

THE UPR PROJECT AT BCU



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The UPR Project at BCU
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About the UPR Project at BCU:

Birmingham City University's Centre for Human Rights was created in 2014 to promote human rights, ensure access to justice, and enhance the rule of law around the world. We seek to achieve this through leading research, education, and consultancy. We submit expert reports to international human rights regions, provide advisory services to governments and nongovernmental organisations, and draft legal opinions and file legal briefs in domestic courts and international human rights courts.

The Centre for Human Rights established the UPR Project in 2018 as part of our consultancy service. We engage with the Human Rights Council's review process in offering support to the UPR Pre-sessions, providing capacity building for UPR stakeholders and National Human Rights Institutions, and the filing of stakeholder reports in selected sessions. The UPR Project is designed to help meet the challenges facing the safeguarding of human rights around the world, and to help ensure that UPR recommendations are translated into domestic legal change in member state parliaments. We fully support the UPR ethos of encouraging the sharing of best practice globally to protect everyone's human rights. The UPR Project at BCU engages with the UPR regularly as a stakeholder and is frequently cited by the OHCHR. You can read more about the UPR Project here: www.bcu.ac.uk/law/research/centre-for-human-rights/projects-and-consultancy/upr-project-at-bcu

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INTRODUCTION

1. Pakistan is party to seven of the nine core international human rights treaties.¹ This includes the International Covenant on Civil and Political Rights (ICCPR) and in line with the Covenant's protection of the right to life and the prohibition against inhuman punishment, this Stakeholder Report focuses upon capital punishment.
2. We make recommendations to the Government of Pakistan on this key issue, implementation of which would also see Pakistan moving towards achieving Sustainable Development Goal 16 which aims for peaceful and inclusive societies, access to justice for all and effective, accountable and inclusive institutions at all levels.
3. We urge the State to make practical commitments in the fourth cycle of the UPR for the abolition of the punishment. As an initial step, we call for the suspension of the capital judicial process through the initiation of an official moratorium on the death penalty. This will enable the government to make a positive commitment towards domestic *de jure* abolition.
4. In this submission, we encourage Pakistan to commit to improving its human rights protection and promotion by engaging meaningfully with the fourth cycle of the UPR in 2023. This includes giving full and practical consideration to all recommendations made by Member States, effectively implementing the recommendations Pakistan accepts, and actively engaging with civil society throughout the process.

CAPITAL PUNISHMENT

A. Pakistan and International Law on the Death Penalty

5. The death penalty has remained a distinctive feature of Pakistan's penal system prior to the country's independence through to the current Government's rule. Present laws on the death penalty are, to a large degree, the result of Islamization efforts of the 1980s by former President General Zia Ul-Haq which led to the promulgation of the Hudood Ordinances.
6. The sovereign right to impose the punishment is located in the 1973 Constitution and national laws of Pakistan. Although Article 9 of the Constitution asserts the fundamental right to life, Part 7 provide the Courts with jurisdiction to sentence a person to death. Furthermore, the Pakistan Penal Code contains 27 different offences punishable by death, ranging from murder, rape and kidnapping to blasphemy, treason and drug offences.
7. Upon taking charge of the office in September 2008, then president Asif Ali Zardari issued an indefinite moratorium on executions which ended in December 2014. Between this

time, only one person was executed, Muhammed Hussain, a soldier who was hanged for murder at Central Jail Mianwali.² In the wake of the 2014 Peshawar school massacre, Pakistan lifted its moratorium on the death penalty for terrorism cases and resumed executions. The following year, in March 2015, the country lifted the moratorium entirely.³

8. The death penalty continues to remain a lawful punishment in Pakistan for offences and conduct which contravene the evolving jurisprudence on ‘most serious crimes’ under international law. This has been interpreted to crimes of intentional killings only.⁴

International Law Promoting the Restriction and Abolition of the Death Penalty

9. The United Nations’ framework for regulating the application of the death penalty comprises a corpus of international human rights law and jurisprudence. Of particular relevance are Articles 6, 7, and 14 ICCPR,⁵ its Second Optional Protocol,⁶ the ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,⁷ the Secretary General’s quinquennial reporting,⁸ the Secretary General’s Question on the Death Penalty,⁹ and the Human Rights Committee decisions.¹⁰ Other relevant treaties include the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment¹¹ and the Convention on the Rights of the Child.¹²

