



# TRAPPED INSIDE

## MENTAL ILLNESS & INCARCERATION

*Khizar Hayat, a mentally ill prisoner, spent 16 years on death row. In 2019, his family went to visit him in prison for the final meeting after his last death warrant was issued. He was unaware of his impending execution due to his mental state, and instead thought that his family was there to take him home. Chained to a hospital bed even in his last moments, he passed away a few days later, a victim of neglect who died awaiting justice.*

*Khizar Hayat pictured on the cover page a few days before his passing*

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# Dedication



**Prof Dr. M.H Mubbashar**



**Justice Shakil ur Rehman**

This report is dedicated to Dr. Mubbashar and Justice Shakil ur Rehman, two men who have been giants in the field of psychiatry and mental health legislation in Pakistan. We lost them both too soon, but not before they left their indelible mark protecting the most vulnerable in Pakistan's criminal justice system. We thank Dr. Mubbashar for standing by us when no one else took notice. We also thank Justice Shakil ur Rehman for having the courage to uncover the truth as the Advocate General even when it was most inconvenient.

We miss your inspiration, dedication, humility and support every single day.  
Safia Bano would have never happened without you.

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# CHAPTER 01

## Executive Summary

- 1.1. The landmark Supreme Court judgement in the case of Safia Bano and Others v. The State on 10 February 2021

Individuals suffering from mental illness are among the most vulnerable groups of any society in the world, and reportedly constitute 50 million of the population in Pakistan.<sup>1</sup> Barriers to obtaining treatment and support for mental illness in Pakistan are extremely high, with only 0.4% of health care expenditure devoted to mental health by the government.<sup>2</sup> This vulnerability is exacerbated when they enter the Pakistani criminal justice system, which fails to provide meaningful protection to persons with mental illness and psychosocial disabilities at all stages of arrest, trial, sentencing and detention.

Under Pakistani law, a person of unsound mind is unable to form criminal intent and therefore is not subject to punishment. Despite this, a disproportionate number of mentally ill prisoners are currently in Pakistan's jails. Many inmates come into prison with serious pre-existing mental illnesses which are then made worse by long periods of imprisonment and the stresses of the hyper-violent prison experience. The lack of adequate mental healthcare in prisons, and the starting assumption that prisoners feign insanity for special treatment, leads to needless suffering for prisoners who are mentally ill.

Over the past 12 years, Justice Project Pakistan (JPP) has represented countless mentally ill defendants on death row in Pakistan. This report is a product of that insight, and provides readers with a deeper understanding of mental health and incarceration in Pakistan's criminal justice system by examining the legislative framework and systemic issues that pervade each stage of the

process: arrest, trial, sentencing, imprisonment, mercy petitions and execution. Additionally, this report evaluates the impact of the landmark Supreme Court judgement, *Safia Bano and Others v. The State*<sup>3</sup>, handed down in JPP's strategic litigation filed on behalf of mentally ill prisoners death row prisoners Imdad Ali, Kanizan Bibi and Ghulam Abbas. The judgement, discussed in detail in the section below, was a watershed moment in Pakistan's jurisprudence in terms of establishing safeguards for prisoners with psychosocial disabilities and prohibiting the execution of the severely mentally ill.

Each section of the report details gaps present in Pakistan's criminal justice system in relation to the treatment and protection of mentally ill defendants. Section 2 highlights Pakistan's obligations towards mentally ill defendants under international law. Section 3 discusses the numerous systemic problems that arise during arrest. These range from increased suspicion placed on the mentally ill due to their actions being mistaken by law enforcement authorities, to inadequate training of judicial officers in handling individuals with psychosocial disabilities and mental illness. As a result, these individuals do not benefit from the safeguards contained in the law and face harsher treatment during detention.

Sections 4 and 5 cover the stages of trial and sentencing respectively. Mentally ill defendants often remain undiagnosed, are unable to adequately participate in their defence, and are sentenced harshly as trial courts remain unaware of the legal frameworks that exist to protect them. Pakistani law provides mental

1 Dawn, '50m Pakistanis Suffering from Mental Disorders,' (October 2016) <<https://www.dawn.com/news/1288880>>.

2 Ibid

3 Mst. Safia Bano v. Home Department, Government of Punjab (2016) 37 PLD (SC) 10

health safeguards at the trial stage in the form of the insanity defence and the evaluation of a defendant's competency to stand trial. Similarly, a person's psychological state is of significantly relevant to their sentencing - a fact which has been acknowledged in Pakistan's jurisprudence.<sup>4</sup> In practice, however, these standards for the trial and sentencing of mentally ill defendants are seldom applied.

Section 6 examines the conditions of confinement of prisoners who are mentally ill, identifying the issues they face during incarceration. The majority of prison staff who supervise prisoners with mental illnesses on a daily basis do not receive the necessary training or support to identify and handle such persons. The promotion, protection and restoration of mental health in prisons is critically important for prisoner rehabilitation and their reintegration into the community.<sup>5</sup>

By carrying out this analysis, this report aims to inform domestic and international stakeholders about the shortfalls in existing legal frameworks and the systemic flaws that compound the plight of the mentally ill in Pakistan's criminal justice system. In identifying these flaws, it is the aim of this report to ensure that the current focus on the pathway to reform is maintained, and to suggest possible solutions to the numerous pitfalls surrounding this issue. In recent years, JPP has initiated capacity building efforts aimed at prison officials, judicial officers, mental health experts, lawyers and police officers to fill the systemic gaps highlighted in this report and to obtain improved outcomes for defendants and prisoners with psychosocial disabilities.<sup>6</sup> However, until

Provincial Governments and High Courts prioritise implementation of the directions issued by the Hon'ble Supreme Court in the Safia Bano judgement, progress will be piecemeal at best while failing to protect the most vulnerable prisoners in Pakistan's criminal justice system.

### 1.1. The landmark Supreme Court judgement in the case of Safia Bano and Others v. The State on 10 February 2021

JPP's decades of strategic litigation finally resulted in a landmark judgement on 10 February 2021, when the Supreme Court of Pakistan commuted the death sentences of two severely mentally ill defendants, Kanizan Bibi and Imdad Ali, to life imprisonment.<sup>7</sup> The Court also stayed the execution of mentally ill prisoner Ghulam Abbas and directed that a fresh mercy petition be filed on his behalf including his plea of mental illness, along with copies of his entire medical history/record, and copies of the report of the Medical Board constituted by the Court. The judgement is a historical one for reasons beyond the commutation - it enforces the rights of mentally ill defendants in the criminal justice system. Not only has the Court established key safeguards for mentally ill defendants on death row, it has reiterated and upheld protections that must be afforded to persons with psychosocial disabilities at every stage of the criminal justice system: at the time of

<sup>4</sup> Hafizan v. Wali Muhammad (1968) P. Cr. L.J. 437 (SC), (Hafizan v. Wali)

<sup>5</sup> Mental Health in Prison, A short guide for prison staff, Penal Reforms International, 2018.

<sup>6</sup> Associated Press of Pakistan, 'Justice Project Pakistan (JPP) Conducts Training On Legal, Human Rights Of Persons With Mental Disorders', Urdu Point, 1st February, 2020.

<sup>7</sup> Safia Bano and others v Home Department [2021 PLD 488] ('Safia Bano')

arrest, and during investigation, trial and sentencing, in order to ensure that they are guaranteed due process. It has also barred the execution of individuals who are severely mentally ill.

In its deliberations on the execution of mentally ill defendants, the Supreme Court held that *“if a condemned prisoner, due to mental illness, is found to be unable to comprehend the rationale and reason behind his/her punishment, then carrying out the death sentence will not meet the ends of justice.”*<sup>9</sup> This exemption resulting from mental illness, however, could only apply after examination of the defendant by a medical board, consisting of mental health professionals, and the board’s certification 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.

This case marked the first time that the Supreme Court of Pakistan examined the issue of mentally ill defendants on Pakistan’s death row in such detail. The Honourable Judges deliberated on numerous questions of importance inter alia the effects of mental illness on a person’s capacity/judgement, how to determine the competency of a defendant to stand trial, whether a trial judge can determine a defendant’s state of mind without consulting a mental health expert, whether mercy petitions that fail to disclose the prisoner’s mental illness are subject to judicial review,

whether convicts with mental illness can be executed, and the applicability of the prohibition regarding execution of mentally ill persons in international law. Furthermore, the Court also recommended a change in the language related to mentally ill persons.<sup>9</sup>

For the purposes of this report, the landmark Safia Bano judgement will serve as the mirror before which Pakistan’s legal framework and its systemic flaws will be held in order to better understand the impact of the reforms introduced by the judgement and highlight the progress being made to better protect mentally ill defendants and convicts.

<sup>8</sup> Ibid.

<sup>9</sup> This will be discussed further in this report in section 8.

# CHAPTER 02

## Overview of Pakistan's International Obligations

2.1.1. Rights of persons with mental illness

2.1.2. The Right to Clemency

2.1.3. The Right to Not Be Executed

2.2. Obligations under Islamic Law

Pakistan is a signatory to numerous international treaties which require legal protection for vulnerable criminal defendants such as mentally ill prisoners, including but not limited to: the **International Covenant on Civil and Political Rights** ("ICCPR");<sup>10</sup> the **United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment**<sup>11</sup> ("UNCAT"); the **International Covenant on Economic, Social and Cultural Rights**<sup>12</sup> ("ICESCR"); and **Convention on the Rights of Persons with Disabilities**<sup>13</sup> ("CRPD"). Unfortunately, the obligations associated with these treaties are not properly understood and implemented within Pakistan. This section will therefore briefly outline Pakistan's obligations under these treaties as well as the rights afforded to mentally ill persons under other relevant international laws to help stakeholders better understand and meet their duties towards mentally ill prisoners.

### 2.1.1 Rights of persons with mental illness

The ICCPR, which Pakistan ratified in 2010, urges states that have not yet abolished the the death penalty to not impose it "on a person suffering from any mental or intellectual disabilities or to execute any such person." The ICCPR contains civil and political rights protecting individuals from government actions that infringe upon their liberty, privacy, and freedom of expression and association. Article 7 of the ICCPR prohibits cruel, inhuman, and degrading treatment, empowering mentally disabled persons subject to detainment to argue for more humane conditions of confinement and treatment.<sup>14</sup> To demonstrate compliance with Article 7,

all governments that have ratified the ICCPR are obliged to address the conditions and procedures for providing medical and psychiatric care to mentally ill persons from the time of arrest. Article 10 of the ICCPR mandates that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."<sup>15</sup> Article 26 of the ICCPR guarantees the right to equality and non-discrimination to all persons regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>16</sup> The UN Human Rights Committee, the body responsible for overseeing the interpretation and implementation of the ICCPR, affirmed that states have a positive duty to take steps to eliminate conditions that perpetuate discrimination.<sup>17</sup> The ICCPR also requires that "the reform and social readaptation of prisoners" is an "essential aim" of imprisonment.<sup>18</sup>

The UN Human Rights Committee stated that "*in cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings*"<sup>19</sup> and all defendants are entitled to effective legal counsel under international law.<sup>20</sup> Further, the ICCPR requires that all defendants have adequate time and facilities for the preparation of their defence and to communicate with counsel of their choosing.<sup>21</sup> An adequate defence is all the more vital where a conviction may result in deprivation of life. A state must provide "*adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases.*"<sup>22</sup>

<sup>10</sup> International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 1976) (ICCPR)

<sup>11</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 (UNCAT)

<sup>12</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3

<sup>13</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106

<sup>14</sup> Ibid art 7.

<sup>15</sup> Ibid art 10.

<sup>16</sup> Ibid art 26.

<sup>17</sup> UN Human Rights Committee, General Comment No 18: Non-Discrimination, 37th sess, UN Official Records Suppl. No. 40 (A/45/40): 173-175 (UN Non-Discrimination).

<sup>18</sup> ICCPR rt 10.

<sup>19</sup> UN Human Rights Committee, General Comment No 32: Article 14: Right to equality before the courts and tribunals to a fair trial, 90th sess, CCPR/C/GC/32 (23 August 2007).

<sup>20</sup> ICCPR, art 14(3)(d).

Further, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment<sup>24</sup> has described the imposition and enforcement of the death penalty in the case of persons with mental disabilities as particularly cruel, inhuman and degrading and in violation of Articles 1 and 16 of the UNCAT. This convention imposes an obligation on State Parties to prevent any acts of torture within their territory.<sup>25</sup> Likewise, the Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that “[i]t is a violation of death penalty safeguards to impose capital punishment on individuals suffering from psychosocial disabilities.”<sup>26</sup>

Pakistan ratified the ICESCR in 2008. Article 12 of the ICESCR establishes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>27</sup> Article 12 has been interpreted as an obligation on governments to take specific steps to protect and promote health.<sup>28</sup> The right to health can be viewed both as a positive right to government action or services necessary to maximise health, and as a negative right to protection against unhealthy or dangerous conditions. For further elaboration of the ICESCR’s requirements, principle 14 of the **UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care** provides a guide to states’ obligations under the convention, particularly with respect to protections against improper coercive treatment.<sup>29</sup>

The UN General Assembly (“UNGA”) adopted the CRPD to protect the rights of persons with physical and mental

disabilities. The CRPD provides a “framework for ensuring that mental health laws fully recognise the rights of those with mental illness.”<sup>30</sup> This Convention is binding on member states, including Pakistan.

