionally, the explanation that follows Section 13 explicitly states that the term 'mental disorder' includes schizophrenia.

> "(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;[121]"

[118] Supra 20
[119] *Ram Narain Gupta v. Smt Rameshwari Gupta* (AIR 1988 SC 2260)
[120] Section 13, Hindu Marriages Act, 1955

Similarly, the analysis of the *Ram Narain* judgment that has been reproduced and relied upon the by Supreme Court is not geared towards proving whether schizophrenia is a mental disorder but rather to prove whether the respondent suffered from schizophrenia to the extent that would justify dissolving her marriage. The Indian supreme court itself states in Ram Gupta that "Schizophrenia is described thus: A severe mental disorder(or group of disorders*)*." [122] The Court itself makes a distinction between the definition of mental disorder under the Indian Mental Health Act, 1959, and under that required under the Hindu Marriage Act by reproducing the following paragraph of *Benett v. Benett*:

> " ..... Now, the definition of `mental disorder' in sec. 4 of the Mental Health Act, 1959, is in very wide language indeed. It includes mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind and so, for the moment to turn to medical language it clearly includes, or one would suppose it clearly includes, not only psychotic illness but neurotic illnesses as well and thus begins by enormously enlarging the field. The way in which this very large field is cut down in the Act of 1965, s. 9(1)(b), is by the use of this phrase "of such a kind or to such an extent as to be unfitted for marriage and the procreation of children.[123]"

Thus, the Supreme Court of Pakistan was therefore in error when it relied on the definition of mental illness in the Hindu Marriage Act as the ambit of that act bears little relevance to the issue at hand. There is no requirement of permanency in the Mental Health Ordinance 2001 just like the Indian Mental Health Act. A plain text reading of the Ordinance demonstrates that at times the provisions of the Act may apply where a person may be suffering from a mental disorder that is temporary.

Section 44 of the Ordinance states:

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[121] Ibid
[122] Supra 118
[123] Benett v. Benett *(1969) 1 All E.R. 539*

> "44. Maintenance during temporary mental disorder.– *If it appears to the Court that the mental illness of a mentally disordered person is in its nature temporary and that it is expedient to make provision for a temporary period, for his maintenance or for the maintenance of such members of his family as are dependent on him, the Court may direct his property or a sufficient part thereof to be applied for the purpose specified therein.*[124]"

In the absence of any other laws limiting the scope of the definition in this context, the Supreme Court incorrectly concluded that Schizophrenia does not fall within the definition of the Mental Health Ordinance. A review petition was filed against this decision, and a medical board was constituted to determine Imdad's mental illness in November 2016. However, the court is yet to decide the review petition. Imdad's case, thus, becomes a textbook example of a lack of understanding of mental health issues on the part of Pakistan's state institutions. This results in a continuous violation of the rights of mentally ill prisoners as they remain exposed to the risk of being executed.

Non-incorporation of international legal obligations

The execution of the mentally ill is prohibited under international law. The Government of Pakistan is now obligated to intervene in the case to ensure that Pakistan does not breach its Constitutional obligations to uphold Fundamental Rights and its international obligations under Article 6 and Article 7 of the ICCPR to prevent the execution of mentally ill prisoners.

The main source of international law on this issue is the International Covenant on Civil and Political Rights (ICCPR), which Pakistan ratified in 2010[125]. Article 7of the ICCPR states:

[124] Section 44, Mental Health Ordinance 2001, http://www.pimh.gop.pk/docs/Mental%20Health%20Ordinance.pdf

[125] "PAKISTAN: AHRC Welcomes the Country's Ratification of the ICCPR and the CAT Convention and Call for Speedy Implementation - Pakistan," ReliefWeb, , accessed September 3, 2018,

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 7 is a non-derogable right under Article 4(2). No exceptions to the prohibition on torture and cruel, inhuman or degrading treatment and punishment are permitted. The UN Human Rights Committee has interpreted the ban on cruel, inhuman or degrading treatment under ICCPR Article 7 as requiring that, "[w]hen the death penalty is applied by a State party for the most serious crimes … it must be carried out in such a way as to cause the least possible physical and mental suffering.[126]"

In *Sahadath v Trinidad and Tobago*, the Committee concluded that where a prisoner suffers from mental illness, their execution would constitute a violation of Article 7[127]. Moreover, the independent experts with the Office of the UN High Commissioner for Human Rights stated that a court which disregards medical evidence of mental disability, and fails to conduct an independent evaluation of the mental health status of the accused, is in breach of Article 7 rights:

"Implementing the death penalty under these conditions is unlawful and tantamount to an arbitrary execution, as well as a form of cruel, inhuman or degrading punishment.[128]"

Similarly, the execution of the severely mentally ill is a violation of Article 6(1) of the ICCPR which expressly prohibits the 'arbitrary' taking of life, as it states that "every human being has the

https://reliefweb.int/report/pakistan/pakistan-ahrc-welcomes-countrys-ratification-iccpr-and-cat-convention-and-call.

