

OPTIMISING PAKISTAN'S DRUG LAW

MAKING THE CONTROL OF NARCOTIC SUBSTANCES ACT
STRONGER, FAIRER AND MORE EFFECTIVE

THE FOUNDATION FOR FUNDAMENTAL RIGHTS (FFR)

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Executive Summary

This is the first comprehensive study undertaken of cases prosecuted under Pakistan’s anti-drug law: The Control of Narcotic Substances Act 1997 (CNSA).¹ The report provides an in-depth analysis of the CNSA regime based on a detailed study of CNSA cases, and proposes recommendations to make Pakistani drug enforcement stronger, fairer and more focused.

By analysing a representative sample of cases tried under the CNSA’s most serious charges, FFR seeks to understand how the law functions in practice; which categories of crime it has principally targeted; what types of individual it predominantly affects; and whether the law has been successful in achieving its self-identified objectives.

The report begins with an explanation of FFR’s methodology, setting out the two principal components that comprise the study’s evidence base: an in-depth quantitative analysis of 76 separate capital drug cases; and 57 in-person qualitative interviews with prisoners who faced the CNSA’s most severe penalties.

The first section of the report presents the key findings from FFR’s case review and interviews. It shows how in the majority of capital drug cases the defendants are ‘drug mules’ arrested for possessing or transporting drugs, while senior traffickers are not identified or are allowed to go free. This section uses data gathered in FFR’s interview phase to establish the socioeconomic profile of prisoners tried under the law: poor, ill-educated people from the most vulnerable groups in society.

The second section of the report examines some of the systemic issues which have led to the situation in the preceding chapter, focusing principally on specific elements of the CNSA statute itself. This section highlights how the statute’s objectives have been ill-served by its reversal of the presumption of innocence; its exclusively seizure-based sentencing rules; the structure of its special courts system; and the practical failures of the enforcement system it establishes.

The third section of the report examines how the CNSA’s legal and practical failings have hindered Pakistan’s fight against drug-related harms, and establishes that the statute has failed to achieve the two objectives outlined in its preamble: to reduce the flow of drugs through Pakistan and to tackle the problems of domestic drug addiction. This section

also considers how certain elements of the law have impeded international counter-narcotics cooperation.

The final section of the report draws on the findings described above to identify practical recommendations for improving the statute. This section sets out four proposed amendments designed to make the law stronger, fairer and more effective:

1. Rework the CNSA’s sentencing framework to make the statute stronger, fairer and more effective;
2. Target senior traffickers with a combination of financial and custodial penalties;
3. End seizure-based sentencing and mandate courts to consider aggravating and mitigating factors; and
4. Improve standards of justice in the CNSA courts through capacity building and strengthening evidentiary standards.

Twenty years after its passage into law, the CNSA is in urgent need of reform. Under the statute, Pakistan’s drug enforcement system is geared towards seizing individual consignments of illicit drugs and handing down the harshest possible punishments for the carriers or “mules” carrying them. This distracts attention and resources from investigating and disrupting organised drug trafficking networks.

Judged by its own objectives, the CNSA regime has failed. This report seeks to understand this failure through an extensive analysis of cases tried under the law, undertaken by practicing criminal lawyers with first-hand experience of the statute. By taking an approach that is fundamentally evidence-based, FFR hopes to make a tangible difference to Pakistan’s battle against drug-related harms.

Methodology

This report's findings are based on research designed and overseen by Barrister Shahzad Akbar, Director and Founder of the Foundation for Fundamental Rights (FFR). Investigation and analysis were carried out by a specialist team of attorneys and researchers at FFR, working alongside caseworkers at the international legal action organisation Reprieve.

The report's conclusions are based on a review of 133 cases drawn from eight Pakistani prisons in which alleged drug offenders were charged with capital drug crimes under the CNSA.

The report focuses on two Pakistani provinces at the centre of the country's efforts to fight drug trafficking: Punjab and Khyber Pakhtunkhwa (KPK). Punjab is Pakistan's most populous province, and is home to more than half the country's population; KPK is Pakistan's northernmost province and shares a long border with Afghanistan, making it a critical route in the trafficking of heroin into the country. The prisons surveyed include:

1. Central Jail Lahore
2. Central Jail Peshawar
3. Central Jail Mianwali
4. Central Jail Adalia, Rawalpindi
5. District Jail Attock
6. Central Jail Gujrat
7. Central Prison Sahiwal
8. Central Jail Gujranwala

The sample pool of 133 cases is made up of two subsets: Subset A was analysed for quantitative data, while Subset B was interviewed to gather qualitative information.

Subset A consisted of 76 cases for which researchers obtained detailed case files. These were drawn from documents including the First Information Report (FIR); Investigation report u/s 173 CrPC; charge sheet (challan); pleadings made in the offender's initial trial in the Sessions court; the final judgment of the Sessions court; and any subsequent appeal pleadings, judgments and other court documents.

The case files for Subset A were analysed according to a pre-agreed list of indicators relating to the circumstances of the offender's arrest and charge, as well as the subsequent trial

proceedings. Indicators included the quantity and type of drugs seized, whether the individual was a senior trafficker engaged in a drug transaction and the sentence handed down.

In tandem with the quantitative case review, researchers visited prisons across the two provinces and undertook qualitative interviews with Subset B, which consisted of 57 prisoners. Interviewers collected answers on a set of questions designed to determine the prisoner's occupation, income and level of education.

Prison rules precluded FFR from recording the interviews we gathered, but full notes of each interview session were made by the interviewers and reviewed by Barrister Akbar. In many cases throughout this report prisoners' names have been changed to protect their privacy and security.

To provide broader context for the research gathered from Subsets A and B, qualitative interviews were also conducted with a range of third party stakeholders who offer alternative perspectives on the application of Pakistan's capital drug laws. These include representatives from the Pakistani Government; a former Director General of the Pakistani Anti-Narcotics Force; and representatives of the United Nations Office on Drugs and Crime (UNODC).

Additional desk-based research and legal analysis was performed by attorneys and caseworkers at FFR and Reprieve, drawing on a range of public reports and materials. A full bibliography of sources consulted is provided at the end of this report.