There are also agreed international standards of best practice, including the **UN Declaration on the Rights of Mentally Retarded Persons (1971)**, the **Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991)**, the **Standard Rules for Equalisation of Opportunities for Persons with Disabilities (1993)**, the **Declaration of Madrid (1996)** and other standards such as **WHO’s Mental Health Care Law: ten basic principles and WHO Guidelines for the Promotion of Human Rights of Persons with Mental Disorders (1996)**. These standards provide countries with interpretive guides to international treaty obligations. They create numerous broad protections that provide important rights to people with mental illnesses such as the right to the highest attainable standard of physical and mental health, protections against discrimination, protections against torture, inhuman, or degrading treatment, and protection against arbitrary detention.<sup>31</sup>

The **UN Standard Minimum Rules for the Treatment of Prisoners (the “Mandela Rules”)** provide specific guidance on how health care services in prisons should be organised, alongside the specific duties and responsibilities of health-care staff. As the internationally accepted minimum standards on prison management, they provide a crucial framework for states to follow in

20 ICCPR, art 14(3)(d).

21 Ibid, art 14(3)(b).

22 *McLawrence v Jamaica*, “Where a capital sentence may be pronounced on the accused, sufficient time must be granted to the accused and his counsel to prepare the trial defense.” CCPR/C/60/D/702/1996.

23 UN Human Rights Council, Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, 30th sess, A/HRC/30/18 (16 July 2015).

24 <https://news.un.org/en/story/2014/12/485132-un-rights-experts-call-us-commute-death-sentence-mentally-ill-prisoner>

25 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

26 Christof Heyns, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc A/HRC/17/28 (23 May 2011).

27 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12 (ICESCR).

28 Committee on Economic, Social and Cultural Rights, General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12), 22nd sess, UN Doc CESCR/E/C.12/2000/4 (11 August 2000)

ensuring the rights of prisoners are respected. To achieve its aims, the Mandela Rules dictate that health-care staff operating in prisons should be independent of the prison administration.<sup>32</sup> Physicians must always be independent of police or prison authorities, which allows them to foster trust and transparency with inmates. Similarly, the **UN Principles of Medical Ethics**,<sup>33</sup> adopted by the UNGA in 1982, provides guidelines for health-care personnel in prisons. They emphasise providing prisoners with equal, non-discriminatory treatment and firmly ban any direct or passive involvement in acts of torture or cruel treatment.

### 2.1.2. The Right to Clemency

The right to seek pardon or clemency is sufficiently widespread to be considered a rule of customary international law. The ICCPR provides unambiguously: *“Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”*<sup>34</sup>

Further, according to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, the right to a pardon suggests *“no entitlement to receive a positive response, but it does imply the existence of a meaningful procedure through which to make such an application.”*<sup>35</sup> The UN Human Rights Committee observed that the failure to consider mercy petitions in good faith amounts to a violation of Article 6(4) of the ICCPR.

In an attempt to remedy any procedural

violations, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions suggested that states are responsible to provide the condemned person with basic information concerning the process of clemency, information such as the date of consideration of the clemency plea and notice of the decision reached in order to protect the integrity of the process.<sup>36</sup> The Special Rapporteur emphasised the importance of individuals having the opportunity to relay any information that might appear relevant to him or her to the body reviewing their plea as to ensure all relevant information is heard.<sup>37</sup>

As per Article 45 of the 1973 Constitution of the Islamic Republic of Pakistan (the “Constitution”): “The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.”<sup>38</sup> However, this presidential discretion consistently results in mercy petitions being rejected. There is also currently no legal framework in place guiding prison officials and defendants on how to draft petitions which often leads to them submitting deficient mercy petitions. As a result, mercy petitions are routinely rejected for technical defects, simply because the jail authorities fail to provide accurate records. The mercy petition process in Pakistan is inefficient and cursory. Given that Article 45 does not stipulate a fixed time limit for making a decision related to mercy petitions, the President can choose to wait to dispose of petitions indefinitely (See Section 7).

Currently, the rejection of mercy petitions by the President of Pakistan

29 Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, GA Res 46/119, UN Doc A/RES/46/119 (17 Dec 1991) principle 14.

30 Convention on the Rights of Persons with Disabilities, GA Res 61/106, UN Doc A/RES/61/106 (24 January 2007).

31 The Center for Civil and Human Rights, ‘International Law, Mental Health and Human Rights’ (2014).

32 UN Office on Drugs and Crime, ‘The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)’ (9 August 2018).

33 Principles of Medical Ethics, GA Res 37/194, UN Doc A/RES/37/194 (18 December 1982).

34 ICCPR Art 6(4).

35 Philip Alston, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc A/HRC/8/3 (2 May 2008) 60.

can only be challenged on the grounds of undue delay in disposal of their mercy petitions, mental illness, and solitary confinement as supervening grounds. The most significant legal determination on this matter in recent times has been by the Indian Supreme Court. In *Shatrughan Chauhan vs Union Of India & Ors*,<sup>39</sup> it was held that undue delay by the President in rejecting mercy to a death row convict amounts to torture. Further, such inordinate and unexplained delay by the President is sufficient in itself to entitle the convict to a commutation. The court commuted the death sentences of 13 prisoners on the basis of undue delay, while commuting the sentences of Barela and Sundar Singh on grounds of their mental illness. Sathasivam, along with justices Ranjan Gogoi and Shiva Kirti Singh took the view that the crime in question was irrelevant while deciding the effects of keeping a death row prisoner waiting for a decision on his or her mercy petition. The suffering that comes with anticipating death on an everyday basis, for the judges, amounted to torture which was violative of the right to life under Article 21 of the Indian Constitution.

In July 2017, the UN Human Rights Committee considered Pakistan's compliance with the ICCPR. During the review, Pakistan's delegation was unable to name a single instance where mercy had been granted by the President to a death row prisoner since the moratorium was lifted in 2014. Regarding the use of the death penalty, the Committee noted in their concluding observations that they were "*particularly*

*concerned that. . . a policy of blanket refusal of clemency applications is allegedly in place and no clemency applications have been granted.*"<sup>40</sup>

### 2.1.3 The Right to Not Be Executed

Pakistan continues to breach international obligations by allowing the death penalty to be imposed on prisoners with mental disorders. Though not specifically prohibited under international law, capital punishment may be imposed only for the gravest criminal offences.<sup>41</sup> International law clearly prohibits the execution of mentally ill condemned prisoners —**whether the illness was present at the time of the commission of the offence or at the time of the execution.** The UN Commission on Human Rights has called on retentionist states "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."<sup>42</sup>

Further, the UN General Assembly has also passed a **Declaration on the Rights of Mentally Retarded Persons** in 1971.<sup>43</sup> Under this declaration, a 'mentally retarded' person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for an offence, such person shall have a right to due process of law with full recognition being provided to his degree of mental responsibility. Whenever 'mentally retarded' persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or should it become necessary to restrict or deny some or all of these rights, the procedure used for that

restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the 'mentally retarded' person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities. The UN General Assembly has also passed a **Moratorium on the Use of the Death Penalty**<sup>44</sup> through which the General Assembly calls upon all states to restrict the use of the death penalty and not to impose capital punishment for offences committed by persons below 18 years of age, on pregnant women or on persons with mental or intellectual disabilities.

In addition, the **Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty** were approved by UN Economic and Social Council Resolution 1984/50 of 25 May 1984. They guarantee protection of the rights of those facing the death penalty and constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment. The third safeguard was amplified by the Economic and Social Council in 1988 with the words "*persons suffering from mental retardation or extremely limited mental competence.*" The Economic and Social Council subsequently added the recommendation that member states eliminate the death penalty "*for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.*"<sup>45</sup>

## 2.2. Obligations under Islamic Law

Islam is the presiding faith in Pakistan and government laws and policies must conform with its principles. Islamic Law recognises that a person with a mental illness could not have had the necessary mens rea or criminal intent to commit the crime if they were 'insane,' lacked competence, had an intellectual disability or were unconscious. According to Imam Abu Hanifa, permanently 'insane' persons should not be punished if the offender is awarded qisas punishment and he or she develops insanity after the announcement of the sentence and before his or her commitment to the victim's heir.<sup>46</sup>

Firstly, 'the insane' are persons who lack or are incapable of having an intention to commit a crime 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.*"<sup>47</sup> However, legislatures and Islamic scholars struggle to precisely define what constitutes insanity.<sup>48</sup> Further, insanity can occur in three ways: (i) absolute or continuous; (ii) intermittent; and (iii) partial. In the case of intermittent insanity, it must be proven that the mental disorder was active at the time of the criminal act for the defendant to be found not guilty. Otherwise, if the condition was in remission and not active, the perpetrator should be held responsible for his acts.<sup>49</sup>

Secondly, three characteristics define competence: (i) the ability to reason

('agil'); (ii) the ability to be fully responsible ('mukallaf'); and (iii) the capacity for deliberate intent ('amad'). A person who lacks or has deficits in meeting all three characteristics is considered a 'manjun' and is legally incompetent.<sup>50</sup>

Thirdly, sufficiently severe intellectual disability in Islamic Law is considered equivalent to insanity.<sup>51</sup> 'Severe' intellectual disability was clarified to include disabilities that impair judgement 'to the extent that it causes inability to appreciate the nature of one's actions'.

Finally, there is an agreement amongst the different schools of Islamic jurisprudence 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.

Islamic law prohibits the imposition of the death penalty on persons suffering from mental illness. Scholars agree that 'insane individuals' cannot serve a death sentence as such punishment would violate Shariah principles.<sup>52</sup> Most notably, eighteenth century Islamic scholar, Allamah Sayyid Muhammad Amin ibn Abidin wrote: *"If a criminal, sentenced to death for murder, is diagnosed with insanity before the punishment is actually imposed, then his post-crime insanity will save him from death penalty."*<sup>53</sup>

# CHAPTER 03

## Arrest

- 3.1. Legal Framework
- 3.2. Systemic Issues
- 3.3. Case Study

### 3.1. Legal framework

The Code of Criminal Procedure, 1898 (“CrPC”) provides the police with a broad range of powers, however, those powers are curbed by key constitutional guarantees as well as procedural provisions.<sup>54</sup> These powers include: the power to arrest and detain under Sections 54, 55 and 167; the power to enter and search land and buildings under Section 47 and 49; and the power to search persons under Section 51. The police also have wide powers to arrest and detain any person who may have been involved in any cognisable offence without a warrant under Section 54(1) of the CrPC. The list of cognisable offences for which a police officer can arrest a person without a warrant are provided in the Second Schedule to CrPC as well as any other law for the time being in force.

Under Section 54(1) of the CrPC, any police officer may, without an order from a Magistrate and without a warrant, arrest any person who has been concerned in any cognisable offence (i) against whom a reasonable complaint has been made (ii) from whom credible information has been received that he is concerned with the commission of such offence, (iii) or a reasonable suspicion exists of his having been so concerned with such offence. This section confers sufficient powers to a police officer, however such power can only be exercised in those cases where the police officer is possessed of some evidence indicating involvement of the person under the above four situations referred to in Section 54 (1).<sup>55</sup>

When a person suspected to have committed a cognisable offence is

arrested by a police officer, it is expected that the officer shall complete an investigation without any loss of time and within 24 hours of the person’s arrest, as indicated in Section 61, CrPC.<sup>56</sup> Under Section 62, every public officer in charge of a police station is required to report to the concerned District Magistrate or if directed by him to the Sub-Divisional Magistrate, about the arrest of a person without a warrant within their territorial limits.<sup>57</sup> It is the responsibility of the concerned Magistrate to scrutinise the report of arrest made by the police officer and determine if the action can be justified in law.

Section 167 of the CrPC authorises the detention of any arrested person by the police beyond 48 hours, and up to a maximum of 15 days, subject to the orders of a Magistrate, where the police officer is unable to complete the investigation within 24 hours of the arrest.<sup>58</sup> The production of a detained person in custody of a police officer, along with the police officer’s diary entries, before a Magistrate is a mandatory requirement of the law. The purpose of the detained person appearing before the Magistrate to obtain remand, allows the detained person to notify the Magistrate if the police officer has acted in violation of Sections 50 or 53 of the CrPC, or if any other illegal action has been taken by police for the purpose of extorting confessions or any other act.<sup>59</sup>

Article 9 of the Constitution provides protection against deprivation of life and property,<sup>60</sup> and Article 10 provides safeguards as to arrest and detention.<sup>61</sup> Article 10 ensures that the individual

<sup>54</sup> The Code of Criminal Procedure, 1898 (Pakistan).