[126] Manfred Nowak, "Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment," *Oxford Handbooks Online*, 2014, , doi:10.1093/law/9780199559695.003.0016.

[127] Sahadath v. Trinidad and Tobago. Communication No. 684/1996. 2 April 2002. CCPR/C/74/D/684/1996, http://www.globalhealthrights.org/wp-content/uploads/2014/04/R.-Sahadath-v.-Trinidad-and-Tobago.pdf

[128] "UN Rights Experts Urge Pakistan Authorities to Halt Execution of a Person with Disabilities," OHCHR, , accessed June 15, 2018, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20593.

inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.[129]"

Various sources assist in the interpretation of the word 'arbitrary,' including the *travaux preparatoires* of the ICCPR, in which 'arbitrary' is defined to mean, inter alia, "without adequate determining principle … not governed by any fixed rule or standard." In *Van Alphen v. the Netherlands*[130], the HRC itself explicitly stated that 'arbitrary' does not simply mean 'against the law' but "must be interpreted more broadly to include elements of inappropriateness [and] injustice." William A. Schabas contends that the deprivation of life is 'arbitrary' if it is "made without due regard to the rules of natural justice and due process and made in a manner contrary or in conflict with international human rights standards or international humanitarian law.[131]" Where a prisoner suffers from severe mental difficulties, it is clear that their execution would be seriously inappropriate and in conflict with international human rights standards. Such an execution, would, therefore, violate the prohibition on arbitrariness.

As held in the case of *Sahadath v Trinidad and Tobago*[132], an individual does not have to be mentally ill at the time of imposition of a death sentence for their execution to be a violation of Articles 6 and 7 of the ICCPR, only at the time of the execution itself. Sahadath involved a Trinidadian citizen who suffered from mental illness. He claimed that on the basis of his mental illness, his execution would constitute a violation by Trinidad and Tobago of Articles 6 (1), 7 and 10 (1) of the ICCPR. Concluding that he was correct, the Committee stated:

> 'Counsel has provided information that shows that the author's mental state at the time of the reading of the death warrant was obvious to those around him and should have

[129] Article 6(1), ICCPR
[130] van Alphen v. the Netherlands (Communication No. 305/1988). Publisher, UN Human Rights Committee (HRC)
[131] William Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Cambridge University Press, 2002).
[132] *Sahadath v Trinidad and Tobago*

been apparent to the prison authorities. This information has not been contested by the State party. The Committee is of the opinion that in these circumstances issuing a warrant for the execution of the author constituted a violation of article 7 of the Covenant.[133]'

Further, the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, approved in 1984 and which have over time become part of customary international law, provide at Paragraph 3:

'Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.'

The Economic and Social Council clarified in 1989 that in implementing paragraph 3 of the Safeguards, Member States should take steps to "eliminate[e] the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution." Paragraph 3 of the UN Safeguards is an unambiguous statement by the UN that those who become 'insane' after sentencing cannot be executed. The UN Commission on Human Rights has called on retentionist states "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person." The EU affirmed this position in the Minimum Standards set out in the EU Guidelines on the Death Penalty. Although the UN does not define the term 'insane' in the Safeguards, it can be assumed that a broad, inclusive definition is favored, an assumption supported by the decisions of the Human Rights Committee. In the 1994 case of *Francis v. Jamaica*[134], the Committee held that the issuing of an execution warrant for an individual who was found to suffer from mental health

[133] Ibid
[134] *Francis v. Jamaica,* Communication No. 606/1994

problems but not to be 'insane', nonetheless amounted to cruel, inhuman or degrading treatment in violation of Article 7 of the ICCPR[135].

In 1989, the UN Economic and Social Council also clarified its earlier Safeguards as requiring the elimination of the death penalty for "persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.[136]" The Council reiterated its call for full implementation of the Safeguards in 1996 (and again in 2001). In annual resolutions urging full compliance with the Economic and Social Council Safeguards, the UN Commission on Human Rights has further called on retentionist countries "[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.[137]"

In keeping with these principles, the penal codes of several retentionist states mandate special treatment of mentally ill or intellectually disabled individuals. The recognition by many states of the ban on executing mentally impaired prisoners confirms the emergence of a customary international norm such individuals from excluding execution. There is a dire need of incorporating these international law principles into Pakistan's criminal justice system, so that the mentally ill in Pakistan may be saved from being subjected to 'cruel, inhumane and degrading treatment i.e., death penalty.

