

Slow march to gallows

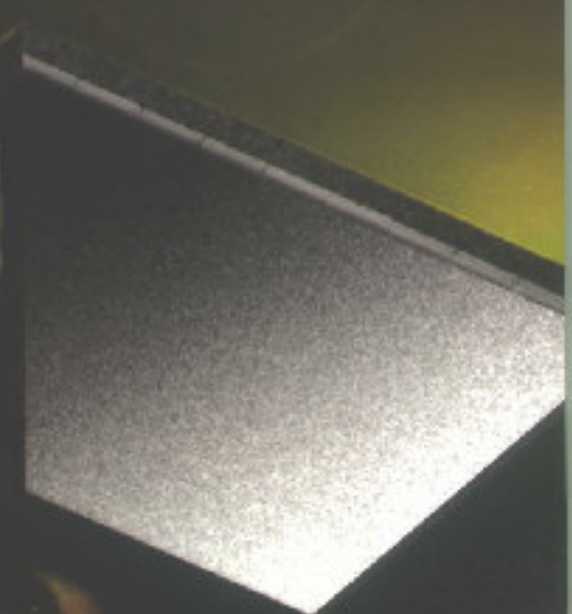
Death penalty in Pakistan



Human Rights Commission
of Pakistan

fidh

International Federation
of Human Rights



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Executive Summary

Foreword: Why mobilise against the death penalty

1. The absence of deterrence
2. Arguments founded on human dignity and liberty
3. Arguments from international human rights law

Introduction and Background

1. Introduction
2. Overview of death penalty in Pakistan: expanding its scope, reducing the safeguards
3. A widespread public support of death penalty

I. The legal framework

1. The international legal framework
2. Crimes carrying the death penalty in Pakistan
3. Facts and figures on death penalty in Pakistan
 - 3.1. Figures on executions
 - 3.2. Figures on condemned prisoners
 - 3.2.1. Punjab
 - 3.2.2. NWFP
 - 3.2.3. Balochistan
 - 3.2.4. Sindh
4. The Pakistani legal system and procedure
 - 4.1. The intermingling of common law and Islamic Law
 - 4.2. A defendant's itinerary through the courts
 - 4.2.1. The trial
 - 4.2.2. Appeals
 - 4.2.3. Mercy petition
 - 4.2.4. Stays of execution
 - 4.3. The case law: gradually expanding the scope of death penalty
5. The Qisas and Diyat Ordinance and its impact on death penalty
6. The case of Juveniles
7. The situation in specific areas
8. Special Laws - The Anti-Terrorism Act

II. A deeply flawed and discriminatory process, from arrest to trial to execution

1. The defects of police investigation
 - 1.1. Recent changes in the police system and investigation service
 - 1.2. The procedure in case of a criminal investigation
 - 1.2.1. The procedure in theory....
 - 1.2.2. and its defects in practice
 - 1.3. Relying almost exclusively on witnesses
 - 1.4. Illegal detention, torture and extrajudicial executions
 - 1.5. Corruption, social and political pressure
 - 1.6. The problem of forensic investigation
2. A faulty judicial process – no fair trial
 - 2.1. The lack of independence of the judiciary
 - 2.2. Corruption, political pressure and social bias
 - 2.3. Not equal before the law: religious minorities
 - 2.4. Not equal before the law: gender discrimination
 - 2.5. The absence of proper legal aid
3. Detention and execution
 - 3.1. Length of detention
 - 3.2. Conditions of detention

3.3. The last days

Conclusion and recommendations

Annex: List of persons met by the delegation

EXECUTIVE SUMMARY

In early 2006, the HRCP and the FIDH jointly organised a fact-finding mission on the application of death penalty in Pakistan. The findings of the mission constitute the basis of the present report.

Pakistan ranks among the countries in the world which issue the most death sentences: currently, over 7,400 prisoners are lingering on death row. In recent years, Pakistan has witnessed a significant increase in charges carrying capital punishment, in convictions to death, as well as in executions.

The HRCP and FIDH find that the application of death penalty in Pakistan falls far below international standards. In particular, they find that, given the very serious defects of the law itself, of the administration of justice, of the police service, the chronic corruption and the cultural prejudices affecting women and religious minorities, capital punishment in Pakistan is discriminatory and unjust, and allows for a high probability of miscarriages of justice, which is wholly unacceptable in any civilised society, but even more so when the punishment is irreversible. At every step, from arrest to trial to execution, the safeguards against miscarriage of justice are weak or non-existent, and the possibility that innocents have been or will be executed remains frighteningly high.

The provisions of the law themselves leave much to be desired: laws are made on a *ad hoc* basis rather than on systematic, rational and just grounds, leading to a haphazard and anarchic lawmaking process which has witnessed a preposterous inflation of charges carrying death penalty in recent years, without contributing to the rule of law. While at the time of independence, only 2 charges carried death penalty, today, 27 different charges do so, including blasphemy, stripping a woman of her clothes in public and sabotage of the railway system. This goes far beyond the scope of the expression “*most serious crimes*” for which death penalty should be reserved under international law, and which is interpreted as meaning that death penalty should not be awarded for crimes beyond intentional crimes with lethal or other extremely grave consequences. Several charges carry mandatory death penalty, such as blasphemy.

The HRCP and FIDH note that not only has the massive application of death penalty *not* strengthened the rule of law, but its application has, much on the contrary, weakened it substantially. This affects all citizens of the country, but even more so those who face a judicial procedure. The lack of consistency of Pakistani courts and the historical weakness of the judiciary, submissive to the executive as well as plagued with systemic corruption, gravely jeopardises the possibility of a fair trial. Furthermore, the very low salaries of the judges exposes them to pressure and bias – both in “political” cases, or in cases where one of the parties is wealthy. The by now routine habit of the executive “rewarding” or “punishing” compliant or resistant judges has seriously undermined the independence of the judiciary.

Pakistan’s special courts are even more prone to such injustices, with overall unacceptably low safeguards of constitutional rights for defendants and of guarantees of a fair trial (e.g. anti-terrorist courts).

The recent increase in convictions to death has to be viewed in the context of a 2003 Supreme Court ruling which stated that, in cases of murder, “the normal penalty of death should be awarded and leniency in any case should not be shown, except where strong mitigating circumstances for lesser sentence could be gathered” (underline ours). Sentences other than capital punishment are consequently handed only exceptionally in cases of murder. This ruling followed, and confirmed, a string of other rulings which also stated that capital punishment should be the “normal penalty” for murder.

Rulings by the Federal Shari’at Court (FSC) and the Supreme Court have limited the possibilities of pardon by the President, in spite of the constitutional provision that grants him the right to do so. The FSC ruled that, according to Islamic law, the legal heirs of a murder victim are the sole persons entitled to grant mercy to the culprit.

The Qisas and Diyat Ordinance has had an adverse impact on the rule of law, on the administration of justice, and on the application of death penalty. By allowing for the possibility to pay “blood money” to relatives of the victim in lieu of execution, the Ordinance has paved the way to a nefarious privatisation of justice, as the State withdraws from one of its main responsibilities, since it no longer is the guardian of the rule of law through the exercise of justice. In Pakistan, crimes are less considered as offences against

the State than as disputes between individuals or families. The life of an individual hinges not on the norms of justice but on the persuasive powers of his relatives. When the heirs forgive a murderer, he is usually acquitted and immediately freed: in practice, blood money means immediate acquittal – and impunity. It has to be said, however, that such impunity is essentially due to the judicial practice: the State *retains the possibility* to punish the criminals – albeit not to capital punishment.

The possibility of compromise has *de facto* lowered the standards of evidence required for conviction. In addition, coercion appears to be routinely used to force the legal heirs to accept compromise. There is no transparent and objective procedure to ensure that the compromise is entered freely, willingly, and without intimidation. Such coercion has become routine practice, notably by local law enforcement agencies, who have an interest in a quick settlement, in order to decrease their caseload, are often corrupt and would be paid a bribe to ensure the victim's family agrees to the compromise. It is indeed very often the police itself which puts pressure on the complainants to enter a compromise.

In 2000, the Juvenile Justice System Ordinance was promulgated, which prohibited the application of death penalty to persons under 18 years of age, and provided for juvenile courts. In 2004, however, a judgment by the High Court in Lahore revoked it. The appeal before the Supreme Court is still pending and meanwhile, the JJSO has been temporarily reinstated by the Supreme Court. However, several juveniles are presently on death row, in blatant violation of international human rights standards.

Capital punishment in Pakistan is also adversely affected by the weakness of the police service and the lack of independence of the judiciary. Convictions to capital punishment often occur after botched police investigations and unfair trials, where possibilities of corruption, coercion, intimidation of witnesses and of police officials, and political or social pressure, among others, happen at every stage, thus allowing for unacceptably high probabilities of miscarriage of justice.

The police in Pakistan is still ruled by a culture of violence, intimidation and coercion; torture is routinely used to extract information or confessions from suspects, and illegal detentions are common. Extrajudicial killings happen frequently. In criminal cases, there is a strong tradition to rely much more on oral evidence than on material evidence (compounded by the serious backwardness of forensic technique and investigation, and the lack of sufficient number of forensic laboratories), which greatly increases the pressure on witnesses, as well as the possibility of testimonies dictated by local or family politics. It is very difficult to have independent witnesses testify, for fear of retaliation against their family, or because of fear of getting involved with the authorities and the police. Coercion or corruption of witnesses can stem from the police, from the powerful local families, from the culprit's relatives, or even from the victim's party. This jeopardises the right to a fair trial. There is no witness protection programme in Pakistan.

More generally, the generally hierarchical and unfair social structure inevitably skews police investigations and judicial proceedings in favour of the wealthy and influential; discrimination pervades the whole system. The Qisas and Diyat Ordinance has institutionalised discrimination against poorer defendants; one is virtually certain to get away with murder, provided one is rich enough to meet the cost of the compensation demanded by the heirs of the victim. Poorer defendants are also victims of the paucity of legal aid: there is no proper provision for effective legal assistance at the state expense for those who can not afford it on their own. This adds to an already skewed police and judicial process, where the powerful and wealthy can easily thwart a procedure in their favour. Sadly, citizens are not equal before the law in Pakistan.

Discrimination is not limited to social and financial grounds. It appears that although there are far fewer female condemned prisoners than male, the punishment meted out will be harsher, and the judges, overall less inclined to grant them mitigating circumstances. The authors of "honour killings" of women are still considered leniently by the courts.

The progressive Islamisation of the State has translated into an institutionalisation of religious discrimination. In particular, the laws of blasphemy, which carry mandatory death penalty has been used against NGOs, minorities, academics and journalists sometimes after grossly unfair trials. In 2005, two persons have been convicted to death on the charge of blasphemy.

The situation in tribal areas is no better, even though the legal regime ruling these areas does not provide for death penalty: so-called tribal "trials", called by the local *jirgas*, routinely provide for unlawful executions of defendants. Reports of public executions in tribal areas appear increasingly frequently in the

press. The lack of judicial guarantees, of defence, of appeals, combined to deep-rooted cultural prejudice, particularly on “honour”, make such executions singularly inequitable. These “condemned” individuals were denied even the minimal legal safeguards available to persons accused of crimes in the tribal areas of Pakistan.

Finally, the HRC and FIDH note that, contrary to the much vaunted and much over-rated argument of deterrence, the systematic and generalised application of death penalty has not led to an improvement of the situation of law and order in the country. It is ironical that while Pakistan has one of the highest rates of conviction to capital punishment in the world, the situation of law and order remains problematic. Systematic condemnation to death certainly does not appear to be the solution to the problem. The “iron fist” mentioned by several judges and officials turns out to be discriminatory, unfair – and utterly inefficient.

FOREWORD: Why mobilise against the death penalty

The HRCP and FIDH are strongly opposed to death penalty, as contrary to the very notions of human dignity and liberty. It has furthermore been proved to be entirely ineffective as a deterrent. International human rights law also tends towards the abolition of capital punishment. Consequently, neither moral principles, nor legal provisions, nor utilitarian considerations can justify the use of capital punishment.

1. Death penalty is ineffective as a deterrent

Among the most common arguments in favour of the death penalty is the utilitarian argument that it acts as a deterrent for potential criminals: death penalty would “set the example”, as it would reduce crime, while supposedly protecting society from its most dangerous elements. These oft-repeated arguments have been empirically proven to be baseless.

Systematic studies undertaken in a number of different countries show that imposition of the death penalty *does not* contribute to a reduction in the crime rate. In Canada, for example, the homicide rate per 100,000 people fell from a peak of 3.09 in 1975, the year before the abolition of the death penalty for murder, to 2.41 in 1980. In 2000, the rate of homicides was 1.8 per 100,000 people in Canada, where death penalty is abolished – and 5.5 in the United States, where it is applied. States in the US which have reinstated capital punishment following the Supreme Court ruling *Gregg vs. Georgia* on 2 July 1976 have not seen their crime rate drop. Conversely, the states which did not reinstate it have not witnessed an increase in the crime rate. Europe, which imposes a ban on death penalty as a condition for becoming member of the Union, has a lower crime rate than the US.

In Pakistan, similar studies have shown the crime rate to be rising, in spite of the death penalty being in force and systematically applied.

Therefore, one can conclude that societies which apply capital punishment are no better protected from crime than societies which do not, where other sanctions are available in order to protect society, notably imprisonment.

The most recent survey of research on this subject, conducted by Roger Hood for the United Nations in 1988 and updated in 2002, concluded that *“the fact that the statistics... continue to point in the same direction is persuasive evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty”*¹.

This conclusion should not be unexpected: all studies show that the deterrent factor is *the certainty of conviction*, not the harshness of punishment. A panel of the National Academy of Science in the US concluded in 1993 that a 10% increase in the probability of apprehension would prevent twice as much violent crime as the same increase in the severity of punishment. In some cases, harsher penalties may actually undermine the deterrence, as in cases of mandatory death penalty for all offenders: judges, who then lack judicial discretion, frequently balk at convicting and demand a higher standard of proof, which often leads to no conviction at all. A typical example is the former provision of mandatory death penalty for gang rape in Pakistan; a Lahore judge ruled in 2002 that *“no doubt offence of gang rape is considered extremely heinous in any society (...), and it is treated as most detestable and abominable crime and obviously for that reason the extreme penalty of death has been provided (...). But practically it has been noticed that whenever heavy punishment especially the sentence of death is provided and there is no alternate punishment either, the number of acquittals are bound to increase”*² – and he went on to acquit the defendants. The same thing happened in the much famed Mukhtara Mai case in 2005 at appellate stage.

Death penalty may hence paradoxically contribute to the rise of impunity.

Already back in the 18th century, Cesare Beccaria noted that, *“it seems absurd that the laws, which are the expression of the public will, and which hate and punish murder, should themselves commit one, and that to deter citizens from murder, they should decree a public murder”*.

¹ Roger Hood *The Death Penalty: A Worldwide Perspective* 3rd ed (Oxford University Press: London, 2002) 214.

² *Mst. Robeena and others v. The State*, 2002 MLD 1193.

2. Arguments based on human dignity and liberty

Human rights and human dignity are universally acknowledged as fundamental norms that form the basis of politically organised society. The death penalty directly contradicts this premise and is based on a misconception of justice.

Human freedom can be defined as the possibility to change oneself and transcend a given life situation. In the case of the criminal justice system, this translates into a responsibility for the State to rehabilitate, reform and re-socialise criminals. The irreversibility of the death penalty undermines this fundamental notion of freedom. One could argue that it is even contradictory in nature: death penalty is predicated on the liberty of the individual (otherwise he could not be held legally responsible, and hence could not be judged, as is the case with mentally deranged persons) – while denying it in the very sentencing to death, which closes all doors to rehabilitation and change. Capital punishment is an oxymoron.

The irreversibility of the death penalty presents another serious threat to justice and human dignity. Even in the most sophisticated legal systems, with the strongest judicial safeguards and guarantees of due process, the possibility of miscarriages of justice remains: capital punishment can result in the execution of innocent people. It was for this reason that Governor Ryan of the state of Illinois in the United States, decided in 2003 to impose a moratorium on death penalty and hence to commute 167 death sentences to life imprisonment, after having discovered that thirteen detainees awaiting execution were innocent of the crimes of which they had been convicted. The report of the Illinois Commission on Capital Punishment stressed that: *“No system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death”*.

When innocent people are executed, *“society as a whole - i.e. all of us - in whose name the verdict was reached, becomes collectively guilty because its justice system has made the supreme injustice possible”* said Robert Badinter, the then French Minister of Justice, in 1981. A society based on human rights and the rule of law cannot accept the possibility of condemning innocent people to death.

The death penalty is a remnant of an outmoded system of criminal justice based on vengeance: that he or she who has taken a life should suffer the same fate. If applied consistently, such a literal understanding of retribution would mean stealing from the stealer, torturing the torturer and raping the rapist. Justice has risen above such a traditional notion of punishment by adopting a principle of a symbolic, yet proportional sanction for the harm done, including fines, imprisonment and other disposals, which preserve the dignity of both victim and perpetrator.

Furthermore, all death penalty prisoners are watched against the commission of suicide. Therefore, the idea that their demise would deliver justice is not borne out by this practice. On the contrary, such practices are strong indicators of an element of revenge against perpetrators and infliction of degrading, humiliating and inhuman treatment.

Furthermore, the HRC and FIDH do not believe in the supposed necessity of the death penalty as a means to vindicate victims and their relatives. They reaffirm that the victim's right to justice and compensation is fundamental in a balanced and fair justice system. A solemn and public recognition by a criminal court of the suffering of the victim plays an important role in addressing this right (through the pronouncement of 'judicial truth'). The HRC and FIDH maintain that answering the call for justice by the death penalty serves only to relieve the basest emotional need for vengeance and does not serve the cause of justice and dignity (even that of the victims) as a whole. Paradoxically, the victims' dignity is itself better served by rising above vengeance. The recognition of the victim in the criminal procedure responds to his or her need to be acknowledged as an actor for whom the process has a particular and personal significance. Providing psychological support and financial compensation to victims also contributes to their feeling that justice has been done and that private vengeance is unnecessary and would result in no meaningful gain to the victim. If these issues are addressed, the argument that the death penalty is necessary to satisfy the victim's need for vengeance becomes largely irrelevant.

The existence of human rights guarantees is the distinctive character of a reliable and legitimate judicial system; notably, the right to a fair trial – including, for example, the rejection of evidence obtained through torture or other inhuman and degrading treatment. From this perspective, the HRC and FIDH are convinced that the full respect of these human rights and the rejection of legally sanctioned violence

are at the core of the legitimacy of any criminal justice system. Justice, particularly when it concerns the most serious crimes and the life of the accused is at stake, should not rely on chance and fortune. The life of an individual should not depend on contingent factors such as jury selection, media pressure and the competence of a defence attorney – in the case of Pakistan, of his individual fortune or persuasive powers to obtain the pardon of the victim’s family. The rejection of inhumane sentences, first and foremost the death penalty, clearly contributes to the building of a judicial system based on universally accepted principles, in which vengeance has no place and in which the population as a whole can trust.

The death row phenomenon refers to the conditions of detention of a person condemned to capital punishment while awaiting the execution of the sentence. The usual conditions of detention - notably its long duration, solitary confinement, uncertainty about the moment of execution and deprivation of contact with the outside world, sometimes including family members and legal counsel – in many cases amount to cruel, inhuman and degrading treatment.

Furthermore, the HRC and FIDH emphasise that the death penalty is often applied in a discriminatory manner, for example, in the USA, where it is applied disproportionately to people from ethnic minorities, or impecunious defendants, or in Saudi Arabia where foreigners are more likely to be sentenced to the death penalty. Such practices violate the universal principle of non-discrimination, which at its base addresses the fundamental equality and human dignity of all persons, regardless of their background and personal attributes.

3. Arguments from international human rights law

International law has incrementally restricted the scope and implementation of death penalty, and aims at its abolition. It is a fact that a total of 129 countries have now abolished the death penalty in law or practice, including 40 which have abolished it since 1990³. Amnesty International notes that 68 countries and territories retain and use the death penalty, but that the number of countries which actually execute prisoners in any one year is much smaller. Furthermore, the Rome Statute of the International Criminal Court and the UN Security Council resolutions establishing the International Criminal Tribunals for the Former Yugoslavia and for Rwanda do not provide for the death penalty in the range of possible sanctions even though those jurisdictions have been established to try the most serious crimes.

Specific international and regional instruments have been adopted which seek the abolition of the capital punishment: the UN Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Protocol on the Abolition of the Death Penalty (Organization of American States), Protocol 6 and the new Protocol 13 to the European Convention on Human Rights (Council of Europe) require the abolition of the death penalty. The Guidelines to the European Union (EU) Policy towards Third Countries on the Death Penalty, adopted by the EU on 29 June 1998, stress that one objective of the EU is *“to work towards the universal abolition of the death penalty as a strongly held policy view agreed by all EU member States”*. Moreover, *“the objectives of the European Union are, where the death penalty still exists, to call for its use to be progressively restricted and to insist that it be carried out according to minimum standards (...). The EU will make these objectives known as an integral part of its human rights policy”*⁴. The EU Charter of Fundamental Rights also states that *“no one shall be condemned to the death penalty, or executed”*.

Each year since 1997, the UN Commission on Human Rights has called upon all States that still maintain the death penalty to *“abolish the death penalty completely and, in the meantime, to establish a moratorium on executions”*⁵.

In 1966, the United Nations adopted the International Covenant on Civil and Political Rights (ICCPR). The treaty was forged from the founding principle of the U.N.’s Universal Declaration of Human Rights.

³ Amnesty International figures

⁴ <http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm>.

⁵ UN Human Rights Commission Resolution 2005/59, UN Doc. E/CN.4/2005/L.77, 15 April 2005, paragraph 5(a). See also UN Human Rights Commission Resolutions 2002/77, 2001/68, 2000/65 and 1999/61

Article 6 of the ICCPR states that *"no one shall be arbitrarily deprived of his life"*⁶. And its Article 7 states that *"no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*⁷

Even if the ICCPR expressly provides for the death penalty as an exception to the right to life surrounded by a number of specific safeguards, in a General Comment on Article 6 of the ICCPR, adopted in 1982, the Human Rights Committee established that this article *"refers generally to abolition [of the death penalty] in terms which strongly suggest (...) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life"*⁸.

The same General Comment stated that death penalty should be reserved only for the *"most serious crimes"*, which is interpreted as meaning that death penalty should not be awarded for crimes beyond intentional crimes with lethal or other extremely grave consequences⁹. The Human Rights Committee established under the ICCPR has stated that *"the imposition of the death penalty for offences which cannot be characterized as the most serious, including apostasy, committing a third homosexual act, illicit sex, embezzlement by officials, and theft by force, is incompatible with Article 6 of the Covenant."*¹⁰

On 8 December 1977, the UN General Assembly also adopted a resolution on capital punishment stating, *"The main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment"*¹¹.

The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, in his report of 14 December 1994, stated: *"The Special Rapporteur would like to express his view that, although the death penalty is not prohibited under international law, there is no such thing as a right to capital punishment, restricted only by some limitations contained in pertinent international instruments. In view of the irreparability of loss of life, the impossibility of remedying judicial errors and, indeed, the well-founded doubts expressed by a wide range of experts in criminology, sociology, psychology, etc. as to the deterrent effect of capital punishment, the Special Rapporteur once again calls on the Governments of all countries where the death penalty still exists to review this situation and make every effort towards abolition."*¹²

As for Asia, it should be highlighted that the Advisory Council of Jurists of the Asia Pacific Forum of National Human Rights Institutions¹³ published a reference report on the death penalty in December 2000. Among its recommendations, it urges that:

- States should abolish the death penalty; the Council urged States to move towards de facto, and eventual de jure abolition of the death penalty,
- Until then the death penalty should only be used for the most severe crimes.
- Safeguards against its abuse should be based on the provisions by international law such as found in the ICCPR and its Second Optional Protocol, the Convention on the Rights of the Child and the Convention Against Torture.

International law states that, when applied, death penalty should only be imposed for the "most serious crimes" and in time of war. Furthermore, it should never be imposed on children under the age of 18, pregnant women and the mentally ill.

Death penalty for the most serious crimes:

⁶International Covenant on Civil and Political Rights, A/Res/2200A(XXI), 1966, http://www.unhcr.ch/html/menu3/b/a_ccpr.htm (March 16, 2005)

⁷ See above.

⁸ UN Human Rights Committee General Comment 6 on the right to life (art. 6), 30/04/1982, paragraph 6.

⁹ General Comment on art. 6 of ICCPR, para 7

¹⁰ Concluding observations of the Human Rights Committee: Sudan under Article 40 of the Covenant, UN document No. CCPR/C/79/Add.85, 19 November 1997, paragraph 8

<http://www.unhcr.ch/tbs/doc.nsf/0/bc310a747155dff88025655300537fae?Opendocument> (March 24, 2005)

¹¹ UN General Assembly Resolution 32/61, 8 December 1977, paragraph 1.

¹² M. Bacre Waly Ndiaye, E/CN.4/1995/61

¹³ The current Forum membership includes twelve full member institutions from Australia, Fiji, India, Indonesia, Malaysia, Mongolia, Nepal, New Zealand, the Philippines, Republic of Korea, Sri Lanka and Thailand – see <http://www.asiapacificforum.net>

In 1984, the UN Economic and Social Council adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. In the same year, the Safeguards were endorsed by consensus by the UN General Assembly.

Safeguard 1 states: *"In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes, with lethal or other extremely grave consequences."*¹⁴

The Committee states that the expression *"most serious crimes"* must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of Article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant.