10. The General Comment on the Right to Life¹³ provides an interpretive lens on the death penalty and concerning ICCPR Article 6(6), which states, ‘[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment,’ it:

reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable [...] and necessary for the enhancement of human dignity and progressive development of human rights.¹⁴

11. The growing international consensus against capital punishment is reflected in the UN General Assembly’s biennial resolution to impose a global moratorium on the use of the death penalty. The eighth and most recent iteration, passed on 16 December 2020, had a total of 123 votes in favour with 38 votes against and 24 abstentions. Pakistan has consistently voted against these resolutions including the 2020 resolution¹⁵ and cited technical error for its ‘yes’ vote in the 2018 resolution.¹⁶

12. Pakistan’s voting record is also reflected in its presence as a signatory to the Joint Permanent Missions’ most recent *note verbale* of dissociation, which records a formal objection to the Secretary General of the United Nations on the attempt to create a global moratorium on the death penalty.¹⁷ This is also reflected in Pakistan’s comments made at the 2019 Human Rights Council’s High-level Panel on the Death Penalty. During the discussions, Pakistan referred to “the legal point that every state has the inalienable

sovereign right recognised by international law to choose its legal and criminal justice systems in pursuit of its people's welfare, peace and security.”¹⁸

B. Implementation of Recommendations from Cycle Three in 2017

13. Pakistan received 289 recommendations in the Third Cycle of which 168 were accepted and 121 were noted.¹⁹ A total of 35 recommendations focused on the death penalty and all were noted indicating that no action would be taken to implement them.

Recommendations concerning Pakistan's Adoption of International Law

14. **Angola** (para 152.2), **Spain** (para 152.3), and **Uruguay** (para 152.3), **Cote D'Ivoire** (para 152.3), **Portugal** (para 152.3), **Sweden** (para 152.3), **New Zealand** (para 152.3), and **Australia** (para 152.121) recommended Pakistan to ratify the Second Optional Protocol to the ICCPR. These were all noted and Pakistan has not shown any change to its position.

Recommendations concerning Abolition

15. **Iceland** (para 152.103) recommended Pakistan to abolish the death penalty whilst several states also recommended a reinstatement of the moratorium on the death penalty with a view to abolition. These included **Estonia** (para 152.104), **France** (para 152.105), and **Czechia** (para 152.106), **Lithuania** (para 152.107), **Montenegro** (para 152.108), **Brazil** (para 152.109), **Greece** (para 152.110), **Norway** (para 152.111), **Switzerland** (para 152.112), **Cyprus** (para 152.113), **Luxembourg** (para 152.114), **Chile** (para 152.115), **Portugal** (para 152.116), **Slovakia** (para 152.117), **Italy** (para 152.118), **Sweden** (para 152.119), **New Zealand** (para 152.120), and **Australia** (para 152.121). **Germany** (para 152.126), **Austria** (para 152.128), and **Namibia** (para 152.129). **Poland** (para 152.102), **Mexico** (para 152.125) and **Germany** (para 152.126) made specific references to the juvenile death penalty and recommended its abolition, with Germany also extending this to those who “suffer from mental illness”.

16. Whilst such recommendations are welcomed, it is crucial that they remain specific and measurable in order to assess the level of implementation. Broad recommendations, whilst easy to accept, lack any impetus to bring about real change.²⁰

17. A clearer SMART approach was seen in Belgium, Moldova and the United Kingdom's recommendations. **Belgium** (para 152.122) made specific reference to the review criteria which includes “human rights instruments to which a State is party”²¹ and recommended an immediate repeal of “legislation that provides for the possibility to impose the death penalty for cases related to freedom of speech, in particular section 295C of the Penal Code, in order to ensure compliance with articles 6 and 19 of the International Covenant on Civil and Political Rights”.

18. Moldova and the United Kingdom provided specific, measurable, and achievable recommendations on the issue however reference to Article 6 of the ICCPR would have

further strengthened their submissions. **Moldova** (para 152.123) urged the State to “initiate a legislative process to revise the Penal Code in order to limit the death penalty to cases in which the accused has committed an intentional killing as a first step towards abolition of the death penalty” and the **United Kingdom** (para 152.124) encouraged the State to “set a clear timeline for the review of legislation carrying the death penalty with the aim of limiting the scope of crimes to which it applies.”