Noncompliance with Islamic Law

The case of mentally ill prisoners on the death row emerges as a rather anomaly because Qur'an, one of the primary sources of law, does not envisage imprisonment as a punishment, and while

[135] Allison Freedman, "Mental Retardation and the Death Penalty: The Need for an International Standard Defining Mental Retardation," *North Western Journal of International Human R Ights* 12, no. 1 (2014): , accessed May 25, 2018.
[136] Shruti Iyer, "Prof. Bhullar's Death Penalty: Executing the Mentally Ill," CLPR, , accessed August 12, 2018, https://clpr.org.in/blog/prof-bhullars-death-penalty-executing-the-mentally-ill/.
[137] Michael Dudley, Derrick Silove, and Fran Gale, *Mental Health and Human Rights: Vision, Praxis, and Courage* (Oxford: Oxford University Press, 2012).

the death penalty is a prescribed punishment for certain offenses, imprisonment till the final adjudication of the matter has no basis in the Book. Prophet Muhammad, however, did use imprisonment as a punishment, although, he did not create a proper prison system. Shabaan argues that in the life of the Prophet, persons guilty of crimes not mentioned of crimes not mentioned in the Book were imprisoned in mosques and his wives' houses[138]. As far as the execution of death was concerned, there is no evidence to suggest that persons were incarcerated for longer periods until the final adjudication of their criminal charge. Thus, post-conviction insanity never arose as an issue in the time of the Prophet, and hence, both the Qur'an and Sunnah are silent on the issues of post conviction insanity. Islamic jurists, however, have developed a take on post-conviction insanity. They have defined insanity as follows[139]:

> 'Insanity generally takes the form of 'impairment of the mind, causing the individual to become unaware of his actions and speech.'

There appears a disagreement among jurists on the subject on post-conviction insanity. Rafay suggests that Imam Shafi and Imam Hanbal do not recognize mental illness as a defense from the execution of punishment[140]. Imam Malik and Imam Abu Hanifa, however, accept post-conviction insanity as a ground for nonexecution of death sentence.

Another authoritative text, which is heavily relied upon by the Federal Shariat Court in reaching its conclusions, is that of *Radd-al Mukhtar aladdurrul Mukhtar.* Allama Abideen, the author, writes:

> "If a criminal, sentenced to death for murder, is diagnosed with insanity before the punishment is actually imposed, then his post-crime insanity will save him from the death

[138] Mohamed Shaaban, "Islam and Jail: The Prophet Used Wives' Houses and Mosques as Prison Facilities," Raseef22, March 14, 2018, , accessed August 29, 2018, https://raseef22.com/en/culture/2018/02/12/islam-jail-prophet-used-wives-houses-mosques-prison-facilities/.

[139] Abdul Qadir Uoda, comp., *التشريع الجنائي الإسلامي مقارناً بالقانون الوضعي,* vol. 1 (Beirut, Lebanon: Dar Al Kutab Al Azli), 585.

[140] Abdul Rafay, "Does Post-crime Insanity Have Any Legal Value in Shariah?" Tribune, , accessed August 25, 2018, https://blogs.tribune.com.pk/story/45701/does-post-crime-insanity-have-any-legal-value-in-shariah/.

penalty, but he will remain liable to pay blood money provided this be of permanent nature[141]."

According to Imam Abu Hanifa, the punishment of an insane person would be withheld. If the offender is awarded *qisas* punishment and he develops insanity after the announcement of the sentence, and before his commitment to the victim's heirs for carrying out the sentence, then *qisas* will be commuted into *dyat*.[142] Thus, under Hanafi jurisprudence, corporal punishments are suspended in cases where the offender develops insanity. Considering Pakistan deploys Hanafi jurisprudence, these provisions of Islamic law can be used to remove mentally ill prisoners from the death row. Pakistan's Islamization of laws has been a major threat to various internationally recognized human rights, as it is perceived to legitimize and validate deprivation of those rights. However, in the case of mentally ill death row prisoners, it may be used as a forum to save them from gallows. 1n 1980, President Zia, on his mission to Islamize Pakistan, established the Federal Shariat Court (FSC)[143]. Article 203-D of the Constitution lays down the powers, jurisdiction, and functions of the FSC. It states:

"Article 203D: Powers, Jurisdiction and Functions of the Court

1. The Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet (PBUH), hereinafter referred to as the Injunctions of Islam.

