

MENTAL HEALTH AWARENESS TOOLKIT

FOR JUDGES



MENTAL HEALTH AWARENESS TOOLKIT: FOR JUDGES

This toolkit has been published by Justice Project Pakistan (JPP) with the financial assistance of AusAid.

This publication was authored by Eman Ahmed with assistance from Zainab Mahbbob of Justice Project Pakistan. Illustrations and layouts were designed by Marium Ali. The contents of this document are the sole responsibility of JPP and can under no circumstances be regarded as reflecting the position of the donor.

Justice Project Pakistan is non-profit legal action firm representing the most vulnerable Pakistanis facing the harshest punishments at home and abroad.

JPP investigates, educates and litigates on their behalf.



www.jpp.org.pk



data.jpp.org.pk



fb.com/justiceprojectpakistan



[@justiceproject](https://twitter.com/justiceproject)



[@justiceprojectpak](https://instagram.com/justiceprojectpak)



TABLE OF CONTENTS

Preface	1
Introduction	3
I. Mental Health & Mental Illness	4
What is mental health?	5
What is mental illness?	5
What is the prevalence of mental illness?	5
What are the symptoms of mental illness?	6
What are the causes of mental illness?	7
Can mental illness be cured?	7
How is mental illness classified and diagnosed?	8
How does the law classify mental illness?	8
Can a person feign mental illness?	11
II. Relevent Legal Procedures	13
Mental illness and the law	14
The trial: What a Judge/Magistrate should do	14
If a defendant is found incapable to stand trial	18
Legal defences: Insanity & Diminished Responsibility	19
Conditions while imprisoned	21
Transfer to a mental health facility	21
Observation and reporting requirements	22
III. Mental Illness & The Law	26
Sentencing & punishment	27
Can a prisoner suffering from mental illness be executed?	28
Implied safeguards against executing a mentally ill prisoner	28
Impact of Supreme Court's judgment	29
Islamic law & mental illness	30
International law	30
Comparative jurisdictions	31
IV. Appendix	34

PREFACE

“the federal government (for Islamabad capital territory) and all the provincial governments shall immediately launch training programs and short certificate courses on forensic mental health assessment for psychiatrists, clinical psychologists, social workers, lawyers, prison staff, police personnel, Court staff, prosecutors and the judges of trial Courts.

Mst. Safia Bano vs Home Department, Government of Punjab [2021 PLD 488 Supreme Court]

People with mental illness are among the most vulnerable in society. Their vulnerability is, unfortunately, seldom recognised or afforded the appropriate levels of protection in the criminal justice system.

Alarming, 50 million people suffer from a mental illness in Pakistan. However, the severe lack of mental health awareness and training specifically in the criminal justice system, as well as in Pakistan generally, means that many individuals never get diagnosed and hence treated. There are many reasons why an individual's mental illness should be taken into account in the criminal justice process: it may affect their legal responsibility for an offence, it may be relevant to the sentencing determination, or it may hinder meaningful participation in the legal process.

While legal professionals do not have a duty to diagnose mental disorders or provide welfare services to defendants with mental illnesses, they do have a duty to ensure that vulnerable defendants are treated fairly and in accordance with domestic law and international obligations.

The need to exercise this duty becomes increasingly important in light of the fact that currently, 33 criminal offences are punishable by death in Pakistan. Failure to uphold the rights of defendants with mental illnesses has resulted in the execution of vulnerable individuals and may do so again if this obligation is not taken seriously.

Mental health and the judicial system is closely linked. It is estimated that 40% of prisoners, globally, suffer from mental

illness. Criminal justice systems, the world over, face substantial challenges when dealing with an offender with mental illness. Research has shown that such individuals are less likely to be released pretrial and more likely to stay longer in jail pretrial, compared to those who have similar charges and no mental health illness. Without treatment, mental illness can linger, become worse, and increase the chances of future involvement in the justice system. To achieve better results for the system and for individuals, access to mental health services should be provided at various stages in the criminal justice system.

Recognizing this complexity, the Supreme Court issued a landmark judgment which provides broad guidelines for managing offenders living with mental illness. Issued on 10th February 2021, in the case of *Mst. Safia Bano vs Home Department, Government of Punjab*, the Court banned capital punishment for prisoners with mental illness. It also directed authorities to set up special forensic mental health facilities and institute training and awareness programs on forensic mental health for medical personnel, social workers, police, prison staff, lawyers, Judges, Magistrates and other Court personnel.

This toolkit seeks to help key stakeholders in the judicial process to understand better and respond appropriately to the mental health needs of offenders with mental illness. The detail on the diagnosis and symptoms of various mental health conditions has been gathered in collaboration with both local and international medical professionals.

INTRODUCTION

GOALS

- Increase awareness regarding mental health, mental illnesses and challenges, specifically in relation to the law and judicial process
- Highlight what Judges and Magistrates should do when they have a mentally ill offender in their Courtroom
- Highlight relevant laws and legal procedures, both domestic and international, that deal with mentally ill offenders

BENEFITS

Increased capacity of legal professionals. Dealing with mentally ill offender, can be emotionally, physically and psychologically challenging. It requires a range of skills and competencies. A legal professional who has the requisite skills and knowledge, will be better equipped to deal with people in a fair and humane way.

Less stressful work environment. When judges and Magistrates do not have the skills to recognize symptoms of mental health problems, 'bad' behavior may be misinterpreted by the Court as the offender being difficult and non-cooperative. In some cases it may lead to the accused being unfairly and unnecessarily sentenced rather than being given the care and treatment they need. This can further worsen the mental illness and increase the chances of the accused reoffending in the future.

Heightened Awareness. Legal Professional will develop greater insights into mental health issues they may encounter in their personal and professional lives.

DISCLAIMER: *This training does not equip attendees to clinically diagnose or treat mental illnesses.*

TOPICS COVERED

This training is divided into 3 modules covering:

- Mental health and mental illness
- Role of Judges/Magistrates
- Relevant laws and legal procedures (domestic & international)

MENTAL HEALTH & MENTAL ILLNESS

01

INTRODUCTION

In Pakistan, it is estimated that 50 million people suffer from mental illness. The number of trained mental health professionals is abysmally low, and it is estimated that there is approximately only one psychiatrist for every 10,000 persons experiencing mental disorders; one child psychiatrist for every four million children experiencing mental health issues, and only four major psychiatric hospitals for the entire population of 220,000,000.

A severe shortage of mental health facilities, treatment and training in particular as it relates to offenders, means that many individuals are never diagnosed, leave alone treated for mental illness. However, in the recent landmark judgment of *Mst. Safia Bano vs Home Department, Government of Punjab*, the Supreme Court of Pakistan directed federal and provincial governments to set up special forensic mental health facilities for the treatment, assessment and rehabilitation of offenders living with mental illness. The judgment also recommends that forensic training programs be launched immediately for prison staff, police, and prison social workers among others.

Before learning about specific rules and regulations applicable to mentally ill offenders, it is important to understand what is mental illness, the symptoms and causes of mental illness as well as cultural factors and attitudes towards mental illness.

LEARNING OBJECTIVES

In this module participants will learn:

- What is mental health and mental illness?
- What are the causes and symptoms of mental illness?
- Can mental illness be cured?
- How does the law classify mental illness?
- Can mental illness be feigned?

WHAT IS MENTAL HEALTH?

The World Health Organization (WHO) defines mental health as "... a state of well-being in which an individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and is able to make a contribution to his or her community."

Mental health affects how we think, feel and act. It also affects how we handle stress and relate to others. Those with good mental health can better handle life's challenges and stress, make appropriate decisions and maintain healthy relationships. Those with poor mental health can find the stresses of life difficult to cope with and have difficulty interacting with people.

WHAT IS MENTAL ILLNESS?

Poor mental health is not the same as a mental illness. A mental illness is a medical condition that can affect how an individual interacts with others. It affects their moods, feelings, thoughts and behavior (or a combination of these). However, prolonged poor mental health can lead to mental illness. Mental illness can increase the risk of physical health problems, like stroke, type 2 diabetes and heart disease.