Abolition of the death penalty but in time of war:

The Second Optional Protocol to the International Covenant on Civil and Political Rights¹⁵ 1966, aiming at the abolition of the death penalty, was adopted by the United Nations General Assembly in 1989. It provides for the total abolition of the death penalty, but allows state parties to use it in times of war if they make a reservation to that effect at the time of ratifying the Protocol.

Nevertheless, time of war is not a time of "no-Law". Wartime is framed by International Treaties to protect civilians and combatants: the Geneva Convention relative to the Protection of Civilian Persons in Time of War¹⁶ and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts¹⁷ (Additional Protocol 1 and 2 in 1977). Thus, the Geneva Convention states in its Article 68 *"In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence."*¹⁸ Moreover, The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocols 1 and 2 in 1977) in its Article 76 (3) states *"To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women."*¹⁹

The Geneva Convention sets also fundamental procedural standards for a death sentence. Thus, in its Article 74, the Geneva Convention asserts *"Any judgment involving a sentence of death, or imprisonment for two years or more, shall be communicated, with the relevant grounds, as rapidly as possible to the Protecting Power"*²⁰. In time of war, a person sentenced to death should have a right to clemency and the sentence should be carried out only after a minimum protective delay. The Geneva Convention in its Article 75 affirms that *"[i]n no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve. No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve."*²¹

Prohibition of the death penalty for children under the age of 18-year-old, pregnant women and mentally ill

There is an international consensus on prohibiting death penalty for persons under the age of 18 years old, pregnant women and mentally ill.

¹⁴ U.N. Economic and Social Council, Resolution 1984/50, "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty", ECOSOC/Res/1984/50, 25 May 1984, http://www.unhchr.ch/html/menu3/b/h_comp41.htm (March 18, 2005)

¹⁵ Second Optional Protocol to the International Covenant on Civil and Political Rights, GA/ Res/44/128, 15 December 1989, http://www.unhchr.ch/html/menu3/b/a_opt2.htm (March 16, 2005)

¹⁶ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, <http://www.unhchr.ch/html/menu3/b/92.htm> (March 26, 2005)

¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, <http://www.unhchr.ch/html/menu3/b/93.htm> (March 26, 2005)

¹⁸ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, <http://www.unhchr.ch/html/menu3/b/92.htm> (March 26, 2005)

¹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, <http://www.unhchr.ch/html/menu3/b/93.htm> (March 26, 2005)

²⁰ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, <http://www.unhchr.ch/html/menu3/b/92.htm> (March 26, 2005)

²¹ Same as above.

The International Covenant on Civil and Political Rights, in its Article 6, states: *“Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”*²²

In addition, the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty state: *“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.”*²³

The U.N. Convention on the Rights of the Child specifically prohibits the use of the death penalty for juvenile offenders.

Its article 37(a) states: *“Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”*²⁴

In 1989, the UN Economic and Social Council in its resolution 1989/64 “Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty” also recommended that member states establish *“a maximum age beyond which a person may not be sentenced to death or executed”*²⁵.

The UN Commission on Human Rights has repeatedly called for the exclusion of child offenders, pregnant women and mentally ill from the death penalty²⁶.

In 1989, the Economic and Social Council in its “Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty” recommended that UN member states eliminate the death penalty *“for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution”*²⁷. In addition, in 1999, the Commission on Human Rights in its resolution 1999/61 called on nations *“not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.”*²⁸

Guarantees of a fair trial

Because of the extreme consequences of a death sentence, the proceedings surrounding it have to be restrictive in order to protect the accused of a wrong condemnation. A fair trial needs to be framed by minimum procedural guarantees for the Defence. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence. Thus the Commission on Human Rights in its Resolution 2001/68 and 2002/77 *“urges all States that still maintain the death penalty:*

- (b) *To ensure that all legal proceedings, and particularly those related to capital offences, conform to the minimum procedural guarantees contained in article 14 of the International Covenant on Civil and Political Rights, including the right to a fair and public hearing by a competent, independent and impartial tribunal, the presumption of innocence, the right to adequate legal assistance and the right to review by a higher tribunal;”*²⁹

In its General Comment on Art. 6 of the ICCPR, the UN Human Rights Committee stressed that *“the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the*

²²International Covenant on Civil and Political Rights, GA/Res/2200A(XXI), 1966, http://www.unhcr.ch/html/menu3/b/a_ccpr.htm (March 16, 2005)

²³ U.N. Economic and Social Council, Resolution 1984/50, “Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty”, ECOSOC/Res/1984/50, 25 May 1984, http://www.unhcr.ch/html/menu3/b/h_comp41.htm (March 18, 2005)

²⁴ Convention on the Rights of the Child, G.A./44/25, 20 November 1989, <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (March 24, 2005)

²⁵ See above.

²⁶ See notably Commission on Human Rights, Resolutions 1999/61, 2000/65, 2001/68, 2002/47, 2003/67, 2004/67, 2005/59

²⁷ U.N. Economic and Social Council, Resolution 1989/64, “Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty”, ESC/RES/1989/64, May 1989

²⁸ Commission on Human Rights, Resolution 1999/61, 58th Meeting, April 28 1999, [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.1999.61.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.1999.61.En?Opendocument) (March 24, 2004)

²⁹ Commission on Human Rights Res/2001/68, 25 April 2001, [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2001.68.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2001.68.En?Opendocument) (March 18, 2005)

Commission on Human Rights resolution 2002/77, 25 April 2002, <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TextFrame/e93443efabf7a6c4c1256bab00500ef6?Opendocument> (March 18, 2005)

*presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence*³⁰.

Moreover, Resolution 1745 of 16 May 1973 of the United Nations Economic and Social Council (ECOSOC) invited the Secretary General to submit, at five-year intervals, periodic updated and analytical reports on capital punishment. In its Resolution 1995/57 of 28 July 1995, the Council recommended that the quinquennial reports of the Secretary-General should also deal with the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty³¹.

Fundamental Guarantees

Article 14 of the ICCPR is a key reference under international law: it sets minimum standards for a fair trial. It includes:

- the right to be presumed innocent until proved guilty
- the right of anyone facing a criminal charge to a fair and public hearing by a competent, independent and impartial tribunal
- the right to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charges against him or her
- the right to have adequate time and facilities for the preparation of a defence
- the right to communicate with counsel of the defendant's choosing
- the right to free legal assistance for defendants unable to pay for it; the right to examine witnesses for the prosecution and to present witnesses for the defence
- the right to free assistance of an interpreter if the defendant cannot understand or speak the language used in court.

The UN Economic and Social Council has the same concern to protect the Defence by setting minimum standards when it comes to a death sentence. Thus, in resolution 1996/15 adopted on 23 July 1996, the UN Economic and Social Council encouraged UN member states in which the death penalty has not been abolished to ensure that defendants facing a possible death sentence are given all guarantees to ensure a fair trial, including the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, the UN Guidelines on the Role of Prosecutors, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the UN Standard Minimum Rules for the Treatment of Prisoners.³² Moreover, the UN Economic and Social Council, in safeguard 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, states: "*Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.*"³³

Also, in resolution 1989/64, the UN Economic and Social Council recommended that UN member states strengthen further the rights of those facing the death penalty by "*[a]ffording special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases*"³⁴.

³⁰ Human Rights Committee, General Comment 6, Article 6, 1994.

³¹ ECOSOC Resolution 1984/50 of 25 May 1984.

³² U.N. Economic and Social Council 1996/15 "Safeguards guaranteeing protection of the rights of those facing the death penalty", ECOSOC/Res/1996/15, 23 July 1996, <http://www.un.org/documents/ecosoc/res/1996/eres1996-15.htm> (March 25, 2005)

³³ U.N. Economic and Social Council, Resolution 1984/50, "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty", ECOSOC/Res/1984/50, 25 May 1984, http://www.unhchr.ch/html/menu3/b/h_comp41.htm (March 25, 2005)

³⁴ U.N. Economic and Social Council, Resolution 1989/64, "Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty," ESC/RES/1989/64, May 1989

It encourages UN member states in which the death penalty has not been abolished “to ensure that defendants who do not sufficiently understand the language used in court are fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence deliberated in court.”³⁵

Bacre Waly Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, has restated “that proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, in accordance with the pertinent international legal instruments. All defendants facing the imposition of capital punishment must benefit from the services of a competent defence counsel at every stage of the proceedings. Defendants must be presumed innocent until their guilt has been proved beyond a reasonable doubt, in strict application of the highest standards for the gathering and assessment of evidence. In addition, all mitigating factors must be taken into account.”³⁶

Moreover, Asma Jahangir, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, in her report on her mission in Jamaica in February 2003, stated with reference to death penalty cases that the Rapporteur has to intervene when “a death sentence is imposed following a trial where international standards of impartiality, competence, objectivity and independence of the judiciary were not met; the legal system does not conform to minimum fair trial standards.”³⁷

Right to appeal to a Court of Higher jurisdiction

The ICCPR in its Article 14(5) states that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”³⁸

Safeguard 6 of the U.N. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty states: “Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.”³⁹ And Bacre Waly Ndiaye, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, stated that “[death penalty] proceedings must guarantee the right of review of both actual and legal aspects of the case by a higher tribunal, composed of judges other than those who dealt with the case at the first instance.”⁴⁰

Right to Clemency

The ICCPR in its Article 6(4) states: “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”⁴¹

Safeguard 7 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, states: “Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.”⁴² Five years later, in its resolution 1989/64, the UN

³⁵U.N. Economic and Social Council 1996/15 “Safeguards guaranteeing protection of the rights of those facing the death penalty”, ECOSOC/Res/1996/15, 23 July 1996, <http://www.un.org/documents/ecosoc/res/1996/eres1996-15.htm> (March 25, 2005)

³⁶ Bacre Waly Ndiaye, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1997/60, 24 December 1996, paragraph 81, <http://www.hri.ca/forthecord1997/documentation/commission/e-cn4-1997-60.htm> (March 25, 2005)

³⁷ Asma Jahangir, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2004/7/Add.2, 26 September 2003, paragraph 54, <http://daccessdds.un.org/doc/UNDOC/GEN/G03/162/17/PDF/G0316217.pdf?OpenElement> (March 25, 2005)

³⁸ International Covenant on Civil and Political Rights, GA/Res/ 2200A(XXI), 1966, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (March 25, 2005)

³⁹ U.N. Economic and Social Council, Resolution 1984/50, “Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty”, ECOSOC/Res/1984/50, 25 May 1984, http://www.unhchr.ch/html/menu3/b/h_comp41.htm (March 25, 2005)

⁴⁰ Bacre Waly Ndiaye, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1997/60, 24 December 1996, paragraph 82, <http://www.hri.ca/forthecord1997/documentation/commission/e-cn4-1997-60.htm> (March 25, 2005)

⁴¹ International Covenant on Civil and Political Rights, GA/Res/ 2200A(XXI), 1966, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (March 25, 2005)

⁴² U.N. Economic and Social Council, Resolution 1984/50, “Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty”, ECOSOC/Res/1984/50, 25 May 1984, http://www.unhchr.ch/html/menu3/b/h_comp41.htm (March 25, 2005)

Economic and Social Council recommended that UN member states provide for “*mandatory appeals or review with provisions for clemency or pardon in all cases of capital offence.*”⁴³

Asma Jahangir also stated, in her February 2003 report, that the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has to intervene when “*the accused is denied his or her right to appeal or seek pardon or commutation of a death sentence*”⁴⁴

Adequate time between sentence and execution

The UN Economic and Social Council in its “Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty” called on UN member states in which the death penalty may be carried out “*to allow adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency*”. Thus, Asma Jahangir, in her 2003 report, stated “*the Special Rapporteur was concerned when she met a number of inmates on death row who claimed that they had already spent more than five years there, and that their appeal to the Privy Council was apparently being blocked by delaying the process in the domestic courts.*”⁴⁵

Conditions of detention:

Several UN instruments are relevant with regard to the conditions of detention of inmates, which apply notably to death row inmates :

- Article 7 of the ICCPR prohibiting torture or cruel inhuman or degrading treatment or punishment; General comment 20 (10 March 1992) concerning that provision, which notably specifies that “The prohibition in art. 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim” (para 5).
- Article 10.1 of the ICCPR : “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.
- UN Basic Principles for the Treatment of Prisoners (UNGA resol. 45/111 of 14 December 1990),
- UN Body of principles for the protection of all persons under any form of detention or imprisonment (UNGA res. 43/173 of 9 December 1988),
- Standard minimum rules for the treatment of prisoners (Ecosoc res. 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977),
- UN Convention Against Torture, art. 1

⁴³ U.N. Economic and Social Council, Resolution 1989/64, "Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty," ESC/RES/1989/64, May 1989

⁴⁴ Asma Jahangir, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2004/7/Add.2, 26 September 2003, paragraph 54, <http://daccessdds.un.org/doc/UNDOC/GEN/G03/162/17/PDF/G0316217.pdf?OpenElement> (March 25, 2005)

⁴⁵ Same as above.

INTRODUCTION AND BACKGROUND

1. Introduction

This mission was undertaken as part of a larger project on death penalty, led by the FIDH, the aim of which is fourfold:

- (1) To stigmatise this inhuman punishment. 88 countries have abolished the death penalty in law, among which 11 have abolished it for all but exceptional crimes such as war crimes. 30 countries can be considered abolitionist *de facto*: they retain the death penalty in law but have not carried out any executions for ten years or more;
- (2) To show that, in general, prisoners condemned or executed throughout the world did not benefit from the right to a fair trial, as enshrined in the 1948 Universal Declaration of Human Rights and the ICCPR. This makes their state-sanctioned executions all the more unacceptable and raises more general concerns regarding the justice system under investigation and possible miscarriages of justice;
- (3) To shed light on and denounce the treatment of death row inmates from conviction to execution; the situation of these inmates often amounts to ‘cruel, inhuman and degrading treatment’, in violation of international human rights law; and
- (4) To formulate recommendations addressed to the relevant State authorities of the country concerned and other relevant actors, in a spirit of dialogue, in order to support local efforts towards the abolition of the death penalty or, as a first step, the adoption of a moratorium on executions.

The present report is the result of an international HRCP/FIDH fact-finding mission on the death penalty and the administration of criminal justice in Pakistan, which took place in the winter and spring 2006. Dr. Anne-Christine Hubbard, FIDH delegate, did the research and wrote the report. Ms. Asma Jahangir, chairperson of HRCP, supervised the work. Mr. Kamran Arif, vice chairperson HRCP, assisted in the research.

The meetings and interviews were arranged by the HRCP chapters in the various provinces of the country. The delegation met with approx. 70 individuals – lawyers, judges, prison officials, state officials, death row inmates, etc –, visited 5 prisons throughout the country, as well as three forensic laboratories.

The delegation would like to acknowledge the contributions made by the HRCP and FIDH secretariats, and sincerely thank all those who helped make this mission a success. The delegation would in particular thank officials in Balochistan, where it was greeted by an excellent cooperation, as well as to the police officials in Abbottabad, and the prison officials in NWFP.

A list of persons met by the delegation is annexed.

2. Overview of death penalty in Pakistan: expanding its scope, reducing the safeguards

Pakistan ranks among the countries in the world which issues the most death sentences: currently, over 7400 prisoners are lingering on death row – 6985 in the province of Punjab alone as of October 2006, according to the Inspector General Prisons of Punjab⁴⁶. The annual rate of executions is much lower, although it has recently witnessed a worrying increase: 1029 executions have reportedly taken place in Punjab from 1975 to 2002, i.e. an average of 37 executions per year⁴⁷ - the figure was 66 in 2005, and 54 for the first half of 2006 alone. 30 people were executed in the sole months of June and July 2006.

⁴⁶ The Balochistan authorities gave a figure of 127 condemned prisoners in Balochistan in March 2006; the NWFP and Sindh authorities have not released recent data. See below for more detailed figures.

⁴⁷ *The News*, 13.07.2006

Executions are carried out by hanging, although death by stoning is also provided for by law, as is the case for rape and Zina (sexual intercourse outside marriage) under *Hadd*⁴⁸. It has so far never been carried out, although the law entered into force in 1990.

It is of grave concern that Pakistan has in recent years witnessed a significant increase in convictions to death penalty. According to HRCP, 361 persons were condemned to death in 2005.

Such an increase of convictions to death has to be viewed in the context of a 2003 Supreme Court ruling which stated that, in cases of murder, *“the normal penalty of death should be awarded and leniency in any case should not be shown, except where strong mitigating circumstances for lesser sentence could be gathered”*⁴⁹. Since then, the standard required for mitigating circumstances to justify lower sentences has become *“preposterously high”*, says an attorney, *“and de facto, impossible to reach”*. Another adds: *“Before, if there was any doubt about premeditation, or provocation, then death penalty would not be imposed. But now the trend is to hand it every single time, regardless of the circumstances of the case. Judges have started feeling like policemen, and imposing death penalty is a means for them to feel that they are restoring law and order”*. The ruling confirmed, and strengthened, previous rulings which had all tended to reverse the former case law, where life imprisonment was the norm for murders, death sentence being handed only in exceptional cases (*“the rarest of the rare”*). This means that today, in Pakistan, sentences other than capital punishment are handed only exceptionally in cases of murder. The lack of consistency of Pakistani courts is to be noted: depending on the judge, on the province, on the political situation in the country, a defendant will be treated differently.

According to the interviews conducted, it appeared that the law commonly referred to as the Qisas and Diyat Ordinance⁵⁰, which provides for the possibility to pay “blood money” in lieu of capital punishment, has paradoxically played a role in such an increase: it has inclined Sessions judges to award capital punishment more easily, since the eventuality of compromise makes it non final. Such a tendency in Sessions Courts is also due to a 2002 Supreme Court ruling that, in cases of grave offences, *“technicalities should be overlooked”*⁵¹; this has translated into lower standards of evidence required for conviction, and into a generally lower level of integrity of trials. The widespread support for death penalty in the country undoubtedly played its part.

Other Supreme Court rulings (*see below*) have also contributed to expanding the scope of death penalty and limiting the grounds of acquittals, while a Federal Shari’at Court (FSC) ruling limited the possibilities of pardon by the President, in spite of the constitutional provision that grants him the right to do so. The FSC ruled that, according to Islamic law, the legal heirs of a murder victim are the sole persons entitled to grant mercy to the culprit (this is discussed in detail later). Such a ruling is to be viewed in the context of a general privatisation of justice in Pakistan, whereby crimes are less and less considered as offences against the State, and more as disputes between individuals or families. A recent case of a Briton condemned to capital punishment, Mirza Tahir Hussain, who was granted clemency on 17 November 2006 by President Musharraf after massive international pressure and against the wishes of the victim’s family, shows, however, that a double standard applies, and that the President still retains the right to pardon when the political circumstances demand it, in spite of claims by various officials that he was no longer empowered to do so, which reportedly explained why he rejected all mercy petitions.

Besides the increase in death sentences and in executions, the HRCP and FIDH see as no less alarming the fact that over the years, Pakistan has witnessed an inflation of the charges which carry death penalty. At the time of independence, in 1947, only homicide and treason carried death penalty; today, there are 27 different charges which carry death penalty, including blasphemy, stripping a woman of her clothes in public and sabotage of the railway system. This goes far beyond the scope of the expression *“most serious crimes”* (General comment on ICCPR, art. 6(2)⁵²) for which death penalty should be reserved, and which is interpreted as meaning that death penalty should not be awarded for crimes beyond intentional crimes

⁴⁸ An Islamic punishment only enforced under strict evidentiary requirements. It is a fixed punishment, meaning that the judge cannot adapt it to the particular circumstances of the case.

⁴⁹ Badar Munir vs. State, 2003 YLR 753(G)

⁵⁰ Criminal Law [Amendment] Ordinance, 1990. We will hereafter and throughout the report refer to it as the Qisas and Diyat Ordinance.

⁵¹ PLD 2002, SC 558 Muhammad Saleem vs. the State.

⁵²It should be noted, however, that Pakistan has not ratified the ICCPR.

with lethal or other extremely grave consequences⁵³. The recently adopted Women's Protection Bill⁵⁴, though a welcome step insofar as it eliminates death penalty for gangrape, nonetheless falls far below international standards on the matter, and does not provide the necessary safeguards against discrimination or an unfair application of the law. It has to be said, though, that the vast majority of death sentences in Pakistan are in fact issued for murder.

Many of these new charges were introduced during the 1977-88 reign of Zia Ul Haq, which also represented an all-time high for executions – and an all-time low for human rights. Besides his Islamisation drive (notably with the introduction of the Hudood Ordinance as well as the initiative to change the penal offences of murder and hurt, which were eventually introduced in 1990 with the Qisas and Diyat Ordinance), Zia Ul Haq is also largely held responsible for “breaking the back” of the judiciary, and the legal profession in general. The most famous death row inmate, former Prime Minister Zulfikar Ali Bhutto, was executed on 4 April 1979 on the charge of conspiring to murder a political opponent, after what was widely held to be an unfair and politicised trial. Bhutto's appeal to the Supreme Court was rejected by 4 judges out of 7; one of the 4 stated in hindsight that the death penalty should not have been awarded, and that he regretted his decision to condemn Bhutto to death, which was due mainly to the massive pressure he had been subjected to.

If Bhutto's execution made headlines the world over, and the lack of independence of the judiciary in his trial and appeals was clear, it is sadly not the only case where capital punishment is awarded after a manifestly flawed process. As we will see in the report, it is most disquieting to note that convictions to capital punishment often occur after botched police investigations and unfair trials, where possibilities of corruption, coercion, intimidation of witnesses and of police officials, and political or social pressure, among others, happen at every stage, thus allowing for unacceptably high probabilities of miscarriage of justice. From arrest to execution, the process shows systemic flaws, with few or no protections against such miscarriages of justice, which is even more scandalous when the punishment is irreversible and irreparable – death. It appears that Pakistan's special courts are even more prone to such injustices, with overall unacceptably low safeguards of constitutional rights for defendants and of guarantees of a fair trial. The recent war on terror has added to the concerns of the human rights community, with anti-terrorist courts summarily trying defendants without proper guarantees of due process of law. The Anti-terrorism laws have also tended to shift the burden of proof from the prosecution to the accused.

On top of the low standard of police investigations and the lack of judicial independence, other factors have further contributed to lowering the integrity of the rule of law and of the judicial process, among which the above-mentioned possibility of compromise in lieu of punishment (provided by the Qisas and Diyat Ordinance) stands prominently, as we will see more in detail: indeed, since the defendant who has paid blood money is immediately released, one is virtually certain to get away with murder and not be punished at all, provided one is rich enough. This provision has also added to the social discrimination already manifest in the administration of capital punishment, as poorer defendants are clearly at a disadvantage: first of all because of the paucity of legal aid – legal assistance, especially in the lower courts, is wholly inadequate –, but also because of the lack of financial means to meet the costs of compensation possibly demanded by the legal heirs of the victim; furthermore the generally hierarchical and unfair social structure inevitably skews police investigations and judicial proceedings in favour of the wealthy and influential.

The situation in tribal areas is, sadly, no better, even though the legal regime ruling these areas does not provide for death penalty: so-called tribal “trials”, called by the local *jirgas*, routinely provide for unlawful executions of defendants. The lack of judicial guarantees, of defence, of appeals, combined to deep-rooted cultural prejudice, particularly on “honour”, make such executions singularly inequitable.

In short, in the words of a prominent Supreme Court Advocate: “*The judicial process is now so flawed in Pakistan that death penalty amounts to murder*”.

⁵³ General Comment on art. 6 of ICCPR, para 7.

⁵⁴ Adopted in November 2006.

Among the stunningly absurd stories that the delegation heard or read about, let us mention that of a man executed in early 2006, in spite of a stay of execution ordered by the court. Due to “*a negligence of the registrar’s office*”, the suspension of execution was somehow not transmitted to the jail. The man was executed while the court was preparing to look at his appeal⁵⁵.

There is indeed little doubt that the application of death penalty in Pakistan does not, at the present stage, conform to relevant international standards on the matter. The very grave flaws in the investigative and judicial processes, as well as in the law itself, currently make it an arbitrary, socially discriminatory and unfair punishment – all the more unacceptable as it is irreversible –, in a general context of lack of judicial independence, of erosion of the rule of law, of corruption of investigative agencies, and where social structures reduce equality before the law to mere wishful thinking.

Very few statistics are publicly available on death penalty, and the HRCP/FIDH delegation has noted a definite reluctance by officials to share available data on the issue. Very few systematic studies have been conducted on themes relating to capital punishment, and there does not in any case appear to be a policy of collecting data on the part of the authorities. It has e.g. been impossible to get any reliable data, be it at provincial or at federal level, on the number of acquittals or overturning of death sentence on appeals, or on the proportion of condemned prisoners who avoid execution by entering a compromise, in spite of repeated requests. Neither has it yet been possible to obtain figures on the number of pardons granted by the successive presidents of Pakistan in recent years.

On this issue, the HRCP and FIDH would like to underline the fact that the United Nations Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions noted that “*in a considerable number of countries, information relating to the death penalty is cloaked in secrecy. No statistics are available as to executions, or as to the numbers or identities of those detained on death row, and little if any information is provided to those who are to be executed and to their families. Such secrecy is incompatible with human rights standards in various respects. It undermines many of the safeguards which operate to prevent errors and abuses and to ensure fair and just procedures at all stages. It denies the human dignity of those sentenced, many of whom are still eligible to appeal, and it denies the rights of family members to know the fate of their closest relatives.*”⁵⁶ ... “*The countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty.*”⁵⁷

3. Widespread public support of death penalty

Such a situation is to be correlated to the wide public backing of death penalty in Pakistan.