<sup>55</sup> Ibid section 54(1).

<sup>56</sup> Ibid section 61.

<sup>57</sup> Ibid section 62.

<sup>58</sup> Ibid section 167.

<sup>59</sup> Ibid sections 50 & 53.

<sup>60</sup> The Constitution of Islamic Republic of Pakistan 1973, Art 9.

<sup>61</sup> The Constitution of Islamic Republic of Pakistan 1973, Art 10.

arrested has the following 4 protections: a) right to be informed of the grounds of arrest; b) right to consult and to be defended by a legal practitioner of his choice; c) right to be produced before a Magistrate within 24 hours; and d) freedom from detention beyond the said period except by order of Magistrate.

Lastly, under the Provincial Mental Health Acts (“the Acts”) passed by Sindh in 2013,<sup>62</sup> Punjab in 2014,<sup>63</sup> Khyber Pakhtunkhwa in 2017,<sup>64</sup> and Balochistan in 2019,<sup>65</sup> there is a duty on the provincial government to establish psychiatric and forensic psychiatric facilities in which prisoners with mental illness can be detained. Furthermore, Section 10 allows for mentally ill arrestees to be transferred to a mental health facility for assessment and urgent treatment instead of being kept in police custody. The application for admission for assessment can be made on the recommendation of two medical practitioners, one of whom should be a psychiatrist. The criteria for detention requires that the detainee has a mental disorder; the detainee must be a threat to his own health and the safety of others; and that the involuntary care of the detainee is not possible in the outside community. The maximum period for detention is 28 days. Similarly, under Section 11, an ‘application for admission of treatment’ can be made by two medical practitioners, subject to the detainee falling under the abovementioned criteria. The maximum period for detention under Section 11 is six months. Section 19(1) provides that if an officer has reason to believe that a person in a public place is suffering from a mental disorder that requires immediate care or control, the officer

may remove the person to a place of safety if they believe it is necessary for the protection of the person with mental illness or for the protection of other persons.<sup>66</sup> Under section 19(2), this detainment must not exceed 72 hours.<sup>67</sup> Further, it is only for purposes of enabling the patient to be examined by a psychiatrist or their nominated medical officer, making any necessary arrangements for treatment or care. Following such procedures would allow medical evidence to be gathered earlier for the purposes of trials and appeals. Section 13 prescribes the method for an emergency hold in cases where the inpatient wishes to leave but the psychiatrist in charge believes that he is still suffering from mental disorder to such a degree that it is necessary for his safety and the safety of others, that he be kept in detention.

### 3.2. Systemic issues

Though there are some procedures in the law to identify mentally ill persons at the time of arrest<sup>68</sup>, these provisions do not provide details as to how to process and assess such persons. The gaps in the law are exacerbated by the fact that the arresting officers and Magistrates are unaware of the signs and symptoms that evidence that a person is suffering from mental illness and further, of the laws that pertain to the arrest and treatment of mentally ill persons upon arrest. All these factors make the risk of wrongful conviction particularly acute for persons with psychosocial disabilities.

Arresting officers have wide powers to arrest and detain persons without a warrant. Such powers are also delegable without specific permission. In many cases, it is noted that a police officer may

<sup>62</sup> The Sindh Mental Health Act, 2013, Sindh Act No.L of 2013.

<sup>63</sup> The Mental Health Ordinance 2001 (VIII OF 2001).

<sup>64</sup> The Khyber Pakhtunkhwa Mental Health Act, 2017, (ACT NO. XVII OF 2017).

<sup>65</sup> The Balochistan Mental Health Act, 2019, Act No. IX of 2019.

<sup>66</sup> Punjab Mental Health Act, 2014 s. 19(1); Sindh Mental Health Act, 2013 s. 19(1), Khyber Pakhtunkhwa Mental Health Act, 2017, s. 19(1).

<sup>67</sup> Ibid s. 19(2).

<sup>68</sup> Such as the provisions of the mental health legislation, but they are not incorporated or aligned with the CrPc and there is widespread lack of awareness of these legislations.

arrest a person without collecting any material connected with the commission of the offence. As such, persons are often implicated for offences they have not committed. Further, no set principle has been followed in making this distinction between “cognisable offence” and “non-cognisable offence” and the list of offences shows that there is no determining factor for the distinction.

Arrests are also not frequently reported to Magistrates who are, under the law, required to scrutinise and decide whether an arrest can be justified in law.<sup>69</sup> Even when arrests are reported, Magistrates automatically remand the cases before them back to police custody without initiating any further inquiry as is prescribed under the law.<sup>70</sup> During this process, the accused are not provided with any access to legal advice or even provided with a state attorney. This is extremely problematic in the case of mentally ill persons who are more susceptible to wrongful conviction as they cannot advocate for themselves.

Because mentally ill persons sometimes behave in a manner which attracts attention, they are more easily made suspects in crimes. Their demeanour may lead investigating officers to believe that they are being evasive or telling lies.<sup>71</sup> In Pakistan, the police routinely utilise torture as an instrument to collect evidence and to extort confessions.<sup>72</sup> In such environments, persons with psychosocial disabilities are much more likely to succumb to torture and to

confess to crimes they have not committed. Despite being a party to the UNCAT and the ICCPR, Pakistan has failed to enact a comprehensive legislative framework that criminalises torture. The routine reliance on torture in Pakistan has been documented repeatedly over the last thirty-five years<sup>73</sup> but genuine reforms have yet to take hold.<sup>74</sup>

Moreover, criminal justice stakeholders, including the police, lawyers and NGOs remain unaware of the provisions in the Mental Health Acts that provide safeguards during arrest and custody, which leads to detainees with psychosocial disabilities being lost in the system for indefinite periods of time without receiving the requisite care and treatment.

<sup>69</sup> The Code of Criminal Procedure 1898 (Pakistan) ss 54, 157 (‘CrPC’).

<sup>70</sup> Justice Fazal Karim, *Access to Justice in Pakistan: A Handbook of Civil and Criminal Procedure with Constitutional Setting* (Pakistan Law House, 2003).

<sup>71</sup> See generally Philip WH Fennell, ‘Mentally Disordered Suspects in the Criminal Justice System’ (1994) 21(1) *Journal of Law and Society*.

<sup>72</sup> After a 2011 visit to Pakistan, the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment concluded that ‘[t]orture, including rape, and similar cruel, inhuman or degrading treatment are rife in Pakistan’, and that it is ‘most frequently used to secure confessions or information relating to suspected crimes’. U.N. Commission on Human Rights, E/CN.4/1997/7/Add.2 (1996). The International Federation of Human Rights further reports how ‘torture is routinely used to extract information or confessions from suspects, and illegal detentions are common’, and quotes a police superintendent as affirming that ‘in effect, the police has complete and unchecked powers. And the lack of modern investigative techniques means that we are “forced” to torture to secure confessions’. Human Rights Commission of Pakistan, *Slow March to the Gallows: Death Penalty in Pakistan* 40 (Jan. 2007), <<https://www.fidh.org/IMG/pdf/Pakistan464angconjointpdm.pdf>>.

<sup>73</sup> See International Crisis Group, 2008, ‘Reforming Pakistan’s Police’, *Asia Report* N°157, 1-4,9,25. <https://www.fidh.org/IMG/pdf/Pakistan464angconjointpdm.pdf>. See also, Sikander Ahmed Shah et al, *Police Order 2002: Police Reforms in Pakistan*, in *DEVOLUTION AND GOVERNANCE: REFORMS IN PAKISTAN*, ed. Syed M. Ali & Muhammad A. Saqib (Oxford University Press, USA, 2008).

<sup>74</sup> While the Torture and Custodial Death (Prevention and Punishment) Bill has been pending in National Assembly since it was first introduced in 2012, the Bill has been allowed to lapse several times with no demonstrable political will pushing for its enactment. The National Action Plan of Human Rights had set July of 2016 as the deadline for the enactment of this law. Human Rights Practices for 2015: Pakistan <<https://2009-2017.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>>.

## 3.3 CASE STUDY KANIZAN BIBI



Kanizan Bibi was born into a very poor family and worked as a housemaid to help make ends meet. In 1989, her employer's wife and children were found murdered, for which Kanizan and her employer were subsequently arrested and convicted. According to her family, the real culprits, who were engaged in a longstanding land dispute with Kanizan's employer, had been arrested but were later released after they bribed the police. They then filed a false police report accusing Kanizan.

Kanizan's family was too poor to afford bail. She spent almost 18 months in pre-trial detention and was thus exposed to mistreatment and torture while in police custody. She was severely tortured for nearly 15 days in violation of both international and domestic law. The police hung her from thick ropes. Mice were let loose in her shalwar (loose pants) which were tied at the ankles so that the rodents would not be able to escape. She was electrocuted. Villagers living close to the police station said they could hear screams from the station at night. During this time, Kanizan was so badly injured that she had to be transferred to a hospital for a few days.

Kanizan had repeatedly insisted on her innocence. The trial court's conviction relied heavily on Kanizan's coerced confession and overlooked key evidentiary gaps in the case. Despite Kanizan challenging the 'confession' and stating that it was involuntary, she was sentenced to death by Additional Sessions Judge, Toba Tek Singh in 1991, and her subsequent appeals in the Lahore High Court and the Supreme Court were dismissed. Despite her long history of mental illness, the President dismissed her petition for mercy along with those of over sixty others in 1999.

In April 2018, the Supreme Court took suo motu notice of Kanizan Bibi's case, ordering a fresh medical examination of Kanizan Bibi. These petitions formed part of the landmark Safia Bano judgement.

# CHAPTER 04

## Trial

### 4.1. Legal Framework

4.1.1. Not guilty by reason of insanity

4.1.2 Competency to stand trial

4.1.3 Diminished responsibility or diminished capacity

### 4.2. Systemic issues

#### 4.1. Legal framework

Pakistan's Criminal Procedural Code provides safeguards for an accused who suffers from mental illness at the time of trial under Chapter 34. The relevance of these protections has been reinforced by the Supreme Court of Pakistan that has reiterated that this chapter must be complied with by the courts.<sup>75</sup> Where a Magistrate has reason to believe that a person is of unsound mind or a person before the Court of Sessions or the High Court appears to be of unsound mind and is thus, incapable of making a defence during an inquiry or a trial, the Magistrate or Court must inquire into this unsoundness of mind.<sup>76</sup> A Court of Sessions or High Court must try the fact of such unsoundness or incapacity as part of the defendant's trial. The finding of unsoundness or incapacity is to be recorded and further proceedings should be postponed, if so required.<sup>77</sup> If an accused is found to be of unsound mind and incapable of making their defence, the Magistrate or Court can release them if they receive sufficient security that the person of mental illness will be properly taken care of, prevented from injuring themselves or other people and will appear before the Court.<sup>78</sup> This procedure is to be followed regardless of whether bail is applied for or not. If insufficient security is given, then the accused is ordered by the Magistrate or Court to be detained in safe custody as they see fit and report this action to the Provincial Government.

Most recently, the Supreme Court of Pakistan has in the *Safia Bano* judgement stipulated that the term unsoundness of mind be replaced with more inclusive terms such as mental

disorder and mental illness.

Unsoundness of mind or competency to stand trial must be established on the balance of probabilities, including but not limited to the following being answered as negative:

- The defendant understands the nature of the charge against him/her;
- The defendant is able to converse with counsel and give instructions;
- The defendant is able to understand the difference between a plea of guilty and one of not guilty;
- The defendant has a reasonable ability to concentrate on what is being said during his/her trial and understands what he/she can do should he/she not agree with something which has been said;
- The defendant is able to follow and understand the evidence being led; and The defendant is capable of giving evidence in their defence.<sup>79</sup>

The Magistrate or the Court may later resume the inquiry or trial at any time and require the accused to be brought before the Magistrate or Court.<sup>80</sup> This procedure under the CrPC is mandatory. A failure to comply with the procedure may impair the legality of the trial.<sup>81</sup> Pending an inquiry and examination, the Magistrate or the Court may also release the accused on sufficient security being given that they shall be properly taken care of and prevented from doing injury to themselves or another and will appear before the court when required.<sup>82</sup> When presented before the Magistrate or Court again, a certificate may be admitted into evidence on behalf of the appointed officer certifying that the accused is capable of making their defence.<sup>83</sup> Alternatively, should the

<sup>75</sup> *Abdul Wahid v The State* (1994) SCMR 1517 (Pakistan).