1A. Where the Court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the Injunctions of Islam, the

[141] رد المحتار على الدر المختار p 532 v6 /
[142] Aimen Saleh Shaban, ed. (Beirut, Lebanon: Dar Al Kutab Al Ilmiyya, 2000).: Page 93, volume 13
[143] "Federal Shariat Court," Federal Shariat Court, , accessed May 8, 2018, http://federalshariatcourt.gov.pk/.

Court shall cause to be given to the Federal Government in the case of a law with respect to a matter in the Federal Legislative List , or to the Provincial Government in the case of a law with respect to a matter not enumerated in the Federal Legislative List , a notice specifying the particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before the Court.

2. If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision:-

a. the reasons for its holding that opinion; and

b. the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect:

Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.

3. If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam,-

a. the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and

b. such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.[144]"

In the exercise of these powers, the Federal Shariat Court has declared a number of laws repugnant to the injunctions of Islam and thus null void, such as those enforcing land reforms in the case of *Qazilbash Waqf,* etc. Considering Islamic law prohibits the execution of mentally ill, it may be challenged before the Federal Shariat Court and is liable to be declared repugnant and hence void.

[144] Article 203-D, Constitution of the Islamic Republic of Pakistan

Chapter 4: Reform through uniform incorporation of international legal obligations into domestic law

Pakistan's non-compliance with her international human rights obligations has primarily two facets. One, reluctance on the part of the legislature to incorporate all the international instruments ratified by the executive, and second, the arbitrary and inconsistent application and enforcement of internationally recognized human rights by the judiciary. As for the first part, Pakistan is party to a number of international human rights treaties including the ICCPR and CAT. The obligations arising out of some of these treaties have been incorporated into the domestic legal framework, while a significant number of them remain suspended as the legislature has failed to enact specific and unequivocal laws on them, for example, its obligations related to the elimination of torture[145]. Furthermore, there appears to be a lack of clarity on the subject whether Pakistan must incorporate these obligations into domestic legislation, or they are enforceable without it. Pakistan, responding to a query regarding the enforceability of ICCPR stated that the treaty became directly applicable upon ratification[146], while the judiciary appears reluctant in enforcing international human rights, in the complete lack of a domestic counterpart. Sheikh and Khan argue that domestic courts, by doing so, deny themselves avenues of interpretation and evolution of their domestic law[147].

The federal legislature in Pakistan is empowered to make laws to "implement international treaties, conventions, and agreements" under the Fourth Schedule of the Constitution, and Article 97of the Constitution lays down the executive authority of the Federation. In *Societe*

[145] Waseem Ahmad Shah, "Pakistan Yet to Enact Anti-torture Law," DAWN.COM, June 26, 2017, , accessed July 19, 2018, https://www.dawn.com/news/1341873.
[146] Zainab Z. Malik, "Treaty Obligations," DAWN.COM, May 28, 2017, , accessed July 22, 2018, https://www.dawn.com/news/1335863.
[147] Maira Sheikh and Moghees Uddin Khan, "International Law Benchbook for The Judiciary In Pakistan | Publications," Research Society of International Law, , http://rsilpak.org/services/international-law-benchbook-for-the-judiciary-in-pakistan/.

General De Surveillance S.A. vs. Pakistan[148], the Supreme Court ruled that the Federal Government has the authority to ratify a treaty, while it remains in the domain of the Parliament to legislate on it. This creates a gap between ratification and implementation, which results in Court's non-recognition of a cause of action originating from an international instrument, but not adopted by the domestic legislature. While the judiciary has no explicit direction in the Constitution to apply international law, there exists no bar either. Resultantly, the judiciary has deployed principles from international instruments in an arbitrary and discretionary manner. The Supreme Court of Pakistan ruled in the landmark, *Al Jihad Trust* case:

"The Fundamental Rights enshrined in the Constitution, in fact, react what has been provided in same of the Articles of Universal Declaration of Human Rights. Supreme Court, while construing the former, refers to the latter if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations. [149]"

On the other hand, the higher judiciary of Pakistan has also ruled on numerous occasions that international law may only be applied if it does not come in conflict with the domestic law. In the case of *Commander Aziz Khan v. Director General, Ports and Shipping*[150], it was held that, if an international legal obligation was not enacted or legislated, in case of conflict between the international law and municipal law, the latter should prevail. Similarly, *Ahtabar Gul v. State*[151] and *Indus Automobile v. Central Board of Revenue*[152] made similar rulings to the effect of promoting the superiority of municipal law over the domestic law.