The argument most frequently cited in support of retaining the death penalty is the high crime rate in the country, and the assumed deterrence of this punishment. Available figures prove this argument to be wholly untenable (*see foreword*) – including in Pakistan itself: according to Amnesty International⁵⁸, official figures available for instance from Punjab province show that the reported incidence of murder has increased there faster than the population increase - despite the death penalty for murder being in force and regularly applied.

On the same grounds, many interviewees added that they supported death penalty because of the supposed “backwardness” of Pakistan; for obscure reasons, the argument was that its abolition could only happen at a certain stage of judicial, economic and political development. One could argue that the retention of capital punishment in a country where the judicial safeguards against miscarriages of justice are tenuous, and where social inequality remains massive, should on the contrary weigh in favour of abolishing, or at the very least suspending, it.

⁵⁵ Reported by *The Daily Times*, 30 May 2006.

⁵⁶ E/CN.4/2005/7, para. 57.

⁵⁷ *Ibid.* para. 59.

⁵⁸ ASA 33/10/96

Such a widespread public support of death penalty means that there is considerable pressure on the judges by society at large: *“In case of acquittal or sentencing to life imprisonment, public opinion views the judges as corrupt and as siding with the murderer; I know of cases where the judge got death threats because he hadn’t sentenced a defendant to death; and I cannot count the cases where the victim’s relatives explicitly said that they would kill the defendant themselves if he’s not convicted to death by the court”*, explained an attorney. Besides curtailing the independence of the judiciary, such public and social pressure contributes to an inequitable and arbitrary application of death penalty, where the reconciliation of families or of villages is viewed as taking precedence over the guarantees of fair trial and due process of law. Several officials and judges interviewed by the delegation acknowledged that, in their view, awarding capital punishment helped to limit the disastrous effects of the clan-based social structure in some parts of Pakistan, where the cycle of revenge can go on for decades: *“In any case, we know that, in cases of family feuds, the culprit will be killed by the opposing party – which will, in turn, entail yet another revenge murder. So awarding death penalty is a means of cutting short this string of endless murders”* said one of them. The HRCP and FIDH strongly oppose such arguments, which not only subordinate the proper administration of justice to utilitarian considerations of supposed – and unproven – collective harmony, but also perverts the role of the justice system by turning judges into auxiliaries of the police.

It is no small contradiction that such utilitarian arguments are often shored up by the general view that punishment should be understood in a retributive, rather than in a reformist, perspective. *“An eye for an eye – a man who has taken another person’s life does not deserve to keep his”*, says an attorney – who was, however, unable to justify why a rapist then should not be raped and a thief, be stolen in return, or to justify the extension of death penalty to charges other than murder, as is the case in Pakistan. Neither is it possible to legitimise the lack of safeguards against miscarriages of justice in the Pakistani legal system, which means that there is no certainty that innocents have not been convicted to death. Following this line of thought, the delegation repeatedly heard that, given the mode of calculation of “days of detention” by the jail authorities (where 12 hours reportedly equate a day of detention, which means that 24 hours actually equal two days of detention), life imprisonment does *de facto* not exceed 10 to 13 years, which is widely regarded as too lenient a punishment for murder.

It has to be noted that the religious factor definitely plays a role, as many people see death penalty as a mandatory punishment prescribed by the Qur’an for certain offences, and therefore both legitimate and unquestionable. The above-mentioned retributive view of the death penalty is to be seen in this context. A prominent lawyer interviewed by the delegation stated that *“indeed, it is God’s prerogative to take life; but here, in our semi-theocratic state, there is a general feeling that the judge represents God when he emits his verdict; this is why he has the right to sentence to death”*. There is little doubt that views based on religion are an added obstacle in creating the space for a rational debate on the acceptability of capital punishment.

The HRCP and FIDH are not to engage in a theological debate about the justifiability of death penalty in Islam. However, given the diversity of interpretations by Muslim scholars on the issue, they are of the view that *“the religious argument is invoked frequently, yet the diversity of practice would suggest there is little consensus even among Muslims as to the scope of capital punishment (...). It appears that religion is little more than a pretext to justify a resort to harsh penalties that is driven by backward and repressive attitudes in the area of criminal law”*⁵⁹.

The delegation noted with some irony that many of the strongest proponents of capital punishment, which unreservedly defended the retributive as well as the deterrent argument, were simultaneously very strong supporters of the possibility of monetary compensation in lieu of punishment, as provided for by the Qisas and Diyat Ordinance – a provision which intrinsically contradicts both arguments: the rich culprit paying for his offence will neither get the retribution, nor will he be deterred from committing it again.

It hence comes as little surprise that the opponents of capital punishment are few and far between, even among legal actors who acknowledge the lack of judicial safeguards and guarantees for condemned prisoners, and who often don’t even view death penalty as a human rights issue.

⁵⁹ William Schabas, “Islam and the Death Penalty”, originally published in William and Mary Bill of Rights Journal 9:1 (December 2000): 223-237.

Only a small number of organizations have picked up the issue, among which the HRCP, the AGHS legal cell, the DCHD (Democratic Commission for Human Development) - both human rights NGOs – and the Women’s Action Forum (WAF). All organisations report having faced serious problems in trying to raise awareness of the unfairness of the application of death penalty in Pakistan, let alone its lack of justification.

Such lack of public awareness may also explain why, in the words of a high ranking official, “*no Chief Justice has ever been interested in addressing the issue of death penalty, or the unfairness of its application in Pakistan. It has never been given priority. Death penalty has never received proper attention in this country*”.

I. THE LEGAL FRAMEWORK

1. The international legal framework

The provisions of international law on capital punishment are described above. As stated, international law has incrementally restricted the scope and implementation of death penalty, and aims at its abolition. In the specific case of Pakistan, the HRCP and FIDH would like to emphasise the fact that the extension of the death penalty in Pakistan in recent years goes against the spirit of the above-mentioned UN General Assembly resolution 32/61 of 8 December 1977 which says “*that the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment*”.

Pakistan has not ratified the ICCPR, in spite of a specific recommendation to do so by the UN Special Rapporteur on Torture in 1996⁶⁰; however, the declarations, general comments, safeguards, and resolutions from international bodies may be considered customary international law (as described in Article 38 of the Statute of the International Court of Justice) as “*international custom, as evidence of a general practice accepted as law*.” In any case, they reflect the current international standards in the field. Thus, Pakistan still has the obligation to comply with, for example, the Commission on Human Rights Resolutions 2001/68 and 2002/77 “*urg[ing] all States that still maintain the death penalty:*

- (a) *To comply fully with their obligations under the Covenant and the Convention on the Rights of the Child, notably not to impose the death penalty for any but the most serious crimes ... [and]*
- (c) *To ensure that the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, non-violent religious practice or expression of conscience and sexual relations between consenting adults”⁶¹.*

Even more precisely, in its resolutions 2004/67 and 2005/59, the UN Commission on Human Rights called upon all States that still maintained the death penalty “*to progressively restrict the number of offences for which it could be imposed and, at least, not to extend its application to crimes to which it did not at present apply*”⁶².

It should also be borne in mind that the U.N. Convention on the Rights of the Child – ratified by Pakistan in 1990 – specifically prohibits the use of the death penalty for juvenile offenders. However, there still seems to be juvenile offenders condemned to death in Pakistani prisons.

2. Crimes carrying the death penalty in Pakistan

As shown below, the list of charges carrying death penalty in Pakistan is remarkably long – an amazing 27 charges! –, and, as stated, goes beyond the notion of the “most serious crimes” as recommended by ICCPR.

⁶⁰E/CN.4/1997/7/Add.2, 15 October 1996, para 102.

⁶¹ Commission on Human Rights Res/2001/68, 25 April 2001, [http://www.unhcr.ch/huridocda/huridocda.nsf/\(Symbol\)/E.CN.4.RES.2001.68](http://www.unhcr.ch/huridocda/huridocda.nsf/(Symbol)/E.CN.4.RES.2001.68), (March 18, 2005) Commission on Human Rights, Resolution 2002/77, 25 April 2002, <http://www.unhcr.ch/Huridocda/Huridocda.nsf/TestFrame/> (March 18, 2005)

⁶² The UN Commission on Human Rights adopted Resolution 2004/67 on the question of death penalty on 21 April 2004, and resolution 2005/59 on 20 April 2005.

It has to be added that some crimes carry *mandatory* death penalty, such as blasphemy (*see section on minorities*).

However, and as is shown by the figures below, the vast majority of death penalty cases are based on only 4 or 5 charges, the main one being murder.

As noted by the UN Special Rapporteur on Extrajudicial Executions in his 2005 annual report, “*the legislation of a significant number of States provides for the death penalty to be mandatory in certain circumstances. The result is that a judge is unable to take account of even the most compelling circumstances to sentence an offender to a lesser punishment, even including life imprisonment. Nor is it possible for the sentence to reflect dramatically differing degrees of moral reprehensibility of such capital crimes.*”⁶³

The last resolution on the question of the death penalty adopted by the UN Commission on Human Rights urges all states that still maintain the death penalty to ensure that it is not imposed as a mandatory sentence.⁶⁴

List of crimes carrying death penalty in Pakistan:

Murder

- Causing death of person other than the person whose death was intended

Section 301 of Pakistani Penal Code:

“Where a person, by doing anything which he intends or knows to be likely to cause death, causes death of any person whose death he neither intends nor knows himself to be likely to cause, such an act committed by the offender shall be liable for *quat-i-amd*”

- Quatl-i-amd (first degree murder)

Section 302 of Pakistani Penal Code:

“Whoever commits *quat-i-amd* shall, subject to the provisions of this Chapter be

(a) *punished with death* as *Qisas*

(b) *punished with death* or either imprisonment for life as *ta’zir* having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available”

- Dacoity with Murder

Section 396 of Pakistani Penal Code:

“If any one of five or five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons *shall be punished with death*, or imprisonment for life, or rigorous imprisonment for a term which [shall not be less than four years nor more than] ten years, and shall also be liable to fine.”

Blasphemy

Section 295-C of the Pakistani Penal Code:

“Use of derogatory remark, etc, in respect of the Holy Prophet: Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) *shall be punished with death*, and shall also be liable to fine.”

In 1990, the Federal Shari’at Court ruled that “*the penalty for contempt of the Holy Prophet (...) is death and nothing else*”⁶⁵, and on May 1, 1991, the death penalty became mandatory for persons convicted under 295-C. Section 295-C applies only to insults to Islam. The accused may be arrested without warrant, and he or she cannot get bail. Trial is before a session court; the judge is required to be a Muslim.

The same Federal Shari’at Court added that “*no one after the Holy Prophet (pbuh) exercised or was authorized [to exercise] the right of reprieve or pardon*” – which means that the mandatory punishment of death for committing blasphemy cannot be commuted by anyone.

Abetment of mutiny

⁶³ E/CN.4/2005/7, para. 63.

⁶⁴ UN Commission on Human Rights, Resolution 2005/59.

⁶⁵ Muhammad Ismail Qureshi v. Pakistan, PLD 1991 FSC 26

Section 132 of the Pakistani Penal Code

“Abetment of mutiny, if mutiny is committed in consequence thereof. Whoever abets the committing of mutiny by an officer, soldier, sailor, or airman, in the Army, Navy, or Air Force of Pakistan, shall, if mutiny is committed in consequence of that abetment, *be punished with death* or with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

Arms trading

Section 13-A (1) of the Pakistan Arms (Amendment) Ordinance, 1996:

“Penalty for transportation of arms, etc. (1) Whoever—

- (a) transports, sells or keeps, offers or exposes for sales, a cannon, grenade, rocket launcher, missile, machine gun, sub-machine gun, dynamite or detonator, or ammunition which can be fired from such arms; or
- (b) goes armed with any of the arms or ammunition referred to in clause (a), in contravention of the provisions of section 8; or
- (c) has in his possession or under his control any of the arms referred to in clause (a) or ammunition which can be fired from such arms, in contravention of the provision of section 9,

shall be sentenced to death or imprisonment for life and his property, whether movable or immovable, shall be forfeited.”

Disclosure of parole or watchword

Section 26 of the Pakistan Army Act:

“Any person subject to this Act who-

- II. treacherously makes known the parole, watchword or countersign to any person not entitled to receive it; or
- III. treacherously gives a parole, watchword or countersign different from what he received, shall on conviction by Court-martial, if he commits the offence on active service, *be punished with death*, or with such less punishment as in this Act mentioned, and if he commits the offence on not active service, be punished with rigorous imprisonment for a term which may extend to five years, or with such less punishment as in the Act mentioned.”

Drug smuggling

Section 9 of the Control of Narcotics Substances Act 1997:

“Punishment for contraventions of sections 6, 7, and 8. Whoever contravenes the provisions of Section 6, 7, or 8 *shall be punishable with:*

- (c) *death* or imprisonment for life or imprisonment for a term which may extend to fourteen years and shall also be liable to fine which may be up to one million rupees, if the quantity of narcotics drug, psychotic substance or controlled substance exceeds the limits specified in clause (b);

Provided that if the quantity exceeds 10 kilograms the punishment shall not be less than imprisonment for life.”

Giving or fabricating false evidence with intent to procure conviction of capital offence

Section 194 of Pakistani Penal Code:

“If innocent person be thereby convicted and executed. And if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence *shall be punished either with death* or the punishment hereinbefore described.”

Haraabah

- Definition

Section 15 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979:

“When any one or more persons, whether equipped with arms or not, make show of force for the purpose of taking away the property of another and attack him or cause wrongful restraint or put him in fear of death or hurt, such person or persons are said to commit *haraabah*.”

- Punishment for haraabah

Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979:

“Whoever, being an adult, is guilty of haraabah in the course of which he commits murder *shall be punished with death* imposed as hadd.”

High treason

Section 2 of the High Treason Act, 1973:

“Punishment for high treason, etc,- A person who is found guilty - of having committed an act of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third of March 1956; of high treason as defined in Article 6 of the Constitution, *shall be punishable with death* or imprisonment for life.”

Hijacking and harbouring hijacking

Section 402-B of Pakistani Penal Code:

“Whoever commits, or conspires or attempts to commit, or abets the commission of hijacking *shall be punished with death* or imprisonment for life, and shall also be liable to forfeiture of property and fine.”

Section 402-C of Pakistani Penal Code:

“Whoever knowingly harbours any person whom he knows or has reasons to believe to be a person who is about to commit or has committed or abetted an offence of hijacking, or knowingly permits any such persons to meet or assemble in any place or premises in his possession or under his control, *shall be punished with death* or imprisonment for life, and shall also be liable to fine.”

Importing, exporting into and from Pakistan dangerous drugs

Section 13 of the Dangerous Drugs Act, 1930:

“Punishment for contravention of Section 7, - Whoever, in contravention of Section 7, or any rule made under that section or any condition of a licence granted thereunder—

- (a) imports into Pakistan,
- (b) exports from Pakistan, or
- (c) transships,

any dangerous drug, *shall be punished with death* or with imprisonment for life, and shall also be liable of fine.”

Section 14 of the Dangerous Drugs Act, 1930:

“Punishment for contravention of Section 8. – Whoever, in contravention of Section 8, or any rule made under that section, or any condition of a licence issued thereunder:

- (a) imports or exports inter-provincially, transports, possesses or sells any manufactured drugs or coca leaf; or
- (b) manufactures medical opium or any preparations containing morphine, diacetylmorphine or cocaine.

shall be punished with death or imprisonment for life, and shall also be liable to fine.

Kidnapping or abduction

- With the intention of unnatural lust

Section 12 of the Offence of Zina Ordinance (Enforcement of Hudood), 1979:

“Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be in danger of being subjected to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, *shall be punished with death* or rigorous imprisonment for a term which may extend to twenty-five years, and shall also be liable to fine, and, if the punishment be one of imprisonment, shall, also be awarded the punishment of whipping not exceeding thirty stripes.”

- Abduction of a minor under fourteen years old

Section 364-A of the Pakistani Penal Code:

“Whoever kidnaps or abducts any person under the age of [fourteen], in order that such person may be murdered or subject to grievous hurt, or slavery, or to the lust of any person or may be so disposed of as to be in danger of being murdered or subjected to the grievous hurt, or slavery, or to the lust of any

person *shall be punished with death* or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years and shall not be less than seven years.”

- For extorting property, valuable security, etc

Section 365-A of Pakistani Penal Code:

“Whoever kidnaps or abducts any person for the purpose of extorting from the person kidnapped or abducted, or from any person interested in the person kidnapped or abducted, any property, whether movable or immovable, or valuable security, or to compel any person to comply with any other demand, whether in cash or otherwise, for obtaining release of the person kidnapped or abducted, *shall be punished with death* or imprisonment for life and shall also be liable to forfeiture of property.”

Mutiny and insubordination

Section 31 of the Pakistan Army Act, 1952:

“Any person subject to this Act who commits any of the following offences, that is to say-

- (a) begins, incites, causes, or conspires with any other person to cause, or joins in, any mutiny in the military, naval, or air forces of Pakistan or any forces co-operating therewith; or
- (b) being present at any such mutiny, does use his utmost endeavours to suppress the same; or
- (c) knowing or having reason to believe in the existence of any such mutiny or any intention to commit such mutiny or of any such conspiracy, does not without reasonable delay give information thereof to his commanding or other superior officer; or attempts to seduce any person in the military, naval, or air forces of Pakistan; shall, on conviction by court-martial, *be punished with death* or with such less punishment as is in this Act mentioned.”

Offences against the State

- Waging or attempt to wage war or abetting waging of war against Pakistan

Section 121 of the Pakistani Penal Code:

“Whoever wages war against Pakistan or attempts to wage such war, or abets the waging of such war, *shall be punished with death*, or imprisonment for life, and shall also be liable to fine.”

Offences in relation to enemy

Section 24 of the Pakistan Army Act, 1952:

“Any person subject to this Act who commits any of the following offences, that is to say,-

- (a) shameful abandons or delivers up any garrison, fortress, airfield, place, post or guard committed to his charge or which it is his duty to defend, or uses any means to compel or induce any commanding officer or other person to do any of the said act; or
- (b) in the presence of the enemy, shamefully casts away his arms, ammunition, tools or equipment, or misbehaves in such manner as to show cowardice; or
- (c) intentionally uses words or any other means to compel or induce any person subject to this Act, or to the Air Force Act, XIV of 1932 (or the Pakistan Air Force Act, 1953), or to the Pakistan Navy Ordinance, 1961 (XV of 1961), to abstain from acting against the enemy or to discourage such person from acting against the enemy; or
- (d) directly or indirectly, treacherously holds correspondence with, or communicates intelligence to the enemy or who coming to the knowledge of such correspondence or communication treacherously omits to discover it to his commanding or other superior officer.
- (e) directly or indirectly assists or relieve the enemy with arms, ammunition, equipment, supplies or money, or knowingly harbours or protects an enemy not being a prisoner; or
- (f) treacherously or through cowardice sends a flag of truce to the enemy; or
- (g) in time of war, or during any operation, intentionally occasions a false alarm in action, camp, garrison or quarters, or spreads reports circulated to create alarm or despondency; or
- (h) in time of action, leaves his commanding officer, or quits his post, guard, picquet, patrol, or party without being regularly relieved or without leave; or
- (i) having been made a prisoner of war, voluntarily serves with or aids the enemy; or
- (j) knowingly does when on active service any act calculated to imperil the success of the Pakistan forces or any forces cooperating therewith or of any part of such forces; shall, on conviction by court-martial, *be punished with death* or with such less punishment as in this Act mentioned.

Sabotage of the railway system

Section 127 of the Railways (Amended) Act, 1995:

“Maliciously hurting or attempting to hurt persons travelling by railway or damaging property belonging to railway. If a person unlawfully throws or causes to fall or strike at, against, into, upon, any property belonging to any railway, including rolling-stock forming part of a train, any explosive substance, wood, stone, or other matter or thing with intent, or with knowledge that he is likely to endanger the safety of any person being in or upon such property, he *shall be punished with death* or imprisonment for life, and shall also be liable to forfeiture of property and fine which may extend to twenty thousand rupees.”

Stripping a woman's clothes

Section 354-A of the Pakistani Penal Code:

“Assault or use of criminal force to woman and stripping her of her clothes. Whoever assaults or uses criminal force to any woman and stripes her of her clothes and, in that condition exposes her to the public view, *shall be punished with death* or with imprisonment of life, and shall also be liable to fine.”

Terrorism Laws

Section 7 of the Anti-Terrorism Act 1997

“Punishment for acts of terrorism. Whoever commits an act of terrorism under Section 6, whereby:--

- (a) death of any person is caused, *shall be punishable*, on conviction, *with death* or with imprisonment for life, and with fine...”

Zina (illegal sexual intercourse)

- Zina liable to hadd

Section 5 of the Offence of Zina Ordinance (Enforcement of Hudood), 1979:

“(1) Zina is zina liable to hadd if-

- (a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married; or
 - (b) it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be married.
- (2) Whoever is guilty of Zina liable to hadd shall, subject to the provisions of this Ordinance,--
- (a) if he or she is a *muhsan*, *be stoned to death at public place;*”

- Zina-bil-jabr (Rape)

Section 6 of Offence of Zina Ordinance (Enforcement of Hudood), 1979:

“(1) A person is said to commit zina-bil-jabr if he or she has sexual intercourse with a woman or a man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely: -

- (a) against the will of the victim,
- (b) without the consent of the consent of the victim
- (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt, or
- (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

Explanation.- Penetration is sufficient to constitute the sexual inter-course necessary to the offence of zina-bil-jabr.

- (2) Zina-bil-jabr is zina-bil-jabr liable to hadd if it is committed in the circumstances specified in sub-section (1) of section 5.
- (3) Whoever is guilty of zina-bil-jabr liable to hadd shall be subject to the provisions of this Ordinance,--
 - (a) if he or she is a *muhsan*, *be stoned to death at a public place.*”

- Zina-bil-jabr (Gang Rape)

Section 10 (4) of the Offence of Zina Ordinance (Enforcement of Hudood), 1979:

“When zina-bil-jabr liable to tazir is committed by two or more persons in furtherance of common intention of all each of such persons shall be *punished with death.*”

3. Facts and figures on death penalty in Pakistan

As stated, it is extremely difficult to obtain official data on death penalty in Pakistan. When they are handed out, they are often outdated, or inconsistent. Furthermore, they often do not coincide, the figures given by the IG Prisons differing from those handed by province officials.

The available figures give a total of over 7400 individuals currently lingering on death row in the country.

3.1 Figures on executions

*The Reviem*⁶⁶ published in its Sept 7-13, 2006 edition the following chart on the number of executions in Punjab in the last five years:

Name of Jail	2002	2003	2004	2005	Jan-July 2006	Total
Lahore	2	2	1	7	4	16
Gujranwala	5	2	0	1	8	16
Sahiwal	1	1	3	5	2	11
Kasur	1	0	4	2	6	9
Sialkot	0	0	0	1	0	7
Multan	4	2	0	2	5	8
Bahawalpur	3	7	8	12	0	35
D.G. Khan	0	2	1	1	2	4
Rawalpindi	2	1	0	3	1	8
Attock	0	1	0	0	1	2
Gujrat	0	1	0	2	2	4
Jehlum	1	1	1	3	8	8
Mianwali	1	4	4	14	14	31
Faisalabad	1	6	4	11	0	36
Jhang	1	1	2	2		6
Total	22	31	28	66	54	201

It was reported that 1029 executions had taken place in Punjab from 1975 to 2002, i.e. an average of 37 executions per year⁶⁷.

The peak was reached in 1978, with 207 executions. The lowest happened in 1989, where no execution took place. During the last year of Benazir Bhutto's reign, only 9 executions occurred.

3.2 Figures on condemned prisoners

3.2.1 Punjab

As of October 2006, 6,985 were on death row in Punjab jails, including 42 women (the majority of whom are held in Multan's women jail).

The breakdown of condemned prisoners in Punjab was the following (only central jails have gallows)⁶⁸:

Name of prison	Male prisoners	Female prisoners
Central Jail, Faisalabad	670	0
Central Jail, Multan	655	0
Central Jail, Sahiwal	637	0
Central Jail, Gujranwala	615	1
Central Jail, Lahore	516	2
Central Jail, Rawalpindi	485	1
District Jail, Sialkot	423	2
Central Jail, Bahawalpur	377	0

⁶⁶ A supplement of the newspaper *Dawn*.

⁶⁷ *The News*, 13.07.2006

⁶⁸ Figures given by the Punjab authorities.

District Jail, Jhang	341	0
District Jail, Sheikhpura	255	0
District Jail, Sargodha	234	1
District Jail, Kasur	213	0
Central Jail, D.G. Khan	201	0
District Jail, Gujrat	182	0
District Jail, Attock	166	0
District Jail, Shahpur	139	1
District Jail, M.B. Din	139	0
District Jail, Jhelum	133	1
District Jail, Multan	113	0
District Jail, R.Y. Khan	105	0
Women's Jail, Multan	0	33
District Jail, Faisalabad	29	0
District Jail, Lahore	2	0
District Jail, Bahawalnagarh	1	0
Total	6,943	42

3.2.2 NWFP

The delegation was unable to get recent figures. The only available ones dated back to 2004. As of 2004, 110 persons had been awarded death sentence in NWFP, including three women. The figures were given by the NWFP Prison authorities, and show some discrepancies – in particular, it was unclear whether three of these 110 condemned prisoners had already been executed. The stage of appeal was equally unclear for some of them.

It seems that no executions take place in Haripur Central Jail, reportedly because of an explicit request by the former owner of the site, who gave the land for the Prison.