19. Signalling its continuing attachment to the practice, Pakistan responded to the recommendations stating that “the application of the death penalty was in full compliance with the International Covenant on Civil and Political Rights. It was applicable only for the most serious crimes. It could not be imposed on an individual under the age of 18.”²² It has since continued to carry out executions in contravention to international law.
20. A staggering 632 death sentences were handed down in 2019 with 14 confirmed executions. This decreased to 49 death sentences and 0 executions in 2020, making it the first time in years that Pakistan did not report any executions.²³ Whilst a promising development, the reason for no executions was likely due to the temporary hiatus in court proceedings due to the COVID-19 pandemic. The following year, in 2021, more than 129 death sentences were reported in the country and the ease of pandemic-related restrictions may have had some impact on this increased figure.²⁴ The real number is likely to be higher. Nonetheless, Pakistan remained execution-free for the second year which is welcome news. Statistics for 2022 are yet to be released at the time of submission.
21. Unfortunately, mandatory death sentences continue to be enforced with military courts involved in imposing the punishment. It also deeply concerning to note that death sentences are being imposed following proceedings that fail to meet international fair trial standards.²⁵ At the end of 2021, more than 3,800 people were still on Pakistan’s death row, including those with mental/intellectual disabilities.
22. On 10 February 2021, the Supreme Court passed a historic order commuting the death sentences of Imdad Ali and Kaniz Bibi, both of whom had been on death row since 1991 and 2002 respectively, on the basis of their psychosocial disabilities.²⁶ We welcome the decision of the Pakistan Supreme Court in 2021 to ban the death penalty being applied to those with mental disabilities which is an important and promising development for the death penalty and mental health in the State.

C. Further Points for Pakistan to Consider

Embracing the Pluralism of Islamic Law to Circumvent the Application of the Death Penalty

23. A number of Muslim-majority nations retain the death penalty; however, its application is seen to vary. Some employ the use of capital punishment at alarmingly high levels whilst others apply it in the rarest of cases. Although religious justifications are often invoked by

such states, the diversity of practice implies that there is a lack of consensus amongst Muslims as to the nature and scope of the death penalty and this is reflected in Islamic law.

24. The continued justification of the death penalty by these States appears increasingly untenable as a reasonable interpretation of Islamic law, and this is aggravated by the possibility of judicial errors and unfair trials in capital cases. The notion of Islamic law as an immutable and static ideal inclines to produce, “legal doctrines that are far more rigid, explicitly harsh, and resistant to change than Islam’s historical tradition would have it – especially in criminal law”.²⁷
25. Drawing upon the work of Amna Nazir,²⁸ legal scholar in human rights and religion, Pakistan should adopt an eclectic approach that draws upon the legal opinions of the different doctrinal schools in Islamic thought which favour the preservation of life.
26. There should be a greater focus on utilising alternative interpretations on the question of the death penalty which is found under the fiqh genre. Fiqh is a man-made endeavour which is configured to varying degrees on epistemological hurdles and the advancement of alternative viewpoints. It is these alternative viewpoints on the status of the death penalty in Islam that must be given a platform, in order to effect real change. For example, whilst apostasy and blasphemy may be prohibited under Islamic law, they are not capital crimes deserving of death.
27. Islam does not teach that the state must execute those guilty of serious crimes and neither does it insist on applying the death penalty. Whilst Muslims cannot deny the legitimacy of the death penalty in Islam, *in theory*, an enlightened reading of the faith demonstrates that it can contribute to the global promotion of flourishing lives and the protection of the right to life by the non-application of the punishment. The death penalty precludes the benefit of amnesty, pardon, or commutation of sentence. An execution is irreversible and an erroneous guilty verdict, whilst possible to be corrected on the record, cannot bring the person executed back to life.²⁹ The finality of the death penalty is recognised in Islam by the Prophet Muhammad’s injunction, which was adapted into a legal maxim, that any doubt must suspend the application of the death penalty for “it is better for the authority to err in mercy than to err in punishment”.³⁰

Adopting the UPR Recommendations to Enable the People of Pakistan to Benefit from Advances in Effective Penology

28. The right to benefit from scientific advancement should also apply to the progress in social science research on the death penalty. The Universal Declaration of Human Rights, Article 27, states, “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,”³¹ and the ICESCR article 15 (1)(b) recognises the right of everyone, “[t]o enjoy the benefits of scientific progress and its applications.”