<sup>76</sup> CrPC ss 464(1), 465(1).

<sup>77</sup> *Ibid* s 465.

<sup>78</sup> *Ibid* s 466(1).

<sup>79</sup> Submissions to the Supreme Court in *Safia Bano* on behalf of *Amicus Curiae*.

<sup>80</sup> CrPC s. 466.

<sup>81</sup> See, *Sirajuddin v Afzal Khan* PLD 1997 SC 847.

<sup>82</sup> CrPC ss 464(1), 466(1).

<sup>83</sup> *Ibid* s 467(2).

Magistrate or the Court take the view that bail will not be granted or sufficient security is not given, the Court may order that the accused be detained in safe custody.<sup>84</sup> This custody should occur in a place and manner that the Court deems fit and in accordance with the provisions of the CrPC.<sup>85</sup> It must also be reported to the Provincial Government.<sup>86</sup>

#### 4.1.1. Not guilty by reason of insanity

Not guilty by reason of insanity is a complete defence available to an accused suffering from mental illness. Section 84 of the Penal Code of Pakistan ("PPC") dictates that a mentally ill person cannot be found criminally responsible for an offence: "*Act of unsound mind: Nothing is an offence which is done by 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.*" Mens rea or criminal intent is an essential ingredient of a criminal offence. This is to be proved by the prosecution by placing evidence that the accused knew what they were doing was illegal or that it was done with dishonesty and in a deceitful manner on record.<sup>87</sup> Under the PPC, actual, not constructive, intention is required to prove an offence.<sup>88</sup>

This law is modelled on the M'Naghten Rules that state no act is an offence if it is committed by a person who, at the time of committing the act, did not know the nature or quality of the act due to unsoundness of mind and secondly, did not know what they were doing was wrong or contrary to the law due to unsoundness of mind.<sup>88</sup> The M'Naghten Rules' definition of insanity does not include more than a cognitive element.

Therefore, the inclusion of several other tests for insanity defences such as the Irresistible Impulse Test is necessary. This test involves a determination of whether an impulse to commit a criminal act was irresistible due to mental illness, regardless of whether the defendant knew right from wrong.

As insanity is a special plea, the burden of proof rests on the defendant to prove the defence. However, a failure of the defence counsel to raise a plea of insanity at trial does not deprive the accused of the right to be treated in accordance with the law. The trial under this section is not for the purpose of ascertaining the guilt of the defendant but is rather to determine whether the defendant is of unsound mind. Both the prosecution and defence have to be provided with the full opportunity to lead evidence in support of their versions.<sup>90</sup>

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

- a. 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);
- b. Unsoundness of mind (this term has been replaced by mental illness or disorder by a recent order of the Supreme Court);
- c. Incapability of knowing the nature of the act/offence; or
- d. Distinction between right and wrong (does he know the act is wrong or contrary to the law?)

<sup>84</sup> Ibid s 466(2).

<sup>85</sup> Ibid s 466.

<sup>86</sup> Ibid.

<sup>87</sup> State v Zahiruddin [2000 P.Cr.L.J. 1105 (b)].

<sup>88</sup> Muhammad Baksh v The State [1995 P.Cr.L.J 1807 (b)].

<sup>89</sup> Re McNaghten's Case (1843) 10 Cl & Fin 200.

<sup>90</sup> Fauquik Bashar versus The State [1997 SCMR 239].

An individual who knows the nature of his act but fails to understand that the act itself is wrong is relieved from criminal responsibility. Sanity should not be confused with criminal intent or mens rea. If a psychological evaluation falls within the scope of legal insanity, no guilty mind and no intent in the commission of the offence can be proven. However, some mental health conditions can be very difficult to detect without either medical expertise or a longstanding relationship with a person.

#### 4.1.2 Competency to stand trial

The critical issue to establish when a mentally ill person accused of committing a crime appears before a court is whether his actions were influenced by his mental illness. If that is the case, it is important to establish how much control and responsibility such a person had on their actions. This determines whether the defendant is competent to stand trial or whether he should be shifted to a secure facility for treatment. The stress and increased levels of agitation arising from the process of arrest and detention can result in the development of disorders such as anxiety or severe depression.

The first and perhaps most important step is to place the defendant suspected of 'insanity' under medical observation promptly, which enables there to be medical evidence of the accused's state of mind immediately after the incident, on the record. The duty to raise issues concerning a defendant's mental health rests on the defence and the state authorities that have interacted with the defendant with mental illness during the proceedings.

In *Abdul Wahid v The State*,<sup>91</sup> the Supreme Court confirmed that the court must comply with the provisions of Chapter 34 of the CrPC, which require it to hold an inquiry or a trial if it has 'reason to believe' that the defendant is of unsound mind and is incapable of making his defence.

Where the court has reason to believe the defendant may be of unsound mind, the court must:

- i. Adjourn the trial;
- ii. Hold an inquiry into the unsoundness of the defendant's mind and the capacity to make his defence;
- iii. Order the defendant to be examined by the Civil Surgeon of the District or by such other medical officer as the Provincial Government may be direct; and
- iv. Examine the medical officer and record the examination in writing.<sup>92</sup>

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. During the adjournment, the Court has discretionary powers to either grant bail in accordance with section 466(1) of the CrPC or to commit the defendant in safe custody. In *Asghar Ali v The State*,<sup>93</sup> the Court stated that the security bond should provide for the surety to take care of the defendant, to prevent him from causing injury to himself, to prevent him from causing injury to any other person and to produce him before the Magistrate or the officer the Magistrate appoints in this regard. Alternatively, the Court or Magistrate can detain the defendant in safe custody in such a manner as they

91 1994 SCMR 1517.

92 Code of Criminal Procedure 1898, S. 464.

93 1992 PCrLJ 2083.

deem fit. The Court or Magistrate is to report the action taken to the Provincial Government. When a trial is postponed under sections 464 and 465, the Magistrate or Court can resume the inquiry or trial at any time and require the defendant to appear or be brought before the Magistrate or court under section 467.

The Court may take into consideration a broad range of independent factors in reaching its decision such as psychiatric assessment, social history and mental health jail records. The Court can summon medical records from the prison, as well as those of family members and members of the community in order to ascertain information regarding the defendant's mental health history and genetic disposition. The Court has noted that where the trial court's order is contrary to the doctor's certificate, and where the Court had not examined the doctor, such order of the trial court was contrary to s. 464-466 CrPC and should be set aside.<sup>94</sup>

Recently, in the seminal case of *Safia Bano*,<sup>95</sup> The Supreme Court of Pakistan laid out an extensive procedure to be followed during the trial of a person who may be mentally ill. The Supreme Court held that to prove a plea under section 84 of the PPC, the accused may benefit from any material, oral or documentary, produced or relied upon by the prosecution.

The Supreme Court stated that the terms 'reason to believe' and 'appears to the Court' in the context of sections 464 and 465 of the CrPC are to be interpreted as

a *prima facie* tentative opinion of the Court. The apex Court further found that the view taken by the trial court is not to be based on subjective impressions but is to be based on an objective assessment of the material and information placed before the Court or that is already available on record in the police file and case file. While forming a *prima facie* tentative opinion, the Court may give due consideration to its own observations in relation to the conduct and demeanour of an accused person. Further, a failure of the parties to raise such a claim, during trial, does not debar the Court from forming an opinion on its own regarding the capability of a defendant to face proceedings. In such a situation, the Court may rely on its own observations regarding the demeanour and conduct of the defendant either before or at the time of taking a plea against the charge or at any later stage.

Once the Court has formed a *prima facie* tentative opinion that the defendant may be incapable of understanding the proceedings of trial or make his or her defence, it becomes obligatory upon the Court to conduct an inquiry to decide the issue of incapacity of the defendant to face trial due to mental illness. The Court must have the defendant examined by a medical board that is to be notified by the Provincial Government, consisting of qualified medical experts in the field of mental health. This medical board is to examine the defendant and opine on whether the defendant is capable or otherwise of understanding the proceedings of trial and make his or her defence.

<sup>94</sup> Ibid.

<sup>95</sup> *Safia Bano*, (n 6).

Furthermore, the Supreme Court has highlighted that the report or opinion of the medical board must not be a mere diagnosis of a mental illness or absence thereof. It must be a structured and detailed report with specific reference to psychopathology (if any) in the mental functions of consciousness, intellect, thinking, mood, emotions, perceptions, cognition, judgement and insight of the defendant. The head of the medical board is then to be examined by the Court as a witness and the examination shall be completed in writing. Both the prosecution and defence should be given an opportunity to cross examine the head of the board. Thereafter, if the defendant wishes to adduce any evidence in support of his or her claim, then he or she should be allowed to produce such evidence, including expert opinion, with the prosecution given an opportunity to cross examine. Similarly, the prosecution may also be allowed to produce evidence which it deems relevant to this preliminary issue with opportunity given to the defence to cross examine. It is upon the consideration of this evidence procured and adduced before the Court that a finding on this question of fact, that is the capability of the defendant to face trial within the contemplation of sections 464 and 465 of the CrPC, shall be recorded by the Court.

#### 4.1.3 Diminished responsibility or diminished capacity

Diminished responsibility or diminished capacity can be employed as a mitigating factor or partial defence to crimes. The threshold to prove diminished

responsibility is lower, and this defence is applicable to more diverse circumstances than the defence of insanity. Under current Pakistani law, insanity is recognised as a valid defence and the defence of irresistible impulse or diminished responsibility is recognised as at least a partial defence or a mitigating factor, depending on the facts of the case.

The defence of diminished responsibility has been explained as “..even if a man charged with murder is not insane, still our law does recognise... that, if he was suffering from some infirmity or aberration of mind or impairment of intellect to such an extent as not to be fully accountable for his actions, the result is to reduce the quality of his offence in a case like this from murder to culpable homicide.”<sup>96</sup> Such aberration includes difficulty in learning, understanding, processing information and problem-solving. It is not an illness or disease. It is a condition that is usually present from birth and is permanent. Mental impairments prevent individuals from appreciating the effect of their actions- they do not intend for certain criminal acts to occur.

Domestic and international laws also recognise that persons with mental impairments are more vulnerable and less criminally responsible than others in the criminal justice system. They are more likely to falsely confess to crimes they did not commit, to be blamed as ringleaders by more sophisticated co-defendants, are less able to assist their lawyer with their defence, make poor witnesses for themselves, and may

<sup>96</sup> R. v. Braithwaite, 1945 JC: 55.

be unable to express remorse, leading to harsher sentences. They may also be less able to understand the consequences of their actions, to control their behaviour and able to be deterred by threats of punishment. They are more likely to act impulsively and to commit a criminal offence. Therefore, they are at special risk of wrongful conviction because their impairment may be perceived as dangerous.

It is very difficult, and often impossible, to determine whether someone has an intellectual disability without an expert psychiatric mental health assessment. Many people learn how to hide their condition to avoid being teased or discriminated against, and not all intellectually disabled people have obvious signs of impairment such as difficulty speaking or unusual facial features. It is thus imperative for experts to administer tests to diagnose the condition.

#### 4.2. Systemic issues

Coerced confessions, ineffective counsel and the resource constraints confronted by both defendants and police, call into question courts' adherence to the standard presumption of innocence. Between 2010 and 2018, Pakistan's Supreme Court overturned 78% of death penalty cases, citing unreliable witness testimonies, involuntary or retracted confessions, insufficient or manipulated evidence and lack of motive of the defendants as the primary reasons for overturning death sentences.<sup>97</sup> Additionally, the Supreme Court, in exercising its capital jurisdiction, raised

serious doubts about the reliability of police investigation, particularly where there is an unexplained delay in registration of the First Information Report (FIR) and where the evidence appears to be planted, manipulated or otherwise doubtful.

The Supreme Court upheld death sentences for lethal offences only and, even for lethal crimes, the Court established a presumption in favour of life imprisonment over the capital punishment. The Supreme Court has recognized that even a "single mitigating instance, available in a particular case, would be sufficient for the judge to not award the penalty of death but of life imprisonment."<sup>98</sup>

However, despite clear direction from the Supreme Court that the death penalty is not the 'normal sentence' for lethal crimes, this principle is seldom applied by the lower courts, who continue to regularly impose death sentences for non-lethal offences. Former Chief Justice Nisar has noted that this failure to follow precedent is one of the chief issues plaguing Pakistan's justice system.<sup>99</sup>

The dearth of mechanisms to detect and classify mentally ill individuals during trial poses an initial and significant obstacle to ensuring Pakistan does not execute persons with mental and intellectual disabilities. Section 464 of the CrPC relies on the Court of Sessions or the High Court to postpone the remainder of a trial pending further medical examination of a defendant by a medical specialist if it has reason to believe that the defendant is of unsound

<sup>97</sup> Foundation of Fundamental Rights and Reprieve, *The Pakistan Capital Punishment Study, A Study and Analysis of the Capital Jurisprudence of the Supreme Court of Pakistan*, March 2019.