Place of detention:

Name of Jail	Male prisoners	Female prisoners
Central Jail, Haripur	43	3
Central Jail, Peshawar	37	0
District Jail, Kohat	12	0
District Jail, Abbottabad	6	0
District Jail, Timergara	3	0
District Jail, Bannu	3	0
Central Jail, D.I. Khan	3	0

Charges:

Charges	Number of prisoners
302 PPC or QDO – Murder	97
17(4) Hudood – Robbery with murder	8
396 PPC – Dacoity with murder	2
5 (10) Zina - Rape	2
10(4) Zina - Gang rape	1

Stage of appeals:

Stage of appeal	Number of prisoners
High Court	22
Supreme Court	21

Mercy petition	9
Federal Shari'at Court	7
No appeal	2
Appealed, but jurisdiction unclear	49

Length of detention:

- 1 had been imprisoned since 1995, i.e. 9 years at the time of the census
- 2 since 1996
- 3 since 1997
- 7 since 1998

One condemned prisoner was listed as “mentally deranged”. He had been condemned since 2000 and was now appealing to the Supreme Court.

At the time of visit (early 2006), 62 individuals were on death row at Peshawar central jail (whereas it counted place only for 23, officially). Out of these 62, approximately half of them were at the stage of appeal to the High Court, about 20 to 25 at the stage of appeal to the Supreme Court, and the remainder at the stage of mercy petition, while trying to negotiate a compromise with the victim’s relatives.

3.2.3 Balochistan

As of 2 March 2006, according to the Balochistan Prison Authorities, 127 individuals were condemned to death in Balochistan (out of a total jail population of 2860), all of them male. The same authorities gave a figure of 141 condemned prisoners on 28 February 2006. The reason for the discrepancy between the two dates – distant of only 2 days – was not given.

All the condemned are held in Mach Central Jail, the only prison in Balochistan to have gallows.

Charges:

Main Charge	Number of prisoners
302 PPC – Murder	101
17(4) Hudood – Robbery with murder	18
396 PPC – Dacoity with murder	1
7(A) ATA – Act of terrorism	6
Charges not mentioned	1

Stage of Appeals:

Stage of appeal	Number of prisoners
High Court	58
Supreme Court	42
Mercy petition	13
Federal Shari'at Court	13
Waiting for compromise	1

Length of detention:

- 1 had been held since 1993, which means he had spent 13 years in prison
- 1 since 1994
- 5 since 1996
- 2 since 1997
- 6 since 1998

29 had been condemned before an anti-terrorism court, and 1 before a Speedy Trial Court

2 were minors at the time of the crime.

3.2.4 Sindh

In late 2003 (no precise date was given), there was a total of 248 prisoners under death sentence in the Sindh jails, including 1 woman, who is held at the Special Prison for Women in Karachi. 107 were held in Karachi Central Prison, 82 in Sukkur, and 58 in Hyderabad.

The delegation was given details on only 237 condemned prisoners out of the 248, as the list given for the Hyderabad prison was not complete.

Charges:

Main Charge	Number of prisoners
302 PPC or QDO – Murder	188
365(A) – Kidnapping for ransom	26
10(4) Zina – Gang rape	8
17(4) Hudood – Robbery with murder	3
396 PPC – Dacoity with murder	4
7(A) ATA – Act of terrorism	6
Charge unclear	2

Stage of appeal:

All condemned prisoners in Sukkur Jail had appealed, but the jurisdiction was not specified. The following table hence covers condemned prisoners in the Karachi and Hyderabad prisons (155 individuals, given the incomplete list of Hyderabad).

Stage of appeal	Number of prisoners
High Court	121
Supreme Court	18
Mercy petition	4
Federal Shari'at Court	9
Status unclear	3

127 had been tried before an anti-terrorism court, and 3 before a special court for speedy trial.

Length of detention:

- 4 had been held since 1991, i.e. 12 years at the time of the census
- 1 since 1992
- 2 since 1993
- 14 since 1995
- 2 since 1996
- 3 since 1997
- 14 since 1998
- 34 since 1999

4. The Pakistani legal system and procedure

4.1 The intermingling of common law and Islamic Law

The legal system in Pakistan is British in its origin and, until recently, in inspiration as well. The Penal law, the Criminal Procedure Code and the laws of evidence, apart from changes brought in the name of Islam, are based on 19th century British laws. However there has been an incremental Islamisation of the laws over the last 30 years, with a peak under Zia Ul-Haq's rule from 1977 to 1988.

The Council of Islamic Ideology (CII), on the basis of art. 227 and 228 of the Constitution, was already mandated to ensure that *“all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions”*. The CII counts between 8 to 20 members, appointed by the President *“from amongst persons having knowledge of the principles and philosophy of Islam as enunciated in the Holy Quran and Sunnah, or understanding of the economic, political, legal or administrative problems of Pakistan”*.

In May 1980, Zia Ul Haq decreed the establishment of a Federal Shari'at Court (FSC), which exercised dual jurisdictions. In its original jurisdiction the FSC can strike down any law that it found to be “repugnant to Islam”. While doing so the FSC lays down the Islamic criteria or interpretation upon which the future law is to be tailored. In the exercise of its original jurisdiction the FSC ruled that expressions of blasphemy against the Prophet Mohammad (under section 295 C of the Pakistan Penal Code) was punishable by death alone.

The FSC also act as the court of appeal for all decisions on crimes covered by the Hudood Ordinance 1979.⁶⁹ The Supreme Court maintains a *Shari'at* Appellate Bench empowered to review the decisions of the Federal Shari'at Court. As a parallel judicial system, the FSC has had the effect of weakening the jurisdiction of the Superior Courts, and acts as a “super-legislature”, as it can order immediate revision of national laws, and its rulings are binding on high and lower courts.

The government of Pakistan, through an Ordinance and later an Act of Parliament passed wide ranging amendments to the Pakistan Penal Code following a judgment of the Federal Shari'at Court to “Islamise” the Penal law against murder and hurt.⁷⁰ These changes, often referred to as the Qisas and Diyat Ordinance made major offences compoundable (as they are now considered against an aggrieved party only), which they were not when they were considered offences against the State. This was a major step in the privatisation of justice (*discussed below*).

The Hudood Ordinances of 1979, carried two sets of punishments: *hadd* and *tazir*. *Haad* punishment is fixed and requires very strict and specific evidence. According to some lawyers *hadd* has never been executed precisely for this reason. Others believe that the enactment of *hadd* punishments was merely an attempt to intimidate religious minorities and less radical Muslims in Pakistan. *Hadd* punishment for Zina or Rape is stoning to death. Theft is punishable by amputation of hand, while armed robbery for *hadd* punishments begets amputation of foot. So far no execution of *hadd* has been carried out in Pakistan.

Tazir refers to a punishment under common criminal law. Punishment is left for the courts to decide and is not subject to Islamic injunctions. An accused could hence be tried for the same case either as *Hadd* or as *Tazir*.

There remains a controversy whether stoning to death is an Islamic punishment. The Federal Shari'at Court ruled that it was not so. Later the same court, after it was given powers to review its own judgment and the dismissal of its Chief Justice, reversed its former findings.⁷¹ This leads to the conclusion that the interpretation of what constitutes an Islamic punishment depends on the political context.

4.2 A defendant's itinerary through the courts

In Pakistan, there are many levels of courts and some, like the Anti Terrorist Court have exclusive jurisdiction on certain crimes. Generally speaking, crimes punishable by death penalty are tried in the Sessions Courts or exclusive criminal courts like the Anti Terrorist Courts. All death penalty cases are

⁶⁹ These crimes included rape, fornication (zina), theft, armed robbery, drinking of alcohol, drug offences and libel for those who making false accusations of Zina.

⁷⁰ Act II of 1997 Criminal Law (Amendment) Act 1997.

⁷¹ PLD 1981 FSC 145, Hazoor Baksh v. Federation of Pakistan
PLD 1983 FSC 255, Federation of Pakistan v. Hazoor Baksh

heard and confirmed in appeal to the Provincial High Courts. (Appeal for stoning to death would lie to the Federal Shari'at Court). A second appeal lies to the Supreme Court.

4.2.1 The trial

Defendants are tried by a Sessions Court, by a single judge. The atmosphere in Sessions Courts is chaotic. All evidence is conducted in the local language and translated by the judge for it to be recorded. Evidence is dragged over several months allowing subsequent witnesses to go through the evidence recorded earlier. Judges are overburdened with some 50-60 cases to be heard in a single day in Punjab, where the crime rate is highest and death penalty more often awarded. Legal assistance at this stage is not provided for by the State.

A senior judge interviewed by the delegation explained: *“At trial level, several elements play in favour of a high rate of conviction to capital punishment: first, the sessions’ judges feel freer to award death penalty as they know that the High Court will look at the matter more closely, so they can basically wash their hands – even if they know that it still means that the defendant might spend 4, 5 or more years in prison; this is also due to several Supreme Court rulings. Second, the Qisas and Diyat Ordinance means the ever-open possibility of compromise, so the judge doubly knows that his decision is not final. Finally, there is a general social and political pressure on judges to award death penalty when there is at least some evidence, because of the disastrous effect on public opinion of the high crime rate and the lack of resolution of most murders”*.

It has to be reminded here that some charges (such as blasphemy) carry mandatory death penalty, which further nullifies the role of the judge. A judge interviewed by the delegation adds: *“Furthermore, because of the case law on murder which stated that the normal penalty is death, we don’t have much discretion here either. We cannot give reduced sentences”*.

4.2.2 Appeals

As stated, appeals come before the High Court, with a panel of 2 judges. A conviction to death before a Sessions Court has to be “confirmed” by a High Court, which means that the appeal is mandatory. In high profile cases, and “in the interest of justice”, it can act as a trial court. The High Court has broad powers – it can take up cases from a lower court if it wants.

There can be a 2nd appeal, but in this case it is the defendant’s duty to convince the judges: the burden of proof is then inverted.

The Advocate General, appointed by the Governor of the province (art. 140, part IV(3) of the Constitution), is mandated to ensure that proper punishment is administered; he has the authority to challenge any acquittal. Most of the current or former Advocates General interviewed by the delegation stated that they appealed acquittals on a systematic basis. However, most interviewees agreed that the responsibility of the Advocate General had considerably diminished, *“and lost its rigour”*, in the words of one, because of section 417(2) CrPC amended, which, by opening the possibility of appeals by complainants, further contributed to the privatisation of justice.

The appeal to the High Court verdict lies before the Supreme Court, before a bench of 3 judges. Unanimity of verdict is not required. The Supreme Court handles constitutional matters, and is hence not a criminal court. It can nonetheless hear appeals on constitutional grounds.

The Supreme Court has taken a stronger stance on death penalty in recent years (*discussed below*), setting a trend for a systematic application of death penalty in cases of murders.

4.2.3 Mercy petition

After all judicial appeals are exhausted, the defendant can file a mercy petition to the President of Pakistan.

The Constitution of Pakistan, in its article 45, grants the President of the country the right to pardon: *“The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by*

any court, tribunal or other authority". On this basis, mercy petitions are systematically addressed to the President. However, several facts, political and legal, have de facto reduced the ambit of this provision:

- First of all, this provision has, to the knowledge of the authors, almost never been used (it has to be said that it has been remarkably difficult to get official information from the authorities). It appears, though, that Benazir Bhutto, when she became Prime Minister in 1988, passed a General Order to commute all death sentences to life imprisonment. In a much-famed recent case, though, Mirza Tahir Hussain, 36, a Briton who was due to be hanged on 31 December 2006 following his conviction for killing a taxi driver, was granted clemency by President Musharraf on 17 November against the wishes of the victim's family (it was, however, reported that the family was paid 200,000 Rs. upon his release⁷²): capital punishment was commuted to life sentence; since the accused had already served 18 years, he was freed and immediately left Pakistan for Great Britain. It appears, though, that the President had already rejected his mercy petition in 2005. The HRCP and the FIDH are very satisfied about this commutation of sentence. However, it does, in turn, raise the question of the high profile nature of this case and the double standard applied when no such pressure exists, even if the cases might have equal merit; the HRCP and the FIDH urge the President of Pakistan to exercise his powers in less high profile cases.
- More importantly, several rulings have progressively reined in the powers of the President under art. 45, even if he formally remains empowered to commute all sentences (the case of Mirza Tahir Hussain confirming that the powers of the President under art. 45 remain intact, at least in cases of *Tazir*). Most prominently stands the Qisas and Diyat Ordinance in this respect, which specifies that pardon can be exercised solely by the heirs of the victim. Sections 54 and 55 (A) of the PPC confirm these restrictions: "*Punishment cannot be commuted without the consent of the victim, or of his/her relatives*" and 55 (A): "*The president cannot exercise the right to forgive prisoners without the consent of victim's relatives*". In July 2006, the Punjab Home Department, in a comment to a journalist, stated similarly: "*According to the law, a death penalty can only be pardoned by relatives of victims*"⁷³.

It should be remembered that the Federal Shari'at Court is barred under Article 203-D of the Constitution from examining the Constitution as to its conformity with Islam; however, in a 1992 judgment, the Supreme Court held that the president had no power to commute death sentences passed as *Hadd* or *Qisas*⁷⁴. The president's power to commute the death sentence given as *Tazir* punishment remains unaffected (as was the case with Mirza), but the Federal Shari'at Court nonetheless made recommendations in this area: "*We may respectfully advise the President to keep in view the Injunctions of Islam (...) while exercising the power under Article 45 of the Constitution even in matters of Tazir, keeping in view ... [Islamic injunctions]*"⁷⁵.

The full bench of the Supreme Court stated in May 2006 that "*Under article 45 of the Constitution, the President enjoys unfettered powers to grant remissions in respect of offences and no clog stipulated in a piece of subordinate legislation can abridge this power of the President. The Exercise of discretion by the President under art. 45 of the Constitution is to meet at the highest level the requirements of justice and clemency, to afford relief against undue harshness, or serious mistake or miscarriage of the Judicial Process, apart from specific cases where relief is by way of grace alone – where relief or clemency is for the honour of the State*"⁷⁶.

Dr Ilyas Zafar, advocate Supreme Court and authority on Shari'at law, stated in July 2006 that "*the President of Pakistan has the power to commute the sentence and isn't subject to any limitations or conditions*"⁷⁷.

There is hence an ambiguity. It appears, though, that, *de facto*, Article 45 is emptied of its content in cases of murder – the delegation was repeatedly told that the reason by the systematic rejection of the mercy petitions had to be found in this very clause. The usual effect of a mercy petition is hence only to delay the execution during the examination of the mercy petition by the President.

⁷² "Mirza flies off", Daily Times, 18 Nov. 2006.

⁷³ Quoted in Daily Times, 29.07.06.

⁷⁴ Hakim Khan v. Government of Pakistan, PLD 1992 SC 595

⁷⁵ Habib-ul-Wahab Alkhairi v. Federation of Pakistan, PLD 1991 FSC 236

⁷⁶ Abdul Malik vs. The State & others, PLD 2006 SC 365, May 2006.

⁷⁷ Quoted in "Seeking clemency", *Weekly Pulse*, Nov. 3-9, 2006.

In spite of this ambiguity, mercy petitions are filed systematically.

The defendant files a petition with the Home Secretary of the Province in which the crime was committed; the provincial home secretary verifies that no compromise is under way, then makes a short summary of the case (incl. background, judgments and appeals), and sends the file with the opinion of the Department to the Interior Ministry; such files are known as the “black files”. The delegation was repeatedly told by various officials in the provinces that the “Opinions” are almost systematically in favour of death penalty, *“because we cannot go against the decision of the courts”*.

The Interior Minister in turn makes a synopsis of the case, and sends it to the Prime Minister, with a recommendation, based on the possible merits of the petition: was the defendant given a fair trial? Are there grounds for mercy? The petition is sent on from the PM to the President, who sends his reply back via the same channels.

In case of rejection, the Provincial Government then sends the following letter to the prison where the defendant is held:

“Rejection of mercy petition of condemned prisoner XXX confined in XXX Prison.

I am directed to convey that the President of Pakistan has been pleased to reject the mercy petition of condemned prisoner XXX, son of XXX, confined in XXX Prison.

The Prisoner may be informed accordingly and execution of the condemned prisoner carried out. Date and time fixed for execution should be intimated to this Department, for confirmation.

Signed: Section Officer (Mercy Petitions)”

The press reported that by mid-June 2006, 245 mercy petitions were lying with the President, but that *“they were all likely to get rejected”*⁷⁸. 63 petitions had been rejected in the first quarter of 2006. It was not possible to gather more precise data from authorities about the proportion of rejections, and the proportion of positive recommendations made by the Home Secretary, in spite of repeated requests to the provincial and state officials.

Unfortunately, it does appear that the executive can have a say as to whether or not the appellant will be able to even *file* a mercy petition. Mushtaq Ahmad, accused of attempting to kill President Musharraf in Rawalpindi in 2003, was allegedly barred from filing a mercy petition by the Ministry of Interior, after quite a surreal haggling with the jail authorities⁷⁹.

4.2.4 Stays of execution

Stays of execution are often granted when there is possibility that the families might reach a compromise. In the above-mentioned case, Mirza Tahir Hussain, was granted five consecutive stays of execution by the President, reportedly to give more time for financial negotiations with the victim’s family. The information gathered seemed to indicate that the victim’s family had rejected the compromise. The planned date of execution of Nov. 1 was once more postponed to Dec. 31 – until the news of the clemency arrived.

4.3 Case law: gradually expanding the scope of death penalty

The HRCP and FIDH are alarmed to note a string of rulings which all have strengthened the case of capital punishment, extended its realm of application, and overall lowered the judicial safeguards against miscarriages of justice. They also note the lack of consistency of Pakistani courts: depending on the judge, on the province, on the political situation in the country, a defendant will be treated differently.

⁷⁸ *Daily Times*, 29.07.06.

⁷⁹ Reported by *The News*, 18 March 2006.

Already in 1991, the Supreme Court insisted on *“this court’s repeated observations regarding imposition of the normal penalty of death to those convicted for murders and (...) the impression of marked tendency of inhibition or hesitation of the trial courts in awarding the said penalty (...). There can be no controversy that the normal penalty prescribed for the murder by the Divine Law as also the law of the land is death”*⁸⁰.

In 2003, the Supreme Court ruled that, in cases of murder, *“the normal penalty of death should be awarded and leniency in any case should not be shown, except where strong mitigating circumstances for lesser sentence could be gathered”*⁸¹.

The lower courts have consistently followed this ruling. In 2004 the Peshawar High Court ruled that murder *“should be met by the maximum sentence provided by law”*⁸².

In 2001, the Lahore High Court criticised a trial judge for *“without giving any reason whatsoever, [having] imposed the alternate punishment of life imprisonment, contrary to the time tested view of the apex Court that without extenuating or mitigating circumstances normal penalty is death (...). Sparing the appellants with death sentence has caused a grave miscarriage of justice”*⁸³.

These rulings reversed the earlier case law, based on *Bachan Singh vs. State of Punjab*⁸⁴, from which it emerged that *“the extreme penalty of death need not be inflicted except in the gravest cases of extreme culpability”*. The Supreme Court had acknowledged that death penalty should be imposed only in the *“rarest of the rare”* cases⁸⁵.

In 2002, the Supreme Court ruled that *“it was firmly laid down that it is high time that Courts should realize that they owe duty to the legal heirs/relations of the victims and also to the society. Sentences awarded should be such, which should act as a deterrent to the commission of offences (...). The approach of the Court should be dynamic and if it is satisfied that the offence has been committed in the manner as alleged by the prosecution, the technicalities should be overlooked”*⁸⁶; since then, small discrepancies in the evidence have been dispensed with; in particular, the Sessions Courts have hence tended to review the evidence with less precision than was previously done.

In 2001, the Supreme Court ruled that the motive is irrelevant for the purpose of sentencing⁸⁷; previously, when the motive was shrouded in mystery, capital punishment would not be handed out. Now it states that *“the lack of motive by itself is not a mitigating circumstance (...). The absence of motive altogether or the inability of prosecution to prove motive for murder does not affect the imposition of normal penalty of death”*⁸⁸.

In 2003, the Supreme Court ruled that *“courts are duty bound to take into consideration the deteriorating law and order situation and increase in the crime rate which has to be curbed with iron hand”*⁸⁹. Such a “duty” has hardened the courts’ stance on death penalty, even if it is in contradiction with the principle of separation of powers: the situation of law and order is the responsibility of the executive, or of the legislative – but not of the judiciary. A public prosecutor commented that *“judges have started feeling like policemen, as if their duty was to impose law and order. They have definitely strayed from their responsibility of interpreting the law”*. In 2001, the above-mentioned Lahore High Court ruling imposed death penalty on two defendants who had been condemned to life imprisonment at trial stage on the grounds that it was important to *“arrest the rising spiral of crime in our society which has reached alarming proportions (...). If the Court of law at any stage relaxes its grip, the hardened criminal will take the society on the rampage (...). Courts cannot sacrifice this deterrence and retribution at the altar of mercy and expediency”*⁹⁰.

In 2002, the Supreme Court ruled that *“under the Islamic principle of dispensation of criminal justice once it is established that an offence falling within the definition of Hadd is proved, no extenuating or mitigating circumstance can be pressed into service for warranting lesser punishment”*.

5. The Qisas and Diyat Ordinance and its impact on death penalty

⁸⁰ Muhammad Sharif v. State, 1991 SCMR 1622.

⁸¹ Badar Munir v. State, 2003 YLR 753(G)

⁸² Psh HC PLD 2004 p. 143

⁸³ Muhammad Asghar v. Muhammad Riaz and others, 2001 YLR 715

⁸⁴ 1980 Cr.LJ 636 (SC)

⁸⁵ Macchi Singh v. State of Punjab, AIR 1983 SC 957; 1983 Cr. LJ 1457

⁸⁶ PLD 2002, SC 558 Muhammad Saleem v. the State.

⁸⁷ 2001 SCMR 387 Waris Khan v. the State.

⁸⁸ 2002 PCrLJ 1091 (B) Ghaffar v. the State.

⁸⁹ Case Ghulam Nabi v. State, 2003 PCrLJ 2021, ref. to PLD 1976 SC 452.

⁹⁰ Muhammad Asghar v. Muhammad Riaz and others, 2001 YLR 715

In 1990, the sections 299 to 338 of the Pakistan Penal Code relating to murder, manslaughter and bodily harm were replaced by the Criminal Law [Amendment] Ordinance, commonly referred to as the Qisas and Diyat Ordinance⁹¹. It redefined such offences and their punishment in Islamic terms; it also introduced new punishments for these offences. This law came into being as a result of a judgment passed by the Federal Shari'at Court and later confirmed by the Shari'at Appellate Bench of the Supreme Court.⁹² It decided unanimously that sections 299 to 338 of the Pakistan Penal Code, 1860 which dealt with offences against human body were repugnant to the injunctions of Islam. First introduced as an ordinance, it was repeatedly repromulgated until it was passed by parliament in 1997.

The *Qisas* and *Diyat* law regards the offences of physical injury, manslaughter and murder as directed essentially against the person of the victim, and only subordinately against the order of the state, which is the reason why the aggrieved party is given precedence to choose the penalty for the culprit.

Under Islamic law, the punishment can either be in the form of *qisas* (equal or similar punishment for the crime committed) or *diyat* (compensation payable to the victim's legal heirs). All offences under the Ordinance are hence compoundable, i.e. can be settled *ex curiae*.

The Qisas and Diyat Ordinance states that the death penalty may be given as *qisas* for intentionally causing death, or for causing the death of someone other than the person intended. The heirs may waive this right, however, in which case the death penalty cannot be enforced; the convict becomes liable to pay *diyat*, compensation to the heirs of the victim, and may also be sentenced to imprisonment under art. 311 PPC (although courts have only exceptionally maintained a sentence after waiver by the heirs or the victim). In case of murder, the Ordinance specifies a minimum value of *diyat* – 30 kg of silver, or its financial equivalent based on the market value of silver, as determined every year by the government (273,000 Rs in 2006⁹³). For charges other than murder, the *diyat* is determined locally, not by law.

Two situations can occur: under 302 A PPC (Quatl-i-amd liable to Hadd), it is enough that one heir forgives the murderer for the compromise to be reached, and capital punishment, avoided. Under 302 B PPC (Quatl-i-amd liable to Ta'zir), all heirs have to agree, and petition the court for the compromise – which has the right to refuse, and which is bound to verify that the compromise has been reached without coercion or intimidation. In effect, however, the courts never exercise this right, just as they never verify the free and willing nature of the compromise.

The legal heirs are then awarded their share according to Islamic law of inheritance (which is also discriminatory to women, as the shares of female heirs are typically smaller than those of their male counterparts). If the deceased is survived by minors, their share of the compensation is deposited on a bank account under supervision of the court until their majority. When a compromise is passed, a Deed of Compromise is produced before the court. The Walis (legal heirs) appear in court to be identified and state that they have reached a compromise.

The life of an individual therefore hinges not on the norms of justice but on the persuasive powers of his relatives.

Even once the death sentence has been confirmed by the courts, it cannot be carried out if the heirs reach a compromise with the convict. An execution can be halted by the heirs even at the last moment before the execution of the sentence. For instance, on 1 June 2006, it was reported that, on the eve of the execution, Mubashir Begum, widow of Mirza Aziz Baig, pardoned Saeed Moez for her husband's murder in Karachi in 1999. On 28 May 2006, Ali Nawaz Khoso was pardoned in Karachi on the eve of his execution by the heirs of the three brothers he had murdered on 23 August 1998. He was reportedly kept in prison under art. 311 PPC⁹⁴. A superintendent of prison interviewed by the delegation stated that "*once, the family accepted the compromise while watching the executioner tie the rope around the man's neck, up on the gallows*". Another prison official reported having received the Deed of Compromise at 2 am – when the execution was planned at 4.30 am.