29. Roger Hood and Carolyn Hoyle have produced the leading social science and criminological investigations into the death penalty worldwide and have concluded:

[t]hose who favour capital punishment ‘in principle’ have been faced with yet more convincing evidence of the abuses, discrimination, mistakes, and inhumanity that appear inevitably to accompany it in practice. Some of them have set out on the quest to find the key to a ‘perfect’ system in which no mistakes or injustices will occur. In our view, this quest is chimerical.³²

30. Social science investigations now demonstrate that reflecting appropriate government means that whilst capital punishment could be created within a legitimate parliamentary process,³³ it is now clear that the application of the death penalty renders an illegitimate and inhumane outcome.³⁴ Abolition in Pakistan would enable the people of the country to benefit from the advancement of the leading social scientific research on punishment policies.

The Universal Periodic Review Recommendations and the Contribution to the Sustainable Development Goals

31. Pakistan should consider adopting the UPR recommendations as an expression of mutual reinforcement of the government’s commitment to promoting the Sustainable Development Goals.³⁵ The human rights values expressed in both the UPR and the SDGs can be woven together to promote policy coherence.³⁶

32. SDG 16 provides for “Strong Institutions and Access to Justice and Build Effective Institutions,” but the application of the death penalty is inconsistent with this goal. Specifically, SDG 16.1 aims to reduce death rates, promote equal access to justice, and “protect fundamental freedoms,” and to further this, SDG 16.A.1 identifies the importance of relevant national institutions, for building capacity at all levels, to prevent violence and combat terrorism and crime.

33. The use of the death penalty does not signal legitimate strength in institutions, but renders counterproductive and inhumane consequences, including a brutalising effect upon society. This was affirmed in the Special Rapporteur’s report on ‘pay-back’ violence and killings.³⁷ The death penalty is antithetical to strong institutional processes for the fostering of the human dignity of the people of Pakistan.

D. Recommendations

We recommend the government of Pakistan to:

- i. Uphold and enforce its international obligations to safeguard the right to life, pursuant to Articles 6, 7 and 14 of the ICCPR.

- ii. Whilst it retains the death penalty, ensure it complies with the ‘most serious crimes’ principle, under Article 6 ICCPR, which restricts punishment to crimes of intentional killing only.
- iii. Ratify the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.
- iv. Develop, in consultation with civil society and relevant regional bodies, a comprehensive action plan to work towards a moratorium, with a view to abolition, within the next three years.
- v. Utilise the pluralistic tradition of Islamic law to remove the death penalty from its legislative framework.
- vi. Affirm its commitment to SDG 16 on access to justice and strong institutions through its support at the next biennial vote on the UNGA Resolution on the moratorium on the use of the death penalty.

¹ See <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx>.

² Asad Kharal, ‘First prisoner hanged in four years’ (*Dawn*, 16 November 2012) <<https://tribune.com.pk/story/466553/first-prisoner-hanged-in-four-years>>.

³ ‘Pakistan’s decision to lift death penalty moratorium a disaster for human rights’ (*ICJ*, 12 March 2015) <www.icj.org/pakistans-decision-to-lift-death-penalty-moratorium-a-disaster-for-human-rights/>.

⁴ See UN Doc CCPR/C/GC/R.36/Rev.2.

⁵ International Covenant on Civil and Political Rights (1976) 999 UNTS 171, Article 6 (right to life); Article 7 (the prohibition against torture and inhuman or degrading treatment or punishment); and Article 14 (the right to a fair trial and the principle of equality of arms).

⁶ The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, GA Res. 44/128, December 15, 1989.

⁷ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Economic and Social Council Resolution, 1984/50; Additions to the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty as Agreed by the Economic and Social Council Resolution 1989/64; and the Strengthening of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty as Agreed by the Economic Council Resolution 1996/15.

⁸ See eg, ECOSOC Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty Report of the Secretary-General UN Doc E/2015/49 (13 April 2015).

⁹ See eg, Report of the Secretary General, Question of the Death Penalty, A/HRC/27/23, 30 June 2014.

¹⁰ For example, *Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

¹¹ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 10 December 1984.

¹² Article 37(a) Convention on the Rights of the Child, G.A. Res 44/25, 20 November 1989.

¹³ UN Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018.

¹⁴ *ibid* para 50.

¹⁵ Resolution on the Moratorium on the use of the death penalty, UNGA Res. 62/149, 18 December 2007, *adopted by 104 votes to 54, with 29 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 63/168, 18 December 2008, *adopted by 106 votes to 46, with 34 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 65/206, 21 December 2010, *adopted by 109 votes to 41, with 35 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 67/176 20 December 2012, *adopted by 111 votes to 41, with 34 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 69/186 18 December 2014 *adopted by 117 votes to 37, with 34 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 71/187, 19 December 2016 *adopted by 117 votes to 40, with 31 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 73/175 17 December 2018 *adopted by 121 votes to 35, with 32 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 75/183, 16 December 2020 *adopted by 123 votes to 38, with 24 abstentions*.