1: Findings from FFR’s quantitative and qualitative research

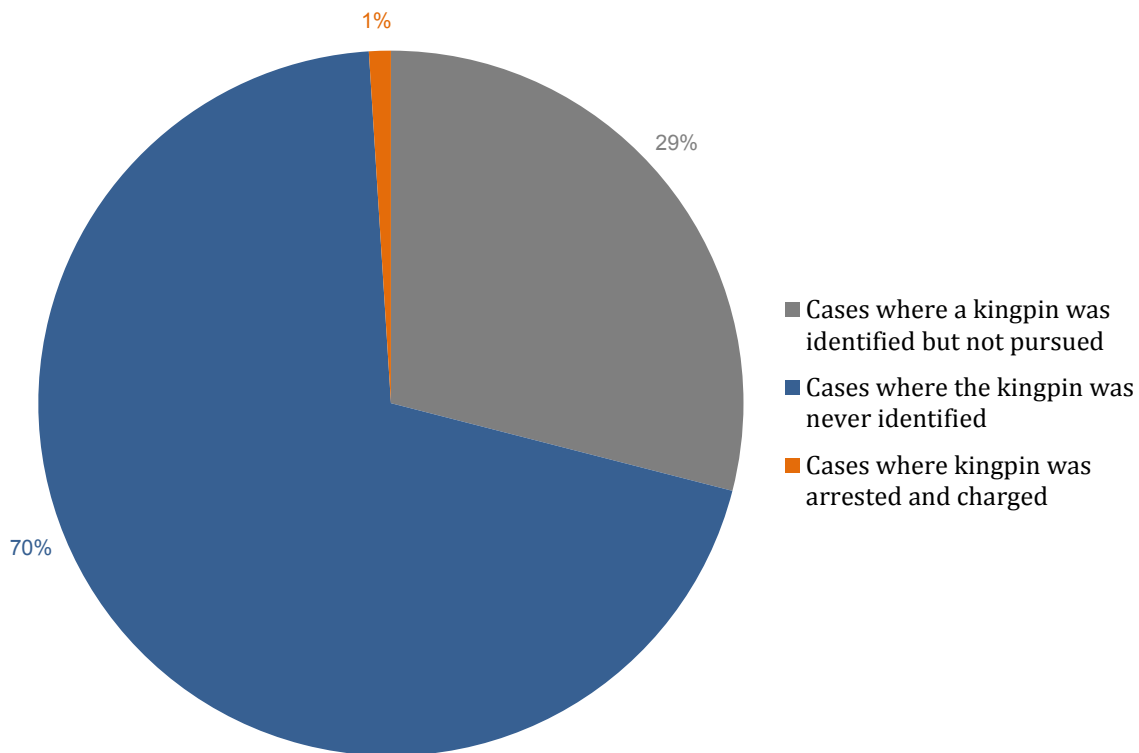
Kingpins go free – allowing the drug trade to continue

FFR’s research found that in as many as 29% of all cases examined, prisoners identified at least one senior trafficker to law enforcement authorities. However, in only 1% of cases was this individual subsequently charged or arrested. This corresponds with concerns, expressed elsewhere, that the ANF continues to focus on the arrests of so-called ‘drug mules’; arrests that do not make a dent in the operations of the cartels.

In 2013, the then-Chief Justice of Pakistan’s Supreme Court acknowledged that the vast majority of narcotics cases being appealed before the Supreme Court involved “petty carriers” rather than “major barons”.² Although the Chief Justice offered the ANF to conduct a formal inquiry into this disparity, FFR found no record of such a study ever being undertaken.

In its review of 133 cases, FFR found no instance in which authorities encouraged apprehended drug couriers to become cooperating witnesses who might offer vital information on senior traffickers in exchange for leniency in sentencing.

Figure 1
Proportion of cases in which a kingpin was identified but not pursued by police



Case Study: Dilawar¹

Dilawar is a 65-year-old truck driver from Faisalabad. One day, Dilawar was asked to drive a shipment of goods to Kashmir. Along the way, he was stopped by ANF personnel who searched the truck. The police uncovered 380 KG of cannabis products in the trailer. Dilawar was arrested and charged with a death-eligible offence.

As a truck driver, Dilawar could not have the resources to purchase such an enormous quantity of narcotics. The total value of drugs confiscated from the trailer of the truck was 13.7 million rupees, almost 1,000 times Dilawar's monthly salary.³ It would take 76 years for Dilawar to earn this amount of money. The day of his arrest, police found only 1,900 rupees (USD \$18.00) on his person.

Dilawar cooperated fully with the police, providing names and details of the people who had arranged the shipment to Kashmir. With this information, the ANF were able to locate and arrest a number of high-level orchestrators. However, these individuals were subsequently released without charges. According to Dilawar, associates of the cartel intervened and convinced the ANF not to press charges.

Dilawar went on to be prosecuted as the principal smuggler, waiting four years in prison before being tried.

Because Dilawar was found to be in possession of cannabis products – even though he was wholly oblivious to this fact – the court presumed his guilt. According to Dilawar, the judge was not interested in hearing any of the arguments brought forward by his lawyer. No independent witnesses were heard in his defence. Dilawar later said:

"ANF judges are only there to convict and not to give you a fair trial.... In our system, you can only be acquitted if you have enough money to buy your way out."

It was impossible for Dilawar's defence lawyer to overcome the odds stacked in favour of the prosecution. He was convicted and sentenced to spend the rest of his life in prison.

¹ This individual's name has been changed to protect their identity.

Majority of those facing harshest sentences are charged with lesser drug crimes

Section 9 of the CNSA dictates that the Act’s most serious punishments – the death penalty and life imprisonment – can be handed down for a number of acts relating to substances prohibited under the statute which are set out in Sections 6, 7, and 8.