There have been cases where a prisoner was executed while the compromise was being concluded: for instance, on 30 May 2006, the press reported that a petition for suspension of execution had been accepted by the Lahore High Court on May 16 in order to arrange for a compromise between the family of the accused, Mr Mohammad Asghar Ali, and the aggrieved party. A notice was issued to the Faisalabad

⁹¹ We will refer to it as such in the rest of the report.

⁹² PLD 1989 SC 633 Federation of Pakistan v. Gul Hasan Khan.

⁹³ Approx. 3600 euros.

⁹⁴ Reported in *Dawn*, 8 June 2006.

Jail Superintendent and the Punjab Home Secretary, and a special messenger was allegedly sent to the prison. However, the accused was executed on 18 May. The Lahore High Court later deplored a “*negligence of the registrar’s office*”⁹⁵. In other cases, a co-accused in a similar act of murder was pardoned and thus set free, while the other was executed.

It has to be noted that it has been impossible for the delegation to gather exact data on the number of cases settled out of court, for any province, in spite of repeated requests to the relevant officials.

The HRCP and FIDH express serious concerns about the impact of the Qisas and Diyat Ordinance:

- On a principled level, it *de facto* amounts to a privatisation of justice, as the offence is no longer an offence to the state, but is considered a dealing between two private parties. This means that in Pakistan, a murder is no longer a crime against the state or its people. It has become a private issue between two families, thus releasing the State from its primary responsibility of providing protection and justice to its citizens. One of the fundamental tenets of punishment, that it is due to society in order to protect it as a community, as well as to preserve the rule and the meaning of law, has been eliminated. It has now been reduced to a mere settlement between individuals, or between families and clans. Such privatisation of justice means a general pollution of the rule of law, and damage to the legal framework. The State withdraws from one of its main responsibilities, as it no longer is the guardian of the rule of law through the exercise of justice.
- This privatisation of justice hence changes the role of the court, now reduced to ensuring fair passage of the case, while the victim’s heirs have the right to decide whether or not prosecution is to continue, appeal to be made and the punishment be inflicted. A judge observed: “*In Islam, the individual victim or his heirs retain from the beginning to the end entire control over the matter including the crime and the criminal. They may not report it, they may not prosecute the offender. They may abandon prosecution of their free will. They may pardon the criminal at any stage before the execution of the sentence. They may accept monetary or other compensation to purge the crime and the criminal. They may compromise. They may accept qisas from the criminal. The state cannot impede but must do its best to assist them in achieving their object, (...) in appropriately exercising their rights.*”⁹⁶
- In particular, when the heirs forgive a murderer, he is acquitted and immediately freed. Although the state still retains the right to punish the offender with a maximum of 14 years of imprisonment under *Ta’zir* (art. 311 of the PPC⁹⁷), the delegation notes that this happens only on an exceptional basis: in effect, blood money means immediate acquittal. A member of the Council of Islamic Ideology deplored this aspect of the Ordinance, stating that “*the original intent of compromise was not to let the culprit go scot-free, but just to avoid death penalty*”. The judicial practice has hence encouraged impunity. A lawyer interviewed by the delegation noted that this could be remedied legally, by imposing a fixed “floor” penalty on murderers who have reached a compromise. In a surprising departure from this practice, the Supreme Court ruled that in cases of dacoity with murder (396 PPC), the courts should still inflict capital punishment, even if the victim’s heirs had pardoned the defendant.
- It has contaminated the sanctity of the murder trial, as the possibility of compromise has *de facto* lowered the standards of evidence required for conviction, and a certain degree of informality, as well as the introduction of extra-judicial elements, has pervaded criminal trials. “*The whole criminal justice system is tainted because the trial becomes “fake”, so to speak, as everyone knows it can stop at any time*” explains a human rights advocate. A former Supreme Court judge added that the Qisas and Diyat Ordinance has translated into a higher rate of conviction to death penalty, and a lower standard of evidence presented to the court.

⁹⁵ *Dawn*, 10 June 2006.

⁹⁶ Quoted by Amnesty International, ASA 33/024/2002

⁹⁷ Confirmed by the Supreme Court, which stated that courts were not bound by a compromise, and could in any case order another sentence than death penalty.

- This privatisation of justice does not only modify in depth the role of the judiciary, but it also limits the power of the executive. As stated above, pardoning a condemned prisoner, in cases of murder, now rests solely with the heirs of the victim, rather than with the President, contrary to art. 45 of the Constitution, although he remains formally empowered to exercise this right. The recent case of Mirza Tahir Hussain, who was granted pardon by President Musharraf on Nov 17, 2006 after massive international pressure (Mr Hussain holds dual Pakistani and British citizenship), against the wishes of the victim's family, shows, however, that the presidential pardon depends more on the political circumstances than on the oft-asserted – and repeated to the delegation innumerable times – stance that the President of Pakistan is not empowered to grant clemency to condemned prisoners.

- The Ordinance has also encouraged highhanded behaviour, as coercion appears to be routinely used to force the legal heirs to accept compromise. There is no transparent and objective procedure to ensure that the compromise is entered freely, willingly, and without intimidation or pressure. Most of the interviewees agreed that the right to compromise was dangerous, insofar as it puts massive pressure on the family of the deceased, which can easily be threatened with yet another murder if they do not accept the deal. On 18 January 2006, the brothers of a murderer awaiting his execution, Saqib Ali, kidnapped a nephew of the victim, Haji Riaz, in order to force the family to accept a compromise. (Saqib Ali had killed Haji Riaz in Faisalabad, reportedly over a land dispute, on Sept. 1, 1989). This was not the first time Saqib Ali's brothers had used such tactics: Saqib Ali was originally due to be hanged on Nov. 22, 2005 – but the execution was put on hold after his brothers abducted Mohammad Asim, the son of the victim, in order to coerce the family into compromise, already then. Mohammad Asim's release was secured, and Saqib Ali's execution was planned anew – until the brothers abducted the nephew, threatening to kill him if a police case was filed, and demanding, besides the compromise, a Rs. 2 million ransom for the nephew's release. Some relatives of Haji Riaz had reported living underground, for fear of abduction, and children were not going to school for this reason, since Haji Riaz's murder. In a most surreal twist, the press reported that the police had seized a Motorway Police personnel said to be a relative of the kidnapping gang, in order to “ensure the safety” of the abductee. On 26 February 2006, the nephew was released, as the family had agreed to pardon the murderer: three MNAs had been involved in brokering the deal between the two families. On 28 Feb. 2006, it was reported that Haji Riaz's two sons had gone to court to certify that they had forgiven their father's killer, without compensation. However, the *Daily Times* reported his execution on 5 May 2006 – all these abductions seem to have been to no avail.
 Needless to say, the social hierarchy, especially in small communities, is of enormous importance. As stated by a judge, *“the right to pardon by heirs puts a premium on murders”*: if a defendant is rich enough, or if he comes from an influential family, he is near certain to get away with murder. Another human rights activist adds that *“the law as it stands amounts to a licence to kill”*. The above-mentioned study conducted in NWFP by DCHD⁹⁸, covering 20 cases of compromises in murder cases, shows that 6 of the defendants (i.e. 33,3%) had never been even arrested: they had absconded, and produced the deed of compromise when appearing in court for the first time.

- According to all testimonies gathered, such coercion has become routine practice; all the more since it often plays in the hands of the local law enforcement agencies, who a) have an interest in a quick settlement, in order to decrease their caseload, b) are often corrupt, and according to evidence gathered, would be paid a bribe to ensure the victim's family agrees to the compromise. An attorney explained: *“The Ordinance is definitely a weapon for corruption of the investigative agency, which can easily twist the course of the investigation. The investigative officer would tell the family ‘your case is very weak, we will not be able to secure a conviction, so you'd better compromise’ – and he gets paid underhand by the defendant's family. Or, conversely, he goes to see the defendant and says ‘oh, you know, the case against you is very strong, it will be very difficult to get acquitted, you'd better seek a compromise’*

⁹⁸ R. Khattak, W. Khattak, “Settled out of Court – the Criminal Justice system in Pakistan”, DCHD.

- and he gets paid by the victim's party". From the testimonies gathered, it thus appears that it is very often the police itself which puts pressure on the complainants to enter a compromise.

- More generally, it has entailed a significant deterioration of police investigations, as murder cases are no longer taken as seriously, especially in family feuds, where the process of compromise starts early on. The above-mentioned study by DCHD⁹⁹, covering 114 cases of murder (for a total of 225 accused and 121 victims), shows that when the complainant is in the immediate family of the deceased, the chance of compromise is much higher than when s/he is not.
- The coercion can take place within the family itself: if one member of the aggrieved party refuses to compromise, while others accept it, the case law is that s/he is turned down, and the compromise is accepted¹⁰⁰.
- Out-of-court settlements perpetuate the discrimination against women: according to the same DCHD study, 100% of cases when a woman had been killed ended with a compromise. The family of a murdered woman in NWFP told the delegation that they had been forced to accept a compromise, *"because they threatened to kill our only son if we didn't accept it, and we cannot afford to lose our only son"*.
- The courts seem to take an attitude of benign neglect when it comes to the coercion taking place for a settlement to be reached. One of the reasons is that such compromises contribute to allaying the task of courts, by disposing of cases.
- The Qisas and Diyat Ordinance adds a further element of social discrimination in an already biased process, as poorer defendants might not be able to gather the funds necessary for the required compensation. The law hence discriminates in terms of the financial capacity of the offender. Those who cannot afford to pay to save their lives will be executed. A death row inmate convicted of murder told the delegation that the complainants had demanded 6 million Rs., whereas he could only afford 2 millions. The relatives of a condemned executed a few years ago stated that the victim's relatives had asked for 1 million Rs, but all they had managed to gather was 400,000 Rs. *"The requirement that the death sentence cannot be commuted except with the consent of the heirs of the victim, who may grant mercy to the convict and accept diyat, compensation, in place of execution, makes it likely that a compromise settlement may be less frequently found with a poor convict than a rich one. This would result in the death penalty being applied arbitrarily: poor people sentenced to death would be more likely to be executed than those who are rich"*, writes Amnesty International¹⁰¹. Indeed, one could imagine the situation where two co-defendants, accused of the same crime, would, depending on their fortunes, face two radically different prospects: the poor one would be executed, while his co-accused would be acquitted, simply on the basis of the latter's ability to pay off the compensation. However, the HRC and FIDH welcome the recent, Dec 2006 ruling by the Supreme Court that the State was bound to pay the amount of compensation demanded by the victim's heirs in case the defendant cannot afford it.
- The introduction of a compromise has informally revived – or strengthened – age-old practices banned by law, such as demanding, besides "blood money", a woman in marriage, or the permanent exile of the defendant. The lack of effective judicial supervision of the negotiations has direct bearing on the multiple irregularities of such procedures, and the open possibility of coercion and intimidation. Several attorneys interviewed added that it was very common to have a payment "behind the screen", whereby the relatives would get a woman in marriage, or property, or much more money than officially stated. The compensation can also take the form of the permanent exile of the accused, who is never allowed to come back to his village – or

⁹⁹ "Settled out of Court – the Criminal Justice system in Pakistan", DCHD.

¹⁰⁰ 2005 SCMR 599 Khan Muhammad v. The State. In case of Qisas any one heir can forgive but in capital punishment in Tazir all heirs must agree to the compromise.

¹⁰¹ ASA 33/034/1997

faces murder if he does. In November 2000, the Peshawar High Court held that in cases of *dijyat*, the handing over of a woman shall not be a valid form of compensation and lower courts shall not accept such agreements. This judgement has been ignored as the practice is reported to persist.

- In cases of “honour killings”, there is virtual impunity. In such practices it is family members who conspire to kill a woman on suspicion of immorality and thereafter they forgive the relative who killed the woman. Human rights organizations protested against this law and an amendment was adopted in 2002 granting courts discretion to punish the offender despite a compromise. So far the courts have not exercised this discretion and generally maintain a general hands-off, no-interference policy in such settlements.
- It has added pressure on independent witnesses (*see below*), which can become an obstacle in cases of settlement out of court, as the only ones who would stand in the way of a compromise.

6. The case of juveniles

In 2000, the Juvenile Justice System Ordinance (JJSO) was promulgated, which prohibited the application of death penalty to persons under 18 years of age, and provided for juvenile courts. Although seemingly unevenly applied, this was a significant step towards Pakistan’s upholding its obligations under the CRC.

In 2004, however, a judgment by the High Court in Lahore found the JJSO to be “*unreasonable, unconstitutional and impracticable*” and revoked it. This meant that children would again be tried under the same procedure as adults, and that they could again be convicted to death.

The federal government and a non-governmental organization working on child rights filed appeals against the Lahore High Court judgment. On 11 February 2005, the Supreme Court stayed the Lahore High Court judgment until a decision was made.

The Supreme Court did not hear the appeals during 2005 and pending its decision, the JJSO has been temporarily reinstated by the Supreme Court.

However, some cases of juveniles on death row have been recorded. As of March 2006, for instance, the authorities of Mach Central Jail acknowledge two cases of juveniles condemned (both charged under section 302 of the PPC, i.e. murder). One is 14 years old, the other was determined to have been 17 at the time of commission of the offence. Both cases were under appeal at the time of writing.

On 15 Feb. 2006, the medical board in Peshawar was reported to examine a young death convict on the grounds that he was 16 at the time of the crime, committed on 17 July 2003. He had been awarded death penalty on 24 March 2005 in Swat.

On 14 June 2006, the press reported the execution of Mutaber Khan. He had been convicted on Oct. 6, 1998 in Swabi for killing 5 people in April 1996. His appeal to the Peshawar High Court was dismissed on 20 May 2000, and the one to the Supreme Court, on 13 Sept. 2001. Mutaber Khan claimed to have been 16 at the time of commission of his crime, and purported to prove it with a school certificate stating that he was born on 8 Feb. 1980, and that he had been kept two years in the child section of the Central Prison. His appeal was rejected on the grounds that the order to commute death penalty into life for all juveniles would not affect him, as his age had not been recorded at trial.

In June 2006, 40 children were reportedly lingering in Sargodha District Jail death cells, contrary to JJSO section 20(1).

7. The situation in specific areas

Pakistan presents the specificity of having some parts of its territory subject to a different legal regime than the rest of the country. These are the tribal areas in NWFP and in Balochistan.

The Tribal Areas of Pakistan, known as the Federally Administered Tribal Areas (FATA) comprise 7 Agencies (ruled by a “political agent” appointed by Islamabad) and 5 Frontier Regions. The Tribal Areas

have a semi-autonomous status, administered through a separate legal system, known as the Frontier Crimes Regulation, which, surprisingly enough, has remained unchanged since 1901.

It is marked by the virtual absence of any of the fundamentals of any sound democratic institutions: elected government, separation of executive, judicial and legislative; autonomous judiciary; judicial review, legal and human rights protections¹⁰². Though part of Pakistani territory, the inhabitants of FATA are denied the guarantees enshrined in the Constitution of Pakistan – in effect, not all citizens are equal in Pakistan. The FCR blatantly contravenes most of the provisions of the UDHR: “*Judging by the standards of international human rights principles, the norms practiced in civilised states and the fundamental rights guaranteed in the Constitution of Pakistan, the FCR fails to meet the test of compatibility*” writes Dr. Faqir Hussain¹⁰³.

This exception is inscribed in the Constitution: article 247 of the Constitution of Pakistan provides

(3) *No Act of Majlis-e-Shoora (Parliament) shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs, and no Act of Majlis-e-Shoora (Parliament) or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or to any part thereof (...).*

(5) *Notwithstanding anything contained in the Constitution, the President may, with respect to any matter, make regulations for the peace and good Government of a Federally Administered Tribal Area or any part thereof.*

(7) *Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Majlis-e-Shoora (Parliament) by law otherwise provides (...).*

The FATA thus belong to a wholly separate system, under the complete control of the “political agent”, who is not accountable for his actions before any court or assembly. In particular, he can order detentions at will, for a renewable three-year period (sections 43, 44 and 45 of the FCR), without any right of appeal for the individual in any civil or criminal court (section 48). Under the FCR, the Political Agent, a civil servant, simultaneously acts as prosecutor, investigator and judge. He nominates and appoints the Council of Elders, known as the *Jirga* (section 8), to enquire into a dispute – however the Political Agent is not bound by the rulings of the *Jirga*. The decision to disregard the *Jirga’s* finding cannot be challenged in any court (section 10, 60)¹⁰⁴.

This is a blatant violation of a number of provisions of the UDHR, in particular Articles 7, 8, 9, 10 and 11¹⁰⁵. It is also a violation of a number of provisions of the ICCPR (not ratified yet by Pakistan), in particular its Articles 9 and 14 (arbitrary arrests and fair trial guarantees).

¹⁰² Dr Faqir Hussain, “Testing FCR on the Touchstone of the Constitution”, in *Report of the Consultation Proceedings on the Frontier Crimes Regulation (1901)*, HRCF and Tribal Reforms and Development Forum, Peshawar, October 2004 writes: “This way [through the FCR] the Executive was made the ultimate authority and final arbiter to initiate trial, prosecute offenders and award punishments. The trial for a including appellate and revision authorities are from amongst the Executive. Consequently, the law contains no concept of an independent/impartial judicial authority or a court of law to dispense free and fair justice. This is contrary to the mandate of the Constitution. The very Preamble as well as Article 2-A and 175 of the Constitution provide for an independence to judiciary. This vital safeguard is altogether missing from the FCR. All its provisions - substantive as well as procedural e.g. selection of Jirga members (section 2), trial procedure in civil/criminal matters (sections 8 & 11), the power to blockade hostile or unfriendly tribe (section 21), demolition of and restriction of construction of hamlet, village or tower on frontier (section 31), removal of persons from their places of residence (section 36), manner method of arrest/ detention (section 38 8 39) security for good behaviour (sections 40, 42), imposition/collection of fine (sections 22-27), etc are in violation of the Constitution. This is contrary to Article 8 of the Constitution, which provides that any law or customs or usages having the force of law, in so far as it is inconsistent with the fundamental rights shall be void. Quite clearly, the provisions of FCR are violative of several articles of the Constitution e.g. Article 4 (right of individual to be dealt with in accordance with the law), Article 9 (security of person), Article 10 (safeguards as to arrest and detention), Article 13 (protection against double jeopardy, self- incrimination), Article 14 (inviolability of dignity of man, prohibition of torture for the purpose extracting evidence) Article 24 (protection of property rights) and Article 25 (equality of citizens)”.

¹⁰³ Dr Faqir Hussain, “Testing FCR on the Touchstone of the Constitution”, in *Report of the Consultation Proceedings on the Frontier Crimes Regulation (1901)*, HRCF and Tribal Reforms and Development Forum, Peshawar, October 2004, p. 40.

¹⁰⁴ For a more detailed report on the tribal justice system, see Amnesty International, *Pakistan, the tribal justice system*, ASA 33/024/2002

¹⁰⁵ Article 7 of the UDHR: “*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination*”.

Article 8 of the UDHR: “*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*”.

Article 9: “*No one shall be subjected to arbitrary arrest, detention or exile*”.

Article 10: “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*”.

Article 11: “*(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence*”.

In its last Concluding Observations on Pakistan, the UN Committee on the Elimination of Racial Discrimination “noted with regret that no specific information is provided on the laws and regulations concerning the Federally Administered Tribal Areas and the North-West Frontier Province¹⁰⁶ (...). There is insufficient information on (...) whether everyone enjoys the right to “equal treatment before the tribunals and all other organs administering justice” and to “security of the person”¹⁰⁷.

It is also noteworthy that the FCR recognises the doctrine of collective responsibility. Authorities are empowered to fine and detain the fellow members of a fugitive's tribe, or to blockade the fugitive's village, pending his surrender or punishment by his own tribe in accordance with local tradition (sections 22, 26). Under sections 20 and 21, entire members of a “hostile” or “unfriendly” tribe can be put behind bars, their property can be seized and confiscated, and their houses demolished (sections 33, 34)¹⁰⁸. Local observers have reported the widespread army demolition of family homes of people believed to have sheltered associates of Al-Qaeda or the Taliban.

Such collective responsibility is contradictory to the concept of due process, where each individual receives separate treatment based on their individual circumstances — as they relate to the crime in question. The UDHR provisions regarding the right to a fair trial are based on the principle that the criminal responsibility is individual – and never collective. This is confirmed by the clear prohibition of collective punishments in time of war, enunciated at Article 33 of the 4th Geneva Convention: “No protected person may be punished for an offence he or she has not personally committed,” and “collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” By definition, such punishments are even more unacceptable in time of peace.

Legally, death penalty does not apply in these areas; however, since ordinary courts have no jurisdiction over these areas, and are replaced by tribal *jirgas* (council of elders), which do not hesitate to order executions as part of a settlement, HRC and FIDH are deeply concerned about the illegal executions being undertaken there, with no oversight whatsoever by the state authorities.

Although it happened in a PATA (Provincially Administered Tribal Area), i.e. not in an area submitted to the FCR, the following example is significant: on 28 April 2006, Malik Faiz Muhammad, a member of the Nihag-Wari *jirga* in Upper Dir said that anyone reporting an honour killing case to the police or filing the case with the court will be killed by the *jirga*, since the publicising of such cases had brought a bad name to the area. Two weeks prior to this announcement, the *jirga* had issued a verdict in favour of honour killing, declaring it a permissible act. Malik Faiz Muhammad stated that “we stick to our verdict that honour killing is permissible and those who commit it will not be liable to any punishment. We will also not allow the aggrieved party to report the case to the police or file a case before a court. We will kill those who will violate the *jirga* verdict”¹⁰⁹.

There is quite an ironical paradox about such a situation in the tribal areas: while many officials and legal actors interviewed by the delegation were of the opinion that death penalty supposedly helps stop such executions by clans or family, the delegation was repeatedly told that the perseverance of such executions in the tribal areas was a legitimate substitute for capital punishment in areas where it does not exist.

While in Balochistan, the delegation was told that in B areas (tribal areas), murder investigations would be led by levies (tribal police forces), even though the police jurisdiction has recently been extended to some of these areas. However, the tradition remains; and even though the levies are bound by law to make investigations according to police rules, they are not properly trained, and still handle things as under the FCR, i.e. with the presumption of collective responsibility, with all the possibilities of pressure and intimidation that it opens up. A judge from Balochistan explained that the tribal set-up aggravates the problem of faulty police investigations in cases of murder. The tribal set-up is such that it is extremely difficult to find independent witnesses, since everyone is part of a family, or a clan, and as such is submitted to heavy pressure to stand by its “side of the story”. “The witnesses are notoriously unreliable in tribal areas; it would be simply too difficult – and very dangerous – for a person to stand up against one’s family’s or one’s tribe’s version of events”.

¹⁰⁶ Concluding observations of the Committee on the Elimination of Racial Discrimination, Pakistan, 23/04/97. CERD/C/304/Add.25, para 15.

¹⁰⁷ Ibid., para 17.

¹⁰⁸ See Muhammad Raza, *Time to repeal the Frontier Crimes Regulation*, and Amnesty International, *Pakistan: Tribal justice system must be abolished or amended*, ASA 3/025/2002, 19 August 2002

¹⁰⁹ Quoted in « Jirga to kill anyone reporting honour killing cases to police », in *Daily Times*, 29 April 2006.

Reports of public executions in tribal areas appear increasingly frequently in the press. For instance, the public execution in Miramshah, North Waziristan, of Ehsanullah, who had allegedly killed two men on June 22, was reported on 1 July 2006. He was reportedly executed by two relatives of the victim, who had been handed Kalashnikovs by the locally ruling Taleban.

On 26 March, in Tiarza, South Waziristan, the public execution of Hayatullah Gul, accused of killing a taxi driver, took place on the orders of a *shura*, or council of persons, described in Pakistani media as the local Taleban. He was reportedly executed by the father of the victim. His “trial” reportedly took only a few hours to complete. The accused had no legal counsel to assist him and no possibility to challenge the conviction and punishment. He reportedly pleaded guilty and was allowed to ask forgiveness from the victim’s family, which was refused.

On 14 June, the public execution of Muhammad Ghani, accused of killing some fellow tribesmen in North Waziristan was reported. He was also reported to have been executed by heirs of the victim.

It appears that all these “condemned” individuals were denied even the minimal legal safeguards available to persons accused of crimes in the tribal areas of Pakistan. In the case of Hayatullah Gul, he was not brought before a duly constituted *jirga* (informal council), his case was not decided by the Political Agent for South Waziristan and, if the Frontier Crimes Regulation had been applied, the death penalty could not have been imposed on him as it does not provide for the death penalty for any offence.

8. Special laws - the Anti-Terrorism Act

The Anti-Terrorism Act (ATA) was adopted in 1997 with the aim to “provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected therewith and incidental thereto”¹¹⁰; it explicitly overrides all other legal provisions (section 32), and applies to the entire country (section 1(2)). The HRC and FIDH are concerned that it further curtails the guarantees of fair trial, especially in death penalty cases. It appears that the ATA *de facto* shifts the burden of proof from the prosecution to the accused resulting in a presumption of guilt. In 1999, in the case *Khawaja Hasanullah v. The State*¹¹¹, the Karachi High Court ruled that the burden of proof was indeed shifted onto the accused, on the basis of section 8 of the Suppression of Terrorist Activities (Special Courts) Act 1975, which states:

“When any person accused of having committed as scheduled offence is found to be in possession of, or to have under his control any article or thing which is capable of being used for, or in connection with the commission of such offence, or is apprehended in circumstances which lead to raise a reasonable suspicion that he had committed such offence, he shall be presumed to have committed the offence unless he can prove that he had not in fact committed the offence” (underline ours).