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- ¹⁶ ‘Pakistan Says UN Vote Was “Inaccurately Recorded”, Still Favours Death Penalty’, *The Wire*, 18 December 2018, <https://thewire.in/rights/un-general-assembly-pakistan-death-penalty>; ‘Islamabad’s vote on death penalty at UN corrected’, *Dawn*, 20 December 2018, <https://www.dawn.com/news/1452485>.
- ¹⁷ UNGA, ‘Note verbale dated 13 September 2019 from the Permanent Mission of Egypt to the United Nations addressed to the Secretary-General’ (16 September 2019) UN Doc A/73/1004.
- ¹⁸ UNHRC, ‘Panel Discussion on the Death Penalty - 4th Meeting, 40th Regular Session Human Rights Council’ (UN Web TV, 26 February 2019) at time 1:12:00. See also Report of the United Nations High Commissioner for Human Rights, ‘High-level panel discussion on the question of the death penalty’ (21 June 2019) UN Doc A/HRC/42/25, para 31.
- ¹⁹ UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Pakistan - Addendum’ (16 February 2018) UN Doc A/HRC/37/13/Add.1.
- ²⁰ Amna Nazir, ‘The Universal Periodic Review and the Death Penalty: A Case Study of Pakistan’ 4(1) *RSIL Law Review* 126, 153.
- ²¹ UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 1(c).
- ²² See UNHRC, ‘Report of the Working Group on the Universal Periodic Review – South Sudan: Addendum’ (8 March 2017) UN Doc A/HRC/34/13/Add.1, para 7.
- ²³ Amnesty International, *Death Sentences and Execution 2020* (2021) 10, 13.
- ²⁴ Amnesty International, *Death Sentences and Execution 2021* (2022) 12.
- ²⁵ *ibid* 14-15.
- ²⁶ Haroon Janjua, ‘Pakistan ends death penalty for prisoners with severe mental health problems’ (*Guardian*, 12 February 2021) <<https://www.theguardian.com/global-development/2021/feb/12/pakistan-ends-death-penalty-for-prisoners-with-severe-mental-health-problems>>.
- ²⁷ Intisar A Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (CUP 2015) 321.
- ²⁸ See eg Amna Nazir, ‘Islamic Member State and the Scrutiny of the Death Penalty in the Universal Periodic’ (PhD thesis, University of Birmingham and Birmingham City 2019).
- ²⁹ Working Group on the Death Penalty in Africa, ‘Study on the Question of the Death Penalty in Africa’ (The Gambia: Baobab Printers) 39.
- ³⁰ al-Tirmidhī, *Jāmi’ al-Tirmidhī*, Hadith no. 1424.
- ³¹ It is further recalled that the Human Rights Council determined that the basis of the Universal Periodic Review includes consideration of the Universal Declaration of Human Rights, see, Institution-building of the United Nations Human Rights Council, A/HRC/RES/5/1 18 June 2007.
- ³² Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2015) 7-8.
- ³³ John Rawls stated, “[a]t some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy,” in, *Political Liberalism* (Columbia University Press 2005) 248.
- ³⁴ Austin Sarat stated, “law cannot work its lethal will and ally itself with the killing state while remaining aloof and unstained by the deeds themselves,” in, *When the State Kills: Capital Punishment and the American Condition* (Princeton University Press 2001) 21.
- ³⁵ See the UN Sustainable Development Goals website, <https://sustainabledevelopment.un.org/?menu=1300>.
- ³⁶ The first two cycles of the UPR were reviewed under a data mining procedure and of the circa. 50,000 recommendations, it was possible to link more than 50% of those to SDG targets, see, The Danish Institute for Human Rights, *Linking the Universal Periodic Review to the SGGs*, p. 2.
- ³⁷ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Mission to Papua New Guinea (3 to 14 March 2014), A/HRC/29/37/Add.1, 30 March 2015, para. 96, “...several interlocutors shared the opinion that the death penalty might actually lead to further killings... given the payback culture. While the Special Rapporteur condemns the existence of the payback culture, he acknowledges that payback-related killings might increase if the death penalty is carried out.”