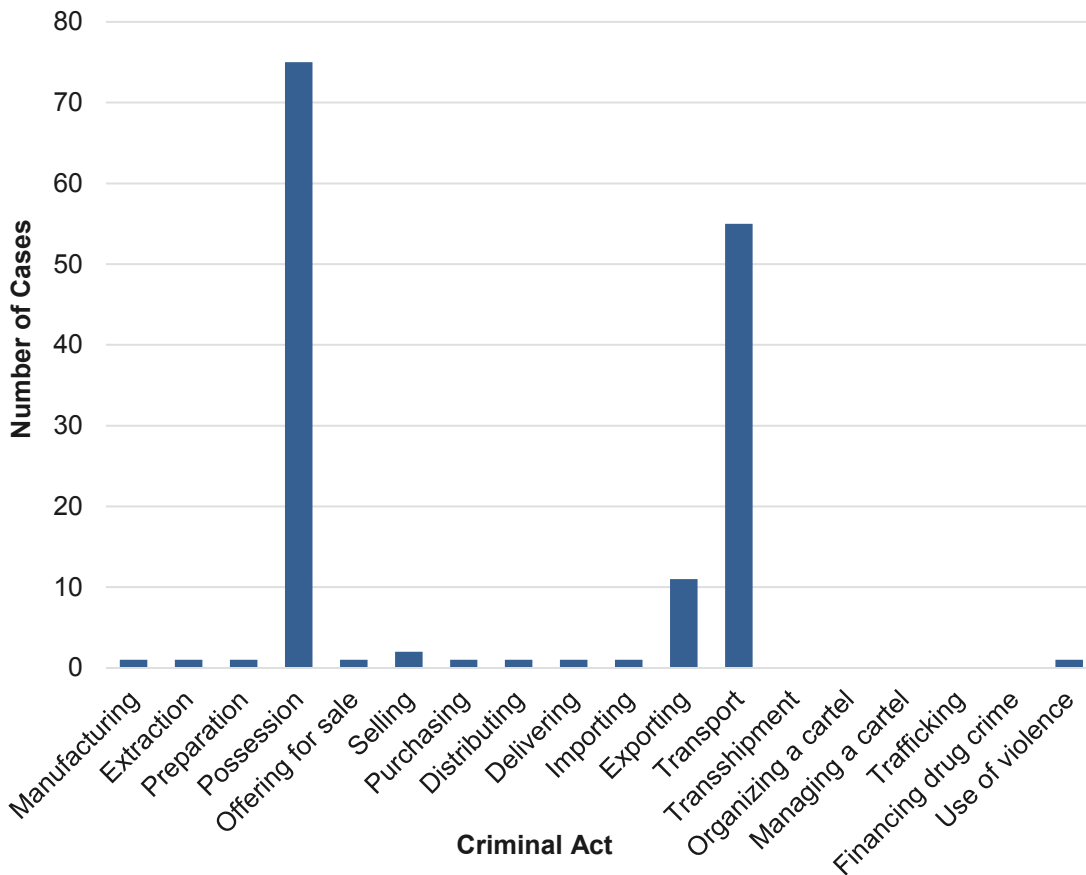
These acts include manufacturing; extraction; preparation; possession; offering for sale; selling; purchasing; distributing; delivery on any terms; transport; import into Pakistan; export from Pakistan; transport within Pakistan; transshipment; organising a cartel; managing a cartel; trafficking; financing drug-related activity; and the use of violence or arms in drug crime.

However, despite the large number of acts which carry the death penalty, FFR’s research suggests that in practice this is only handed down for possession or transport of narcotics. In fact, FFR found no single case where a defendant had faced capital charges for the organisation, management or financing of drug trafficking.

According to FFR’s case review, 100% of all capital charges were brought for primarily possession-based offences. In 73% of these cases the person found in possession of the narcotics was also involved in the offence of transporting them and in 15% of cases the prisoner could arguably be accused of exporting narcotics (having been arrested while attempting to leave the country).

In none of these cases, however, was there any suggestion that the prisoner had themselves organised, managed or financed drug-related activity. Only 2% of cases involved the sale or “dealing” of drugs and only 1% of cases involved violence on the part of the prisoner.

Figure 2
Offences for which death sentences are most commonly handed down



Sentences are based on size of seizure, not drug type or other factors

FFR's research found that sentencing under the CNSA almost never takes into account key issues such as the type of drug seized from the defendant; the presence or absence of violent acts in the commission of the offence; the defendant's willingness to cooperate with law enforcement and name more senior figures; the possibility that the defendant was coerced or manipulated into carrying the drugs; or whether the defendant is female, pregnant, elderly or intellectually disabled.

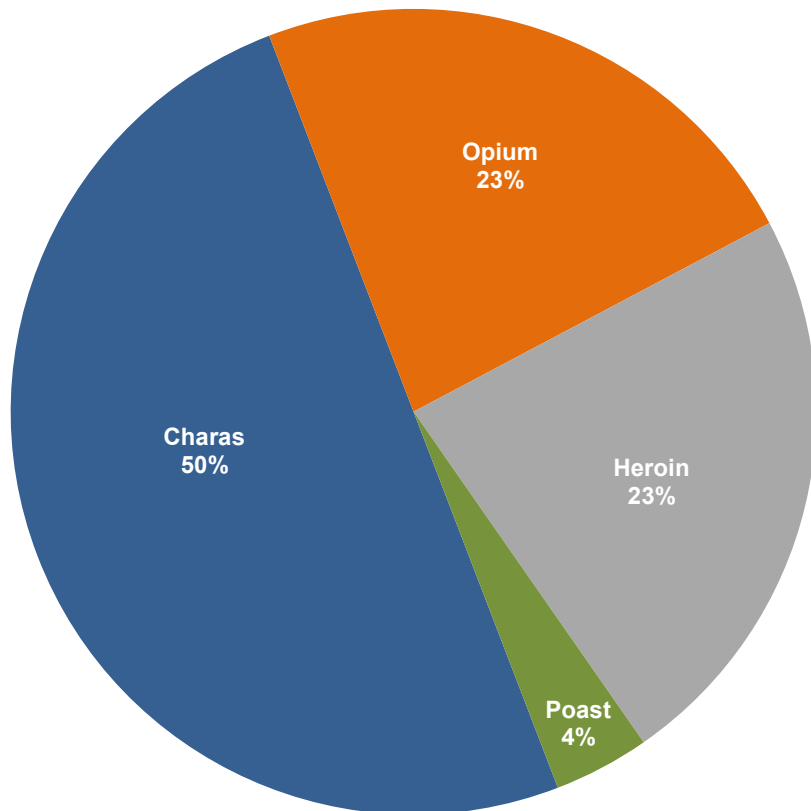
The sole benchmark for sentencing is the quantity of narcotics seized. This means a low-level drug courier faces the same punishment as an international drug kingpin and is far more likely to be charged on the basis that their role involves active possession of narcotics (whereas a kingpin

may coordinate a cartel's activities without ever going near any narcotics themselves).