There are more than 200 classified forms of mental illness. Some of the more common disorders are depression, bipolar disorder, dementia, schizophrenia and anxiety disorders. Symptoms may include changes in

mood, personality, personal habits and/or social withdrawal.

Having a mental illness is not related to a person's strength of character or intelligence. Examples of famous and successful people who have/had a mental illness include Michael Jackson, Shakespeare and Nobel Prize winner, John Nash. In 1998 the Prime Minister of Norway took time off while in office to deal with mental health issues, and was successfully re-elected to a second term.

WHAT IS THE PREVALENCE OF MENTAL ILLNESS?

It is estimated 792 million people worldwide suffer from mental illness. In Pakistan according to a recent estimate, around 50 million people suffer from mental disorders. A range of psychiatric disorders have been reported, such as depression, substance and alcohol misuse, schizophrenia, bipolar disorder, and post-traumatic stress disorder. According to one estimate, 36% of Pakistanis suffer from anxiety and depression, which is often caused by strained family and social relations, the feeling of not fitting in, and the unstable economic and political conditions of the country giving rise to unemployment and poverty.

WHAT ARE THE SYMPTOMS OF MENTAL ILLNESS?

Unlike physical disability, we cannot see mental illness. It is therefore difficult to detect mental illness, especially if you are not a trained mental health professional. Due to a lack of mental health services in the country, many with mental illness themselves may not be aware of their condition.

The following signs can be indicators of an existing mental health condition.

- Confused thinking/speech
- Being sad and withdrawn
- Prolonged sadness
- Suicide or self-harm
- Extreme mood swings
- Strange thoughts (delusions)
- Changes in energy levels
- Drug/Alcohol Abuse
- Seeing/Hearing things that are not there
- Not looking after oneself
- Rigidity
- Extreme and excessive fear and worry
- Disruptive and aggressive behavior
- Problems communicating with others
- Dramatic changes in eating or sleeping habits

While many individuals may demonstrate such behavior, it does not necessarily mean they are mentally ill. Such behavior is also a common response to being on trial or imprisoned. Only one or two of these symptoms alone do not suggest a mental illness.

WHAT ARE THE CAUSES OF MENTAL ILLNESS?

No one is immune from mental illness. Anyone can develop a mental illness no matter their gender, religion, race, socio-economic status, level of education, employment status etc. There is no one single reason a person develops mental illness. Rather, mental illnesses is the result of different factors, including:

- **Genetics.** Mental illness can often be hereditary and run in the family.
- **Imbalance in brain chemistry.** Mental illness can be the result of an imbalance in the naturally occurring chemicals in the brain and body.
- **Environment.** Mental illness can develop if person is/was living in a stressful environment, such as poverty or for example where there is abuse.
- **Trauma and stressful events.** Traumatic and stressful events such as a car accident, the death of a loved one, or being sentenced to prison can also lead to mental illness.
- **Substance abuse.** Drugs and alcohol can also trigger mental illness. Substance abuse can also make it more difficult to recover from mental illness.

CAN MENTAL ILLNESS BE CURED?

There are no cures for mental illness, however, symptoms can be treated in order to manage these conditions and improve an individual's quality of life in order they can live more fulfilling lives despite their difficult conditions.

Most, if not all mental disorders and mental illnesses are chronic in nature and while they can be managed with psychotherapy and medication, they cannot be cured.

CYCLICAL NATURE OF MENTAL ILLNESS

Some mental illnesses are cyclical in nature. For example, depression (low moods, tiredness, lack of interest) hypomania/mania (high moods, very energetic, intense new interests in hobbies) and bipolar disorder.

The cyclical nature of some is discussed below:

- Bi-polar disorder is such that in some patients the episodes alternate after every few months or few years; while still in others these alternate very frequently, at times on a daily basis. The lucid intervals in between the episodes are usually maintained with the help of medication as well as avoiding stressful situations or loneliness.
- Schizophrenia and related psychosis can also present as cyclical in nature with periods of better psycho-social functioning in between. Factors which help manage symptoms include medication, supportive environment, as well as avoiding illicit substances.
- Anxiety and stress related disorders as well as disorders of eating behaviors can also present cyclically.
- Personality disorders present problems in perceiving and thinking about self and others, emotional instability and behavioral problems in psycho-social domains as well as impulse control. These disorders are enduring and

persistent, meaning they can start in childhood or adolescence and continue into adulthood. The severity of the symptoms increase and decrease with periods of lucid intervals in between and throughout the sufferers life.

- Disorders of cognitive functioning such as dementia is a progressive and an irreversible illness. It tends to present with memory deficits progressing to problems in speech, sensory functions and executive functions.

HOW IS MENTAL ILLNESS CLASSIFIED & DIAGNOSED?

Mental health professionals evaluate symptoms to make a diagnosis. They rely on the criteria specified in the International Classification of Diseases (currently in its 11th edition) and the Diagnostic and Statistical Manual of Mental Disorders (currently, in the fourth edition) published by the American Psychiatric Association to diagnose a specific mental illness. For each mental illness, the ICD/DSM gives a general description of the disorder and a list of typical symptoms. Mental health professionals refer to these resources to confirm that the symptoms a patient exhibits match those of a specific mental illness.

HOW DOES THE LAW CLASSIFY MENTAL ILLNESS?

Each province has its own Mental Health Act and according to these Acts mental illness is classified into three main categories: Intellectual disabilities,

Personality Disorders and Severe Mental Disorders.

I. INTELLECTUAL DISABILITIES

Intellectual disability is characterized by below-average mental ability and a lack of skills necessary for day-to-day living, such as communication, social and self-care skills. These limitations can cause a child to develop and learn more slowly or differently than a typically developing child. Intellectual disability can happen any time before a child turns 18 years old, even before birth. Children who experience these deficits have long been recognised to be at increased risk of psychiatric disorders. There are varying degrees of intellectual disability, from mild to severe.

Intellectual disability has an enormous impact on how the individual experiences the world, how others perceive them and the likelihood of psychological and behavioural problems. People with intellectual disabilities require special care depending on the severity of the disorder (mild, moderate, severe). A person with a diagnosis of intellectual disability can still function and attend day to day living to a reasonable extent depending on the severity of the disorder as well as the support available.

COMMON CAUSES OF INTELLECTUAL DISABILITY

Intellectual disability—formerly known as mental retardation—can be caused by injury, disease or a problem in the brain.

The most common causes of intellectual disabilities are:

- **Genetic conditions.** Sometimes an intellectual disability is caused by abnormal genes inherited from parents,

errors when genes combine, or other reasons.

- **Complications during pregnancy.** An intellectual disability can result when the baby does not develop properly in the womb. This can be the result of alcohol consumption during pregnancy or an infection like rubella while pregnant.
- **Problems during birth.** If there are complications during labor and birth, such as a baby not getting enough oxygen, he or she may have an intellectual disability.
- **Diseases or toxic exposure.** Diseases like whooping cough, the measles, or meningitis can cause intellectual disabilities. They can also be caused by extreme malnutrition, not getting appropriate medical care, or by being exposed to poisons like lead or mercury.

PREVALENCE OF INTELLECTUAL DISABILITIES

Pakistan has one of the highest reported rates of childhood intellectual disabilities in the world. Prevalence estimates vary from 19.1/1000 for serious intellectual disability to 65/1000 for mild intellectual disability. There is significant delay in detection of intellectual disabilities especially in rural setting.

INTELLECTUAL DISABILITY & THE LAW

The seminal case of *Atkins v. Virginia*, United States Supreme Court 2002, discusses intellectual disability and offending as follows:

*“Because of their disabilities in areas of reasoning, judgment, and control of their impulses, people with intellectual disability do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. **Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings.**”*

“Intellectually disabled persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”

II. PERSONALITY DISORDERS

People with personality disorders have long-standing patterns of thinking and acting that differ from what society considers usual or normal. The inflexibility of their personality can cause great distress and can interfere with many areas of life, including social and work functioning. People with personality disorders generally also have poor coping skills and difficulty forming healthy relationships.

Because they do not believe they have a disorder, people with personality disorders often do not seek treatment on their own.