The definition of terrorist offences is inordinately wide, and can cover almost any violent crime. The ordinance includes within the ambit of terrorist acts “violence against a person” or a property that “create[s] a sense of fear or insecurity in society”¹¹² or “acts intended or likely to stir up sectarian hatred”¹¹³. In one case of multiple rape, for instance, the prosecution argued that the crime had “caused [a] widespread sense of insecurity and harassment [sic] in society” and hence classified the crime under the ATA¹¹⁴. In another case, according to ICG, a former head of a security service brought a case against a journalist, arguing that the latter’s stories about financial corruption in the military constituted acts of terrorism¹¹⁵. It also appears that the anti-terrorism act has been used against Ahmadis.

The punishment for any “terrorist act” which results in death is the death penalty; in other cases a minimum of seven years’ imprisonment up to life imprisonment and fine is prescribed (section 7).

¹¹⁰ Introductory paragraph of the Act

¹¹¹ 1999 MLD 514

¹¹² Anti-Terrorism Act 1997, Act No. XXVII of 1997, §6(1)(b) and (2)(b)-(c).

¹¹³ Section 6 (5)

¹¹⁴ “Defence plea for case shifting dismissed”, *Dawn*, 25 August 2004, p. 5. See also Human Rights Commission of Pakistan, *State of Human Rights in 2002* (Lahore, 2003), p. 74 (noting use of antiterrorism courts by police officers seeking to evict peasants from their land).

¹¹⁵ ICG interview with Mak Lodhi, journalist, Lahore, 10 August 2004. The case was dropped after the paper in question hired the country’s top defamation and human-rights lawyers and published an apology.

The HRCP and FIDH are concerned about the discretion police have to decide whether to bring cases before ordinary or anti-terrorism courts; they are also concerned about the lack of legal safeguards for defendants before these courts, as some of them are explicitly suspended.

Under the Act, wide powers are given to law enforcement personnel:

“An officer of the police, armed forces and civil armed forces may:-

(i) after giving prior warning use such force as may be deemed necessary or appropriate, bearing in mind all the facts and circumstances of the situation, against any person who is committing, or in all probability is likely to commit a terrorist act or a scheduled offence, and it shall be lawful for any such officer, or any superior officer, to fire, or order the firing upon any person or persons against whom he is authorized to use force in terms hereof”¹¹⁶.

This section, which opens the door to abuse of power by police, is aggravated by the section 39 of the Act, which says: *“No suit, prosecution or other legal proceedings shall lie against any person in respect of anything which is in good faith done or intended to be done under this Act”*.

This is particularly worrying in the Pakistani context, where police forces and other law enforcement agencies are known to make regular use of force, coercion and excessive violence. In addition, it is contrary to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), which state that *“law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result”* (para. 4), and that *“Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall (...)Minimize damage and injury, and respect and preserve human life”* (para. 5b).

When arrested, defendants lack the guarantees to a fair trial:

- They may only be tried by Special Courts directed to be set up by the Act (section 12);
- Suspects arrested for offences allegedly committed before the Act came into effect may also be tried under the Act provided the punishment given corresponds to the punishment provided by the law at the time of the commission of the offence (section 38).
- Special Courts may hear cases in any place the federal government may consider appropriate, including mosques or the places where the offences were allegedly committed (section 15).
- Special courts may also try suspects in their absence (section 19(10)) but must then appoint an advocate to defend him.
- Trials have to be concluded within seven days (section 19(7)). This time limit may only be extended if strictly required and only for two days.
- Appeal against conviction and sentence lies exclusively to Special Appellate Tribunals to be set up under the Act (section 24);
- The judgement of a special court, subject to the result of the appeal to the Special Appellate Tribunal, which has to reach a decision within seven days, is final (section 31).

The ICG writes: *“In short, the anti-terrorism courts (...) give the federal government unwarranted procedural shortcuts and a tool with which to coerce suspects”¹¹⁷.*

According to the interviews conducted, the ATA courts fall short of fair trial standards on several counts:

- There is very little independence of the judges, who are submitted to considerable political pressure. There is evidence that many of them take “advice” from senior military officers before a verdict is issued.
- There is no proper communication between attorney and client
- The witnesses are subject to massive pressure, and tend to be even less independent than in ordinary courts

¹¹⁶ Section 5(2) (1)

¹¹⁷ICG – “Pakistan, building an independent judiciary”, report 86, Nov. 04

- There is often interference of high ranking officials in the course of the trial, or tampering of the evidence. *“It’s quite uncanny how often evidence favouring the accused disappears in such trials”* says an attorney.

II. A DEEPLY FLAWED AND DISCRIMINATORY PROCESS, FROM ARREST TO TRIAL TO EXECUTION

1. The defects of police investigation

One of the main issues raised during the mission’s investigation was the paucity of police investigations, which carries singular weight in case of murder investigations. The police is poorly equipped, poorly trained, corrupt, underpaid, susceptible to local power politics. According to a High Court judge, *“most of the acquittals for murder in High Court occur because of defective investigations by the police at the pre-trial stage”*. A former Advocate General adds that *“police investigations are very sub-standard. The Pakistani tradition of relying on eye witnesses means that the police will usually neglect material evidence and often invent fake witnesses. A lot of oral evidence is simply fabricated”*.

In effect, and since most death penalty verdicts are handed for murder, this means that the chance of miscarriage of justice is very high. Nowhere in the world is there ever a foolproof investigation, which could guarantee with absolute certainty the culpability of the defendant; in Pakistan, however, given the immense fallibility of police investigations, the certainty of culpability dwindles to a preposterously high proportion.

On 26 July 2006, it was reported that Malik Taj Mohammed had been freed by the Supreme Court, after having been detained for three years for murder of Malkani Bibi, who was believed to have been murdered during a property dispute between relatives a few years ago; the charges were dismissed when it was discovered that the “murder victim” was still alive, and actually serving a jail sentence for theft. Mr Mohammed told the chief justice that his “opponents” had even gone so far as to perform a mock burial of Ms Bibi, the official said. Mr Mohammed informed the court that the “murdered” woman had in fact been arrested in another case and is currently serving a sentence in a prison in the city of Gujrat. The chief justice ordered to the police to present her before him, and she was located and brought before the court.

The problem with the police is manifold: a tradition of relying quasi-exclusively on oral evidence (which means that investigation rests mainly on witnesses, with all the possibility of coercion, of distortion and subjectivity that this entails), a “culture” of torture and illegal detentions, the poor quality of investigative techniques, the lack of training and expertise of investigative officers, the susceptibility of police to political and social pressures, etc. The delay in obtaining the results of ballistic or other forensic analysis further impedes the investigative process. Police officers themselves decry the lack of formal training procedures for investigations. Add to that the growing tendency to shift the burden of proof onto the shoulders of the victim; many investigative agencies seem to see it as the victim’s duty to find the witnesses.

The lack of human resources also plays a role. For example, the Abbottabad Cantonment Police Station counts only 35 constables in the Investigative Service for a population covering approximately 300,000 people. It means that the police faces a workload usually incompatible with a proper and thorough investigation of each case.

Last but not least, there has been a growing shift within the investigative agencies, which have turned the burden of proof onto the victim: for many police officers, it is now up to the victim to find the witnesses – essentially, the victim has to do the prosecution on his or her own. As a prominent Lahore lawyer told the delegation: *“There is no due diligence in either investigation or prosecution. If the victim fails to produce witnesses, the police just sits back. This flaws the whole judicial process from the very onset”*. Here again, it is the State’s responsibility which is at stake.

1.1 Recent changes in the police system and investigation service

Some recent changes have been made as to the police system in Pakistan. Time will tell if these changes will make a difference as to the current weaknesses in the system, especially when it comes to the investigation, which as of now suffers from very serious flaws. The core of Police Rules dates back to the pre-partition 1934 legislation.

First of all, as of January 2006, “human rights officers” and supervisory committees comprising public representatives of the area were introduced in police stations – albeit solely for the Islamabad Capital Territory. The aim was to eradicate the culture of violence and torture in the hands of law and order officials.

The new set-up, composed under articles 10, 14 and 14(2) of the Constitution, was introduced on January 1, 2006. Initially, an officer of the rank of sub-inspector was deployed in every police station as human rights officer (HRO) with an independent status, delegating him the authority to watch human rights violations in police stations under sections 23, 25.2(2), 26.18(2)(3) and 26(1) of Police Act 1861 and Police Rule 1934. It is yet too early to evaluate the result of this new set-up, although one can have some doubts about a system whereby the police checks the police.

In 2005, the Punjab police implemented a measure whereby all police stations in the province would have a “reporting room”. The IGP also set up nine inspection teams headed by senior police officers to carry out raids at various investigation centres and police stations, with a view to eradicate corruption and negligence; this led to several officers being either suspended or taken disciplinary action against. The Punjab government pledged 19 billion Rs in Jan 2006 to improve police performance.

More importantly, the Police Order 2002 has reorganised the powers of the police forces; in particular, it has separated the powers of police operations and police investigations (except for the Islamabad area - although the police officials interviewed in Islamabad Capital Territory told the delegation that they had proceeded de facto with the same separation). Most of the police officers interviewed, however, stated that this separation has not been implemented in reality, and the confusion of the two aspects of police work is still common.

The Ordinance also set up Public Safety Commissions (PSCs) to oversee the workings of the police, and Police Complaints Authorities (PCAs) to provide citizens with a mechanism to have their grievances against the police redressed. Almost 4 years later, PCAs are still to be set up.

As to the PSCs, they have been set up as a complaint authority to investigate cases of police abuses. They were to be established at national, provincial and district levels – in effect, they exist only at district level, and not in all 108 districts of the country¹¹⁸. Their main tasks were to approve annual policing plans and monitor implementation of these, address citizens’ complaints, e.g. in the case of non-registration of FIRs, and provide input about senior police appointments, as well as provide the police with recourse against illegal orders. A commentator noted that “*the commissions thus were to give citizens a voice in policing policy, act as external accountability mechanisms and insulate the police from political interference*”¹¹⁹. However, a superintendent of police interviewed by the delegation stated that “*the reality is that such Commissions are highly ineffective, and that there are simply no checks against the excesses of police abuses*”. Furthermore, these Public Safety Commissions are often being perceived as an instrument of strengthening the stranglehold of local elite and politicians, who collude with the police to further their interests. Indeed, *The News* reported in March 2006 that the constitution of these Commissions showed that they were stacked with people having strong local affiliations and stakes in the areas where they are supposed to check police abuses. *The News* writes: “*The result is that a collusive relationship has emerged between the members of the Safety Commissions and the local police on the basis of ‘I scratch your back, you scratch mine’ (...). The insiders are of the view that the D[istrict]PSC have been saddled with ineffective powers which have emboldened the police officers at senior levels (...). It is inconceivable that the framers of the new policing system might not have weighed the implications of establishing such an inane watchdog over police working*”.¹²⁰ An ex-secretary of DPSC Kasur tells that the commission once asked his legal opinion in a matter

¹¹⁸ As of June 2006, they existed only in 86 districts of Pakistan.

¹¹⁹ Quoted from “Force for reform?”, in *The News*, 12.03.06

¹²⁰ “Thana culture flourishing in absence of DPSCs”, *The News*, 9 March 2006. It adds, in a report dated 12 March 2006: “*Changes brought by the 2004 amendments [to the Police Order 2002] have significantly weakened mechanisms for external police oversight and accountability and facilitated political interference in police functioning*”.

involving police torture; he received a phone call the very afternoon from the District Police Officer threatening him to stop this inquiry or else, face “*severe consequences*”¹²¹.

Several training sessions have been organised with foreign support. For example, the US Department of Justice carried out a course on how to conduct criminal investigations in early 2005 for the Pakistani police. The exact details of the course (number of trainees, duration of course, content of the course, concrete results, etc) have not, however, been made available to the delegation. In April 2006, the US announced that they would train Pakistani law enforcement personnel on modern anti-terrorism techniques.

1.2 The procedure in a criminal investigation

1.2.1 The procedure in theory...

Upon arrival on the crime scene, the police are required to cordon off the crime scene, analyse the dead body, reconstruct the crime and the events prior to it, collect the evidence and the body. Among the many problems reported to the delegation by police officers in the course of investigation is, from the first moment, the protection of the crime scene, especially in rural areas where the police (usually the Station House Officer – SHO) may take some time to reach the location. “*By the time we get to the crime scene, it is usually already badly ruined by the relatives or the people present, who have moved the body, gone all over the place, and ruined whatever material evidence would have been left by the murderer(s); it is not uncommon for the police to arrive and have 60 or 70 people all over the place. My estimate is that we manage to secure only 25% of crime scenes*”, explains a police officer.

Under section 154 of the CrPC, a First Information Report (FIR) is filed detailing the first account of the events. The witnesses must be mentioned in the FIR, as well as the time of murder.

The body is then sent for a post-mortem.

A forensic report of the murder weapon and/or bullets may be demanded by the police. When relevant, the police might also require cell phone providers to provide the identification of numbers called or calling.

A report, based on section 161 of the CrPC, is then written; it is composed of two sections: one in which the investigative officer narrates his investigation and the second part in which the witnesses’ testimonies are recorded (although it should be underscored that a statement of an accused under section 161, i.e. to the police, would be inadmissible as evidence before a court; to be valid, it would have to be recorded before a judicial magistrate, under section 164 of CrPC). A site plan has to be drawn (the case can be invalidated in case of absence of site plan); many observers note that a sketch is very easily tampered with, or can be easily modified if the police officer wants to advantage one party or the other. Very seldom are photographic cameras used – here again, only in high profile or sensitive cases.

In case one or several individuals are suspected, the latter section would be filed under section 521 of the CrPC.

Lawyers are not present during the whole investigation.

All these elements together form the final report of police investigation, filed under section 173 of CrPC. It is called the “*Challan*”, and forms the first basis for the court case. The Challan has to be submitted at the latest 14 days after the FIR has been filed. However, the police has three days after the expiration of the 14-day deadline to submit an interim Challan, explaining the reasons why the complete Challan could not be completed in time.

1.2.2 and its defects in practice

¹²¹ Quoted in Idem.

As its name indicates, the FIR is only *information*, and is not part of the evidence. It is only a first step *before* the actual investigation. However, there is a definite tendency by police officers to file FIRs *only after* the investigation, once the “culprit” has been identified. This is clearly a negation of the law, but can be explained by the decision to base police promotion on solved cases and the pressure to get better results. “*The whole police structure, in effect, encourages officers not to file FIRs until they think they know who the culprit is*,” says a human rights lawyer; *this is all the more serious that the courts do not take the problem seriously. Other targets to improve police efficiency should be invented to make sure there are no disincentives for the police to respect the law*”. A police officer interviewed by the delegation confirmed that “*unfortunately, there is little doubt that we proceed from the suspected criminal to the crime, rather than from the crime to the criminal. But you have to understand we are pressed for results, so we have to deliver and make arrests, at almost any cost*”. For instance, on 20 March 2006, Mr Ghulam Mustafa Bhutto appealed to the PM and the Sindh Chief Minister to help him get justice as police were refusing to lodge a FIR for the murder of his daughter in Doulatpur, near Nawabshah¹²². On 11 Feb 2006, it appears that the police deliberately delayed the registration of a case of kidnapping in Lahore: Muhammad Salem had been kidnapped on 29 December 2005; his wife was asked a Rs 1,5 million ransom. She immediately informed the police, who kept delaying the registration of the case for 40 to 45 days, insisting that the wife should identify the criminals first.

It also appears that the rule regarding the submission of the Challan is almost never followed. “*I have yet to come across a single case where the Challan was indeed submitted in time. The whole thing is a mockery*”, says a criminal lawyer. On 15 May 2006, it was reported that the police had submitted the interim Challan in a case of kidnapping of 9 people in Hyderabad.... 8 years after the facts.

Furthermore, the delegation was repeatedly told that the Muslim tradition of burying the dead within 24 hours often impedes the post-mortem autopsy, which is hurriedly carried out before handing the body back to the relatives for burial. The police has nonetheless the authority to order a post-mortem irrespective of the wishes of the family; likewise, a complaint can be filed to the Sessions’ Judge which can go as far as to order the exhumation of the body for autopsy purposes.

The lack of cooperation between the various police districts is also an element which often impedes investigations. The delegation was told, however, of a 1.3 billion Rs project, entitled PROMIS (Police Record Office Management Identification System), which should come into force 3 or 4 years from now, and which aims at computerising all of the nation’s police records. If implemented, the PROMIS project would then remedy the above-mentioned problem.

An added impediment to proper investigations is the fact that the evidence is usually collected piecemeal, and haphazardly, over several days or weeks. It appears, from all testimonies gathered, that only very seldom is a systematic, coordinated and speedy investigation led – and that only in high profile cases.

Furthermore, material evidence is systematically downplayed in favour of oral evidence (*see below*). This directly affects the investigation, which most often is seriously neglected as far as material evidence is concerned; the fact that the police is not properly trained further downgrades the quality of material investigations. For instance, a police officer told the delegation that “*although some stations are equipped with photographic material in order to take pictures of the crime scene, as a substitute for the sketch of the site, which is obviously much less objective and more subject to controversial and subjective changes than a picture, since very few officers are trained in taking proper pictures of crime scene, it’s almost useless to have these cameras in the station*”.

Finally, the police routinely uses extralegal detention and torture to extract confessions from suspects (*see below*).

1.3 Relying almost exclusively on witnesses

All legal actors agree: there is a strong tradition in Pakistan to rely much more on oral evidence than on material evidence. A murder investigation would hence rely essentially on witnesses. “*Now the problem is obviously that the witnesses can be intimidated, bribed, coerced... Such near-exclusive reliance on witnesses allows for a lot of judicial errors*” says a Judge. Such coercion or corruption of witnesses can stem from the police, from the

¹²² Reported in “Father of murdered girl seeks help for FIR registration”, *Dawn*, 21 March 2006

powerful local families, from the culprit's relatives, or even from the victim's party, especially in case of family feuds and old enmities.

Furthermore, many police officers and judges acknowledge that it is very difficult to have independent witnesses testify, for fear of retaliation against their family, or because of fear of getting involved with the authorities and the police. Some police officers interviewed by the delegation acknowledged on condition of anonymity that, since a case relies almost exclusively on witnesses, they sometimes even go as far as to invent fake witnesses, to bolster whatever evidence they have been able to gather. *"You wouldn't believe the amount of fabricated evidence"*, says one. It is disturbing to note that, under the Law of Evidence, it is possible to maintain part of a witness' testimony as admissible evidence, even if it is proved to be false in other parts. In 1993 the Supreme Court noted that *"in any case, the rule 'falsus in uno falsus in omnibus' is no longer applicable and not unoften the Court has to sift the grain from the chaff"*¹²³.

The above-mentioned study conducted in NWFP by DCHD, covering 114 cases of murder, shows that 103 of the witnesses came from the immediate family of the deceased (as opposed to 41 witnesses where the relationship is "not mentioned"). Such a high figure does not bode well for the independence of the witnesses.

It further appears that *"witnesses often feel that they must support the prosecution"*, in the words of a prominent judge, *"so that they are often ready to back up any story against the defendant, for fear of getting themselves in trouble with the police and the authorities"*.

There is no witness protection programme in Pakistan. This adds to the fear that many feel in case they testify against a powerful individual or an influential clan.

The delegation was also told that influential individuals had the means to prevent police officers to testify in court – sometimes through elaborate systems of transfers and new appointments –, further skewing the fairness of the procedure.

1.4 Illegal detention, torture and extrajudicial executions

Yet another problem affecting the Pakistani police is the above-mentioned "thana" culture, and a practice of unlawful detentions and torture. HRCP states that, in 2005, *"the use of torture was extremely widespread in the country – with both police and prison officials responsible for inflicting it. No official was punished for this crime, to the knowledge of HRCP, with such impunity promoting further instances of torture."* 1,356 cases of custodial torture were reported in 2005 – 256 more than in 2004 –, with the Punjab police topping the lot; out of these cases, only 362 led to a FIR being filed, and only 32 policemen arrested. A superintendent of police interviewed by the delegation confirmed that *"in effect, the police has complete and unchecked powers. And the lack of modern investigative techniques means that we are 'forced' to torture to secure confessions"*.

This is linked to the culture of oral evidence – conviction is usually secured after confession (it has to be noted, however, and as stated above, that under section 161 of the CrPC, a statement by an accused recorded by the police does not have legal value in a court); and this has translated into a "tradition" of coercion. Torture in order to obtain confession, to intimidate and terrorise is widespread, common and systematic. It appears to be so common that some lawmakers find no problem with it: during a meeting of the National Assembly Standing Committee on Interior on 15 May 2006, lawmakers astonishingly advocated police torture during physical remand of an accused, Amir Wasim, in order to get *"quick and desirable results"*. MNA Saeed Virk stated *"My own brother is a police cop and I know how investigations are conducted in police stations during physical remands of accused"*¹²⁴.

As stated, the police will routinely make use of illegal detention and torture to get the confession needed. Several interviewees mentioned that the police will also often arrest several suspects and detain them: *"The idea is basically to arrest ten people in order to have a chance to catch the actual culprit. Basically throwing out a wide net – imagine how serious a police investigation can be if that's the way they proceed to find out the criminal"*.

HRCP writes in its 2006 annual report: *"Illegal detention by police was extremely common, with many victims suffering torture or other kinds of brutality. Police officials seemed oblivious to reprimands by courts regarding the holding people without cause, or without entering an arrest in any record"*. It adds: *"deaths in custody most often took place when police used violence to extract a confession. In most such cases, no record of an arrest had been made"*.

¹²³ Ziaullah v. The State, 1993 SCMR 155.

¹²⁴ Quoted in "Police chided for not torturing accused", in *The News*, 16 May 2006.

Cases of illegal detention of family members of suspects in order to “persuade” the suspect to give in have been reported.

On 2 May 2006, 20-year old Hamid Hussain, accused of murder together with his 19-year old brother Sajid, was reported to have died while in custody in Badami Bagh police station, Lahore. In February 2006, a probe was ordered into the custodial death of Abdul Ghaffar Shaikh, who had been arrested on suspicion of kidnapping and killing a boy in Jacobabad.

On 19 Feb 2006, the press stated that the Peshawar city police had arrested 50 juveniles during the recent anti-Danish cartoons protests; most of them reported to have been tortured in custody. They appeared in court in handcuffs, contrary to the provisions of the JJSO, and were not separated from adults during the custody; the police charged children as young as 6 under the Anti-terrorism Act and the PPC.

On 17 January 2006, it was reported that Habibur Rehman, an 18 year old, had been tortured to death during police custody in Chitral the previous week-end. He had been arrested on suspicion of shop lifting, and when he was produced before the judicial magistrate, his condition was already critical, to the extent that the court ordered to send him to jail. He was however taken to the hospital, where he expired.

On 14 February 2006, Rasool Bakhsh, a witness in a murder case, was released on court’s order in Muzaffargarh after having been illegally detained by the police; he was allegedly tortured during his detention.

A ten-year old boy, Raees Rafaqat, was arrested on 6 April 2006 in Lahore and taken into police custody for alleged car-lifting. He was kept in custody during 14 days, during which he was severely beaten with “*a stick with nails in it*”, deprived of food or sleep during days on end. He was not allowed to see his relatives for a week. He was eventually released through court order and cleared of all charges.

It seems that very few police officers have ever been convicted for such acts, in spite of overwhelming evidence that such a culture exists among Pakistani police. This is all the more worrying in light of the recent set up of PSCs and PCAs.

Furthermore, there appears to be an unchecked number of extrajudicial executions, as a means of disposing of cases for an overburdened police force: “*It’s obviously easier to just kill a criminal than reform him, just as it is easier to kill him than to prosecute him – which also explains the high ratio of extra judicial killings in this country*” says a human rights lawyer. HRCP writes, in its 2006 annual report, that “*the number of cases in which persons were killed in cold-blood by police and the incident passed off as a police “encounter” continued to rise. Files maintained by the HRCP showed there had been 62 encounters across the country in the first ten months of 2008, in which at least 107 persons had been killed*”

1.5 Police corruption, social and political pressure

There is ample evidence of police corruption in Pakistan, and of its susceptibility to social and political pressure and influence which interfere with a just and impartial investigation.

Police corruption stems in part from their being underpaid: on average, a constable earns a monthly salary of 5,000 Rs. As one constable put it, “*it is difficult to maintain the highest level of work ethics when you are underpaid, overworked, and constantly decried by everyone*”. On 18 January 2006, *The News* reported that in Sheikhupura, 21 policemen had not been paid for nine months. A journalist laughed: “*Stories of corruption of the police are so frequent that I don’t even report them any longer. Sadly, it’s not news, it’s become the accepted norm*”. In January 2006, it was e.g. reported that an astonishing 2/3 of all Lahore police officers (12,530 out of approx. 19,000) had been punished in 2005 on various charges, from corruption to misuse of power, illegal detention or poor performance. 667 officers had been dismissed from service, and another 109 were awarded compulsory retirement. In April 2006, it was announced that strict disciplinary action had been taken against 1,275 police officers in Lahore in the previous eight months for alleged corruption, and in May 2006, it was announced that 20% of Lahore policemen had been punished during the first quarter of the year.

There also appears to be a culture whereby the police would demand a bribe or expensive items from people implicated in false cases to declare them innocent. A policeman stated “*In about 99% of cases, the*

police know the criminals but they resort to dirty tactics and malign innocent civilians to mint money”, and that this was done in connivance with their superiors¹²⁵.