<sup>98</sup> Ghulam Mohiuddin alias Haji Babu & ors Vs. The State (2014 SCMR-1034).

<sup>99</sup> *Courting the Law, Launch of Pakistan Capital Punishment Study by FFR and Reprieve*, April 21, 2019.

mind. However, outdated understandings of mental illness mean judiciaries often pose simple general knowledge questions to defendants which cannot be taken as valid indicators of sanity.<sup>100</sup> Ultimately, the powers under Section 464 and 465 are rarely invoked. Even when mental health practitioners examine and diagnose defendants, the courts have been reluctant to consider the relevance of mental illnesses. In *Imdad Ali v. Home Department*<sup>101</sup> the Supreme Court held that schizophrenia was not a permanent mental disorder but a recoverable disease, a view that ultimately contributed to the defendant receiving the death penalty.

Lastly, there remains a significant lack in competent representation of mentally ill defendants. The burden of proof to prove that the defendant is of unsound mind rests on the defence, who must prove it on the balance of probabilities. Consequently, if a defendant's counsel does not raise mental illness during the proceedings, then the protections under the CrPC are rendered less effective. This was highlighted in the case of Muneer Hussein who was assigned counsel minutes before he was cross examined.<sup>102</sup> Since his counsel was not aware of his family background of mental illness, he did not move to have Muneer examined by a medical board.<sup>103</sup>

100 Isabel Buchanan, *Trials on Death Row in Pakistan*, 2016, p 163.

101 *Mst. Safia Bano v. Home Department, Government of Punjab* (2016) 37 PLD (SC) 10.

102 Justice Project Pakistan and Allard K. Lowenstein (n 2) 34.

103 Justice Project Pakistan, Khizar Hayat, Case Study.

# CHAPTER 05

## Sentencing

5.1. Legal Framework

5.2. Systemic Issues

## 5.1. Legal framework

There are no separate guidelines to be followed by judges while sentencing those accused of capital crimes apart from brief guidance that is provided in Sections 366 and 367 of the CrPC. These provisions describe the general requirements on how a judgement is to be delivered. As a result, the decision regarding whether or not to award the death penalty to a mentally ill individual rests entirely upon the judge presiding over the case. This is in stark contrast to comparative jurisdictions, such as the United States, where separate sentencing hearings are held in order to determine the quantum of punishment after a conviction is awarded.

In the *Safia Bano* judgement, the Supreme Court developed jurisprudence on the sentencing of mentally ill defendants by reflecting upon the Mandela Rules, which state that prisoners who are diagnosed with mental or physical disabilities, such that their mental or physical disabilities would be aggravated by detention in prison, shall be transferred to health facilities as soon as possible. Further, if necessary, other prisoners with mental disabilities and/or health conditions can be observed and treated in specialised facilities under the supervision of qualified health-care professionals. The Court also drew upon the precedent developed in the Supreme Court of India in *X v. State of Maharashtra*<sup>104</sup> which states that a test of severity can be a guiding factor for recognising those mental illnesses which qualify for an exemption from the death penalty. The test envisaged predicates that the defendant needs to have a severe

mental illness or disability that a medical professional would objectively consider to be so serious that the defendant cannot understand or comprehend the nature and purpose behind the imposition of such punishment. The Indian Supreme Court found that these disorders generally include schizophrenia, other serious psychotic disorders, and dissociative disorders with schizophrenia.

Amongst other international laws, the Court also reflected on the ICCPR and the CRPD<sup>105</sup> in support of the contention that cruel, inhuman or degrading punishment shall not be awarded to any person. Based on the above, the Supreme Court in the *Safia Bano* judgement opined that if a condemned prisoner is found to be unable to comprehend the rationale and reason behind his or her punishment, then carrying out the death sentence will not meet the ends of justice. However, it was clarified that not every mental illness shall automatically qualify for an exemption from the death penalty. As such, the apex court of Pakistan has clarified that the mental state of a defendant has to first be considered by the Court itself, and then by mental health professionals on a medical board, before a defendant is sentenced. While passing such a sentence, the Court has also clarified that the trial court must consider whether defendants with mental illnesses should instead be held in mental health facilities where better care can be taken of them. Most significantly, the Supreme Court of Pakistan has held that, in line with international law, mentally ill defendants cannot be sentenced to death.

<sup>104</sup> (2019) 7 SCC 1 (also available at 2019 SCC OnLine SC 543).

<sup>105</sup> The ICCPR and CRPD are both ratified by the Government of Pakistan.

## 5.2. Systemic issues

Matters of sentencing are of great significance. Sentencing hearings require a set of facts and factors to be presented that are different to those presented at the trial of the defendant. For a Judge to adequately give due regard to all information relevant to matters of sentencing, a separate sentencing hearing is required. Due to the lack of consistency in the legal precedent regarding the application of the death penalty, there is a need to formulate and institute sentencing guidelines to be followed by courts when interpreting the application of the death penalty as a maximum sentence. The guidelines can be drawn up from the existing precedent developed by the superior courts of Pakistan regarding which extenuating circumstances warrant a mitigation of death sentence to life imprisonment.

Currently, sentencing is left entirely to the discretion of the trial judge<sup>106</sup> as the CrPC does not provide for any consistent sentencing laws or guidelines for a pre-sentence hearing. The Human Rights Committee of the Pakistan Bar Council passed a resolution for the amendment of the CrPC in 2016 and other legislation so as to provide for an essential pre-sentence hearing.<sup>107</sup> Copies of this resolution were sent to the Law Ministry and the input of the National Assembly speaker and Senate Chairperson was sought.<sup>108</sup> However, there has been no change to the CrPC and sentencing continues to take place as part of the trial itself.

Serious psychiatric illness not amounting to insanity is also relevant to sentencing. First, it may reduce the moral culpability

of the defendant, as distinct from the defendant's legal responsibility. Secondly, the defendant's illness may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served. Thirdly, in cases where a defendant is suffering from serious psychiatric illness, general deterrence should not be a sentencing aim, whether or not the illness played a role in the commission of the offence. The illness may have subsided since that time. Fourthly, specific deterrence may be more difficult to achieve and is often not worthy of pursuing as such. Finally, psychiatric illness may mean that a given sentence will weigh more heavily on the defendant than it would on a person in normal health. This is reiterated by international law which establishes that mental illness affects the culpability of a defendant convicted of a crime (as discussed in Part 2 of this report) and the domestic courts have acknowledged this notion.<sup>109</sup>

<sup>106</sup> Justice Project Pakistan, *Mental Health Manual for judicial officers*, pg 16. (Judges Manual)

<sup>107</sup> Hasnaat Malik, 'Legal Reprieve: PBC Urges Government to Allow Presentence Hearings', *The Express Tribune* (online, 14 August 2016) <<https://tribune.com.pk/story/1161929/legal-reprieve-pbc-urges-government-allow-presentence-hearings>>.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Hafizan v. Wali* s.3

# CHAPTER 06

## Imprisonment

### 6.1. Legal framework

6.1.1. Prison Rules and Provincial Mental Health Acts

6.1.2. Conditions while imprisoned

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### 6.2. Systemic issues

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6.2.2. Failure to Transfer Mentally Ill Patients to Psychiatric Facilities

### 6.3. Case study

## 6.1. Legal framework

### 6.1.1. Prison Rules and Provincial Mental

#### Health Acts<sup>110</sup>

The Prison Rules define a mental patient as an “*idiot or person of unsound mind*”<sup>111</sup> and distinguish between non-criminal and criminal mental patients.

Non-criminal mental patients are those who have committed no crime but are sent for medical observation, while criminal mental patients are those who have been accused of committing a crime or indeed have been found to have committed a crime.<sup>112</sup> Criminal mental patients are further divided into four subcategories:<sup>113</sup> (i) accused persons in respect of whose soundness of mind doubts are entertained by a magistrate trying their case and are accordingly sent to a prison for medical observation under section 464 of the CrPC; (ii) accused persons who, by reason of unsoundness of mind, are incapable of making a defence and accordingly are detained under section 466 of the CrPC; (iii) persons held to have committed an act which, but for unsoundness of mind, would have constituted an offence, and accordingly have been acquitted on this ground but have been detained under section 471 of the CrPC pending further Governmental order; and (iv) convicted persons who become mental patients whilst in prison.

The provincial Mental Health Acts have defined a mentally disordered person as one for whose detention in, or removal to, a psychiatric facility or other place of safety, an order has been made in accordance with the provisions of section 466 or section 471 of the Code of Criminal Procedure, 1898 (Act V of 1898),

section 30 of the Prisoners Act, 1900 (III of 1900), section 130 of the Pakistan Army Act, 1952 (XXXIX of 1952), section 143 of the Pakistan Air Force Act, 1953 (VI of 1953) or section 123 of the Pakistan Navy Ordinance, 1961 (XXXV of 1961). Further, the Acts allow for the Board<sup>114</sup> to examine as far as possible every patient and mentally disordered prisoner. The Board shall also inspect records and documents relating to the patients and mentally disordered prisoners since last visitation by the Board. The inspection of mentally disordered prisoners is to be conducted where any person is detained under the provisions of section 466 or section 471 of the Code of Criminal Procedure 1898 (Act V of 1898), section 130 of the Pakistan Army Act, 1952 (XXXIX of 1952), section 143 of the Pakistan Air Force Act, 1953 (VI of 1953), or section 123 of the Pakistan Navy Ordinance, 1961 (XXXV of 1961). The Inspector-General of Prisons, if the accused person is detained in a jail, and the Board of Visitors or any two members of such Board, if the accused person is detained in a psychiatric facility, may visit him in order to ascertain his state of mind and such a detainee shall be visited once at least in every six months by the Inspector-General of Prisons or, as the case may be, the Board or any two members of such Board, shall make a report as to the state of mind of such person to the authority under whose order the accused person is detained and the Inspector-General of Prisons or, as the case may be, the Board of Visitors or any two members of such Board, shall make a report as to the state of mind of such person to the authority under whose order the accused person is detained.<sup>115</sup>

<sup>111</sup> Pakistan Prison Rules 1978 ('Prison Rules') r 433.

<sup>112</sup> Ibid r 434.

<sup>113</sup> Ibid r 440.

<sup>114</sup> The Board is a Board of Visitors charged with carrying out the purposes of the Acts. The Board is to consist of a current or former Judge of the High Court, two psychiatrists, a prominent citizen of good standing, two medical practitioners, and the Director General Health Services.

<sup>115</sup> Punjab Mental Health Act, 2014, S. 54; Sindh Mental Health Act, 2013, S.54; The Khyber Pakhtunkhwa Mental Health Act, 2017, S. 48.

### 6.1.2. Conditions while imprisoned

During imprisonment, a person found or presumed to be a mental patient is to be kept separate from other prisoners.<sup>116</sup> 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.<sup>117</sup>

### 6.1.3. Transfer to a mental health facility

Where a criminal mental patient has been deemed incapable of making a defence and is consequently detained under section 466 of the CrPC, he is, 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.<sup>118</sup> Upon receipt of orders from the Government, a mental patient will be transferred to a mental hospital 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 hospital is ready to receive the patient.<sup>119</sup> 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.'<sup>120</sup> This transfer will only occur if the Medical Superintendent considers it necessary and the previous consent of the Medical Superintendent is

conserved.<sup>121</sup> The time spent at a mental hospital is to be recognised as a sentence undergone when the prisoner becomes of sound mind and is returned to the prison.<sup>122</sup> Upon return, a mental patient is to be assigned suitable work and such liberty as determined to be safe by the Medical Officer.<sup>123</sup>

### 6.1.4. Observation and reporting requirements

If a convicted person appears to be of unsound mind, a Superintendent is to place this person under observation by the Medical Officer for 10 days, after which the Medical Officer is to report results. If found to be unsound, a report reflecting this is to be submitted to the Inspector General, and orders are to be obtained from the Government to allow for a transfer to a mental hospital.<sup>124</sup>

If a criminal mental patient, who has been deemed unsound of mind and is incapable of making a defence, or whose soundness of mind is doubted by the magistrate has been sent to prison for observation under section 464 of the CrPC is to be imprisoned for more than 1 month, this fact must be reported to the Inspector General.<sup>125</sup> The Inspector General of Prisons is to visit ex-officio mental hospitals within his jurisdiction and may visit persons confined under sections 466 and 471 of the CrPC in order to ascertain their state of mind.<sup>126</sup> Where this person is contained in a prison, the Inspector General is to visit this person at a minimum of once every 6 months and where they are confined in a mental hospital they must be visited by two visitors to the hospital at a minimum of once every 6 months.<sup>127</sup> The Inspector General of Prisons is also to be made a

<sup>116</sup> Pakistan Prison Rules, 1978, r 435.