COMMON CAUSES OF PERSONALITY DISORDERS

Some common causes of personality disorders are:

- Childhood trauma, neglect or abuse.
- Neurological and genetic factors.
- Family history of mental illness. For example, people with antisocial personality disorder are more likely to have a family history of depression.

PREVALENCE OF PERSONALITY DISORDERS

Personality disorders are among the most common of the severe mental disorders and often occur along with other mental illnesses, such as substance abuse disorders, mood disorders (depression or bipolar disorder), and anxiety disorders.

Most personality disorders begin in the teen years, when the personality further develops and matures. As a

result, almost all people diagnosed with personality disorders are above the age of 18. Some personality disorders—such as borderline personality disorder and histrionic personality disorder—are more common in women, and others—such as antisocial personality disorder and obsessive-compulsive personality disorder—are more common in men.

III. SEVERE MENTAL DISORDERS

Severe mental disorders are mental health conditions involving changes in emotion, perception, thinking, cognition, and behavior (or a combination of these). Severe mental disorder may be caused by a reaction to environmental stresses, genetic factors, biochemical imbalances, or a combination of these. With proper care and treatment many individuals learn to cope with mental illness or emotional disorder.

Severe mental disorders comprise schizophrenia, major depression, bipolar disorders, characterized by delusions, hallucinations, leading to impairment of insight and judgment thus resulting in arrested or incomplete mental development, abnormally aggressive and irresponsible conduct.

- **Schizophrenia** is a mental disorder that impairs a person's ability to think, make judgments, respond emotionally, remember, communicate, interpret reality, and/or behave appropriately so as to grossly interfere with the person's capacity to meet the

ordinary demands of life. Symptoms may include poor reasoning, disconnected and confusing language, hallucinations, delusions, and deterioration of appearance and personal hygiene.

- **Bipolar disorder or manic-depressive illness** is characterized by a person's moods, alternating between two extremes of depression and mania (exaggerated excitement). The manic phase of bipolar disorder is often accompanied by delusions, irritability, rapid speech, and increased activity.
- **Major depression** is much more severe than the depression most of us feel on occasion. People suffering from major depression may completely lose their interest in daily activities; feel unable to go about daily tasks; have difficulty sleeping or are sleeping too much; are unable to concentrate; have feelings of worthlessness, guilt, and hopelessness; and may have suicidal thoughts.

Severe mental disorders range from mild to life-threatening are chronic in nature, but can be managed with the proper medication and treatment. While they can be managed, it may not be possible to fully reverse them.

COMMON CAUSES OF SEVERE MENTAL DISORDERS

Severe mental disorder is often the result of :

- biochemical imbalance
- psychosocial factors
- genetic vulnerability.

PREVALENCE OF SEVERE MENTAL DISORDERS

No comprehensive survey has been conducted in Pakistan regarding the prevalence of severe mental disorders. However, based on similar studies worldwide, we can extrapolate that roughly 5.2% of adults suffer from severe mental disorder. Also according to research the prevalence is higher among females than males.

CAN A PERSON FEIGN MENTAL ILLNESS?

A concern in the criminal justice system is that prisoners may pretend to have a mental illness in order to avoid a harsh punishment.

While concerns surrounding feigning mental illness are not unfounded, there are equally serious consequences for misclassifying an individual who genuinely suffers from a mental illness. Doing so may improperly result in the execution of a mentally ill prisoner, or the unjust imposition of a harsher penalty than is warranted in the circumstances.

The main way in which the risk of feigning mental illness can be reduced is to ensure the offender is examined by a mental health expert.

REVIEW

MENTAL HEALTH AND MENTAL ILLNESS

- Mental health and mental illness are not the same thing
- Mental illness is a medical condition that can affect how an individual interacts with others and affects their moods feelings, thoughts and behavior
- Mental illness can be managed but not cured
- Mental illness is cyclical in nature
- Having a mental illness is not linked to a person's character

SYMPTOMS OF MENTAL ILLNESS

- Confused thinking/speech
- Being sad and withdrawn
- Suicide or self harm
- Extreme mood swings
- Delusions
- Changes in energy levels
- Drug/Alcohol Abuse
- Not looking after oneself
- Rigidity
- Excessive fear and worry
- Aggressive behavior
- Communication problems
- Dramatic changes in eating or sleeping habits

CAUSES OF MENTAL ILLNESS

- Genetics
- Imbalance in brain chemistry
- Stressful environment
- Substance abuse

LEGAL CLASSIFICATION OF MENTAL ILLNESS

- Intellectual Disability
- Personality Disorder
- Severe Mental Disorder

CAN MENTAL ILLNESS BE FEIGNED?

The only way to ensure an offender is not feigning mental illness, is to have the offender examined by a mental health expert.



RELEVANT LEGAL PROCEDURES

INTRODUCTION

People with mental illnesses often are ostracized, discriminated against and society views them as inherently dangerous. Recognizing this vulnerability, the law has laid out certain safeguards at various stages of the criminal justice system, relating specifically to mentally ill offenders.

An offender with mental illness who receives proper medical treatment, has a better chance of adjusting to community life and is less likely to re-offend. Awareness and sensitivity towards the mental health status of offenders will help legal professionals in carrying out their main duty of ensuring that justice is upheld.

LEARNING OBJECTIVES

In this module participants will learn:

- Legal requirements when conducting the trial of an offender with mental illness
- Legal requirements if the accused is unfit to stand trial
- Legal defences available for a defendant with mental illness
- Legal requirements related to the transfer and prison condition of a mentally ill offender

MENTAL ILLNESS & THE LAW

An offender's first point of contact with the criminal justice system is upon their arrest by the police. At this point, before the offender appears in Court, the police should identify the following factors:

- Does the detainee understand the police caution after it has been fully explained to him or her?
- Is the detainee fully orientated in time, place, and person and do they recognise the key persons present during the police interview?
- Is the detainee likely to give answers which can be seriously misconstrued by the Court?
- Is the detainee able to understand the consequences of his/her answers? In some cases detainees may admit to anything in order to fill their immediate needs, such as the ending of the interview or to avoid torture.
- If the police feels the detainee is behaving inappropriately, the police should refer them to a mental health expert for an evaluation. The mental health expert will examine whether the detainee is fit or unfit to stand trial.
- If the detainee is declared unfit to stand trial, they are to be held at a forensic mental health facility until they are fit to stand trial. If the detainee is deemed fit to stand trial by the police, the case can proceed to the trial stage as per normal rules and regulations.

THE TRIAL: WHAT A JUDGE/MAGISTRATE SHOULD DO

Not only should the police establish if the prisoner is fit to stand trial or not, so too should the Court. If the presiding Magistrate/Judge observes inappropriate behaviour or symptoms of mental illness, the Court is obligated to adjourn the trial and determine the accused's fitness to stand trial.

As part of this process, the Court first forms a *prima facie* tentative opinion on the accused's state of mind and fitness to stand trial. If the presiding Judge/Magistrate decides the accused is not fit to stand trial, the Court then orders an in depth examination by a medical board. Based on the report and expert testimony of the board, the Court makes its final decision regarding the accused's fitness to stand trial.

If the Court's final decision is that the offender is capable of standing trial, the case proceeds according to standard rules and regulations.

If the Court decides that the accused is not fit to stand trial, the Court has discretionary powers to either grant bail in accordance with section 466(1), or to commit the defendant to safe custody.

The following sections describe this process (the inquiry into the accused's fitness to plead, the medical board's report and examination), and applicable legislation in greater detail.

FITNESS TO PLEAD

According to sections 464 and 465 of the CrPC the Court is obligated to conduct an inquiry to determine a defendant's fitness

PROCEDURE IN CASE OF ACCUSED BEING LUNATIC:

SECTION 464. CrPC

- (1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Provincial Government directs, and thereupon shall examine such surgeon or other officer as a witness, and shall reduce the examination to writing.
- (1-A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of Section 466.
- (2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and, shall postpone further proceedings in the case.

SECTION 465. CrPC

- (1) If any person before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Court is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case.
- (2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

to plead if the issue has been raised by the defence.