Several police officials acknowledged that there was no strict accountability system, and that parts of the police budget were diverted to individuals. A constable added that *“the saddest aspect of it all is that even if you actually want to be clean and honest, there is massive internal pressure within the police department to, at the very least, stay silent about the corruption around you – and indirect pressure to make you an accomplice of it”*.

On 16 January 2006, *Dawn* reported that a protest had been held in Dadu against the release of four murder suspects; they had allegedly paid the investigation SP at the police station in Dadu the sum of Rs. 300,000.

An ASP told the delegation that in all the districts he had ever been appointed to in his carrier, he had witnessed the police being constantly submitted to political pressure: *“If we do not please the local politicians, a whole game of transfers and new appointments starts. Which means that any investigation involving them or anybody they might want to protect is flawed from the very beginning, and we are pressurised to accommodate our findings to what they want”*. Another adds that *“politicians, however corrupt they may be, are above the law in this region. The results of our investigation need to suit them, and they certainly do put sufficient pressure to make sure they do”*. Needless to say, such pressure necessarily affects the objectivity of the investigation. This also translates into pressure on police officers not to testify in court. As some local officials are linked to local mafias, it means that crimes involving local gangs might go unpunished. Furthermore, a judge adds that *“there is little doubt that the honourability of the victim plays a role”*. In cases of blasphemy, there is ample evidence that the social pressure, especially stemming from religious groups, on the police comes close to being untenable; some police officers confirmed having been personally threatened if they did not find the accused guilty of blasphemy. Cases of collusion with one party or the other are common and widespread. In May 2006, Syed Abid Hussain of Bahawalpur complained that the police refused to register a FIR for the gang rape of his wife, although the culprits were known. The husband stated that police did not register the gang rape case but booked the accused for a minor offence; following protests, the police filed the gang rape case, but the witnesses were not named and their statement, no recorded. Abid also accused the police of forcing him to reconcile with the accused.

Several police officers added that tensions sometimes arise with the Military Police (MP) when crimes occur in areas where the MP is working.

1.6 The problem of forensic investigation

One of the key problems affecting police investigations in Pakistan is the serious backwardness of forensic technique and investigation – and the lack of sufficient number of forensic laboratories. For example, there are only two such laboratories (both mobile) for all of NWFP. The cost of a mobile unit is 7.5 million Rs.

The lack of training and expertise in forensic techniques among Pakistani police officers constitutes another serious problem.

Certes, some technological improvements have been made recently, such as the extension to all districts of fingerprinting identification devices; but more modern techniques, such as DNA testing, are used only in exceptional or high-profile cases. *“The system is inconsistent, explains one ASP, and even deciding which “high profile” cases should get the benefit of DNA testing is left to our arbitrary decision”*. Some explain this rarity by the high cost of a DNA test, approx. 400 US\$. A seasoned criminal attorney in Abbottabad told the delegation that she had yet to come across a case where the investigating police officers arrived at the crime scene with their forensic material, *“not even the fingerprinting box”*.

Even if fingerprinting is now common, the fact that there are no national fingerprinting databases, but only provincial ones, limits its usefulness. However, the delegation takes note of the recently approved 1.2 billion Rs AFIS project – the Automated Fingerprint Identification System, which, according to State officials, should be fully operational in 2009, and which will create a nationwide fingerprint database. It has reportedly already been implemented in Islamabad.

¹²⁵ Quoted in “Police extort money from the innocent”, *The News*, 1 March 2006

Tellingly, police officers told the delegation that they seldom, or almost never, use gloves when investigating on a crime scene. Blood stains on clothes and material are only tested to check whether it is human or animal blood – even something as simple as the blood group is not tested for. Both the police officers and the attorneys interviewed added that they are most often not equipped with scales – which in narcotics cases is very important, since possession of a quantity above 10 kg entails death penalty. In such cases, determining the amount is often, stunningly enough, left to the subjective appreciation of the officers.

Furthermore, all police officers interviewed complained about the several-week or even –month delay for receiving laboratory analyses or cellphone identification numbers back from Islamabad or Lahore, thus unnecessarily delaying the investigation. A criminal lawyer said that in a case of murder in which he was a counsel, the ballistics report took over 5 months to be sent back. Other lawyers stated that the results from the analyses sometimes arrived after the trial had started. A Quetta lawyer stated that in an anti-terrorist case, the forensic results of the analysis of explosives reached two years after the event, after the trial and while the defendant was appealing his sentence.

The delegation had the opportunity to visit the Quetta (Balochistan) forensic unit, and see two mobile forensic labs, in Abbottabad and Islamabad.

A typical mobile forensic unit would consist of:

- A Fingerprinting kit
- A Metal detector
- A Movie Camera
- Normal Cameras
- A Blood stains test kit
- A Narcotics Identification kit
- A Tape recorder
- A Research Endoscope Kit
- A Footprint Mould-taking Kit
- Emergency Lamps
- A Bag sealer
- A Megaphone
- A Sexual Assault Evidence Kit
- An Explosive residue Detection Kit
- An Evidence Vacuum Sweep Kit
- An Ultraviolet Search Lamp
- An Infrared Viewer
- Illuminated magnifiers
- A Post Mortem Kit
- An X-Ray Machine
- A computer
- A Number Restoration Equipment, for guns

However, most of these elements were not to be seen in any of the Mobile Units the delegation visited. The delegation was told that the missing elements “*were kept separately*”, though no explanation was given for this “separation”. Furthermore, such sophisticated units are very recent, and would not have been used in most of the cases currently in the judicial pipeline. In any event, the very limited number of such units (only two for all of NWFP) means that only an infinitesimal minority of crimes will see a full-fledged investigation with all forensic means. The police officers interviewed added that the tradition of oral evidence means that the collection of material evidence, and hence the use of such units is systematically downplayed in favour of witness testimonies.

In the Quetta Forensic Science Laboratory (“*Justice through Science*”), the only one in all of Balochistan, the delegation had the opportunity to see a Chemical Etching Device, which allows to restore the original fabrication number of a vehicle. The Laboratory also had a Blood Stains Identification device, through

benzedine, which allows to test whether or not the blood is human or not. There is no blood group identification system. The benzedine test costs approx. 2 to 300 Rs. per test.

Similarly, the Lab also uses the PICRIC Agent test, which determines if a stain is human semen; but it cannot determine if it is the same semen as that of the accused.

There is also a rather elaborate Narcotics Test device, given by the UNDP, according the Lab officials. It allows to determine the nature of the narcotics, even though the officials acknowledged that they seldom test for the proportion of actual narcotics in a given sample – which is actually a central problem, given that, under Pakistani law, the penalty depends on the quantity of narcotics found in the possession of the person. For some obscure reason, they very seldom made use of the Gas Chromotography Equipment (also given by the UNDP), which is precisely designed to determine the percentage of drugs in a sample. The delegation was told that most of the new equipment had been donated by the US Embassy in 2003. This serves to underscore the lack of public funding for scientific criminal investigation by the Pakistani State.

The Quetta Lab handles an average of 1500 cases a year, according to its officials.

2. A faulty judicial process - no fair trial

“The judicial process is now so flawed in Pakistan that death penalty amounts to murder” says a prominent Supreme Court Advocate. *“Due process is simply not followed, and there is no due diligence in either investigation or prosecution. With such huge gaps at every stage, it has become impossible to find the truth, and hence to ensure that justice is done”*.

The HRCP and FIDH find that criminal trials in Pakistan do not conform to the internationally recognised fair trial standards of *“equality before the law; trial by an independent and impartial judicial tribunal; presumption of innocence; public and fair hearing which has all the guarantees necessary for the defence; safeguards against ‘self incrimination, double jeopardy and ex post facto laws’ and the right to legal assistance”*¹²⁶.

They also find that the judicial process does not, at the present stage, guarantee the respect of certain fundamental rights enshrined in the Constitution of Pakistan, such as the right to equality before law, life and liberty¹²⁷; fair procedure for arrest and detention; safeguards against torture to extract confession, double jeopardy, retrospective punishment and self-incrimination.¹²⁸ They note the surprising omission, from the list of rights, of the right to a fair trial.

Very seldom are psychiatric tests undertaken to determine whether the defendant is fit to stand trial.

The HRCP and FIDH also express their concern about the seemingly random communication between prisons and courts. On 30 May 2006, it was reported that a petition for suspension of execution had been accepted by the Lahore High Court on May 16 in order to arrange for a compromise between the family of the accused, Mr Mohammad Asghar Ali, and the aggrieved party. A notice was issued to the Faisalabad Jail Superintendent and the Punjab Home Secretary, and a special messenger was allegedly sent to the prison. However, the accused was executed on 18 May. The Lahore High Court later deplored a *“negligence of the registrar’s office”*¹²⁹.

The Asian Development Bank (ADB) is funding a US\$ 330 million project on “Access to Justice” in Pakistan. It has already allowed to increase the number of judges (e.g. in Peshawar, 12 new judges have been sworn in since the beginning of the programme). This has reduced the backlog in the courts. However, the ADB Access to Justice Program is more focused on civil law, and less on criminal law. There is therefore little hope that it will make a significant difference as far as the criminal justice system is concerned.

2.1 The lack of independence of the judiciary

One of the main obstacles to a fair trial in Pakistan is the historical weakness of the judiciary, the independence of which has been incrementally curbed over the decades to make it inordinately submissive to the executive. *“The judiciary has, throughout Pakistan’s existence, been consistent and constant in one respect. It has*

¹²⁶ Art 6,7,10,11 Universal Declaration of Human Rights; Art 14-16 International Covenant on Civil and Political Rights; Art 6,7 European Convention on Human Rights.

¹²⁷ Made subject to law.

¹²⁸ Arts 9,10,12,13 and 25.

¹²⁹ *Dawn*, 10 June 2006.

*always legitimized authoritarian and military intervention in the political structures of Pakistan. Not once has it invalidated the incumbent regime of a military adventurer*¹³⁰.

Since 1955, the courts have consistently submitted to the will of the executive, and specifically the military, power. In 1955, the Supreme Court (then Federal Court) upheld Governor-General Ghulam Mohammad's right to dissolve the Constituent Assembly and to promulgate laws, through the doctrine of "state necessity"; since then, the courts have proved unwilling to inquire into the validity of executive action, or to exercise proper checks on the executive. The judiciary did not challenge either General Ayub Khan or Zia ul-Haq, both military leaders who had taken over power through an unconstitutional *coup d'Etat*; in the case of Yahya Khan, his rule was indeed deemed to be invalid by the courts... but only after he had departed.

In 1977, Zia ul-Haq, chief of the army staff, took control of Pakistan and proclaimed martial law. In November 1977, the court pronounced its judgment on the validity of Zia's takeover and the imposition of martial law; the court concluded that Zia's takeover was justified on grounds of state necessity and the welfare of the people. It added that *"this is not a case where the old Legal Order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a temporary period and for a specified and limited objective, namely the restoration of law and order and normalcy in the country"*¹³¹.

On the promulgation of martial law, members of the Supreme Court and provincial High Courts had been required to swear allegiance to the provisional constitution, an oath which conflicted with the oath they had earlier taken to *"protect, uphold and defend the Constitution [of 1973]"*. Judges refusing to do so were removed. The Supreme Court Chief Justice and twelve other superior court judges were purged in this manner¹³².

Martial law was lifted in January 1986, but only after adoption of the 8th Amendment to the Constitution, which provided that laws and orders passed during martial law, including the new Islamic laws and amendments granting the president increased power over elected assemblies (which he could now dissolve on a largely subjective evaluation of their performance¹³³) and judiciary, be exempt from review by any court.

In October 1999, upon his military takeover, General Musharraf issued a Provisional Constitution Order (PCO), which prohibited the Supreme Court and the provincial High Courts from making any order against the chief executive *"or any person exercising powers or jurisdiction under his authority."* On January 26, 2000, Musharraf issued an order requiring all Supreme and High Court judges to take an oath that would bind them to uphold his proclamation of emergency and the PCO. In the case of Syed Zafar Ali Shah *vs.* Pervez Musharraf¹³⁴, which challenged the constitutionality of Musharraf's rule, the Supreme Court ruled that the Office of the Chief Executive was valid, and conferred on him the authority to amend the Constitution. Once again, the coup had been legitimized by the judiciary, *"which has been habitually relegated to the task of validating army take-overs through questionable jurisprudence"*¹³⁵.

Basically, *"Pakistan's courts have followed the path of least resistance and least fidelity to constitutional principles"*, writes the ICG¹³⁶. A lawyer interviewed by the delegation sadly noted that *"throughout our history, our Constitution has shown such an amazing elasticity... Bent in all ways, so much so that it has been rendered almost meaningless. And the courts have been submissive and obedient all along"*.

The system of appointment, promotion and removal of judges has further undermined the independence of the judiciary, as they have increasingly come under the purview of the executive in order to "reward" complying judges, and "punish" the ones producing rulings perceived as adverse to the government.

Such compliance of the judiciary with the executive has direct bearing on death penalty cases; in particular, it makes it singularly difficult to ensure fair trials in political cases. We have seen the case of Zulfiqar Ali

¹³⁰ Aitzaz Ahsan, "Why Pakistan is not a democracy", in M. Desai, A. Ahsan, *Divided by Democracy*, Roli Books, Delhi, 2005, pp. 111-113.

¹³¹ Quoted by A. Ahsan, *ibidem*, p. 118.

¹³² See H. Haqqani, *Pakistan – Between Mosque and Military*, Vanguard Books, 2005, p. 143

¹³³ See Osama Siddique "The Jurisprudence of Dissolution : Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents"

¹³⁴ PLD 2000 SC 869.

¹³⁵ Osama Siddique "The Jurisprudence of Dissolution : Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents", p. 3

¹³⁶ ICG, "Pakistan - Building an independent judiciary", 2004.

Bhutto's condemnation and execution. But it holds true of lesser political opponents as well. In *A judge may speak*, Mir Khuda Bakhsh Marri, former Chief Justice and Governor of Balochistan, explains at length the process of politicisation of the judiciary throughout Pakistan's history, where political opponents in particular were denied fair trials. He cites the case of Abdul Hameed Baluch, a 21 year old student leader from Balochistan, who had been convicted of murdering a recruiting agent by a Special Military Court and sentenced to death. The Balochistan High Court had granted an order on 8 December 1980 staying his execution, because of grave irregularities in his trial and conviction. The name of the man he was charged with murdering was twice changed during the trial when the alleged victim proved to be alive. As a result of the Provisional Constitutional Order 1981, the High Court's order staying his execution was suspended and Abdul Hameed Baluch was executed in Mach Jail on 11 June 1981.

The delegation was also concerned to note the seemingly arbitrary criteria some judges mentioned for awarding death penalty. A judge explained that he would award death penalty when a murder had been committed by stabbing, rather than gunshot, because it testified, in his view, to a particularly cruelty and brutality in the commission of the crime. *"Killing someone with a gun is not very severe, you see, and it is also a sign that there was probably no premeditation. Whereas stabbing someone means a closer contact and a more intense determination to kill"*. On 31 May 2006, it was reported that the ATC sentenced Qari Umar Hayat to *"16 times death"* (as well as a fine of 4.8 million Rs and compensation for 4.8 million Rs.) for the murder of 16 people.

It does appear that the executive can also have a say as to whether or not the appellant will be able to file a mercy petition, as stated above. Mushtaq Ahmad, accused of attempting to kill President Musharraf in Rawalpindi in 2003, was allegedly barred from filing a mercy petition by the Ministry of Interior, after quite a surreal haggling with the jail authorities¹³⁷.

2.2 Corruption, political pressure and social bias

Although very few cases of judicial corruption are ever publicised, there is little doubt that the judiciary in Pakistan is plagued by systemic corruption. This is, in part, due to the very low salaries of the judges, especially in the lower judiciary.

The ICG writes: *"The subordinate judiciary presents a social rather than a political crisis. Chronically under-funded, woefully short of trained staff and adequate facilities, and forced to work in squalid conditions, the subordinate judiciary shows a legacy of generations of state neglect. One consequence of this neglect is endemic corruption and concomitant interminable delays in the resolution of cases"*¹³⁸.

This exposes the judges to pressure and bias – both in "political" cases, or in cases where one of the parties is wealthy. An added obstacle is, in the words of a judge, *"the low level of legal education in the country. Many judges simply do not have the required juristic knowledge"*.

There is also a pressure from the higher judiciary to dispose of cases, since the judiciary is overburdened in Pakistan. This pressure directly affects fair trial procedures. Several lawyers and officials interviewed by the delegation acknowledged a definite pro-prosecution bias among the judges, further skewing the fairness of the trial. *"Sadly, there is now a presumption of guilt in Pakistani courts when it comes to murder cases"*, says an interviewee. An increased tendency to appoint lawyers who have served as public prosecutors as judges to Superior Courts has strengthened this pro-prosecution bias, and further undermined due process and fair trial procedures.

Furthermore, as far as death penalty is concerned, there is ample evidence that the state uses death penalty to reduce its burden of structuring the process of imprisonment in a fair manner respectful of prisoners' rights. In effect, the state is shying away from its duty of rehabilitative justice and of reform: *"More generally, it is the whole integrity of the legal system which is at stake when it comes to death penalty"*, adds another interviewee.

¹³⁷ Reported by *The News*, 18 March 2006

¹³⁸ ICG, "Pakistan- Building an independent judiciary", 2004

2.3 Not equal before the law: religious minorities

Among those who stand most at disadvantage when facing the courts in Pakistan are the religious minorities. The progressive Islamisation of the State has translated into an institutionalisation of religious discrimination. In particular, the laws of blasphemy, which carry mandatory death penalty (in 1990, the Federal Shari'at Court ruled that *"the penalty for contempt of the Holy Prophet (...) is death and nothing else"*¹³⁹, and on May 1, 1991, the death penalty became mandatory for persons convicted under 295-C of the PPC), have often been instrumentalised by the religious majority, and inordinately affect religious minorities. It has to be noted that the mandatory punishment of death for committing blasphemy cannot be commuted by anyone (following the FSC's ruling that *"no one after the Holy Prophet (pbuh) exercised or was authorized [to exercise] the right of reprieve or pardon"*).

The lack of fair trial in such cases is even more blatant. Amnesty International states: *"Trials of people charged with blasphemy have been grossly unfair despite the death penalty being the mandatory punishment for this offence (...). The available evidence indicates that charges were brought as a measure to intimidate and punish members of minority religious communities or non-conforming members of the majority community and that the hostility towards minority groups appeared in many cases compounded by personal enmity, professional envy or economic rivalry or a desire to gain political advantage."*¹⁴⁰

The blasphemy charge is among the ones to have caused the most widespread controversy in Pakistan; a High Court judge interviewed by the delegation said that *"the law had been extensively misused and abused"*. Observers and lawyers decry its lack of safeguards, in spite of some recent and welcome changes: the law has recently been amended to the effect that a police officer, not below the level of a superintendent, should investigate the matter before a report is lodged and a case filed. However, all observers agree that the amendment is procedural rather than substantive, and that the abuses committed under the law are unlikely to disappear. Indeed, before these changes, the accused would be immediately detained, thereby opening the door to widespread arbitrariness and local feuds and professional jealousy. These have not been eliminated, as the investigative police comes from the same area as where the "crime" occurred, which leaves room to similar local pressures and feuds as previously. Several judges interviewed also acknowledged a major influence by religious groups among the judiciary since Zia ul Haq's era, which further undermines the fairness of the procedure in cases of blasphemy.

Apart from being repeatedly condemned by national and international observers as seriously contradicting freedoms of expression, of belief and of opinion, as it has been used against NGOs, minorities, academics and journalists alike, in a sometimes most arbitrary manner, the provision clearly oversteps international standards on the charges carrying death penalty.

It appears that no one in Pakistan has been executed for blasphemy as yet, although the delegation was told that out of the 110 cases of blasphemy in 2005, involving 97 persons, 2 had been convicted to death. On 7 February 2006 it was reported that Shahbaz Ahmad was sentenced to death and a 1.7 million Rs fine by the Anti-Terrorist Court in Faisalabad under the blasphemy laws for being a "cult leader".

It has to be added that a number of those accused of blasphemy were killed by non-state actors, sometimes in the presence of law enforcement agents, notably while in prison. Very few of these actors have been proceeded against, and so far no-one has been convicted for such killings.

2.4 Not equal before the law: gender discrimination

Yet another problem plaguing the application of death penalty in Pakistan is the discrimination against women.

If it is true that there are far fewer condemned women than men in Pakistan, it nonetheless turns out that they are usually meted out a far harsher treatment than their male counterparts, mainly for cultural reasons. Overall, women have to face much worse treatment than men in court, as they have to face

¹³⁹ Muhammad Ismail Qureshi v. Pakistan, PLD 1991 FSC 26

¹⁴⁰ ASA 33/10/96

massive cultural prejudice, which often prevents judges from looking objectively and fairly at the decision of sentencing. A criminal lawyer explained for instance that a man killing his wife would often get the mitigating circumstances of provocation, whereas the case of a woman killing her husband would on the contrary get aggravating circumstances.

An example is that of Bibi Khatoon, a woman convicted to death penalty, currently in Haripur Jail and, at the time of writing, awaiting the result of her mercy petition. She is convicted for having abetted the murder of her husband, killed by her lover. She is reported to have hidden the murder weapon, a rifle, after the murder. While the assassin, her lover, was forgiven by the husband's relatives who entered a compromise with him, the same relatives denied it to her. According to her attorneys, Bibi Khatoon represents a unique case, insofar as very few convictions to capital punishment are handed for abetment of murder.

The cultural prejudice against women is an aggravating factor in cases of "honour" killings, where it appears that judges often take a lenient view on the murderer(s), especially when they come from the woman's family. As stated previously, the law, *in specie* the Qisas and Diyat Ordinance, is singularly unjust: in such cases, the victim's relatives, who are supposed to decide whether or not to "forgive" the killers, are the very culprits. A 2002 amendment stated that the Court had to decide whether to accept a compromise in such cases. Unfortunately, it appears that the amendment has made little difference, as the Courts maintain a general hands-off, no-interference policy in such settlements.

Furthermore, as stated above, the Qisas and Diyat Ordinance often translates into complete impunity for murderers when the victim is a woman. A survey done by DCHD in NWFP, showed that in cases of murder of a woman, 100% of cases were settled out of court.

2.5 The absence of proper legal aid

Art 10 of the Constitution of Pakistan provides the right to consult and be defended by a legal practitioner of his choice. However, in the absence of the right to fair trial, it becomes very difficult to interpret the right 'to consult and be defended by a legal practitioner of his choice' as imposing an obligation on the State to provide counsel of choice at State expense, even when financial disability is established. Since there is no right to a 'practical and effective' legal aid, its provision remains a discretion with the court. There is no effective mechanism to oversee the competence and performance of the court appointed counsel. The law also provides no remedy against ineffective representation, as in absence of any right to legal aid; its denial does not violate any rights under domestic law.

Hence, further aggravating the unfairness of the application of the death penalty in Pakistan is the absence of proper provision for effective legal assistance at the state expense for those who can not afford it on their own. As the average fee for an appeal to the High Court in a murder is approx. 60,000 Rs (about 800 euros), one sees the importance of legal aid. A condemned prisoner estimated to the delegation his legal fees as close to 300,000 Rs: approx. 50,000 for the lawyer at the trial, 150,000 for the High Court lawyer, and another 100,000 for the appeal to the Supreme Court. This was considered a "*strict minimum*" by most of the attorneys interviewed.

According to members of the Bar Council, complaints against lawyers are taken very lightly – if taken up at all.

The closest that the system comes to legal aid is the Pauper Council: the High Court Rules¹⁴¹ provide that in cases where the punishment is 'death' or 'imprisonment for life' and the accused/defendant is unrepresented, the court shall engage a lawyer for him or her at State Expense.

Now the problems with the Pauper Council are multiple:

- The lawyers appointed 'at the State Expense' are selected from list, maintained by High Court Judges and appointed by the Advocate General's office, of lawyers who volunteer their services for this purpose. It is – unsurprisingly enough – mainly composed of either young and inexperienced lawyers, or briefless ones.

¹⁴¹ West Pakistan High Court Rules as adopted by the provinces. The High Court Rules are made by the respective High Courts of each province under powers delegated by the Code of Criminal Procedure, 1872 for safe administration of Justice.

- As the ‘expense’ is meagre and seldom paid – or always with an important delay –, it comes as little surprise that few lawyers are willing to serve as Pauper’s Councils. The fee is around 200 Rs. per hearing (approx. 3 euros – this compares to an average 100,000 Rs. for a murder case as private council), and according to several lawyers interviewed, the bureaucratic procedures to be paid are such that many lawyers simply abandon the process; *“in effect, says one, one has to be an absolute idealist and devoid of any material considerations to accept to serve as a Pauper’s Council – otherwise it is simply not worth it”*. *“In the end, the loser is always the accused”*, adds another.
- The Pauper Council is appointed *only* in the case of death penalty – which means that many condemned prisoners have not been represented at the stage of trial. In other words, legal aid is provided only once the verdict of death has been handed.

It is perhaps also important to mention here that the law also does not provide an appeal or any other remedy on ground of incompetent or ineffective legal representation. *“All of these elements combine to discriminate against the poor, who are disproportionately affected by the death penalty”*, says a former Supreme Court Judge. In effect, according to a study by AGHS on condemned prisoners in 2002, 71% of all condemned prisoners in NWFP were uneducated, and 59% had a monthly income below 4,000 Rs.

The criminal justice system in Pakistan, therefore, cannot be said to be providing equality before law. The failure to provide a system to assist persons in need of effective legal representation in facing capital charges, discriminates against the economically disadvantaged section of the population, it violates their right to fair trial.