[148] *Societe General De Surveillance S.A. vs. Pakistan* (2002) SCMR SC. 1694
[149] *Al-Jehad Trust case,* PLD 1996 SC 324
[150] *Commander Aziz Khan v. Director General, Ports and Shipping,* 1991 CLC362
[151] *Ahtabar Gul v. State* (2014) PLDPesh. 10
[152] *Indus Automobile v. Central Board of Revenue* (1988) PLDKar. 99

In some instances, Courts have acknowledged the responsibility of the Courts to ensure compliances with the international legal obligations. In *M.D. Tahir v. Pakistan*[153], the Court ruled that while exercising judicial review, international agreements are not be questioned, as the Constitution and the Islamic injunctions both mandate honoring and upholding such commitments. *Hanover Fire Insurance Co. v. Muralidhar Banechand*[154], the Court ruled that the interpretation and application of statutes should be done in such a fashion, that it is not inconsistent with rules of International law. Similarly, *Suleman v. Manager Domestic Banking, Habib Bank*[155], the Court ruled that States should honor their international obligations.

It is due to this inconsistency in the practice of the state institutions in general, and the judiciary, that results in systematic violations of human rights. There is a dire need on the part of the legislature to fill out gaps between international and domestic obligations. Similarly, the judiciary needs to adhere to a certain degree of consistency while adjudicating matters involving issues of international human rights, which will be in line with an expansive interpretation [156] of fundamental rights, as well as, compliance with its obligations as one of the three pillars of a party state. It is only through uniform incorporation of Pakistan's international legal obligations, especially those under the International Covenant of Civil and Political Rights and the Convention Against Torture that it will be able to provide its mentally ill prisoners their due protection.

[153] *M.D. Tahir v. Pakistan* (1995) CLCLah. 1039
[154] *Hanover Fire Insurance Co. v. Muralidhar Banechand* PLD 1958 SC138
[155] *Suleman v. Manager Domestic Banking, Habib Bank,* 2003 CLD Kar. 1797
[156] Moeen H. Cheema, "Two Steps Forward One Step Back: The Non-linear Expansion of Judicial Power in Pakistan," *International Journal of Constitutional Law* 16, no. 2 (June 15, 2018): , accessed November 11, 2018, doi:https://doi.org/10.1093/icon/moy040.

Conclusion

The abolitionist movement has gained significant momentum in the recent decades, and a consequence, many countries on the globe have abolished the death penalty, either de jure or de facto. Pakistan, owing to its theological foundations, and its security climate retains this penalty and awards it for a long list of offenses. Hence, Pakistan has one of the biggest death row populations in the world. Unlike other retentionist countries, where the scope of the death penalty is being reduced by excluding various offenses and offenders, Pakistan, so far, has only excluded juvenile offenders. India, for instance, has not only substantively limited the judicial discretion in the award of the death penalty, but its higher judiciary has also ruled on commutation of mentally ill prisoner's death sentences to life. Pakistan's nonchalance in removing the mentally ill from death row is, firstly, due to noncompliance with the safeguards enshrined in the domestic laws. If Pakistani prisons and judiciary complied with the rules and provisions provided in the Pakistan Prison Manual and the Mental Health Ordinance 2001 in their true spirit, the rights of the mentally ill would be safeguarded and they will be removed from the death row.

Secondly, it is due to a lack of understanding of mental illnesses, and an absence of a fully functional institutional framework for the assessment of existing rules and for integrating the developments in psychiatry into the criminal justice system. Thirdly, the non-incorporation of Pakistan's international obligations pose a challenge in recognition of rights and safeguards for their protection created and promulgated by international human rights instruments. In the realm of international law, there have been significant developments which identify various vulnerable groups and pursue their removal from the death row. Pakistan, despite being a party to those covenants and treaties such as the ICCPR and CAT, has not incorporated its obligations under these instruments. This non-incorporation results in grave violations of the internationally recognized rights of many, including the mentally ill on the death row.

In order to resolve these, Pakistan needs to ensure compliance of its domestic laws on the part of its executive, alongside ascertaining the incorporation of her international legal obligations into her domestic legal framework. Simultaneously, there is a dire need to install a mental health framework to inculcate the development in psychiatry into its legal system. It is only through these measures that Pakistan's mentally ill prisoners may be removed from the death row, and the rights of many including Imdad and Khizar may be protected.

Bibliography

Akbar, Muhammad Siddique , and Mazhar Hussain Bhutta. "Situation of Prisons in India and Pakistan: Shared Legacy, Same Challenges ." *South Asian Studies: A Research Journal of South Asian Studies*27, no. 1 (January 2012): 171. Accessed January 01, 2018.

"Abolitionist and Retentionist Countries." Abolitionist and Retentionist Countries | Death Penalty Information Center. Accessed January 07, 2018. https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries.