Even if the defence has not raised the issue, Chapter 34 section 464 of the CrPC, requires a Magistrate to adjourn the trial and conduct an inquiry into the defendant's fitness to plead if they have "reason to believe" that a defendant is mentally ill and incapable of making their defence.

Section 465 also requires a judge to adjourn the trial and conduct an inquiry into the defendant's fitness to plead, if the defendant "appears to the Court" to be of unsound mind.

According to the Supreme Court, in *Mst. Safia Bano and Others v. the State* [2021], "...

the terms "*reason to believe*" and "*appears to the Court*" in the context of sections 464 and 465 CrPC are to be interpreted as a *prima facie* tentative opinion of the Court".

The judgment goes on to explain that this opinion is to be based on an objective assessment of the material and information placed before the Court, which would include the police file and the case file, any psychiatric assessment that has been conducted previously, the defendant's social history, mental health records, testimonies from family and community members, and any records of the defendant's family history that can shed light on the

defendant's past genetic disposition.

Even if neither party has raised such a claim during the trial, the Court can still form a *prima facie* tentative opinion regarding the capability of an accused person to stand trial. According to the Supreme Court judgment while forming this *prima facie* tentative opinion the Court should:

- Observe the demeanor and conduct of the accused, either before or at the time of taking a plea against the charge or at any later stage.
- Take note whether he/she is being represented by counsel
- Assess the mental health condition of the accused by asking specific questions, such as:
 - Do they know why they are attending the Court and what is their account of the offence
 - Do they understand the proceedings which are being conducted (trial) and the role of people who are a part of the trial (the basic procedure may be explained to them to assess if they are able to understand);

- The Court should assess if they have reasonable attention/concentration span to understand what is being said during the trial and also aware of what to do if they do not agree with what is being said during the trial.
- Do they understand the evidence against them and what the witnesses are saying. In order to ascertain this, the Court may examine witness statements/interviews with them for evidence of understanding.
- If a particular plea has been submitted, the Court can ask them to explain the reasons for the plea (they may have been advised against this, which can make assessment difficult).

It is important to remember that a *prima facie* tentative opinion cannot be formed by the Court only on the basis of such questions. The Court is required to objectively consider all the material available before it, including the material placed/relied upon by the prosecution. If the Court's *prima facie* tentative opinion is that the offender is capable of standing trial, the case can proceed according to standard rules and regulations.

MANDATORY PROCEDURES

The procedures set out in sections 464 and 465 are mandatory, and an omission to comply with them will vitiate the trial. For example, in *Sirajuddin v Afzal Khan* (1997), the Supreme Court upheld a judgment of the Peshawar High Court, which set aside a conviction and a death sentence because the defendant had not been fit to plead. It was found that the provision of section 465 of the Code of Criminal Procedure 1898 had not been complied with by the trial judge. The error was all the more serious since the defendant's mental illness was specifically brought to the Courts attention by a psychiatrist, and supported by reports of the medical board constituted under the orders of the trial Court. The defendant was eventually remanded to a mental hospital for periodical examinations and a re-trial was directed upon recovery.

However, if the Court's *prima facie* tentative opinion is the accused may be incapable of understanding the proceedings, it is obligatory upon the Court to order an examination by a Medical Board to decide if the accused is capable or not of standing trial. The Judge/Magistrate can order an examination, of the accused, by the Medical Board at anytime during the trial.

MEDICAL BOARD

According to the Supreme Court's 2021 judgment: "Once the Court has formed a *prima facie* tentative opinion that the accused may be incapable of understanding the proceedings of trial or make his/her defence, it becomes obligatory upon the Court to embark upon conducting an inquiry to decide the issue of incapacity of the accused to face trial due to mental illness. Medical opinion is *sine qua non* in such an inquiry. For this purpose, the Court must get the accused examined by a Medical Board". However if the Court decides otherwise, it directs a provincial medical board to examine the accused.

MEDICAL BOARD'S REPORT

Once the Medical Board has examined the defendant it submits its report to the Court. As the Supreme Court notes "The Medical Board's report and opinion is *sine qua non*" in such an inquiry and carries substantial weight. The judgment goes on to say, "The report/opinion of the Medical Board must not be a mere diagnosis of a mental illness or absence thereof". It must be a detailed and structured report with specific reference to the accused's mental illness and its impact on specific mental functions.

These mental functions are:

- **Thinking:** this is a product of the frontal lobe of the brain. A disorder of thinking can prevent the person from making correct appraisals and from responding logically, on the basis of evidence, data and reality. The function of thinking can be best assessed from speech (oral or written), but thinking patterns can also be ascertained from non-verbal cues, expressions, and behaviours. A disorder of thinking can therefore cause inability to separate right from wrong as seen in the eyes of law
- **Intellect:** this is one of the higher

PROVINCES TO SETUP MEDICAL BOARDS

The Supreme Court has directed provinces to set up special medical boards for assessment. According to the Supreme Court Judgment: "We hold that words "Civil Surgeon" and "medical officer" used in Chapter XXXIV CrPC. and Prison Rules be substituted by the relevant Legislature with "Medical Board". The Medical Board shall comprise of qualified and experienced Psychologists and Psychiatrists. The concerned governments are directed to take immediate steps to do the needful."

(*Safia Bano and others v. The Home Department, Government of Punjab* 2021)

DEATH PENALTY UNLAWFUL FOR THOSE WITH MENTAL ILLNESS

If it is established that the accused does suffer from a mental illness, given the cyclical nature of mental illness (and depending on the severity of accused's illness as well as their medical history) there is a possibility that the accused was also suffering from the mental illness at the time of the offence.

Since it is nearly impossible to demonstrate **beyond a reasonable doubt** that the accused committed the offence while lucid, it is unlawful under domestic law, Islamic law and international law to award of the death penalty to a person suffering from a mental illness, as defined by the Mental Health Ordinance and Acts.

mental functions through which a person understands the nature of things and their uses, as well as actions and their consequences. Intellect also impact a person's problem solving ability. A person with an impaired intellect cannot distinguish right from wrong as in the eyes of law.

- **Judgment:** this refers to a person's capacity to make appropriate decisions, and act upon them particularly in social situations.
- **Insight:** this is the mental function through which we understand problems, review their causes, and arrive at tenable solutions.

A defendant is required to have all these mental abilities and an absence of any one will result in an unfitness to plead.

MEDICAL BOARD TO BE QUESTIONED

Once the Medical Board has submitted its report, the lead psychologist/psychiatrist also provides oral evidence as a Court witness. The prosecution and defence should be given an opportunity to examine and cross-examine

the medical expert. The prosecution may also be allowed to produce evidence which it deems relevant to the defendant's mental health.

It is upon the consideration of all this evidence procured and provided to the Court, that a finding on the capability of the accused to face trial is made.

IF A DEFENDANT IS FOUND INCAPABLE TO STAND TRIAL?

If the inquiry reveals that the defendant is of unsound mind and is incapable of making his defence the trial must be adjourned until the defendant is deemed fit to plead. When a trial is adjourned under sections 464 and 465, the Court can resume the inquiry or trial at any time and require the defendant to appear or be brought before the Court under section 467.

Where the trial is adjourned, the Court has discretionary powers to either grant bail in accordance with section 466(1), or to commit the defendant to safe custody.

As stipulated by section 466, if bail is granted,

bail conditions should provide for the surety:

- To take care of the defendant;
- To take care to prevent the defendant from doing injury to himself;
- To take care to prevent the defendant from causing injury to any other person;
- To produce him before the Court, or before an officer appointed by the Court.

The Court must report any action taken to the Provincial Government.

LEGAL DEFENCES: INSANITY & DIMINISHED RESPONSIBILITY

Once the Court has established that the accused is not fit to stand trial, due to mental illness, the following legal defenses

are available to an accused:

- Insanity
- Diminished responsibility

THE INSANITY DEFENCE

It is a well established principle of law that “*mens rea*” is an essential ingredient of a criminal offence. *Mens rea* is a Latin term and literally means “guilty mind”. It refers to the mental element of a person’s intention to commit a crime, or knowledge that one’s action or lack thereof would cause a crime to be committed. If a person has a mental illness when committing an offence, they may not have the requisite *mens rea* and maybe acquitted on the basis of the insanity defence.