Basing sentencing policy around seizure size has also created perverse sentencing patterns which see the death penalty more frequently handed down for possession of cannabis products than heroin or other opiates. Of the cases FFR reviewed where a death sentence was handed down, 50% involved the seizure of cannabinoid substances such as charas, while only 23% involved the seizure of heroin.

Thus it remains the case that scores of Pakistani 'drug mules' still languish on death row for the crime of carrying hashish – a drug which has been effectively legalised by an increasing number of countries and territories including Canada,⁴ the Netherlands,⁵ Portugal⁶ and a number of US states.⁷

Figure 3
Drugs for which death sentences are most commonly handed down



Case Study: Khalid²

In 2011, ANF officials stopped a Toyota in Lahore with three people inside. Upon searching the car, the ANF discovered 104.4 KG of cannabis products and 24 KG of opium hidden within the vehicle.

The man in the front seat had 2.4 KG of cannabis products under his feet. He was sentenced to 5 years in prison. The driver had 12 KG of cannabis products under his seat and in a cavity of the car door. He was sentenced to life in prison.

In the rear of the car was a man named Khalid. Hidden in cavities behind the seat where he was sitting were 90 KG of cannabis products and 24 KG of opium. On the strength of this coincidental proximity to the largest quantity of drugs, Khalid was sentenced to death.

There was no suggestion throughout Khalid's trial that he played a more senior role in trafficking the drugs than any of the other defendants. Khalid was no more of a drug baron than his co-defendant in the passenger seat, and yet one received a five-year sentence while the other languishes on death row.

Khalid and his co-defendants may have chosen to divide the driving time between them over the course of a long car journey; they may have switched seats while stopping for petrol; Khalid might simply have longer legs than the other passengers in the car. In this case these incidental factors made the difference between life and death.

² This individual's name has been changed to protect their identity.

The poorest and most vulnerable face the harshest punishments

In the overwhelming majority of cases reviewed by FFR, individuals facing capital charges under the CNSA fit the definition of 'drug mules' proposed in 2012 by the European Monitoring Centre for Drugs and Drug Addiction:

"(a) drug courier who is paid, coerced or tricked into transporting drugs across an international border but who has no further commercial interest in the drugs".⁸

The mules who comprise the vast bulk of those convicted under the CNSA tend to be severely disadvantaged economically, socially and

intellectually. Given the risk of capture when transporting large quantities of narcotics, there is every incentive for kingpins to select couriers on the basis of their expendability and their susceptibility to influence. Groups fitting this profile in the Pakistani context include the very poor; women; drug-dependent people; and people with learning difficulties.

Based on FFR's in-depth qualitative interviews, the median reported income of a prisoner tried under the CNSA's capital provisions is around 10,000 rupees a month (USD \$95.42). This is significantly below the Pakistani Federal Government's minimum wage for unskilled workers (14,000 rupees/USD \$133.59 per month).⁹

Figure 4
Levels of income among persons convicted of death-eligible drug offences

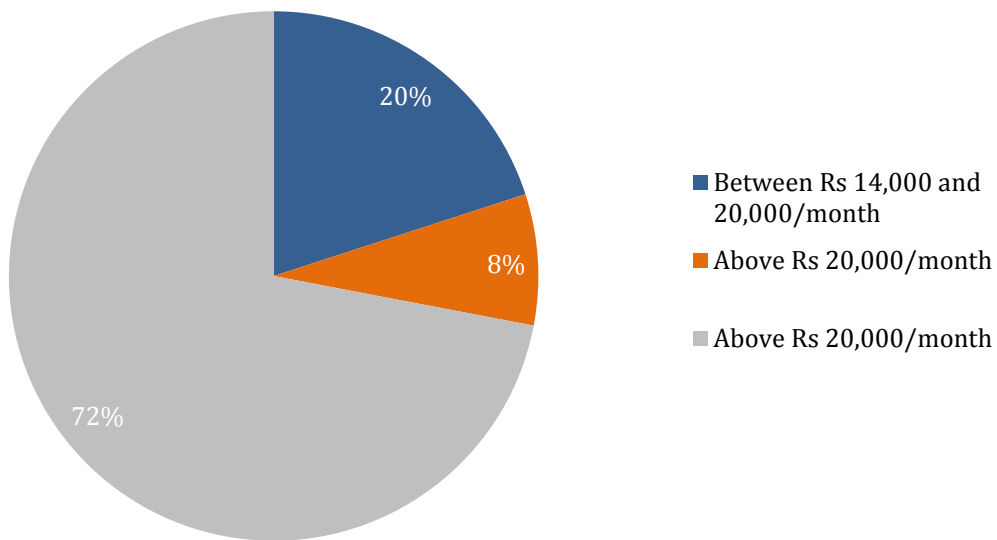
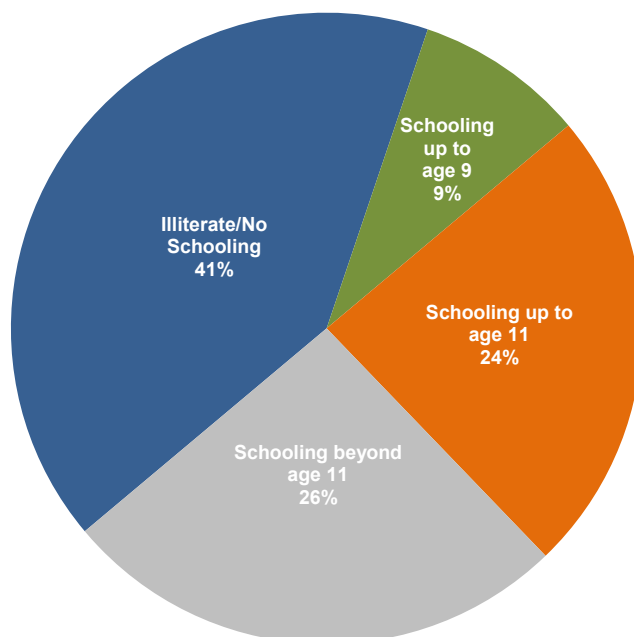


Figure 5
Levels of education among persons convicted of death-eligible drug offences



As well as being poor, most prisoners had received only the most rudimentary education and 41% of prisoners surveyed were entirely illiterate. The majority were not educated past the age of 9 years old and the most common occupation among prisoners interviewed was manual labour paid by the day.¹⁰

FFR's case review suggests there is little chance these individuals could be acting independently or have acquired the narcotics they were seized with via their own means. The average value of the narcotics seized from each prisoner was roughly 1,600 times the prisoners' median income.¹¹ The case studies included later in this chapter provide examples of the exploitation and coercion many prisoners experienced when being convinced to carry narcotics.