Ansari, Inamullah. "Mental Health Pakistan: Optimizing Brains." OMICS International. November 30, -0001. Accessed November 11, 2018. https://www.omicsonline.org/open-access/mental-health-pakistan-optimizing-brains-1522-4821-17-160.php?aid=37919.

Asad, Malik. "Over 1.8 Million Cases Pending in Pakistan's Courts." DAWN.COM. January 21, 2018. Accessed July 13, 2018. https://www.dawn.com/news/1384319.

Batra, Bikram Jeet. *Lethal lottery: the death penalty in India: a study of Supreme Court judgments in death penalty cases 1950-2006*. New Delhi: Asia Law House, 2007.

Center for Death Penalty, National Law University, Delhi India. "Center for Death Penalty, National Law University, Delhi India." Deathpenaltyindia.com. Accessed December 26, 2017. http://www.deathpenaltyindia.com/Death-Penalty-Research-Project.jsp.

Cesara, Beccaria. *On Crime and Punishment*. Indiana: Bobbs-Merrill, 1963.

Cheema, Moeen H. "Two Steps Forward One Step Back: The Non-linear Expansion of Judicial Power in Pakistan." *International Journal of Constitutional Law* 16, no. 2 (June 15, 2018): 503-26. Accessed August 11, 2018. doi:https://doi.org/10.1093/icon/moy040.

"Constituent Assembly Debates On 3 June, 1949 Part Ii." Indian Kanoon. Accessed November 11, 2018. https://indiankanoon.org/doc/348883/.

"Death Penalty Database." The Death Penalty in India. Accessed January 01, 2018. https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=India.

"Death Row." JPP. Accessed January 02, 2018. http://www.jpp.org.pk/death-row/

Foucault, Michel, and Alan Sheridan. *Discipline and punish: the birth of the prison*. London: Penguin Books, 1977.

Bhatia, Gautam. "Indian Supreme Court Changes Stance on Death Penalty: Holds Delay to be a Ground for Commutation." OHRH. February 05, 2014. Accessed January 01, 2018. http://ohrh.law.ox.ac.uk/indian-supreme-court-changes-stance-on-death-penalty-holds-delay-to-be-a-ground-for-commutation/.

Hashim, Asad. "Pakistan lifts death penalty moratorium." Pakistan News | Al Jazeera. December 17, 2014. Accessed December 25, 2017. http://www.aljazeera.com/news/asia/2014/12/pakistan-lifts-death-penalty-moratorium-201412171053749938 7.html.

Hood, Roger, and Carolyn Hoyle. *The death penalty: a worldwide perspective*. New York, NY: Oxford University Press, 2015.

Mathias, Matthew D. "The Sacralization of the Individual: Human Rights and the Abolition of the Death Penalty." *American Journal of Sociology*118, no. 5 (2013): 1246-283. Accessed December 5, 2017. doi:10.1086/669507.

Sharma, Rajendra K. *Criminology and penology*. New Delhi: Atlantic Publishers & Distributors (P) Ltd, 2016.

Slow march to the gallows Death penalty in Pakistan. Report. International Federation For Human Rights, Human Rights Commission of Pakistan. 2007.

ABUDAWOOD, Suleman. *Sunan-e-Abu Dawood Sharif. Vol. 3. Vol. 3*. Book Centre Bradford.

Aziz, Sadaf. *The constitution of Pakistan a contextual analysis*. Oxford: Hart Publishing, 2017.

Bandial, Sahar. "Delayed Justice." The Express Tribune. February 16, 2018. Accessed July 25, 2018. https://tribune.com.pk/story/1635971/6-delayed-justice-3/.

Bose, Sugata, and Ayesha Jalal. *Modern South Asia: history, culture, political economy*. London: Routledge, 2011.

Butt, Aamir. "Jinnah's Pakistan: Islamic state or secular democracy?" The Nation. Accessed January 28, 2018. https://nation.com.pk/25-Dec-2015/jinnah-s-pakistan-islamic-state-or-secular-democracy.

Calkins, Philip B., and Muzaffar Alam. "India." Encyclopædia Britannica. February 02, 2018. Accessed February 04, 2018. https://www.britannica.com/place/India/The-early-Turkish-sultans#ref485598.

Choudhury, G. W. "The Constitution of Pakistan." *Pacific Affairs*29, no. 3 (1956): 243. Accessed February 3, 2018. doi:10.2307/2753474.

Cheema, Moeen H. "Two Steps Forward One Step Back: The Non-linear Expansion of Judicial Power in Pakistan." *International Journal of Constitutional Law* 16, no. 2 (June 15, 2018): 503-26. Accessed November 11, 2018. doi:https://doi.org/10.1093/icon/moy040.