This defence is found in section 84 of the Pakistan Penal Code (PPC) which states: “Nothing is an offence which is done by

2011 PCRLJ 1114 INAYATULLAH v. THE STATE

The accused had been convicted of murder and sentenced to life imprisonment by the Trial Court. The Trial Court gave the sentence, despite three successive Medical Boards having confirmed that the accused was a chronic patient of ‘schizophrenia’. The Trial Court also failed to call on members of the Medical Board to provide testimony.

On appeal the High Court set aside the conviction and sentence awarded to accused by the Trial Court. The case was remanded to the Trial Court with directions to summon the members of Medical Boards, before commencing the trial, to obtain their expert opinion regarding the accused’s capability to defend himself in the trial.

1984 PCRLJ 2660 MUHAMMAD YAQOOB v. STATE

At the time of occurrence, the accused was cutting fodder with a sickle. All of a sudden he began attacking the victim and eventually killed him. There were no indications that the two were fighting immediately before the attack. Prosecution put forth evidence that the accused was suffering from mental illness and therefore his actions were neither intentional nor motivated. This was supported by the testimony of a medical expert. Plea of insanity was accepted and accused acquitted in these circumstances.

a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to the law.”

In order to establish the defence of legal insanity, three of the four conditions of section 84 of the PPC must be satisfied:

- Commission of an offence (in other words, if the prosecution fails to prove that the prisoner has committed the act, then the mental state does not matter. He is not guilty)
- Unsoundness of mind (this term has been replaced by mental illness or disorder by a recent order of the Supreme Court)
- Incapability of knowing the nature of the act/offence; or
- Distinction between right and wrong (does he know the act is wrong or contrary to the law?).

An individual who knows the nature of his act but, because of a mental disorder, fails to understand that the act itself is wrong, is relieved from criminal responsibility. Both the prosecution and defence have to be provided with the full opportunity to lead evidence in support of their versions.

Pakistan’s definition of mental disorders, as outlined in the Mental Health Ordinance 2001, is notably broad. It defines mental disorders as including “mental illness, including mental impairment, severe personality disorder, severe mental impairment and any other disorder or disability of mind”. Excluded from the scope of the definition is “promiscuity or other immoral conduct, sexual deviancy or dependence on

alcohol or drugs.”

The phrase “disorder or disability of the mind” is synonymous with “mental illness”. As explained clearly by an Australian Court judgment (R v Porter, 1933), the insanity defence can only be used if the defendant is suffering from a mental disease, disorder or disturbance, rather than “mere excitability, passion... stupidity, obtuseness, lack of self control and impulsiveness”. The judgment explains that a “disease of the mind” may be permanent or temporary, curable or incurable. There does not need to have been a physical deterioration in the cells of the brain, or an actual change in the constitution of the brain, for a condition to be a “disease of the mind”. Examples of conditions which have been held to be diseases of the mind include:

- Major mental illnesses such as schizophrenia
- Brain injuries, tumours or disorders
- Hyperglycaemia (caused by excessive blood sugar levels)
- Physical diseases which affect the soundness of mental faculties,
- Sleepwalking
- Some cases of dissociation and epilepsy

If a person is acquitted on the basis of insanity, section 471 of the CrPC states that they are to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit. As such, if a person is a danger to himself or others and is of unsound mind, the Court has the power to transfer the person to be placed in safe custody where the Court sees fit.

DIMINISHED RESPONSIBILITY

If a person is found to be mentally ill, apart from the insanity defence, diminished responsibility or diminished capacity can be employed as a mitigating factor. It has a lower threshold to prove and is applicable to more diverse circumstances than the insanity defence. Under current Pakistani law, total mental insanity is recognised as a valid defence and the defence of irresistible impulse or diminished responsibility is recognised as a partial defence or a mitigating factor, depending on the facts of the case.

Mental impairments prevent individuals from appreciating the effect of their actions—they do not intend for certain criminal acts to occur. The defence thus allows individuals with any kind of mental impairment, even if not categorized as a mental disorder to benefit from mitigating circumstances.

CONDITIONS WHILE IMPRISONED

Just as there are specific laws and procedures dealing with the trial, sentencing and punishment of an offender who is mentally ill, there are also specific regulations dealing with the treatment of a mentally unwell offender while in prison.

During imprisonment, a person found or presumed to be a mental patient is to be kept separate from other prisoners. Such a person is also considered to be dangerous until certified harmless. Criminal mental patients are to be confined to their cells and to be kept

under strict and continuous supervision if deemed dangerous, noisy or filthy in habits. They may also be detained in the prison hospital or a ward dedicated for the purpose of detainment for these persons.

TRANSFER TO A MENTAL HEALTH FACILITY

Where a mental ill offender is deemed incapable of making a defence and is consequently detained under section 466 of the CrPC, they are, on application of the Superintendent to the District Coordination Officer to be transferred to a mental health facility while awaiting further orders from the Government. Upon receipt of orders from the Government, a mental patient will be transferred to a mental health facility with the relevant documents set out in rule 445 of the Prison Rules. This patient will not be transferred unless a medical officer certifies that they are physically fit to take the journey immediately before the transfer, and it has been certified that the Medical Superintendent of the mental health facility is ready to receive the patient. A patient may also be transferred to a mental health facility in anticipation of government sanction in certain urgent cases, that is, when a patient is noisy, filthy or dangerous. The time spent at a mental health facility is to be recognised as a sentence undergone when the prisoner becomes of sound mind and is returned to the prison. Upon return, a mental ill prisoner is to be assigned suitable work and such liberty as determined to be safe by the Medical Officer.

OBSERVATION & REPORTING REQUIREMENTS

If a convicted person appears to be mentally ill, a Superintendent is to place this person under observation by the Medical Officer for 10 days. The Medical Officer is to submit a report to the Inspector General. If found to be mentally ill, orders are to be obtained from the Government to allow for a transfer to a mental hospital.

If a criminal mental patient, who has been deemed mentally ill and is incapable of making their defence, or whose soundness of mind is doubted by the Magistrate has been sent to prison for observation under section 464 of the CrPC and is to be imprisoned for more than 1 month, this fact must be reported to the Inspector General.

MENTAL HEALTH ORDINANCE 2001

In 2001 the Federal government enacted the Mental Health Ordinance (MHO), which replaced the Lunacy Act of 1912. The ordinance dealt with access to mental healthcare and voluntary and involuntary treatment. The MHO allowed a person to be detained up to 28 days for the purposes of assessment; and up to 6 months for the purposes of treatment. The ordinance also allowed the police and Judges/Magistrate to detain an offender for observation for 72 hours.

In 2010 as a result of the 18th Amendment, health became a provincial issue and responsibilities were devolved to the provinces to pass appropriate legislation. So far, only Sindh and Punjab have passed relevant mental health legislation, which is based on the federal MHO.

CODE OF CRIMINAL PROCEDURE 1989
FITNESS TO PLEAD
CHAPTER XXXIV LUNATICS – CAPABLE OF
MAKING A DEFENCE PATHWAY

INQUIRY BY MAGISTRATE
[Section 464]

When there is reason to believe that the accused is of unsound mind the Magistrate shall inquire into such facts

INQUIRY BY COURT OF SESSIONS OR HIGH COURT
[Section 465]

When the accused appears to be of unsound mind the Court of Sessions or a High Court shall, in the first instance, try such facts.

RULES OF THE INQUIRY

- "It is clear that inquiry into unsoundness of mind of the accused and his consequent incapacity to stand trial has to be made in accordance with section 465, Cr.P.C., as a preliminary step before taking any evidence on any charge and that in this inquiry both the prosecution and defense ought to be associated with full opportunity for leading evidence in support of their versions. (1997 SCMR 239)
- Where a court entertains doubts to the sanity of the accused, the Court should not merely put questions to the accused, but should try the fact of such unsoundness of mind by examining the Civil Surgeon or some other Medical Officer, and taking such evidence as might have been procurable with a view to ascertaining whether the accused had at any time previous to the commission of the crime exhibited symptoms of insanity, and where by the trial Court does not comply with the provision of Section 465, Cr.P.C. but convicts the accused the trial is vitiated." (PLD 1980 Peshawar 103)
- When the accused had been admitted in a mental hospital before the trial, court must give a finding as to mental fitness of the accused before proceeding with the trial (1973 P.Cr.L.J 248).