3. Detention and execution

3.1 Length of detention

Yet another problem in the application of death penalty in Pakistan is the length of detention. Some condemned prisoners linger on death row for 10 to 15 years, given the time it takes to exhaust all appeals and the overburdening of courts. The Balochistan authorities give the figure of 7 (out of a total of 127 condemned as of March 2006) condemned prisoners who had been in jail for 10 years or more. On the other hand, a defendant accused of attempted murder on the President’s life was executed within 8 months. The figures from Sindh show that at least one condemned prisoner has been held for 12 years.

According to a survey undertaken by AGHS in 2002 on condemned prisoners, out of a total of 1500 death penalty appeals pending in High Courts, 28 had been pending between 9 to 12 years, and 326 for the last 6 to 8 years. Of the 217 total cases pending before the Supreme Court, 28 had been pending for the last 9 to 12 years, and 87 for the last 6 to 8 years.

The discrepancy between the number of convictions and the number of executions can be explained by several factors:

- The length of the judicial process; some prisoners have been on death row for up to 15 years.
- The tradition to grant stays of execution, especially when there is possibility of compromise with the heirs of the victims – accepting “blood money” in lieu of execution.
- A double effect of the Qisas and Diyat Ordinance:
 - The possibility of even last-minute compromises with the legal heirs of the victim (in cases of murder)
 - A tendency by Sessions judges to award capital punishment more easily, as the eventuality of compromise makes it non final.

3.2 Conditions of detention

The prisons in Pakistan are notoriously overcrowded – official figures dating from August 2005 stated a jail population throughout the country of 86,194, for an official capacity of 36,825. This naturally affects death row inmates as well.

In Kot Lakhpat Jail, Punjab, for example, the official capacity for condemned prisoners is 261 – for 532 actual death row inmates, including 27 at the stage of mercy petition. The Superintendent of the Jail

reckons there are an average of 6 or 7 executions per year in his prison. In June 2006, the Punjab authorities pledged to build 132 new cells within three months. At the time of writing – December 2006 –, it appears none had yet been built. As of June 2006, there was an average of 7 to 8 persons incarcerated in death cells, which averaged 6 x 8 ft (1,8 x 2,4 m).

At the time of visit (early 2006), 62 individuals were on death row at Peshawar central jail, whereas it counted place only for 23, officially.

Mach prison in Balochistan (the only one to have gallows in the province) is currently building 60 additional death cells, up from 40. They were supposed to be ready at the end of the spring 2006. Each cell is 96 sq. ft (approx. 8,8 m²). Balochistan counted a total of 127 condemned prisoners as of March 2006 (out of total jail population of 2860); 13 cases are at the stage of mercy petition. According to the Superintendent of Mach jail, one execution only occurred in 2005.

Death row inmates are submitted to a different regime than other prisoners. They are not allowed to work on the jail premises, and have restricted outdoor possibilities. In Punjab, they are allowed a half hour's walk in the morning, and another half hour in the evening, while other inmates have the right to stay outdoor for several hours. The Punjab Minister for Jails Saeed Akbar Khan Niwami announced on 24 May 2006 that condemned prisoners would from now on have a two-hour morning and evening stroll, handcuff free. The information available at the time of writing shows, however, that this is still not implemented.

It appears that condemned prisoners are also submitted to a different regime as far as visits are concerned, which are restricted. *The Daily Times*, in a June 5, 2006 report, stated that condemned prisoners were not allowed to see relatives in Punjab. The delegation has not been able to ascertain this fact. The parlours are also separate, not allowing for physical contact.

A former death row inmate said he had been chained in iron ankle fetters for three consecutive days in Sahiwal Jail; he went on a hunger strike to protest. They were later removed.

An official from Mach Prison in Balochistan added that contrary to other inmates, death row inmates are not allowed to have a television in their cell, but are allowed to keep a radio.

A spiritual leader comes every week, or as per request, to see the condemned prisoners. They are entitled to books from the jail's library.

In Adyala Prison, Rawalpindi, death row inmates are excluded from all social activities organised on the jail's premises, such as sports trainings and competitions, computer science courses, et. al. The jail counts an average of 6 or 7 condemned prisoners per cell.

A former death row inmate, whose sentence was commuted to life imprisonment, told the delegation of the *"unbearable anguish"* of being on death row. *"I stopped eating regularly, stopped being interested in anything. Facing death in this way is the worst torture I could have imagined"*.

3.3 The last days

When the death verdict has been confirmed by the High Court, a "Black Warrant" – the letter confirming the death sentence – is sent to the prison. After clemency is rejected, the prison receives an Execution Order.

The Home Secretary calls the prison where the condemned prisoner is detained to confirm the Execution Order. A 7-day frame is given to the Superintendent of the Jail for the execution of the prisoner.

Most of the Superintendents interviewed by the delegation said that they systematically chose the last day of the 7-day period for the execution, in the hope of a last-minute compromise with the victim's party.

On 1 June 2006, it was reported that, on the eve of the execution, Mubashir Begum, widow of Mirza Aziz Baig, pardoned Saeed Moez for her husband's murder in Karachi in 1999. The deputy superintendent of Karachi Central Prison, Khalid Shaikh, stated that all the preparations for the execution had already been made when the call came at 2 pm, and that they were about to shift the accused back from the special execution cell to the death ward.

As stated above, all executions occur by hanging, even though death by stoning is provided for by law. A man, Javed Iqbal, accused of having killed 100 children in the late 1990s was reportedly condemned to death by having his body cut in 100 pieces and burnt in acid; he reportedly committed suicide during his

imprisonment. In 2002 the Supreme Court ruled that if *Hadd* is proved, then “*execution of punishment should take place in the same manner as the crime*”¹⁴². This was deemed impossible.

It is the Superintendent’s duty to tell the condemned prisoner that his mercy petition has been rejected and that he will be executed. “*Announcing to a condemned prisoner that he will be executed, and presiding over his execution, is the absolute worst part of this job*”, says one – “*it’s almost unbearable, especially as with our judicial system you’re never quite sure whether he indeed did commit the crime he’s accused of*”.

He then sends the following letter to the hangman:

“To Mr XXX, attached to XXX Prison

Subject: Execution of condemned prisoner XXX, son of XX, resident of XXX

Memo: You are hereby directed to report to superintendent District Jail XXX today the XXX at 6 pm for execution with Manila rope etc immediately.

Signed: Superintendent of XXX prison”.

A few days prior to the execution, the condemned is transferred to a “Kalkothri cell” – also called the “black room” or the “gallows’ cell”. This is where the prisoner will spend his last few days, in solitary confinement. The cell is an average of 10 by 12 ft large. In Peshawar Prison for example, there are 3 specific cells for death row inmates about to be executed.

The hangman is bound by duty to arrive to the prison on the eve of the execution; he is brought there by specially mandated police officers. A hangman usually covers several prisons in one province; the delegation was told that it was getting increasingly difficult to find executioners in the country. There is for instance only one hangman for all of NWFP, 2 for Punjab, and 5 for the whole country. An executioner earns an average of 6,000 Rs per month (approx. 100 US\$), and a premium of 600 Rs per execution. All executioners in Pakistan are Christian.

The night prior to the execution, all officials (the Superintendent, the physician, the judge, the executioner, the extra police officers) stay in the jail and sleep there. “*But I can never sleep the night before an execution, says a hangman, I stay awake all night. It always makes me feel so bad*”.

The day before his execution, the prisoner is allowed to see his relatives for a few hours. “*It is always – quite understandably – an extremely emotional moment, says a Superintendent, I cannot begin to tell you how difficult it is for the families to cope with such a farewell. Often, we see them collapsing completely when they exit the cell after their last farewell*”. In the evening, the condemned receives the visit of the Superintendent of the Prison, and of a judicial officer who records his last will. A superintendent explained: “*Most of the condemned lose it completely the eve of the execution. Actually, it seems that the moment they become utterly senseless is when they are transferred to the gallows’ cell*”.

From midnight till the time of hanging, the condemned is given only liquids; his last meal is also very light “*maybe only an apple and some milk*”, says a Superintendent. A former prisoner who spent several months in a cell adjacent to the death cells tells of condemned prisoners collapsing mentally during the night before their execution: “*One of them spent the whole night crying and begging God: “Oh my God, why do you have to let me die this way, why don’t you let me die breathing?” He got more and more crazy and insane as the night went by. He actually collapsed on the way to the gallows and had to be carried there. Another one, a 60-year old man, got a stay of execution at 11 pm the night before – you should have seen him dancing on the way back to the barracks. But when the execution finally happened, some weeks later, he spent the whole night crying, claiming his innocence and saying that he did not commit the murder. He was also asking about life after death. He was crying so loud it woke many prisoners up in the prison. It’s the loudest tears I have ever heard in my life. The hangman told me later that at the time of execution, his neck was so scranmy*

¹⁴²PLD 2002 SC p. 42 A

that he had to change the rope three times. And he was so scared that his body didn't hold out, he had defecated and urinated on himself'.

An hour before the execution, the hangman proceeds with a rehearsal, with a sandbag the same weight as the prisoner, in order to check the solidity of the rope and the smooth functioning of the trap door mechanism.

The different gallows seen by the delegation could all accommodate several simultaneous executions, as they were three rings on the beam. An executioner confirmed to the delegation that simultaneous executions do occur: in his case, his last execution was actually a double execution, in which he hanged two men. He added that, although it rarely happens, one could actually execute more than three men at the same time, *"because you attach several people to just one ring"*.

The beam is 18 ft above the lower ground floor, underneath the trap door. One accedes to the lower room by small side stairs.

According to Prison Rules, the executions always occur at dawn – 4.30 am from May to August, 5.30 am in March, April, September and October, and 6.30 am from November to February.

At the time of execution, the Superintendent deposes an officer to sit by the phone in case of a last-minute call from either the Home Secretary or the relatives, in case a stay of execution has been ordered or a compromise agreed on. *"A few months ago, says a Superintendent of Prison, the news of the compromise reached us at 2 am – the execution was planned for 4.30 am"*. For the same reasons, he deposes an officer to the gate of the prison, in case a written order should arrive.

He brings the "No Compromise Certificate".

A judge is deputed to the jail, to attend the execution; extra police guards are sent to the prison as well. A doctor is also sent to the jail, as the presence of a physician is mandatory to ascertain the death of the prisoner.

Some jails allow for the presence of the victim's family at the time of execution. The superintendents interviewed said that they allowed it *"in order to give to some peace to the family who needs revenge"* said one, or *"in the hope of a last-minute compromise"* said another. *"Once, the family accepted the compromise while watching the executioner tie the rope around the man's neck, up on the gallows"*, says a prison official, *"I guess even them, who had grieved so much for the death of their relative, could see the inhumanity of the procedure"*.

Are present at the time of execution:

- The superintendent of prison
- 2 or 3 assistants of the superintendent
- 4 prison officers
- The executioner
- 2 paramedics
- 1 doctor
- One magistrate acting as judicial witness
- Possibly one imam or another religious official

A prisoner said that the tradition in some prisons was for all prisoners in the same courtyard to gather around the condemned prisoner on the eve of the execution, to greet him and pay him their respects. A superintendent added that the prison always gets eerily quiet on the eve of an execution, and that, out of respect for the man about to be hanged, they all wake up at dawn on the morning of the execution. *"It is always a very sad night"*. *"The mood in the prison is always very, very somber and quiet"*, adds another prison official. A prisoner added: *"Everybody in the prison is silent and very, very sad. A day of execution is always a very special, and terrible, day. One can never get used to it"*.

On the morning itself, a ward brings water to the prisoner so he can wash; several officers – up to 20 – come to the cell, handcuff the prisoner and take him to the gallows. He is supposed to walk there on his own. He is taken up on the board. The executioner puts a black mask over his face, ties his legs. He then puts the rope around the neck, and ties it to the supporting beam. *"Sometimes they tell me that the noose is too tight and it feels uncomfortable, says an executioner, so I always try to loosen it up a bit. I guess it is my way of showing humanity"*.

The rope is 9 to 12 yards long. It is specially made in Lahore for this purpose.

The whole process is silent. The prisoner is asked to remain silent, and to do his last prayer silently. *“Most of the prisoners I have watched dying remain incredibly dignified, says a superintendent; it’s as if they collapsed the night before, but on the morning itself, they acquire some eerie dignity. I am often very impressed”.*

The hangman then moves towards the handle which will open the trap doors beneath the prisoner’s feet. Two officers stand by his side.

The Superintendent of Prison has sole authority to order the execution. *“This is the only task that I cannot delegate”*, said one. The signal of the execution is usually a small sign of his hand. In some jails, the superintendent gives the signal by dropping a handkerchief on the ground. The point is to give the signal quietly, so the prisoner does not know when the trap will open under his feet. The two officers then move out of the supporting board.

The hangman lowers the handle, the trap opens with a dull thud, banging against the side cushions beneath, and the prisoner falls, hanging about 4ft above the lower basement floor.

An executioner, who had proceeded to approximately 100 executions told the delegation that, although he usually never drinks, *“each execution affects me so badly that I have to get drunk for a whole week after. And this is after 22 years on the job. But still, it is very depressing. At my first execution, I got so angry, sad and upset that I almost committed suicide. I went to see a religious figure, who told me that I should have a clean conscience, because it was not my fault, even in case an innocent is executed. But I still feel so bad. Even now, the only way to get over it is to get completely drunk. But please understand, I had no choice of a job”*. He adds: *“It took years before I could tell my children what my job was. Even now, they don’t dare tell any of their friends, they are so ashamed of it; they keep telling me it is a very bad job. Before every execution, they pray for my soul as well as that of the prisoner”*.

The body is left hanging for 30 minutes to an hour, after which it is examined by a physician, who certifies the death by checking that the heart has stopped.

Hanging entails death by breaking the spinal cord of the individual. If the ratio weight/rope length is not properly calculated, then the person would die of suffocation rather than of a broken spine. Death then takes much longer to occur. A prison official told the delegation he had once or twice witnessed condemned prisoners agonise for 20 or 30 minutes before finally dying, although usually, the delegation was told that it takes *“an average of 2 minutes if you’re heavy, and 5 minutes if you’re light”*.

The body is lowered to the ground. The clothes are changed, and it is wrapped in a cloth, as per Muslim tradition. There is an official salute by the prison’s officers, and a guard of honour. The body is then handed to the relatives, one of whom has to identify it. In case there are no relatives, the body is buried in the jail cemetery.

The Superintendent of Prison and the judicial magistrate then send the following confirmation of death to the Home Secretary:

“I hereby certify that the sentence of death passed on XXX has been duly executed and that the said XXX was accordingly hanged by the neck till he was dead at 4.30 am on XX.XX.06, that the body remained suspended for a full hour, and was not taken down until life was ascertained by a Medical Officer to be extinct; and that no accident, error or other misadventure occurred.

Dated: XXX

Signed: The Superintendent
The Magistrate.”

CONCLUSION AND RECOMMENDATIONS

In light of the above findings, the HRC and FIDH hold that the application of death penalty in Pakistan falls far below international standards in the matter. In particular, they find that, given the very serious defects of the administration of justice, of the police service, the general hierarchical and feudal social system as well as the cultural prejudices affecting women and religious minorities, capital punishment in Pakistan is discriminatory and unjust, and allows for a high probability of miscarriages of justice, which is wholly unacceptable in any civilised society, but even more so when the punishment is irreversible.

Furthermore, the provisions of the law themselves leave much to be desired: laws are made on a *ad hoc* basis rather than on systematic, rational and just grounds, leading to a haphazard and anarchic lawmaking process which has witnessed a preposterous inflation of charges carrying death penalty in recent years, without contributing to the rule of law. The HRC and FIDH strongly underline the fact that not only has the massive application of death penalty *not* strengthened the rule of law, but its application has, much on the contrary, weakened it substantially. This affects all citizens of the country, but even more so those who face a judicial procedure.

Add to that the fact that laws do not provide the necessary safeguards against miscarriages of justice, and that they have, in particular through the Qisas and Diyat Ordinance which amounts to a privatisation of justice, institutionalised discrimination against poorer defendants, as well as enhanced practices of intimidation, coercion and power tactics at the local level. This adds to an already skewed police and judicial process, where the powerful and wealthy can easily thwart a procedure in their favour. Sadly, citizens are not equal before the law in Pakistan.

Finally, the HRC and FIDH note that, contrary to the much vaunted and much over-rated argument of deterrence, the systematic and generalised application of death penalty has not led to an improvement of the situation of law and order in the country. It is ironical that while Pakistan has one of the highest rates of conviction to capital punishment in the world – it should be remembered that over 7400 individuals are currently on death row -, the situation of law and order remains problematic. Systematic condemnation to death certainly does not appear to be the solution to the problem. The “iron fist” mentioned by several judges and officials turns out to be discriminatory, unfair – and inefficient.

The HRC and FIDH consequently urge:

The government of Pakistan:

On death penalty

- To adopt an immediate moratorium on executions in light of the serious shortcomings of the guarantees of due process and fair trial in criminal trials; this could notably be done through a decision by the President of Pakistan to systematically commute death sentences
- To seriously consider moving towards the abolition of death penalty
- As a first step, to restrict the number of offences carrying the death sentence to the most serious crimes only, and to refrain from adopting new crimes entailing capital punishment, in conformity with international human rights standards; to suppress the mandatory death sentence when it currently exists, as imposed by international human rights law. These amendments should be applied retrospectively to prisoners who were condemned to death on the basis of prior legislation, in conformity with para. 2 of the UN Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty
- To put an immediate end to the sentencing and execution of minors, and commute all death sentences pronounced against persons who were below 18 at the time of the offence
- To appoint a committee of high level jurists to report on the application and conditions of implementation of death penalty in the country
- To abolish the compoundable character of very serious offences such as murder
- To become party to the ICCPR, then to the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty

- To guarantee transparency of data collection regarding death penalty in the country, and make public statistics on the number of death sentences pronounced and executed every year, differentiated by gender, age, charges etc, in order to allow for an informed public debate on the issue

On the administration of justice

- To guarantee accessibility of members of civil society to prisons and ensure contacts with condemned prisoners. A special task force of lawyers under the auspices of the Bar Councils should be set up to monitor the conditions of detention of condemned prisoners.
- To set up a systematic and reliable legal aid system, making sure that senior lawyers participate in the system, increasing their emoluments in that framework and establishing a supervisory mechanism involving the Bar association to ensure that lawyers from the legal aid scheme discharge their functions effectively; ensure access to legal representation from the time of arrest and during the pre-trial stage
- To strengthen police investigations, in particular through material and forensic information collection, to ensure proper training in those fields and to stop basing police promotion on solved cases since it induces the police not to file FIR as long as they do not hold the person they believe to be the culprit
- To establish effective and independent complaint mechanisms, in order to improve both the quality of the police and the public confidence it enjoys
- To increase budgetary allocations for the police and for justice, as well as to address the issue of prison overcrowding
- To establish a programme/mechanisms for the protection of victims and witnesses taking part in criminal procedures
- To set up an efficient mechanism to combat corruption within the police and the judiciary

The Asian Bank of Development

- To focus on the criminal justice system in light of its serious shortcomings
- To emphasise the issue of legal aid in the Access to Justice Programme, in particular for condemned prisoners

The NGOs and civil society in Pakistan

- To organise a vigorous campaign on capital punishment in view of a moratorium
- For the media, to promote balanced discussion of the death penalty issue and promote critical discussion of the administration of justice

The European Union

- In accordance with the EU Guidelines on the death penalty, to raise the issue of the death penalty in the framework of its bilateral meetings with Pakistan, including under the 2001 EC/Pakistan Cooperation Agreement which includes a human rights clause and entered into force in 2004
- To provide technical assistance and share information, where requested by the Pakistani government
- To encourage moves towards abolition and to support efforts to develop professional and public human rights education and judicial and prosecutorial training
- To support civil society initiatives in favour of abolition in Pakistan

ANNEX

The delegation visited five prisons:

- Adyala Prison in Rawalpindi, in Punjab
- Kot Lakhpat Prison, Lahore, in Punjab
- Mach Central Jail in Balochistan
- Abbottabad Prison, in NWFP
- Peshawar Central Jail in NWFP

It inspected one Forensic Laboratory (in Quetta) and two mobile Forensic Units (Rawalpindi and Abbottabad)

LIST OF PERSONS INTERVIEWED

State and provincial officials:

Syed Kamal Shah, Interior Secretary, Islamabad

Mansoor Ahmed, Secretary for human rights, law and justice

Muhammad Humayun, Home Secretary, Balochistan

Mohammad Yunus Khan Tanoli, Advocate General, NWFP

Badshah Gul Wazir, Secretary, Home and Tribal Affairs Department, NWFP

Syed Afzal Haider, Member of the Council of Islamic Ideology (CII), Advocate Supreme Court

Judges:

Justice (Retd.) Malik Saeed Hasan

Justice Dost Mohammad Khan, Abbottabad

Justice Jehanzaib Rahim, Abbottabad

Zia Mahmood Mirza, former Supreme Court Judge

Fazlur Rehman, former High Court Judge, Balochistan, Ombudsman

Lawyers:

Ms Hina Jilani, Advocate Supreme Court, Lahore

Moeen Cheema, Professor of Law, Lahore University of Management Sciences, Lahore

Ms Salma Qazi, Advocate High Court, Abbottabad

Ms Shabnam Nawaz, Advocate High Court, Abbottabad

Ms Rabia Sultana, Advocate High Court, Abbottabad

Rashid ul Haq Qazi, Advocate Supreme Court, Abbottabad, former Advocate General, NWFP

Tahir Hussain Lughmani, Advocate High Court, Mansehra

Mohammad Akbar Khan, Abbottabad

Tahir Khan, Advocate High Court, Abbottabad

Sohail Ayub Tanoli, Advocate High Court, Abbottabad

Mohammad Akbar Khan Swati, Advocate High Court, Abbottabad

Khawaja Sultan, Advocate

Malik Anwaar Ul Haq, Advocate, Supreme Court

Fasial Zagar Mengal, Advocate, Federal Shari'a Court

Hamid Khan, Senior Advocate Supreme Court

Zahoor Ahmed Shahwani, Advocate High Court, Quetta, Vice chair HRCB Balochistan chapter

Jamil Khan Sherwani, Advocate High Court, Quetta

Ms. Shakar Baloch, Advocate High Court, Quetta

Ms. Tayaba Altaf, Advocate High Court, Quetta

Ms. Farzana Syed, Advocate High Court, Quetta

Ms. Shahnaz Ali Silachi, Advocate High Court, Quetta

Ms. Shaista Gul Kasi, Advocate High Court, Quetta

Ms. Tahira Qayyum, Advocate High Court, Quetta

Ms. Humma Nazir, Advocate High Court, Quetta

Ms. Sadia Saeed, Advocate High Court, Quetta
 Taher Mohammed Khan, Quetta
 Mohammad Iqbal, Advocate, Supreme Court
 Zahurul Haq, Advocate, Peshawar
 Muhammad Ikram Chaudhury, Advocate Supreme Court
 Sheikh Mahmood Ahmed, Advocate Supreme Court
 Zulfiqar Ahmed Bhutta, Advocate Supreme Court
 Justice (R) Gularin Kiani, Advocate Supreme Court
 Justice (R) K.M.A. Samdani, Advocate Supreme Court

Police officials:

Salman Ayyaz Khan, Assistant Superintendent of Police (ASP), Islamabad
 Akhtar Waheed, ASP Cantonment, Abbottabad
 Dr Mujeeb Ur-Rahman Khan, SSP Police, Quetta
 Faizan Safdar, PSP Investigation, Quetta
 Sadullah Khatran, DIG Special Branch, Forensic Lab Unit, Quetta
 Asif Saif Ullah Paracha, Superintendent of Police, Crime Branch, Balochistan
 Rasul Bukhash, Deputy SP of Police, Crime Branch, Quetta, Balochistan
 Abdul Khadir, DSP, Crime branch, Quetta, Balochistan
 Sayed Abdullah, DSP Forensic Science Lab, Quetta, Balochistan
 S.A. Jabbar, Chemical Expert, Forensic Science Lab, Quetta, Balochistan
 Haj Muhammed Sarwar, Chemical Etching Expert, Forensic Science Lab, Quetta, Balochistan
 Mohammed Munir Maan, Fingerprint Expert, Forensic Science Lab, Quetta, Balochistan
 Asim Gulzan, Additional Superintendent of Police, Islamabad Capital Territory (ICT)
 Abid Ikram, Inspector, ICT Police
 Khalid Mehmood, Sub-Inspector, ICT Police

Prison officials:

Khalid Abbas, Superintendent, Central Jail Peshawar
 Sardar Zaman Babar, Deputy Superintendent, Abbottabad Central Jail
 Capt. Sarfraz Ahmad Mufti, IG Prisons, Punjab
 Mian Shaukat Mahmood, former IG Prisons, Punjab.
 Javed Latif, Superintendent, Kot Lakhpat Jail, Punjab
 Shujauddin Kasi, DIG Prisons, Quetta, Balochistan
 Mohammed Ali, Assistant Superintendent Prisons, Headquarters, Quetta, Balochistan
 Syed Abdul Razzaq, Superintendent Mach Central Jail, Balochistan
 Malik Shaukat Feeroz Khan, SP, Adyala Jail, Rawalpindi

Human rights activists, journalists:

Tanveer Jahan, DCHD
 Muhammad Ismail Khan, Dawn, bureau chief, Peshawar
 Wasim Ahmed Shah, Dawn, journalist, Peshawar

Others:

The delegation interviewed a death row inmate, a former death row inmate, former prisoners, families of condemned prisoners and of murder victims.

It also interviewed an executioner.

(These names are withheld for privacy and/or security reasons.)