"Constituent Assembly Debates On 3 June, 1949 Part Ii." Indian Kanoon. Accessed November 11, 2018. https://indiankanoon.org/doc/348883/.

"Constitution of the Islamic Republic of Pakistan." Commonwealth Legal Information Institute. Accessed January 30, 2018. http://www.commonlii.org/pk/legis/const/1973/8.html#c4.

"Every 8th Person Executed in the World Is Pakistani: Report." DAWN.COM. October 05, 2018. Accessed September 23, 2018. https://www.dawn.com/news/1436367.

"Death Penalty in India: Annual Statistics." Project 39A. Accessed June 5, 2018. https://www.project39a.com/annual-statistics.

Dudley, Michael, Derrick Silove, and Fran Gale. *Mental Health and Human Rights: Vision, Praxis, and Courage*. Oxford: Oxford University Press, 2012.

"Federal Shariat Court." Federal Shariat Court. Accessed May 8, 2018. http://federalshariatcourt.gov.pk/.

Freedman, Allison. "Mental Retardation and the Death Penalty: The Need for an International Standard Defining Mental Retardation." *North Western Journal of International Human R Ights* 12, no. 1 (2014). Accessed May 25, 2018.

Ḥaqqānī, Ḥusain. *Pakistan: between mosque and military*. Gurgaon, Haryana: Viking, 2016.

Hotiana, Usman Amin. "Imdad Ali and the Law." World | Thenews.com.pk |. Accessed August 16, 2018. https://www.thenews.com.pk/print/205489-Imdad-Ali-and-the-law.

Human Rights Watch. "Pakistan: Execution Ends Moratorium on Death Penalty." Human Rights Watch. November 21, 2012. Accessed June 20, 2018. https://www.hrw.org/news/2012/11/20/pakistan-execution-ends-moratorium-death-penalty.

Iyer, Shruti. "Prof. Bhullar's Death Penalty: Executing the Mentally Ill." CLPR. Accessed August 12, 2018. https://clpr.org.in/blog/prof-bhullars-death-penalty-executing-the-mentally-ill/.

Khan, Hamid. *Constitutional and political history of Pakistan*. Karachi: Oxford University Press, 2012.

Khan, Muhammad Daniyal. " THE WEARINESS OF JUDICIAL SYSTEM IN PAKISTAN AND ITS IMPACTS ON COMMON MAN." Punjab Law Journal. Accessed September 4, 2018. https://www.pljlawsite.com/2011art10.htm.

Malik, Zainab Z. "Treaty Obligations." DAWN.COM. May 28, 2017. Accessed July 22, 2018. https://www.dawn.com/news/1335863.

Mohydin, Rimmel. "Pakistan's Courts Are Failing to Acknowledge Mental Illness." Open Society Foundations. Accessed August 22, 2018. https://www.opensocietyfoundations.org/voices/pakistan-s-courts-are-failing-acknowledge-mental-illness.

Mubārak, Abū Al-Faẓl ibn, H. Blochmann, D. C. Phillott, H. S. Jarrett, and Jadunath Sarkar. *The A-in-i Akbari*. Delhi: Low Price Publications, 2008.

Mumissa, Micheal. "Sharia law and the death penalty Would abolition of the death penalty be unfaithful to the message of Islam?" *Penal Reform International*, July 2015. https://www.penalreform.org/wp-content/.../07/Sharia-law-and-the-death-penalty.pdf.

Nowak, Manfred. "Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment." *Oxford Handbooks Online*, 2014. doi:10.1093/law/9780199559695.003.0016.

Omar, Shagufta. "Abolition of Death Penalty with Special Reference to Pakistan Part 2." *SSRN Electronic Journal*, 2010. doi:10.2139/ssrn.1713101.

"PAKISTAN: AHRC Welcomes the Country's Ratification of the ICCPR and the CAT Convention and Call for Speedy Implementation - Pakistan." ReliefWeb. Accessed September 3, 2018. https://reliefweb.int/report/pakistan/pakistan-ahrc-welcomes-countrys-ratification-iccpr-and-cat-convention-and-call.

Pakistan. Constituent Assembly, 1949. *National Assembly.*Accessed February 1, 2018. www.na.gov.pk/uploads/documents/1434604126_750.pdf.

Pardesi*, Yasmeen Yousif. "An Analysis of the Constitutional Crisis in Pakistan (1958-1969) ." Post Graduate Institute of Law. Accessed February 4, 2018.

Qureshi, Saleem. "Islam and development: The Zia regime in Pakistan." *World Development*8, no. 7-8 (1980): 563-75. doi:10.1016/0305-750x(80)90041-8.