<sup>117</sup> Ibid 442.

<sup>118</sup> Ibid r 441.

<sup>119</sup> Ibid r 445.

<sup>120</sup> Ibid r 447.

<sup>121</sup> Ibid r 447.

<sup>122</sup> Ibid r 449.

<sup>123</sup> Ibid r 451.

<sup>124</sup> Ibid r 444.

<sup>125</sup> Ibid r 441.

<sup>126</sup> Ibid r 452.

<sup>127</sup> Ibid.

member of the Board of Visitors as per the provincial Mental Health Acts. This Board is to be responsible for periodically inspecting every part of a psychiatric facility and examine as far as possible every patient and mentally disordered prisoner. The Board shall also inspect records and documents relating to the patients and mentally disordered prisoners. Moreover, the admission, transfer or removal of patients concerned with criminal proceedings in such facilities shall also be under the administrative control of the Inspector General of Prisons.<sup>128</sup>

#### 6.1.5. Effect of the landmark Supreme Court judgement in the case of Safia Bano and Others v. the State

The Supreme Court recommended amendment to the Prison Rules that relate to mentally ill persons. It directed that restrictive terms such as ‘unsoundness of mind’ and ‘unsound mind’ be replaced wherever they occur in the PPC, CrPC and the Prison Rules with more sensitive and internationally recognised definitions of mental illness and mental disorder. It opined that a limited definition of the terms ‘mental disorder’ or ‘mental illness’ should be avoided. The Provincial Legislatures were directed to appropriately amend the relevant provisions of the mental health laws to cater to medically recognised mental and behavioural disorders as notified by WHO through its latest edition of International Classification of Diseases (“ICD”) in order to better appreciate the evolving nature of medical science. In this vein, the Court also recognised that outdated and derogatory terms such as ‘lunatic’ and

‘insane’ in the CrPC, Prison Rules and the PPC should be replaced with terms that are more inclusive and sensitive.

The Supreme Court also directed the Federal Government and all the Provincial Governments to immediately establish or create High Security Forensic Mental Health Facilities in teaching and training institutions, 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 Provincial Mental Health Acts, which require these facilities to be set up, as they are essential for the understanding of complex mental disorders occurring in the prison process and will equip prison officials to properly assist prisoners with mental illness. The Court has also 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.

Finally, the Supreme Court’s direction in this case for the transfer of the three mentally ill prisoners to psychiatric facilities, set the precedent that mentally ill persons are, in future, to be transferred to mental health facilities where they can receive proper care. This precedent will prevent a further deterioration of their mental health in prison.

128 S. 55, Punjab Mental Health Act 2014, S. 55(2) Sindh Mental Health Act 2013, S.49 Khyber Pakhtunkhwa Mental Health Act 2017.

## 6.2. Systemic issues

### 6.2.1. Gaps in the Prison Rules and the Provincial Mental Health Acts

Pakistan's criminal justice system overwhelmingly fails to offer adequate protection during arrest, trial, sentencing and even during detention for those suffering from mental illness. The lack of mental health treatment and training means that many individuals never get diagnosed and mental impairment often goes undetected prior to the commission of the offence and at trial. The majority of mentally ill defendants thus obtain their first diagnosis of mental impairment after incarceration. The tendency for mentally impaired prisoners to fall through the gaps in the criminal justice system is largely attributable to various deficiencies in the procedures and application of the Prison Rules. While Rule 440 lists the criteria to identify a mental patient, it creates an arbitrary procedure for doing so. Diagnosis of a mental patient is to be made by the Magistrate, rather than by a trained mental health professional. The Magistrate employs diagnostic criteria predicated on rudimentary questions which possess no overt link to mental capacity, including asking who the President of Pakistan is.<sup>129</sup> Asking such questions is in no way scientifically linked to identifying mental illness. These rudimentary questions only suffice to capture extreme mental illness. Furthermore, they fail to encapsulate temporary mental impairments which may exist during the commission of the relevant crime. Rule 435 further ostracises mentally ill prisoners by

detaining them separately from all other prisoners.

The deficiencies of Rule 440 are compounded by Rule 443, which explicitly provides for the close examination of symptoms to "preclude the possibility of a criminal feigning insanity." It, therefore, assumes as a starting point, that prisoners exhibiting delusional or erratic behaviour are feigning mental incapacity. Rule 443 does not establish an objective diagnostic criteria for mental illnesses. It is at the Superintendent's discretion to put a prisoner under observation by a medical expert for diagnosis. While the ultimate diagnosis is made by a medical officer, the discretionary nature of the Superintendent's power means that mentally ill prisoners may not be referred for a mental health examination. It places the onus of conducting mental health assessments on persons who are not independent, qualified medical health experts. Moreover, the practice of separating mentally ill persons by holding them in protective custody, usually in a single cell as per Rule 435, excludes them from equal participation in prison life. It reduces their access to education and recreational activities which may further deteriorate the psychological welfare/mental wellbeing of the prisoners. Therefore, the legal provisions segregating mentally ill persons must be amended to ensure that they are exposed to meaningful human contact, so that placing them in protective custody does not amount to solitary confinement.<sup>130</sup> Since forensic prisoners (persons found not guilty of an offence

<sup>129</sup> Isabel Buchanan, *Trials on Death Row in Pakistan*, Penguin Random House: UK (2016), 157.

<sup>130</sup> Solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

by reason of mental illness or who are unfit to plead because of mental illness) must be kept in separate wards, they face discrimination and are unable to receive the requisite medical care in the proper facilities as per the laws.

The current prison rules make no provision for assessment and identification of mentally ill patients upon their admission to prison. There is no provision for a psychologist or psychiatrist to assess and support prisoners with mental disabilities through their incarceration. There is no process of screening for mentally ill patients and for their on-going care. After admission, the care of a mentally ill patient is assigned to a medical officer who is not trained to address psychological illnesses. Medical staff are hired by the prison officials. The Guidelines to the Mandela Rules<sup>131</sup> explain that health-care staff operating in prisons should be independent of prison administration and that they should be independently appointed to ensure that clinical and health assessments of detainees are based solely on medical criteria. Further to this, the current Prison Rules define a mental patient as “*an idiot or person of unsound mind.*”<sup>132</sup> This invokes two broad issues in relation to the language. Firstly, this definition is too narrow and fails to include certain mental illnesses that ought to be encompassed. Secondly, the labelling of a mental patient as an ‘idiot’ generates a very derogatory stigma towards mental patients.<sup>133</sup> The use of the word ‘idiot’ denotes similar negative connotations to ‘insane’ and ‘retarded’.

A major factor contributing to the substandard treatment of mentally ill prisoners is the lack of awareness and understanding among physicians, psychiatrists, lawyers and judges of the Provincial Mental Health Acts.<sup>134</sup> Despite the Provincial Mental Health Acts directing for the establishment of a Mental Health Authority, efforts by Provincial Governments in following this direction have been sparse. The Sindh Mental Health Authority was formed five years after the Act was passed, Punjab, Balochistan and Khyber Pakhtunkhwa have failed to establish an authority.<sup>135</sup> The effectiveness of these Mental Health Authorities and the Board of Visitors, discussed in the previous section of this report and established under the same laws, remains to be seen. However, independent oversight of prison facilities under the Board of Visitors could function as a crucial prophylactic against the systemic procedural violations faced by mentally ill prisoners in Pakistan.

#### 6.2.2. Failure to Transfer Mentally Ill Patients to Psychiatric Facilities

While Section 6 and 55 of the Mental Health Ordinance 2001 (“MHO”) and Prison Rules<sup>136</sup> provide for the establishment of special security forensic facilities, in reality prisoners are rarely ever transferred to these facilities and are instead kept in detention cells without being provided requisite treatment. This was evidenced in the case of Khizar Hayat who was diagnosed with severe schizophrenia.<sup>137</sup> His illness was a source of conflict with other prisoners, who beat and harassed him. In 2010, a medical

<sup>131</sup> Guidance Document on the Nelson Mandela Rules.

<sup>132</sup> Prison Rules, r 433.

<sup>133</sup> Noor Naina Zafar & Maryam Haq, *Mentally Ill Prisoners In Pakistan's Criminal Justice System: Analysing Fair Trial & Due Process Standards*, 2018, University College Lahore Human Rights Review, Volume 5, pp. 1-44.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Prison Rules r 445-447.

<sup>137</sup> Justice Project Pakistan, Khizar Hayat (Case Study, 16 February 2016) <[https://www.jpp.org.pk/case\\_study/khizar-hayat-bring-it-back/](https://www.jpp.org.pk/case_study/khizar-hayat-bring-it-back/)>.

officer recommended that Hayat be transferred to a psychiatric hospital after he showed signs of injuries. Instead, Hayat was put in solitary confinement. He remained in isolation for six years, which only exacerbated his illness, until his death in 2019.

It is the Provincial Government that is empowered to recommend the removal of a mentally ill prisoner from prison to a psychiatric facility. In practice, a general lassitude and resistance has also been observed in the attitudes of psychiatric facilities in admitting mentally disordered prisoners for treatment and care. This is partially due to the fact that such facilities are already overcrowded and lacking in funds. According to the WHO, in 2009 there were only 0.02 beds for persons with mental disorders in forensic inpatient units.<sup>138</sup> Another reason for such attitudes is the responsibility attached to accepting such prisoners: surveillance over and security of the prisoners and other patients must be provided for. Mentally ill prisoners are also to be visited by the Inspector-General but the Inspector-General does not have sufficient knowledge of mental illnesses. Therefore, his visit for the purposes of observing the progress of a case will not be effective if he is not accompanied by a qualified medical professional.<sup>139</sup>

<sup>137</sup> Ibid.

## 6.3 CASE STUDY KHIZAR HAYAT



Khizar Hayat was sentenced to death for the murder of his friend and fellow police officer, Ghulam Ghous, in 2003. His jail medical records state that he started exhibiting “psychiatric symptoms” in February 2008, although the seeds of Khizar’s illness - paranoid schizophrenia - were present since birth. Medical authorities and psychiatrists had confirmed multiple times over the years that Hayat had severe mental illness, and that he experienced intense hallucinations and “active symptoms of severe psychosis.” These afflictions made him the target of horrid abuse and attacks by other prisoners, leading to him being hospitalised for head injuries at one point. Despite being prescribed powerful antipsychotics for years, his condition deteriorated to the point where, according to a report by the Medical Officer of Lahore Central Jail, in 2010 Khizar was suffering from “active symptoms of severe psychosis” and uttering words which could “provoke and harass other prisoners.” The report recommended that he be shifted to a mental health facility until such time that he recovered. By 2012, he had become so delusional that it was no longer possible to house him among the rest of the jail population, and he was moved to a cell in the jail hospital. His mother’s requests that he be transferred to a proper medical facility in 2009 were repeatedly ignored. After spending 16 years of his life on death row and the last six years alone in his cell in the jail hospital, Khizar Hayat passed away on the night of March 21, 2019 at a hospital where he had been admitted after he stopped taking food and medication.

# CHAPTER 07

## Mercy Petitions/ Presidential Pardon

7.1. Legal Framework

7.2. Systemic Issues

7.3. Case Study

## 7.1. Legal framework

Article 45 of the Constitution of Pakistan grants the President of Pakistan the authority to pardon death row defendants by accepting mercy petitions.<sup>140</sup> In order to set this power in motion, following the rejection of a condemned prisoner's final appeal to the Supreme Court of Pakistan, the relevant Prison Superintendent must inform the prisoner that the mercy petition must be submitted in writing within a period of 7 days of the dismissal, per Rule 104(i), of the Pakistan Prison Rules. However, according to Rule 104(iii), prisoners may submit mercy petitions until the evening on the day preceding that fixed for execution. Rule 104 of the Pakistan Prison Rules delineates that mercy petitions can be submitted "from or on behalf of condemned prisoner." Rule 104(viii) further stipulates the process for mercy petitions submitted "on behalf of a prisoner...by his relative or friend."

Subsequent mercy petitions can be submitted only in two other instances: (i) where a mercy petition has been submitted under the procedure prescribed by Rule 104(i) but the petitioner has not received notice of the outcome, or (ii) a mercy petition is submitted under the procedure prescribed by Rule 104(i) and there are fresh grounds to submit a mercy petition.

If the mercy petition is submitted within the prescribed period, according to Rule 104(ii), the Superintendent dispatches the mercy petition to the Provincial Home Secretary with a covering letter, stating the date fixed for execution and certifying that execution is pending till

the orders of the Provincial Government. In the event that the petition is submitted after the period of 7 days after dismissal has lapsed, per Rule 104(iii), the Prison Superintendent forwards the petition to the Provincial Government confirming that, pending a reply to the petition, the execution will not be carried out.