RELEASE OF LUNATIC PERSON PENDING INVESTIGATION OR TRIAL
(SECTION 466)

SECTION 466(1)

THE MAGISTRATE OR COURT MAY RELEASE HIM ON BAIL.

If accused found of unsound mind, + incapable of making defense + insufficient security given

SECTION 466(2)

THE MAGISTRATE OR COURT MAY ORDER HIM TO BE DETAINED IN SAFE CUSTODY

If accused found of unsound mind, + incapable of making defense + insufficient security given

WHEN ACCUSED APPEARS TO HAVE BEEN INSANE
(SECTION 469)

THE MAGISTRATE OR COURT SHALL PROCEED WITH THE CASE

If accused appears to be of sound mind at time of inquiry or trial and evidence shows that he was not at the time of the offence

RESUMPTION OF INQUIRY/TRIAL 467(1)

Magistrate or Court can at any time require accused to be brought to court

DECLARED FIT FOR RELEASE PROCEDURE UNDER S.466 OR S (SECTION 474)

If IG Prisons (if lunatic in jail) or visitor of asylum (if lunatic in asylum) certify that the accused be released, the Provincial Government may order him to be released OR detained in custody OR transferred to an asylum.

TRIAL RESUMES

RESUMPTION OF INQUIRY OR TRIAL (SECTION 467(2))

When accused is on bail, a Certificate by the Court appointed Officer (under section 466) that the accused capable of making his defense shall be receivable in evidence

If PG orders the accused to be transferred to an asylum it may appoint a Commission consisting of a Judicial + 2 Medical officers.

PROCEDURE WHERE LUNATIC PRISONER IS REPORTED CAPABLE OF MAKING HIS DEFENSE (SECTION 473)

When the lunatic person is detained in prison or in an asylum, under section 466, the Inspector General of prisons (if lunatic in jail) or visitors of asylum (if lunatic in asylum) shall certify that in their opinion such person is capable of making his defense

PROCEDURE ON ACCUSED APPEARING BEFORE A MAGISTRATE OR A COURT (SECTION 468(1))

If Magistrate or Court considers him capable of making his defense

PROCEDURE ON ACCUSED APPEARING BEFORE A MAGISTRATE OR A COURT (SECTION 468(2))

If Magistrate or Court considers him still incapable of making his defense

COURT PROCEEDS UNDER SECTION 468

TRIAL RESUMES

MAGISTRATE SHALL AGAIN ACT ACCORDING TO SECTIONS 464/465 AND 466

NOT GUILTY BY REASON OF INSANITY

CODE OF CRIMINAL PROCEDURE 1989 & PAKISTAN PENAL CODE 1860

ACT OF A PERSON OF UNSOUND MIND SECTION 84 PPC

Nothing is an offence, which is done by a person who, at the time of committing an offence by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law.



JUDGMENT OF ACQUITTAL ON GROUND OF LUNACY SECTION 470 CrPC

If accused acquitted by reason of unsoundness of mind, the finding shall state



PERSON ACQUITTED ON SUCH GROUNDS TO BE DETAINED IN SAFE CUSTODY SECTION 471(1)

Such persons to be detained in safe custody in such place and manner as the Magistrate or Courts thinks fit.

POWER OF PROVINCIAL GOVERNMENT TO RELIEVE IG OF CERTAIN FUNCTIONS SECTION 471(2)

The provincial Government may order the Officer in charge of the jail to discharge any or all of the functions of the IG

REVIEW

WHAT A JUDGE/MAGISTRATE SHOULD DO WHEN THE OFFENDER IS MENTALLY ILL

- Form a prima facie opinion on the accused's fitness to stand trial
- Order a Medical Board to examine the accused
- Medical Board to be examined by the Court, Defence and Prosecution
- If accused found incapable to stand trial, Court to adjourn trial under sections 464 & 464 CrPC
- Grant bail in accordance with section 466(1), or to commit the defendant to safe custody.

AVAILABLE LEGAL DEFENCES

- 1) **Insanity Defence:** three of the four conditions of section 84 PPC must be satisfied. These are:
 - Commission of an offence
 - Unsoundness of mind
 - Accused is incapable of understanding the nature of the offence
 - Accused doesn't understand the difference between right and wrong
- 2) **Diminished Capacity:** diminished capacity can be employed as a mitigating factor. It has a lower threshold to prove and is applicable to more diverse circumstances than the insanity defence.

CONDITIONS WHILE IN PRISON

- A prisoner presumed to be mental ill is to be kept under strict supervision and separate from other prisoners.
- A mentally ill offender can also be transferred to a mental health institution but only if a medical officer certifies that they are fit to make the journey.
- The time spent at a mental health facility counts towards the prison sentence when the prisoner becomes of sound mind and is returned to the prison.
- Upon return, a mental patient is to be assigned suitable work and such liberty as determined to be safe by the Medical Officer.

MENTAL ILLNESS & THE LAW

03

INTRODUCTION

As we learnt in the previous module, if an offender is mentally ill, regular rules and regulations may not be applicable. There are specific laws that govern how the trial of a mentally ill offender is to be conducted. Similarly, an offender's mental illness is also of relevance to the law at the time of sentencing, when the Court determines an appropriate penalty for an offence.

This process involves balancing multiple factors. These include the gravity of the offence, factors unique to the case at hand and various sentencing principles—such as deterrence, denunciation, proportionality, community protection etc.

LEARNING OBJECTIVES

In this module participants will learn:

- Sentencing and punishment guidelines
- Can a mentally ill prisoner be executed?
- Implied safeguards against execution
- Importance of the Supreme Court Judgment
- Islamic law and mental illness
- International law and mental illness
- Comparative jurisdictions

SENTENCING GUIDELINES PROVIDED BY THE SUPREME COURT

Some broad sentencing and punishment guidelines for offenders with a mental illness can also be found in the Supreme Court of Pakistan's judgment in *Mst. Safia Bano and Others v. the State (2021)*. The Court ruled **that if a condemned prisoner is not able to comprehend the rationale and reason behind his/her punishment, then carrying out the death sentence will not meet the ends of justice.**

However, it is clarified that not every mental illness shall automatically qualify for an exemption from carrying out the death sentence. This exemption will be applicable only in that case where a medical board consisting of mental health professionals, certifies after a thorough examination and evaluation that the condemned prisoner no longer has the higher mental functions to appreciate the rationale and reasons behind the sentence of death awarded to him/her.

The decision also directed Courts to consider whether persons with mental illnesses should instead be held in mental health facilities where better care can be taken of them.

SENTENCING & PUNISHMENT

Currently, the Code of Criminal Procedure 1898 provides no sentencing laws or guidelines. Additionally, in Pakistan there are no pre-sentence hearings or the requirement of a pre-sentence report, where factors relevant to sentencing are looked at. As a result, the Court has complete discretion while sentencing offenders. This has led to uncertainty and a lack of uniformity with regards to sentencing.

However, when sentencing a mentally ill offender we can find some guidance in the Verdins judgment, issued by the highest Court in the Australian state of Victoria. According to the judgment, "impaired mental functioning, whether temporary or permanent" may be relevant to sentencing. The judgment stipulated six principles that should be kept in mind at the time of sentencing an offender with a mental illness. These are known as the Verdins Principles.

1. **Moral culpability.** If the offender is

suffering from a mental illness, it may reduce the moral culpability of the offending conduct.

2. **Type of sentence and conditions.**

If the offender is suffering from a mental illness, it may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.

3. **General deterrence.** Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.

4. **Specific deterrence.** Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited

by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentencing or both.