Women in Pakistan are particularly vulnerable to this kind of coercion. In June 2014, the ANF's legal director acknowledged in a newspaper interview that it was part of the "strategy of the drug mafia" to use female carriers to transport drugs through airports and that "traffickers thought it was 'safe' to use women and children as it was thought that they were able to escape detailed checking by the security staff".¹²

UNODC's 2011 study "Females Behind Bars" estimated that nearly a quarter of all women imprisoned in Pakistan (24%) were charged with drug-related offences.¹³

A 2013 study of 114 female prisoners in Lahore's Kot Lakhpat jail noted that these prisoners "were from economically disadvantaged strata of the society" and "were indulged in criminal activities for making the both ends meet." The study concluded that the women in question "were earning hands of their families, as most of the women were divorced, separated, widowed or single".¹⁴

Case study: Nisar³

Nisar is a baker who worked in the kitchens of a hotel. In 2010, soon after losing his job, he was apprehended by police and charged with possessing 15 KG of heroin under Section 9c of the CNSA.

As a baker, Nisar would earn approximately Rs 12,000 per month.¹⁵ The street value of the heroin confiscated at his arrest exceeded 5.2 million rupees¹⁶: more than Nisar could hope to earn in 35 years of work.

It is impossible that someone like Nisar – who earned less than the national minimum wage¹⁷ and had USD \$9 in his pocket at the time of his arrest – could have obtained these drugs through his own means. Appealing for mercy before the court, Nisar told the judge that:

“Actually I am a labourer and use to make loaves on a oven of a hotel...I am a poor fellow and cannot think of transportation of narcotics of huge quantity.”

The special trial court in Attock hearing the case did not dispute Nisar’s status as a low-level drug carrier, accepting that:

“Apparently accused seems to be a poor fellow and none has come behind him to pursue his case. He was provided a counsel on state expenses to defend his case. It seems that he has been used as a tool for transportation of narcotics/drugs but it is a fact that as per law no leniency is provided to any individual...”

*“As no leniency is provided hence accused is convicted u/s.9(c) Control of Narcotics Substances Act,1997, and sentenced to death penalty. He be hanged by his neck till he is dead subject to confirmation by Hon’ble High Court”.*¹⁸

The special judge acknowledged in his judgment that Nisar was not an architect of Pakistan’s drug trade, that in fact he was a pawn in a highly organised trafficking ring. Despite the fact that evidence of the third party involvement was recovered from the vehicle in which Nisar was apprehended,¹⁹ the police declined to investigate these leads. It is clear that high-level culprits associated with Nisar’s case remain at large.

As the judge pointed out, sentencing under the CNSA lacks a mechanism to differentiate the culpability of a carrier from that of a kingpin. Because possession is practically a strict liability offence, and the court was satisfied that Nisar was in possession of a death-eligible quantity of drugs, he was sentenced to death. He is currently appealing his death sentence before the High Court.

³ This individual’s name has been changed to protect their identity.

2. Problems with the Act (in law and in practice)

Presumption of guilt

The Pakistan-focused “Prosecutors’ Handbook” published in 2015 by the UNODC advises that:

*“A fundamental principle of criminal justice is that an accused person is always presumed to be innocent unless the prosecution can establish his guilt beyond the shadow of a reasonable doubt. A fair and expeditious trial is a fundamental human right which cannot be denied to anyone”.*²⁰

The fundamental makeup of the CNSA court system is designed to reverse this standard. The critical characteristic of proceedings in the special courts is set out in Section 29 of the Statute, which is entitled “Presumption from possession of illicit articles”. This provision stipulates that:

“in trials conducted under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of any narcotic drug, psychotropic substance or controlled substance...”

This principle effectively reverses the presumption that defendants alleged to have been in possession of narcotics are innocent until proven guilty. The prosecution is still required to prove that the drugs in question were indeed recovered from the defendant’s possession, but should this be successfully established it falls to the defendant to demonstrate that they have not committed an offence under the statute.

Poor representation

The disadvantage to defendants described is compounded by the low standards of representation across CNSA courts.

In its review of judgments from 76 capital cases tried under the CNSA regime, FFR did not find a single example of a case in which the court took into account testimony from an independent witness (i.e. a person not directly employed by the Anti-Narcotics Force or another law enforcement agency). Without independent testimony, it is extremely difficult for a defendant to overcome the presumption of guilt imposed by the court. In the absence of such testimony, therefore, defendants are more or less bound to be convicted.

The CNSA courts’ high conviction rate is hardly surprising given how low the bar is set for convictions. It is also a flawed indicator of the system’s success, given the frequency with which convictions are overturned or significantly reduced on appeal. Low standards of justice in CNSA courts create a protracted process in which offenders spend more than ten years challenging their initial death sentence – first in the High Court, and then in the Supreme Court – only to have the sentence overturned or reduced to a custodial term of fewer years than they have already spent in prison.

Arbitrary sentencing rules

As has already been observed in section 1, the CNSA’s sentencing rules apply the same punishment for any act committed under Sections 6, 7, or 8 which involves more than 1 KG of a prohibited substance. These acts range from simple possession through to managing and financing a drug cartel, meaning that a ‘drug mule’ faces the same punishment as an international drug kingpin.

The death penalty and life imprisonment are the only two sentences permitted by the CNSA for any offence punishable under Sections 6, 7, or 8 of the Act which involves more than 10 KG of a prohibited substance. If the quantity involved is between 1 KG and 10 KG, a judge may choose between a death sentence, a life sentence or a specific term of imprisonment. As in practice cases tried under the law almost exclusively involve possession, sentencing is based solely on seizure size.