Under Rule 107(iv) of the Prison Rules, where a petitioner is of unsound mind or of ill-health, two copies of the medical report shall also be submitted to the Provincial Government. In addition, Rule 107(v) stipulates that where the Prison Superintendent and Medical Officer believe the prisoner was below 18 years of age at the time of the offence, his or her record of birth must also be submitted to the Home Secretary, Provincial Government.

According to Rule 104(iv), regardless of whether the Provincial Government considers the petition, it has to forward it to the Ministry of Interior and simultaneously postpone execution pending the receipt of the orders of the President. If the Provincial Government decides to commute the sentence, the petition to the President is withheld and the petitioner and Prison Superintendent duly informed. However, if after consideration the Provincial Government rejects the petition, it is forwarded to the Ministry of Interior, along with records of the case to forward to the President of Pakistan. If the mercy petition was submitted after the requisite period of 7 days following the Supreme Court's rejection of the prisoner's appeal, Rule 104(iv) states that it is at the Provincial Government's discretion to consider and to postpone execution. It may withhold a petition

<sup>140</sup> The Constitution of Pakistan, 1973, Art. 45 ("The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority").

addressed to the President if, per Rule 104(v), a petition containing a similar prayer has already been submitted to the President. The petitioner shall be informed of the fact of withholding the petition and of the reason thereof.

Thereafter, the Ministry of Interior forwards the petition to the President of Pakistan along with a recommendation regarding whether the mercy petition should be accepted or rejected. The President, then, has the power to pardon. Once a petition has been rejected by the President, no second or subsequent petition shall be forwarded to the Provincial Government for consideration unless there are fresh grounds. Upon receipt of the President's orders, the Provincial Government shall immediately send an acknowledgement in the same manner as is used for communicating the order. Upon rejection, the orders are communicated by a duly registered, express letter.<sup>141</sup>

In early 2019, the Ministry of Human Rights obtained Cabinet approval to reform the mercy petitions procedure. In October 2019, the Ministry of Interior issued new Standard Operating Procedures (SOPs) for the consideration of mercy petitions, which for the most part contained perfunctory changes, with the exception of the introduction of provincial committees constituted to review mercy petitions at the provincial level. However, the SOPs failed to fulfil Pakistan's obligations under international Law and failed to define the functions and powers of the committees. As a result, cases with strong evidence of humanitarian abuses and violations continued to be misrepresented under the new process and older cases on

stays of execution have not been resolved.<sup>142</sup> Additionally, the new procedure cannot be properly implemented without being codified in domestic law through comprehensive rules, in order to ensure transparency, certainty, due process and objectivity, in line with international law standards, to give prisoners a meaningful opportunity to seek clemency. However, without the procedure being codified in domestic law, it cannot be properly implemented, which is certainly the case as most Provincial Governments were either completely unaware or unable to implement it effectively.

## 7.2. Systemic issues

While the President possesses the constitutional authority to pardon death row defendants by accepting mercy petitions under Article 45 of the Constitution, in practice, such petitions are always denied. Moreover, since lifting a six year de facto moratorium on the death penalty, the President of Pakistan has pursued a blanket policy of refusing to grant clemency to prisoners and has made it effectively impossible for prisoners on death row to obtain pardons or commutations of death sentences. The President has consistently rejected mercy petitions submitted by prisoners who have persuasive cases for relief.<sup>143</sup>

In accordance with the Prison Rules, mercy petitions are filed after all judicial appeals have been exhausted by the prisoner.<sup>144</sup> The Rules require prison authorities to submit a mercy petition on behalf of any prisoner unrepresented by legal counsel.<sup>145</sup> In order to comply with this rule, jail authorities submit a brief

141 No Mercy: A Report on Clemency for Death Row Prisoners in Pakistan by Justice Project Pakistan, September 25, 2019, p 9.

142 The Express Tribune, 'SC denies relief to retired captain who killed two majors,' September 25, 2019.

143 According to the Ministry of Interior, the President's office rejected 513 mercy petitions of condemned prisoners over the last five years, 444 of which were in the fifteen months after the resumption of executions in December 2014. The Interior Ministry also informally confirmed that the Government of Pakistan has a policy in place to summarily reject all pleas of mercy.

<<https://jpp.org.pk/mercy-petitions-need-to-introduce-sops/>>

144 Prison Rules, Rule 104.

145 Ibid, Rule 104(i).

pro forma petition which contains no real information about the individual prisoners and their personal circumstances. As JPP has documented in a prior report, *“most mercy petitions contain just three perfunctory lines: ‘The prisoner’s Supreme Court decision has come through. He has been sentenced to death. Please consider his case for mercy.’”*<sup>146</sup> These petitions rarely mention age, disability status, medical conditions, length of time on death row, behaviour while incarcerated, or any other mitigating circumstances that would justify a lesser sentence. Often, when a prisoner has a compelling jail medical record, which might give grounds for mercy to be granted, these records are not included.

Overwhelmingly, these jail mercy petitions are simply dismissed out of hand. In many cases, prisoners wait years between the dismissal of their appeals, the submission of their jail mercy petition, and their actual execution. In the intervening years, circumstances may arise which might provide grounds for clemency: the prisoner might develop a serious illness, they might establish their good character through contributions to society while in prison, or they might even have simply already served the equivalent of a life sentence.<sup>147</sup> There is an obligation on the Government under international law to give due consideration to the request and to make a reasonable and fair decision on whether or not to grant mercy in the case.<sup>148</sup> At present however, these rudimentary standards of fairness are not followed in Pakistan and even where prisoners have attempted to raise such circumstances in requests for mercy, they have been ignored.

In previous reports, JPP has highlighted the systemic violations in Pakistan’s practice of capital punishment, and urged the Government of Pakistan to streamline the process through which mercy petitions of condemned prisoners are submitted and evaluated.<sup>149</sup> In 2019, following serious criticism from the UN Human Rights Committee in 2017 that Pakistan lacked any meaningful clemency process,<sup>150</sup> and a further review of the issue in 2018 as part of the EU GSP+ process,<sup>151</sup> Pakistan submitted in its state follow up report that a Committee to review mercy petitions had been notified.<sup>152</sup>

Since the lifting of the moratorium on the death penalty in 2014, the President has not granted a single pardon, rejecting 513 mercy petitions between 2012 and 2016 alone.<sup>153</sup> The Interior Ministry has also informally confirmed that the Government of Pakistan has a policy in place to summarily reject all pleas of mercy.<sup>154</sup> Mercy petitions in Pakistan have become a mere formality, a last-ditch effort that is never approved. This practice is in clear violation of Pakistan’s domestic and international law obligations, and when many death row convicts including those highlighted in this report have viable arguments for a pardon, it highlights the failings of the current legal system.

The mercy petition process itself in Pakistan is deeply flawed, with prison officials writing up the mercy petitions for those unrepresented by legal counsel without contacting the families of the prisoners during the process to obtain essential details. This results in vague petitions and prison officials with far more power in their hands than

146 Justice Project Pakistan and Allard K. Lowenstein International Human Rights Clinic, *A Most Serious Crime: Pakistan’s Unlawful Use of the Death Penalty* (September 2016), p. 23, [https://law.yale.edu/system/files/area/center/schell/2016\\_09\\_23\\_pub\\_dp\\_report.pdf](https://law.yale.edu/system/files/area/center/schell/2016_09_23_pub_dp_report.pdf). [A Most Serious Crime].

147 As per S. 57, Pakistan Penal Code 1860, a life sentence shall be for 25 years.

148 International law makes it absolutely critical that in order to ensure transparency, certainty, due process objectivity. The process and criteria through which mercy petitions must be specified in domestic legislation. Furthermore, the government must ensure that sentences are not carried out before requests for pardon have been “meaningfully considered” and conclusively decided upon.

149 Justice Project Pakistan and Allard K. Lowenstein (n 2); Justice Project Pakistan, ‘No Mercy: A Report on Clemency for Death Row Prisoners in Pakistan’, September 25, 2019.

150 Human Rights Committee, ‘Concluding observations on the initial report of Pakistan’, 23 August 2017, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRICAqhKb7yhssymRLSm3gUSDIntv8Slm%2F%2BjSkxSILEnCLYiaWS2Zt2ITQFT11h40HjFTMf8Nky906kLKaSHalcX%2Byl7%2FfUPrUqGm8FbOBVj6GjzqpQw>

intended, which also opens avenues for corruption. Furthermore, mercy petitions, once received, are often set aside indefinitely, since there is no fixed time limit for their redressal. Prisoners can languish on death row for decades, unjustly causing them severe psychological harm. The Indian Supreme Court, upon recognising that prisoners in its jails faced a similar plight, ruled that mercy petitions can lessen the death sentence to life imprisonment if the President has significantly delayed the decision without an adequate reason.<sup>155</sup>

Pakistani jurisprudence also emphasises that unjustified post-trial delays causing prisoners to spend more time in appalling prison conditions are themselves mitigating factors which are grounds for commuting a prisoner's death penalty to imprisonment. The Supreme Court's jurisprudence over the last decade has established the principle that prisoners who spend a period on death row that is "equal to or more than a term of imprisonment for life [are] reasonably entitled to an 'expectation of life.'"<sup>156</sup>

The Government of Pakistan is currently looking to reform the process of reviewing mercy petitions by reforming the format and implementing an open-committee structure to review them. A committee structure benefits from more actors being involved in the clemency process and resists the capture of the clemency mechanism by law enforcement or prosecutorial interests. Although they vary widely in practice, open-committees may help provide consistency and institutional memory in

the exercise of the mercy power and, compared to a bureaucracy, may be resistant to political influence.<sup>157</sup>

151 The News, 'EU report on GSP+ assessment: NAB under attack for being partial, harsh on opposition, says EU' by Tariq Butt, February 25, 2020. <<https://www.thenews.com.pk/print/619461-eu-report-on-gsp-assessment-nab-under-attack-for-being-partial-harsh-on-opposition-says-eu>>  
152 (CCPR/C/PAK/CO/1/Add.1).

153 Raza Khan, President turned down 513 mercy petitions over the last five years: Interior Ministry, Dawn (15 April 2016), <https://www.dawn.com/news/1252257>.

154 Syed Irfan Raza, President rejects mercy appeal of 17 death penalty convicts, Dawn (18 December 2014), <http://www.dawn.com/news/1151758/president-briefed-on-decision-to-end-moratorium>.

155 Shatrughan Chauhan & Anr vs Union Of India & Ors (2014) 3 SCC 1, Writ Petition (Criminal) no. 55 of 2013.

156 Hassan & others v. the State & others (PLD 2013 SC 793), paras.16, 20.

157 Andrew Novak, Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States, 49 U. Mich. J. L. Reform 817 (2016).

## 7.3 CASE STUDY GHULAM ABBAS



Ghulam Abbas was arrested in September 2004 for fatally stabbing his neighbour in a dispute over the payment of the electricity bill in Haji Lal Din area of Rawalpindi. He was sentenced to death by a Sessions Court in May 2006. His subsequent High Court and Supreme Court appeals were dismissed in 2010 and 2016, respectively. In 2018, a Supreme Court review petition was also dismissed. Ghulam's mercy petition was eventually rejected by the Presidency on 22 April 2019. His most recent medical evaluation, by a board constituted by the Supreme Court in September 2020, declared that Ghulam was suffering from schizophrenia.

In relation to Ghulam Abbas's case, the Supreme Court noted that "though it has come on record that a mercy petition filed by condemned prisoner Ghulam Abbas was rejected by the President of Pakistan yet there is nothing on record to show whether the ground of mental illness was taken into consideration while dismissing the mercy petition."<sup>158</sup>

The Court directed that a fresh mercy petition be filed on his behalf mentioning his plea of mental illness, along with copies of his entire medical history/record, copies of the report of Medical Board constituted by the Court and a copy of this judgement, and be reconsidered in light of this judgement. The Court stated: "...we expect that the mercy petition filed on behalf of condemned prisoner Ghulam Abbas shall be disposed of after taking into consideration all the circumstances including the observations made by this Court in the instant judgement."<sup>159</sup> In doing so, the Court judicially reviewed the entire mercy petitions review process and effectively delineated the minimum guidelines that must be followed in the consideration of mental illness as a ground for clemency. It has set precedent for the rights and protections afforded to mentally ill prisoners at arrest, investigation, trial, sentencing and clemency stage.

<sup>158</sup> Safia Bano and others v Home Department [2021 PLD 488] ('Safia Bano').

<sup>159</sup> Ibid.

# CHAPTER 08

## Execution

8.1. Legal Framework

8.2. Systemic Issues

8.3. Case Study

### 8.1. Legal framework

As per section 374 of the CrPC, when a defendant is sentenced to the death penalty, an instant appeal lies to the High Court of the province, which re-evaluates the evidence collected in the subordinate court and confirms or overrules the sentence. If the High Court confirms the death penalty, there is no obligation to appeal. However, it is customary to do so. The defendant can appeal to the Supreme Court of Pakistan. Given the severity of the sentence, the Supreme Court allows the hearing of appeals — a benefit not extended to other criminal and civil matters.