Rafay, Abdul. "Does Post-crime Insanity Have Any Legal Value in Shariah?" Tribune. Accessed August 25, 2018. https://blogs.tribune.com.pk/story/45701/does-post-crime-insanity-have-any-legal-value-in-shariah/.

"REFORM OR REPRESSION? Post-Coup Abuses in Pakistan." *Human Rights Documents online*, 2000. Accessed January 26, 2018. doi:10.1163/2210-7975_hrd-2261-0254.

Schabas, William. *The Abolition of the Death Penalty in International Law*. Cambridge: Cambridge University Press, 2002.

Shaaban, Mohamed. "Islam and Jail: The Prophet Used Wives' Houses and Mosques as Prison Facilities." Raseef22. March 14, 2018. Accessed August 29, 2018. https://raseef22.com/en/culture/2018/02/12/islam-jail-prophet-used-wives-houses-mosques-prison-facilities/

Shaban, Aimen Saleh, ed. Beirut, Lebanon: Dar Al Kutab Al Ilmiyya, 2000.

Shah, Waseem Ahmad. "Pakistan Yet to Enact Anti-torture Law." DAWN.COM. June 26, 2017. Accessed July 19, 2018. https://www.dawn.com/news/1341873.

Sheikh, Maira, and Moghees Uddin Khan. "International Law Benchbook for The Judiciary In Pakistan | Publications." Research Society of International Law. http://rsilpak.org/services/international-law-benchbook-for-the-judiciary-in-pakistan/.

Capital Punishment, Report no. 35. Law Commission of India, Government of India. 1967.

The Death Penalty. Report no. 262. Law Commission of India, Government of India. 2015.

"UN Rights Experts Urge Pakistan Authorities to Halt Execution of a Person with Disabilities." OHCHR. Accessed June 15, 2018. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20593.

Uoda, Abdul Qadir, comp. ***الوضعي بالقانون مقارناً الإسلامي الجنائي التشريع***. Vol. 1. Beirut, Lebanon: Dar Al Kutab Al Azli.

Yusuf, Daniyal. *Counting the Condemned.* Report. Justice Project Pakistan. Accessed October 24, 2018. https://www.jpp.org.pk/wp-content/uploads/2018/10/2018_10_04_Counting-the-Condemned-Final.pdf.

List of Cases

Ahtabar Gul v. State (2014) PLDPesh. 10

Allauddin Mian & Ors. vs State Of Bihar, 1989 AIR 1456

Al-Jehad Trust case, PLD 1996 SC 324

Bachan Singh vs State Of Punjab, AIR 1980 SC 898

Benett v. Benett (1969) 1 All E.R. 539

Commander Aziz Khan v. Director General, Ports and Shipping, 1991 CLC362

Ediga Anamma vs State Of Andhra Pradesh, 1974 AIR 799

Francis v. Jamaica, Communication No. 606/1994

Hanover Fire Insurance Co. v. Muralidhar Banechand PLD 1958 SC138

Indus Automobile v. Central Board of Revenue (1988) PLDKar. 99

Jagmohan Singh v. State of U.P, 1973 AIR 947

Machhi Singh And Others vs State Of Punjab, 1983 AIR 957

Maulvi Tamizuddin Khan v. The Federation of Pakistan , PLD 1955 FC 240.

Mithu Etc vs State Of Punjab Etc, 1983 AIR 473

M.D. Tahir v. Pakistan (1995) CLCLah. 1039

Navneet Kaur v. State (NCTof Delhi), (2014) 7 SCC 264

Panchhi And Ors. vs State Of U.P, 1998 CriLJ 3305

Qazilbash Waqf and others Vs. *Chief Land Commissioner Punjab and others*. PLD 1990 SC 99

Rajendra Prasad Etc. Etc vs State Of Uttar Pradesh, 1979 AIR 916

Ram Narain Gupta v. Smt Rameshwari Gupta, AIR 1988 SC 2260

SafiaBano v. The Federation of Pakistan, PLD 2017 SC 18

Sahadath v. Trinidad and Tobago. Communication No. 684/1996.

Santosh Kumar v. State of Maharashtra, (2009) 6 SCC 498

Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1

Sher Singh v. State of Punjab, 1983 AIR 465

Suleman v. Manager Domestic Banking, Habib Bank, 2003 CLD Kar. 1797

State v. Dosso , P.L.D. 1958 S.C. 553

Triveniben v. State of Gujarat, 1989 AIR 1335

T.V. Vatheeswaran vs State Of Tamil Nadu, 1983 AIR 361

van Alphen v. the Netherlands (Communication No. 305/1988)