The flaws in this sentencing framework have not gone unnoticed by senior members of Pakistan’s judiciary. In March 2009 Justice Asif Saeed Khan Khosa delivered a judgment in the Lahore High Court which addressed sentencing under the CNSA in some detail, noting that:

“in many situations a sentencing approach based only upon quantity of the recovered substance may lead to unjust and oppressive results and to punishments which may be unduly cruel and harsh.”

The current arrangement leaves no scope under the law to consider aggravating or mitigating factors in an individual case, and leads to perverse sentencing patterns at the trial court level, with some defendants receiving death sentences for crimes which elsewhere attracted comparatively short terms of imprisonment. Justice Khosa observed that:

“different judges, both at the trial and the appellate stages, have been passing sentences upon convicts placed in similar situations which sentences are quite often hideously variable as they oscillate and fluctuate between unduly lenient and grossly oppressive.”²¹

A point to which Justice Khosa devoted particular attention was trial courts’ continued failure to distinguish between the type of drug seized in CNSA cases. The judgment noted that:

*“Different kinds of contraband substances covered by the Control of Narcotic Substances Act, 1997 vary sharply in their harmful nature or dangerous effects as a huge quantity of one substance may be less harmful or dangerous than a small quantity of another substance”.*²²

The judgment went on to provide a proposed set of sentencing guidelines which retained the law’s focus on seizure size while making some distinction between the type of drug seized – advising that more leniency be shown for drugs such as Bhang and Poast, and that harsher punishments should be reserved for drugs including heroin, opium and cocaine. In keeping with the statute, the guidelines retained the death penalty as an option for seizures in excess of 1 KG.

Perverse trial court judgments continue, however, despite the circulation of Justice Khosa’s judgment to all of Pakistan’s additional sessions courts and specialist CNSA courts.

Non-independence of prosecutors

The flaws in trial court processes are exacerbated by a lack of prosecutorial independence within the CNSA courts.

Prosecutors in this system are directed and employed by the ANF. With no independence they have no ability or incentive to reject even the weakest of cases, meaning these are often pursued despite their flaws. While these cases are near-guaranteed to result in conviction in the ANF courts, their flaws tend to be exposed some years later when subjected to the increased rigor and scrutiny of appellate courts (see [section 3: Convictions overturned](#)).

Incentives to catch carriers not kingpins

ANF Reward Rules introduced in 2000 established financial incentives for ANF officers and prosecutors calculated according to the quantity of drugs seized in a particular case.²³ For instance, for each kilogram of heroin seized, a 5,000-rupee reward is available. A kilogram of hashish, meanwhile, carries a 500-rupee reward. These rules keep law enforcement focused on making individual seizures of narcotics, rather than on building more complex investigations targeted at senior traffickers and their networks.

Under the CNSA regime, apprehending carriers has remained the principal focus of law enforcement efforts, rather than the identification of senior traffickers and the disruption of criminal networks.

3. Evidence the system is broken

No deterrent effect – for cartels, it's business as usual

FFR's research suggests that the CNSA is not effectively deterring drug traffickers from maintaining and developing their operations in Pakistan.

The individuals who are disproportionately punished under the statute are ill-educated people in desperate economic circumstances. FFR's qualitative interviews suggest these individuals are quite willing to take the risk of transporting drugs in exchange for a relatively minor payoff.

FFR's case review and interviews suggest that senior traffickers are very comfortable using such individuals as "mules" and indeed select them for their vulnerability and expendability. Drug cartels exploit carriers precisely because they bear all the risk of punishment.

The capital provisions of the CNSA, and the law's seizure-based sentencing framework, have allowed senior traffickers to exploit the socioeconomic status of their "mules" so as to outsource any risk of apprehension and prosecution. It goes without saying that senior traffickers will never personally transport their own contraband. They therefore incur no risk under the statute.

Under the current system, senior traffickers see little threat of apprehension as a result of their activities, as law enforcement authorities remain focused on the individuals transporting prohibited substances rather than those organising, managing or financing drug trafficking.

Senior traffickers also see little threat of prosecution in Pakistan's court system, which focuses largely on possession-based drug offences. While this system continues to prosecute carriers rather than kingpins, it is distracted from the task of disrupting or dismantling organised trafficking networks.

By contrast, in jurisdictions such as the UK, sentencing bodies have recommended that asset recovery measures and financial penalties serve as a greater deterrent to traffickers because "the fear of financial reprisal is of more concern to offenders than the potential loss of liberty, especially as

confiscation orders can target not only the proceeds of crime but also any legitimate assets."²⁴

At present, the CNSA fails to exploit apprehended drug couriers' potential as cooperating witnesses who may lead authorities to more senior players in organised drug trafficking – despite the fact that (in the words of the UNODC) "a person who has taken part in an offence connected with a criminal organisation possesses important knowledge about the organisation's structure, method of operation, activities and links with other local or foreign groups".²⁵

The CNSA incentivises authorities to see the arrest and conviction of carriers as an objective in itself, rather than considering how these individuals could be encouraged to assist in the disruption of criminal networks. In this respect, it is useful to consider substantial international precedent for offering cooperating witnesses more lenient sentences in exchange for their cooperation.

The UNODC has described the provision of leniency in sentencing for cooperating witnesses as "a powerful tool in the successful prosecution of organised crime", and such sentencing arrangements are enshrined in statute in countries including Indonesia,²⁶ Cambodia,²⁷ Myanmar,²⁸ Malaysia,²⁹ Laos,³⁰ Germany,³¹ the United Kingdom,³² the United States³³ and Canada.³⁴

The United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders recently recommended that:

*"Mitigation of punishment and grants of immunity from prosecution encourage accomplices and 'insiders' to supply useful information and testimony. Providing for the possibility, in appropriate cases, of mitigating punishment or granting immunity to persons who provide substantial cooperation in the investigation and prosecution of criminal offences should be duly considered."*³⁵

Drug trafficking and use not reduced

The two core objectives of the CNSA as outlined in the preamble to the statute are:

1. ***to “control the production, processing and trafficking” of “narcotic drugs and psychotropic substances”; and***
2. ***“to regulate the treatment and rehabilitation of narcotic addicts”.***³⁶

In the twenty years since the law’s passage, neither of these goals have been achieved and drug trafficking and drug addiction in the country have been allowed to spiral out of control.