5. **Effect of sentence.** If the offender is suffering from mental illness at the time of sentencing, or if there is a chance the mental illness may recur in the future, the sentence will weigh more heavily on the offender than it would on a person in normal health.
6. **Risk of Imprisonment.** If the offender is suffering from a mental illness, there is a risk that imprisonment will have an adverse effect on the offender's mental health.

It is also important for judges and Magistrates to keep in mind that mental illnesses can often prevent mitigating factors from being properly put in front of the Court for consideration. Symptoms which are common within certain disorders—such as paranoia, disorganised thoughts and lack of insight—can provide great challenges in obtaining medical evidence when a defendant denies suffering from any such disorder.

To conclude, in the absence of any sentencing rules it is advised that Courts take into consideration the Supreme Court judgment and use the Verdins Principles as nuanced guidelines while sentencing offenders who have either a temporary or permanent mental health issue. Judges should balance all evidence with relevant considerations and come to an informed and just decision that leaves prospects open for rehabilitation. Doing so would uphold both Article 10A ('Right to a fair trial') and Article 25 ('Equality of citizens') of the Constitution of Pakistan.

CAN A PRISONER SUFFERING FROM MENTAL ILLNESS BE EXECUTED?

Pakistan's domestic laws and International laws prohibit the execution of a condemned prisoner who was suffering from mental illness at the time of the offence. Execution is also prohibited of a condemned prisoner if they are suffering from a mental illness at the time of the execution. Aside from the inhumanity of executing a mentally ill person, doing so serves no punitive purpose or justification.

IMPLIED SAFEGUARDS AGAINST EXECUTING PRISONERS WITH MENTAL ILLNESS

Apart from the explicit injunction on executing those suffering from mental illness, there are also implied safeguards in our rules and regulations.

Rule 107 (iv) of the Prison Rules makes it obligatory upon the Superintendent of the prison to submit two copies of the medical report along with a mercy petition to the President of Pakistan and the Governor of the Province, where a condemned prisoner takes a plea of mental illness. Rule 362 read with the language used in the warrant, issued under section 381 CrPC shows that the purpose behind this rule is to convey to the condemned prisoner the reason behind his execution. Similarly, the purpose behind informing him that his appeal and mercy petition stand rejected is to make him aware that he has exhausted all the legal remedies against his/her conviction. With this understanding, Rule 362 provides the condemned prisoner an opportunity to write a will before being executed. Therefore,

this Rule can be termed as an implied safeguard against execution of a death sentence where a condemned prisoner, due to mental illness, has lost his ability to reason and understand the rationale behind his punishment.

IMPACT OF SUPREME COURT'S JUDGMENT

The Supreme Court in *Mst. Safia Bano and Others v. the State* [2021], gave a landmark judgment that prohibits awarding death penalty to an offender who suffers from mental illness. It also prohibits carrying out the death penalty if the prisoner is suffering from mental illness.

The judgment is also important because the Court noted that restrictive terms like “unsoundness of mind” should be replaced with international definitions of mental illness and mental disorder. Similarly, outdated terminology such as “lunatic” and “insane” used in our rules and laws, should be replaced with more sensitive terminology.

The Supreme Court also directed the Federal Government (for Islamabad Capital Territory) and all the Provincial Governments to immediately establish/create High Security Forensic Mental Health Facilities in the teaching and training institutions of mental health for assessment, treatment, and rehabilitation of under trial prisoners and convicts who have developed mental ailments during their incarceration.

This is the first time that a direction has ever been passed to set up forensic facilities by a superior Court. This is also in accordance with the Mental Health Ordinance, 2001 which requires such

facilities to be set up as they are essential for the understanding of complex mental disorders.

The Court further directed the Federal Government and all the Provincial Governments to immediately launch training programs and short certificate courses on forensic mental health assessment for psychiatrists, clinical psychologists, social workers, police and prison personnel. Furthermore, the Federal Judicial Academy, Islamabad and all the Provincial Judicial Academies shall also arrange courses for Trial Court judges, prosecutors, lawyers and Court staff on mental illness including forensic mental health assessment.

The United Nations released a statement welcoming the landmark judgment by the Supreme Court. The judgment brings Pakistan in line with the recommendations of the UN Human Rights Committee that oversees Pakistan’s compliance with the International Covenant on Civil and Political Rights (ICCPR), which Pakistan is a signatory to.

ISLAMIC LAW & MENTAL ILLNESS

Similar to western laws, Islamic law recognises that a person cannot have had the required *mens rea* if they were:

- i. suffering from mentally illness
- ii. lacked competence
- iii. had an intellectual disability
- iv. were unconscious

I. MENTAL ILLNESS

In line with legal traditions in other countries, Islamic jurisprudence recognizes the concept of insanity and mental illness. Those suffering from mental illness, under Islamic Law, are recognized to be lacking or not capable of having an intention because of disturbed reasoning. This is based upon the *hadith* “the pen does not record (evil actions) against the sleeper until he awakes, against the boy until he reaches puberty or against the mad man until he recovers his wits”. The issue that has confronted legislatures and Islamic scholars is to precisely define what constitutes mental illness.

II. LACK OF COMPETENCY (AHIYYA)

There are three characteristics that are considered to define competence: the ability to reason (*agil*); the ability to be fully responsible (*mukallaf*); and the capacity for deliberate intent (*amad*).

A person who lacks all three characteristics is considered a *majnoon* and is legally incompetent. Such a person would, by necessity, lack the *mens rea* for any offence.

III. INTELLECTUAL DISABILITY

According to some literary sources, intellectual disability (*atah*) in Islamic law is considered equivalent to insanity when the condition is severe enough.

IV. THE UNCONSCIOUS

Amongst the different schools of Islamic jurisprudence, there is an agreement that a person who commits a crime whilst unconscious is not criminally liable for his

actions. The primary example of this is when a person is asleep and commits a criminal action.

INTERNATIONAL LAW

The **UN Mandela Rules** reflect the global standard minimum rules for treatment of prisoners. The following Mandela Rules are relevant to the treatment of mentally ill prisoners:

- Rule 1: Prisoners with mental ill-health must be treated with humanity and respect for their inherent dignity.
- Rule 2: All prisoners must be protected from discrimination, including on the grounds of their mental health status.
- Rule 24: Mental healthcare and support must be provided at the same level of care as in the community.
- Rule 25: Prisons should retain a sufficient number of specialists on their staff, including psychiatrists and psychologists.
- Rule 33: States have an obligation to provide adequate treatment and care for the mental health of all prisoners, and to mitigate the effects of imprisonment on mental well-being.

In its resolution of December 1982, the General Assembly of the United Nations adopted the **Principles of Medical Ethics**, prepared by the Council for International Organizations of Medical Sciences. The principles supplement the Declaration of Tokyo of the World Medical Association and United Nations Standard Minimum Rules for the Treatment of Prisoners.

Principle 2 states that: “It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly

SUPREME COURT'S JUDGMENT & INTERNATIONAL LAW

International jurisprudence on imprisonment and sentencing of offenders suffering from a mental illness has also been taken into account by the Supreme Court of Pakistan. Most significantly, the Supreme Court held that in line with international law, mentally ill persons cannot be sentenced to death.

In the case of *Safia Bano and Others v. the State (2021)*, the Supreme Court of Pakistan reflected upon the Mandela Rules in detail. In rendering its decision the Court also took into account the International Covenant on Civil and Political Rights (ICCPR) and the Convention on Rights of Persons with Disabilities (CRPD), both ratified by the Government of Pakistan, in support of the contention that cruel, inhuman or degrading punishment shall not be awarded to any person.

physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment." It is the duty of these personnel to protect the physical and mental health of detainees and prisoners and to provide them with treatment *"of the same quality and standard as is afforded to those who are not imprisoned or detained"* (Principle 1).

COMPARATIVE JURISDICTIONS

Jurisdictions that retain the death penalty, such as India and the USA, have increasingly decided that executing mentally ill prisoners is a violation of the right to life and dignity. There is an emerging consensus that executing people who cannot comprehend the nature of a death sentence and its connection to a crime violates the prohibition on cruel, inhuman or degrading treatment.