Although successive Pakistani Governments have judged drug enforcement efforts to be successful on the basis of rising quantities of narcotics seized, and a corresponding increase in the number of drug carriers convicted, these indicators are misleading. In fact, the UNODC recently observed that increased seizures by Pakistani law enforcement “may actually be an indication of increased trafficking and production across the border in Afghanistan”.³⁷

In reality, Pakistan’s focus on seizing drug shipments and arresting their carriers has not significantly impacted the flow of drugs through the country. The UNODC’s 2015 World Drug Report notes that Pakistan is by far the most frequently identified transit country in the heroin seizure reports of other states’ authorities.³⁸ Pakistan remains the destination or transit country for 43% of opiates produced in Afghanistan,³⁹ which supplies roughly 90% of the world’s heroin.⁴⁰

The US State Department recently acknowledged that the Pakistani Government “is only able to interdict a fraction of that traffic”.⁴¹ A UNODC study from 2009 estimated that between 160-200 metric tonnes of Afghan heroin are trafficked through Pakistan annually, and that only 2% of this was seized.⁴² Three years later, Pakistani customs officials estimated that number had risen to between 210 and 240 tonnes.⁴³ In the first six months of 2016, the ANF seized just 3.682 tonnes of heroin, according to its own estimates.

The continued flow of heroin into Pakistan is contributing to a surge in domestic drug addiction. The International Narcotics Control Board reported in 2014 that “the annual prevalence of opiate abuse among adult Pakistanis aged 15-64 years has grown

from 0.7% in 2006 to 1.0% in 2013, concurrent with increases in trafficking of opiates via Pakistan”. In 2013 the UNODC estimated that 4.25M Pakistani citizens were drug dependent.⁴⁴

Problems for international cooperation

The ANF’s “Drug Abuse Master Plan” lists among its core objectives the goal of “soliciting international support” for Pakistan’s drug enforcement efforts.⁴⁵ However, a key element of the law – the application of the death penalty for drug-related offences – serves as an active impediment to effective international cooperation.

The International Narcotics Board (INCB) has recognised that “the prospect of the death penalty often constitutes under national legislation a compulsory or discretionary ground for refusal of international mutual assistance”. The UNODC has also issued guidance advising that international counter-narcotics assistance may be withdrawn in cases where the recipient state continues to apply the death penalty for drugs. The UNODC’s policy states that:

*“At the very least, continued support in such circumstances can be perceived as legitimizing government actions. If, following requests for guarantees and high-level political intervention, executions for drug-related offences continue, UNODC may have no choice but to employ a temporary freeze or withdrawal of support...”*⁴⁶

Pakistan’s continued use of the death penalty for drug offences discourages many international donors from providing technical assistance and capacity building support to Pakistan’s counter-narcotics institutions.

The United Kingdom, which coordinates closely with Pakistan on international drug policy matters, has noted that “(the death penalty) affects our provision of police or other justice and security assistance to countries which retain the death penalty – In countries where the assistance we offer could lead to the death penalty, the assistance we may be able to offer will be limited.”⁴⁷

In 2014 the then-Deputy Prime Minister of the UK confirmed that “given that the death penalty remains on Pakistan’s statute books as a penalty for drug trafficking, there are challenges and risks to cooperation”.⁴⁸

Evidence the system is broken

In August 2015 the then UK Home Secretary Theresa May confirmed “when the Government of Pakistan lifted the moratorium on the death penalty, the Foreign and Commonwealth Office worked with partners across government to review all UK security engagement with Pakistan”.⁴⁹ Foreign Office Minister Tobias Ellwood subsequently confirmed that further funding to Pakistani counter-narcotics programmes was “under consideration”.⁵⁰

At present, bodies like the UK National Crime Agency (NCA) are substantially restricted from sharing evidence with Pakistani law enforcement which could contribute to the imposition of a death sentence.

At the same time, Pakistan remains open to criticism that its application of the death penalty for drug offences leaves Pakistan in breach of its obligations as a signatory to the International Convention on Civil and Political Rights (ICCPR), which prohibits the use of the death penalty for all but “the most serious crimes”. The UN Human Rights Committee, which is responsible for the authoritative interpretation of the ICCPR, has repeatedly judged that drug offences do not meet this threshold.⁵¹

Convictions overturned

Chapter V of the CNSA establishes a system of special courts in which to try drug offenders. In recent years these courts have maintained a consistent conviction rate of between 89 and 92%. Pakistan’s ANF has argued that this illustrates the success of its fight against drug trafficking. The agency’s 2013 Annual Report noted that:

“Mere arresting didn’t quench the thirst in ANF. Bringing culprits to the task through effective prosecution in the courts remained priority of the command in 2013. Surely, it brought fruit; the conviction rate rose to applauding 92% in 2013 as compared to 88% in 2012. Fear of having 92 percent chances of being convicted would surely forbid a sane man from falling prey into the hands of drug traffickers”.

Concerns have been raised, however, that the Special Courts’ high rate of conviction conceals serious flaws in the CNSA regime. The United States’ State Department observed in its 2015 *International Narcotics Control Strategy Report* that between January and September 2014:

“Law enforcement agencies registered over 30,588 cases, with ANF registering 668 cases with a 90 percent conviction rate. However, almost the same percentage of cases is overturned on appeal. The vast majority of these cases involved low-level possession or small quantity courier trafficking.”⁵²

UNODC assessments concur with this criticism:

“Judges grant long continuances, defendants file delaying interlocutory appeals and witnesses are reluctant to testify. The great majority of narcotics cases that go to trial are uncomplicated drug possession cases involving low-level couriers and straightforward evidence.”⁵³

FFR’s analysis strongly supports the case that CNSA convictions stand up very poorly under the scrutiny of superior courts.

FFR’s research identified no single case where the Supreme Court upheld a death sentence handed down by the CNSA’s special courts. According to statistics laid before Pakistan’s National Assembly in October 2014, at least 70 death sentences handed down in CNSA courts have been overturned by higher courts.⁵⁴ Commenting on these statistics in the Express Tribune newspaper, a Supreme Court lawyer who has dealt with drug smuggling cases noted that:

“The majority of these sentences were quashed by higher courts due to insufficient evidence or flaws in the trial process.”⁵⁵

In its review of cases tried under CNSA, FFR identified a pattern in which Special Courts overlooked significant flaws in the prosecution’s case, and interpreted the law in a way which would require significant reassessment on appeal. As the appellate statistics laid before the National Assembly show, such reassessments often lead to a significant reduction in sentence, if not the offender’s immediate release.