UNITED STATES OF AMERICA

The Supreme Court of the United States of America has held that executions of mentally

ill prisoners amount to "cruel, inhuman and degrading punishment" under the Eighth Amendment of their Constitution, as they fail to meet either the retributive or the deterrent purposes of capital punishment. The Supreme Court has also emphasized that there is a greater threat of wrongful convictions in cases of persons with mental illness.

INDIA

Section 84 of the Indian Penal Code also provides a complete defence of insanity, providing an avenue by which the accused can avoid the death penalty. The Supreme Court of India also bars executions of mentally ill prisoners under Article 21 (Right to Life) of the Constitution of India and considers mental illness as a supervening circumstance warranting the commutation of death sentences of offenders. Recent judgments of the Supreme Court had commuted the death sentences of offenders with mental illnesses, even if the illness was contracted during their time on death row.

Indian Courts have also recognised that waiting for the death penalty to be carried out constitutes psychological torture and cruel punishment.

MALAYSIA

Section 84 of the Malaysian Penal Code provides a complete defence where the offender “by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law”. This provides an avenue by which a mentally ill offender can avoid the death penalty.

In jurisdictions that no longer impose the death penalty, such as Australia and England, mental disorders such as schizophrenia have been held to constitute mitigating factors that warrant the imposition of a lesser sentence.

AUSTRALIA

In Australia, the Verdins Principles (discussed previously) apply to any proceedings in which the offender is shown to be suffering at the time of the offence (and/or to be suffering at the time of sentencing) from a mental disorder or abnormality or an impairment of mental function, whether or not the condition in question would properly be described as a serious mental illness. Australia’s commitment to ensuring justice for offenders with mental disorders is further illustrated by:

- The creation of specific sentencing sanctions which allow offenders with mental health problems to be sent to a hospital rather than prison
- Exempting people with mental health problems from mandatory custodial sentencing
- Providing different Court processes for accused people with mental illnesses or cognitive impairments

- Providing mental health services and support to accused people with mental health problems who have been released on bail.

UNITED KINGDOM

Courts in the United Kingdom also consider mental illness to be a mitigating factor that mandates a lesser sentence. UK’s *Mental Health Act 2007: Guidance for the Courts on remand and sentencing powers for mentally disordered states*: “The Act reflects the continuation of the Government’s policy that mentally disordered people who commit offences should receive specialist mental health treatment rather than being punished, wherever that can safely be achieved”.

In the United Kingdom, the reduced culpability of offenders with mental disorders is also recognised in the defence of diminished responsibility. This is applicable if the offender is unable to: understand the nature of their conduct; form a rational judgment; and/or exercise self-control. In such circumstances, the accused is convicted of manslaughter rather than murder and given a lesser penalty.

REVIEW

SENTENCING & PUNISHMENT GUIDELINES

- Verdins Principles
- Moral culpability
- Type of sentence or conditions
- General deterrence
- Specific deterrence
- Effect of sentence
- Risk of imprisonment

EXECUTION OF A MENTALLY ILL PRISONER

- Pakistan domestic laws and International laws prohibit the execution of a prisoner suffering from mental illness at the time of the offence.
- Execution is also prohibited of a condemned prisoner if they are suffering from a mental illness at the time of the execution.

ISLAMIC LAW

Under Islamic law a person cannot have had the required *mens rea* if they were:

- suffering from mentally illness
- lacked competence
- had an intellectual disability
- were unconscious

INTERNATIONAL LAW

The UN Mandela Rules are the main set of rules relevant to the treatment of mentally ill prisoners:

- Rule 1: Prisoners with mental illness must be treated with humanity and respect
- Rule 2: Prisoners with mental illness must be protected from discrimination
- Rule 24: Mental healthcare and support must be provided at the same level as in the community
- Rule 25: Prisons must have sufficient number of specialists, including psychiatrists and psychologists
- Rule 33: States must provide adequate treatment and care for the mental health needs of all prisoners

INTERNATIONAL JURISDICTIONS

- There is an emerging international consensus that executing those suffering from mental illness violates the prohibition on cruel, inhuman or degrading treatment.
- Jurisdictions that retain the death penalty, such as India and the USA, have increasingly decided that executing mentally ill prisoners is a violation of the right to life and dignity.
- In jurisdictions that no longer impose the death penalty, such as Australia and England, mental illness, such as schizophrenia, is a mitigating factor that warrants a lesser sentence.

04 APPENDIX

CODE OF CRIMINAL PROCEDURE 1989 PAKISTAN – CHAPTER XXXIV LUNATICS

S.464

Procedure in case of accused being lunatic.

(1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Provincial Government directs, and thereupon shall examine such surgeon or other officer as a witness, and shall reduce the examination to writing.

(1A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of Section 466.

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and, shall postpone further proceedings in the case.

S.465

Procedure in case of person sent for trial before Court of Session or High Court being lunatic.

(1) If any person before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Court is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case.

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

S.466

Release of lunatic pending investigation or trial.

(1) Whenever an accused person is found to be of unsound

mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

(2) Custody, of lunatic: If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall, order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the provincial Government:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Provincial Government may have made under the Lunacy Act, 1912.

S.467

Resumption of inquiry or trial. (1) Whenever an inquiry or a trial is postponed under Section 464, or Section 465, the Magistrate or Court, as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before Such Magistrate or Court.

(2) When the accused has been released under Section 466 and, the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

S.468

Procedure on accused appearing before Magistrate or Court: (1) if, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court, considers him capable of making his defence, the inquiry or trial shall proceed,

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of Section 464 or Section 465, as the case may be, and if the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of Section 466.

S.469

When accused appears to have, been insane. When the accused appears to be of sound mind at the time of Inquiry or trial, and the Magistrate or Court is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the fact or that it was wrong or contrary to law, the Magistrate or Court shall proceed with the case.

S.470

Judgment of acquittal on ground of lunacy. Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or

that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

S.471

Person acquitted on such ground to be detained in safe custody.

1. Whenever the finding states that the accused person committed the act alleged, the Magistrate or Court before whom, or which the trial has been held, shall, if such act would but for the incapacity, found, have constituted an offence, order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the action taken to the Provincial Government:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Provincial Government may have made under the Lunacy Act, 1912.

2. Power of Provincial Government to relieve Inspector-General of certain functions: The Provincial Government may empower the officer in charge of the jail in which a person is confined under the provisions of Section 466 or this section, to discharge all or any of the functions of the Inspector General of Prisons under Section 473 or Section 474.

S.473

Procedure where lunatic prisoner is reported capable of making his defence. If such person is detained under the provisions of Section 466, and in the case of a person detained in a jail, the Inspector-General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them shall certify, that, in his or their opinion, such

person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time, as the Magistrate or Court, appoints, and the Magistrate or Court shall deal with such person under the provisions of Section 468, and the certificate of such Inspector-General or visitors as aforesaid shall be receivable as evidence.

S.474

Procedure where lunatic detained under Section 466 or 471 is declared fit to be released: (1) If such person is detained under the provisions of Section 466 or Section 471, and such Inspector-General or visitors shall certify that in his or their judgment, he may be released without danger or his doing injury to himself or to any other person, the Provincial Government may thereupon order him to be released or to be detained in custody, or to be transferred to a public lunatic asylum; if he has not been already sent to such an asylum; and, in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a Judicial and two medical officers.

(2) Such Commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the Provincial Government, which may order his release or detention as it thinks fit.

S.475

Delivery of lunatic to care of relative or friend.

(1) Whenever any relative or friend of any person, detained under the provisions of Section 466 or Section 471 desires that he shall be delivered to his care and custody, the Provincial Government may, upon the application of such relative or friend and

on his giving security to the satisfaction of such Provincial Government that the person delivered shall—

(a) be properly taken care of and prevented from doing injury to himself or to any other person, and

(b). be produced for the inspection of such officer, and at such times and places, as the Provincial Government may direct, and

(c) in the case of a person detained under Section 466, be produced when required before such Magistrate or Court, order such person-to be delivered to such relative or friend.

(2) If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the Inspecting Officer referred to in sub-section (1), clause (b) certifies at anytime to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shaft call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of Section 468, and the certificate of the inspecting officer shall be receivable as evidence.