4. Conclusions and recommendations

Based on the findings and analysis set out above, FFR has arrived at four provisional recommendations for amending and optimising the CNSA. We believe these targeted reforms would make the statute stronger, fairer and more effective. These recommendations are listed below and followed by the detailed rationale behind each.

Recommendation 1: Rework the CNSA's sentencing framework to make the statute stronger, fairer and more effective

FFR proposes that Section 9 of the statute be reworked to allow for more proportionate sentencing which reflects the severity of the offence committed. This should include the removal of the death penalty from the statute, given its proven failure to effectively deter offenders.

FFR's research shows that the capital provisions of the CNSA have in fact been counterproductive in the fight against drug trafficking; have disproportionately targeted impoverished mules; and have perpetuated a costly and unnecessary appeals process which ultimately overturns harsh sentences in the majority of cases.

The statutes' current sentencing arrangements have not deterred couriers from transporting drugs on behalf of more senior players, despite the fact that more than a hundred such couriers have been sentenced to death under the law. Similarly, these arrangements have failed to deter more senior traffickers from maintaining and developing their operations.

Conversely, the retention of the death penalty for drug-related offences has served as an impediment to international counter-narcotics cooperation between Pakistan and key partners such as the UNODC and the Government of the United Kingdom (as well as other Governments who oppose the application of the death penalty for drug offences).

Reworking the CNSA's sentencing framework and removing the death penalty for drug offences would aid Pakistan's fight against narcotics

trafficking and increase efficiency in the prosecution of drug crimes.

Recommendation 2: Target senior traffickers with a combination of financial and custodial penalties

Under the CNSA as it currently stands, drug trafficking in Pakistan has flourished. This is partly because the CNSA has built an enforcement system focused principally on seizing individual consignments of illicit drugs and handing down the harshest possible punishments for the carriers or "mules" carrying them – leaving senior traffickers to continue their operations unchecked.

FFR recommends that the CNSA's sentencing provisions be reworked so as to prioritise the disruption and dismantling of organised drug trafficking networks. Specifically, FFR recommends that the offences set out in Sections 6, 7 and 8 of the act be punishable by a combination of financial and custodial sentences which target traffickers' liquidity as well as their liberty.

With this objective in mind, it is useful to consider recommendations made in 2009 by the Sentencing Advisory Panel of the United Kingdom (SAP), in a paper which considered the most effective ways to deter organised drug trafficking. The SAP noted that:

"For those at the top of the supply chain, the considerable financial gains that can be made through importation and exportation offences are likely to far outweigh concerns about the scale of penalties in the unlikely event of conviction..."

"In contrast, asset recovery measures have been found to be of much greater concern to dealers. The profits that can be made from drug offences are enormous and, where such large sums of money are involved, it would appear that the fear of financial reprisal is of more concern to offenders than the potential loss of liberty, especially as confiscation orders can target not only the proceeds of crime but also any legitimate assets."⁵⁶

These principles reflect the practical reality of drug enforcement in Pakistan. For senior traffickers operating in the country, a potential death sentence is not seen as a deterrent because such a sentence is seen as both unlikely and avoidable (particularly given the practical challenges facing the Pakistani criminal justice system).

Conclusions and recommendations

By combining strict financial penalties and confiscation orders with the threat of a custodial prison sentence, an amended CNSA could more effectively target higher level operatives within organised trafficking rings.

Recommendation 3: End seizure-based sentencing and mandate courts to consider aggravating and mitigating factors

The CNSA's seizure-based sentencing regime has resulted in perverse and arbitrary sentencing patterns which see a clear lack of alignment between the severity of an offence and the punishment which is handed down. This is a direct function of the statute's allocation of punishments according to the quantity of drugs involved in the commission of the offence.

At present the CNSA's sentencing rules do not distinguish between offences committed under Sections 6, 7, and 8 so a low-level drug courier faces the same punishment as an international drug kingpin who has organised and financed a major drug cartel.

Similarly, the statute fails to consider the relative harmfulness of the prohibited substance for which an offender may be sentenced. Therefore offences involving cannabis products are as liable to result in a death sentence as those involving heroin – and in practice are actually more likely to attract the death penalty given that these substances tend to be trafficked in larger quantities.

Although Supreme Court Justice Khosa sought to lend greater clarity to these issues in his 2009 judgment in the case of *Ghulam Murtaza v. State*, trial courts have continued to hand down arbitrary and perverse sentences following that judgment.

Only an amendment to the CNSA itself can fix the root cause of arbitrary sentencing: the statute's provision of its most serious punishments for seizures of any prohibited substance in quantities above 1 KG. As long as this provision remains in place, trial court judges will continue to follow the letter of the law and hand down sentences which are perversely punitive but legally correct.

FFR recommends that Section 9's seizure-based sentences, as set out in subsections 9a, 9b, and 9c, be replaced with a more detailed list of aggravating and mitigating factors, including but not limited to:

- the type of drug seized from the defendant;
- the presence or absence of violent acts in the commission of the offence;
- the defendant's willingness to cooperate with law enforcement and name more senior figures;
- the possibility that the defendant was coerced or manipulated into carrying the drugs; and
- whether the defendant is female, pregnant, elderly or intellectually disabled.

Recommendation 4: Improve standards of justice in the CNSA courts through capacity building and strengthening evidentiary standards

FFR recommends that efforts are made to improve the standards of representation and justice across CNSA courts through capacity building and training for judges, prosecutors and investigators. FFR also recommends reviewing how section 29 of the statute impacts standards of justice across CNSA courts, with a mind to reframing this provision.

Section 29, entitled "Presumption from possession of illicit articles", stipulates that: "it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of any narcotic drug, psychotropic substance or controlled substance..."

This principle effectively reverses the presumption that defendants being tried are innocent until proven guilty, meaning the only burden on the prosecution is to prove that the drugs in question were recovered from the defendant's possession – which it is generally able to do through testimony by law enforcement officers who are incentivized to secure convictions.

In light of the specific circumstances under which CNSA courts operate, there is a risk the evidentiary burden required to secure a conviction may be so low as to devalue that conviction significantly. Section 20 may therefore be partly responsible for the large number of convictions that are overturned at the appellate court level.

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