As discussed throughout this report, domestic law provides mentally ill individuals with certain rights, which implicitly safeguard them against execution at three stages; pre-trial, during the trial and post-conviction. A defendant's sanity must be ascertained before they can stand trial, which subsequently determines how they will be treated. Chapter 34 of the CrPC provides safeguards for an accused who suffers from mental illness at the time of trial and the enforcement of these safeguards does not allow the executions of prisoners with mental illness. The Pakistan Prison Rules 1978, under chapter 18 provide a special scheme of protections for the treatment of "criminal mental patients." Finally, post-conviction, the Prison Rules and the Provincial Mental Health Acts provide safeguards as to a defendant's treatment in prison and relate to his or her competency to be executed.

### 8.2. Systemic issues

While the Pakistani legislature has enacted statutes which seek to protect people with mental illnesses, the criminal justice system fails to properly implement these safeguards, revealing the systemic weaknesses of the Pakistani legal system, such as in the Imdad Ali judgement which was part of the Safia Bano legal proceedings.<sup>160</sup> As a paranoid schizophrenic, had Imdad been executed, Pakistan would have breached its obligations under various international instruments. He is one of many such prisoners who has been met with this fate, and thankfully he was spared by the lawyers obtaining a stay of execution from the High Court by placing before the Court irrefutable evidence of his severe mental illness, and highlighting the myriad due process violations rendering him to be wrongfully convicted on death row.

Since lifting the moratorium in December 2014, Punjab also revised its Lahore High Court Rules & Orders, and the Provincial Home Department issued a Notification amending Rule 105 of the Pakistan Prison Rules, 1978, reducing the period of time between the issuing of an execution warrant by a Trial Court and the date of execution for condemned prisoners. This renders the legal avenues available to prisoners facing execution practically impossible to take due to paucity of time, effectively depriving them of their rights provided to them by the law and the Constitution. These revisions to the law infringe upon the right of guaranteed due process and constitutional rights of the citizens of Pakistan particularly infringing Article 4, 9, 10-A, 14 and 25 of the Constitution.

<sup>160</sup> Safia Bano (n 6).

Currently under the Prison Rules, execution warrants are issued by a judge and the execution takes place between 3-8 days after the warrant is administered.<sup>161</sup> However, since this rule was implemented, review of execution dates show that jail officials intentionally issue execution warrants later in the working week, such as on Wednesday or Thursday, to limit the time that defence counsel has to pursue relief for the accused.<sup>162</sup> The issues arising from time pressure is compounded by the early closure of courts on Fridays. Therefore, defence counsel is limited to two days of effectively representing their client, which is an extremely insufficient frame to pursue relief. Additionally, lawyers cannot meet with the prisoner subsequent to the issuing of the execution warrant.<sup>163</sup>

Chapter 14 of the Prison Rules focuses on the use of the death penalty. However, it provides no explicit protection to mentally ill prisoners to prevent them from being executed. Further, whilst section 465 of the CrPC provides for the acquittal of a defendant of unsound mind and rule 440 of the PPC provides that nothing done by a person of unsoundness of mind is a crime, these provisions have not expressly been extended to sentencing or the execution of mentally ill persons. This omission stands in stark contrast to approaches adopted internationally.

One of the implicit protections against executing mentally ill convicts is the mental fitness to make a will, which is a requirement that must be met before a person is executed.<sup>164</sup> Despite implicitly prohibiting the execution of people with mental illnesses, Pakistani law does not

explicitly prohibit the execution of these individuals.<sup>165</sup> This omission is premised on the belief that mentally ill people will already be safeguarded throughout the trial and sentencing process, which is rarely the reality. The Safia Bano judgement provides jurisprudence echoing the principle that a severely mentally ill prisoner cannot be lawfully executed, however, as the Supreme Court has directed, the legal framework must be revised to incorporate this into existing statutes as well.

<sup>161</sup> See Prison Rules (n 103) r 105.

<sup>162</sup> Follow Up Report (n 231) 8.

<sup>163</sup> Ibid.

<sup>164</sup> 2015 YLR 2550.

<sup>165</sup> Pakistan Penal Code 1860 (Pakistan) s 84.

## 8.3 CASE STUDY

# MUNEER HUSSEIN

Muneer Hussein was executed for allegedly murdering two people over 15 years ago. The crimes took place in November 2000 at the home of Muneer's cousin, where he allegedly murdered two of his family members for no apparent reason when he was woken up and offered a cup of tea. Muneer then went to the mosque as if nothing had happened. He could not remember the crime and denied committing the murder when he was arrested. Growing up in an unhappy broken home, Muneer was a violent child whose strange behaviour went unchallenged because of his temper. He tortured animals for pleasure and beat his mother. He shot himself when playing with an uncle's rifle which backfired. The pellets from the gunshot were lodged in his head and were never removed.

Muneer was unable to work because of his erratic behaviour. His marriage resulted in two sons, one of whom described his father as 'very loving, dutiful and caring when he was normal' to JPP representatives but he was, however, prone to violent outbursts and beating the children. Muneer was put under the care of a 'pir' or spiritual healer, where his treatment mostly consisted of brutal beatings.

Muneer was let down by the lawyer at his trial. The lawyer met him for five minutes before the proceedings began, declared him to be 'fine' and made no mention of Muneer's long and well-known history of violent and erratic behaviour.

Muneer suffered from extreme anxiety, paranoia, and auditory hallucinations. His mental condition deteriorated during his incarceration to such an extent that he could no longer recognise members of his family and had no memory of his life prior to his arrest. The 14 years he spent in prison are tantamount to a life sentence, served in the harshest of conditions, without medical attention causing his mental health to deteriorate further. Muneer was executed on 28th April, 2015.

# CHAPTER 09

## Analysis of the Landmark Supreme Court Judgement, *Safia Bano v the Home Department*

### 9.1 Constitution of a Medical Board

9.1.1. Fitness for Trial

9.1.2 Fitness to be executed

9.1.3 Comparative Jurisdiction

### 9.2 The Inaccessibility of Medical Records

### 9.3 Establishment of Forensic Psychiatry Facilities

### 9.4. Regularly Updated Mental Health Training Programs

### 9.5. Psychiatry in Pakistan

9.5.1. Challenging the social, cultural and religious landscape

9.5.2. Public Education

### 9.6 The Limitations of the Jurisprudence followed in the Pakistan Supreme Court

9.6.1. United States v. Lisa Montgomery

9.6.2. Panetti v. Quarterman

### 9.7. Lower Court Reception

As has been discussed in this report, the *Safia Bano v The Home Department* judgement constituted a watershed moment in safeguarding the rights of mentally ill defendants.<sup>166</sup> By reaffirming protections and making additional directives, the Supreme Court sought to establish that at every stage of the criminal justice system persons with mental illness are guaranteed due process. These wide protections are encapsulated by the principle that condemned prisoners cannot be executed if they do not understand the rationale behind their sentences. Whilst this judgement is both a positive starting point and a demonstration of the willingness for the Pakistani Supreme Court to consider the rights of persons of mental illness on death row, it is not immune to critique and scrutiny.

## 9.1 Constitution of a Medical Board

### 9.1.1. Fitness for Trial

The Supreme Court highlights that a judge or magistrate cannot solely rely on their subjective opinion of the accused's mental state for the purposes of sections 464 and 465.<sup>167</sup> Whilst the Court may give due consideration to their own observations with regard to the 'conduct and demeanour' of a defendant, the integral matter is to objectively consider all material available before it.<sup>168</sup> The court is not prevented from forming their opinion on the defendant's suitability for trial merely because of the parties failure to make the claim.<sup>169</sup>

Once the court has formed a *prima facie* tentative opinion that the defendant may be incapable of understanding the proceedings or make their defence, the court is then obligated to conduct an

inquiry to decide the defendant's incapacity to stand trial.<sup>170</sup> To conduct the inquiry into mental illness and incapacity to face trial, the Supreme Court has issued a directive that the trial court must establish a Medical Board to make a 'detailed and structured'<sup>171</sup> mental health assessment. This Medical Board is to consist of two 'qualified and experienced' psychiatrists and one psychologist from public sector hospitals for the examination, assessment and rehabilitation of prisoners if referred by jail authorities.<sup>172</sup> The requirement of a Medical Board with multiple mental health professionals represents the enforcement of a scientific and evidence-based approach to assessing the defendant's mental state. This stands in direct contrast to the previously accepted procedure which allowed the judge or Magistrate to form a subjective opinion of the defendant's mental health.<sup>173</sup> The judgement takes a significant step forward in the protection of persons with disabilities. However, it is crucial for the persons constituting the Medical Boards to have necessary qualifications and experience.

In making the directive, the Court did not consider the lack of psychiatrists, particularly forensic psychiatrists, or psychologists available to serve such a role in the country. There are approximately 400 psychiatrists, working for an estimated 15 million people in the country with mental illness.<sup>174</sup> There are also very few state-run psychiatric hospitals and psychiatric units in general hospitals, with the WHO reporting in 2017 that there are 2.1 mental health beds per 100,000 in the population.<sup>175</sup> This severe lack of capacity can be partially attributed to the fact that there

<sup>166</sup> *Safia Bano* (n 6).

<sup>167</sup> *Safia Bano* (n 6) [53].

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Safia Bano* (n 6) [54].

<sup>172</sup> *Safia Bano* (n 6) [87].

<sup>173</sup> *Safia Bano* (n 6) [53].

<sup>174</sup> Afzal Javed et al, 'Mental healthcare in Pakistan' (2020) 34(1) *Taiwanese Journal of Psychiatry* 6-14.

<sup>175</sup> *Ibid.*

is very little funding allocated to public mental healthcare. Only 0.9% of Pakistan's gross domestic product is spent on health, with 0.04% of the GDP allocated to mental health.<sup>176</sup> These circumstances necessitate that there are very few psychiatrists with sufficient training and that there are scarce opportunities for new psychiatrists to gain meaningful experience in forensic psychiatry.

The demand for experienced mental health practitioners significantly outweighs their capacity to provide such services. When compounded with the fact that the Supreme Court has not been able to establish a timeframe within which a Medical Board must be constituted to assess the accused or prisoner's mental illness, this can cause delays in evaluating their condition. However, implementation of the directive to constitute Medical Boards specifically for mental health inquiries will assist in providing crucial medical evidence for the purposes of trials and appeals. This will further protect the accused's right to a fair trial.

### 9.1.2 Fitness to be executed

The Supreme Court has also extended the protection from execution for persons who develop mental illness whilst on death row. This involves the constitution of a different Medical Board to the board evaluating a defendant's fitness to stand trial. To determine whether a person with mental illness is fit to be executed, the Supreme Court has instructed that the relevant federal government or provincial government must constitute and notify a Medical Board comprising three qualified psychiatrists and two psychologists from

public sector hospitals.<sup>177</sup> The role of this Medical Board is to examine whether the prisoner possesses the higher mental functions to appreciate the rationale of their sentence.<sup>178</sup> However, the court did not give guidance as to when this assessment must be made. Therefore, it is suggested that the assessment should be made as soon as symptoms of mental disorders become present and not merely prior to execution. The execution of such a mechanism relies upon prison officials receiving the adequate knowledge, resources and training to recognise the possibility of mental disorder.

### 9.1.3 Comparative Jurisdiction

A similar system exists in Canada to review a defendant's mental health. Review Boards are specialised tribunals chaired by a judge (or an individual qualified for a judicial appointment) and at least four other members, including a psychiatrist.<sup>179</sup> Their role is to annually review the status of persons who were found to be unfit to stand trial or not criminally responsible due to mental illness. The assessment allows the board to draft a disposition which allows for treatment of the defendant's mental disorder, whilst considering their rehabilitation.<sup>180</sup> The dispositions may be an absolute or conditional discharge or detention in custody in a hospital.<sup>181</sup> Currently, the directive from the Supreme Court of Pakistan to constitute a Medical Board is restricted to the purpose of evaluating fitness to stand trial and for the competency to be executed. The Medical Board's role should therefore be extended to allow recommendations which aim to treat and rehabilitate persons with mental

<sup>176</sup> Tahir Ali and Sana Gul 'Community Mental Health Services in Pakistan: Review Study from Muslim World 2000-2015' (2018) 7(1) Psychology, Community & Health 57.

<sup>177</sup> Ibid.

<sup>178</sup> Safia Bano (n 6) [66].

<sup>179</sup> Department of Justice Canada, 'The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Strategy', Department of Justice Canada (Publication, 7 January 2015) <[https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr06\\_1/p1.html](https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr06_1/p1.html)>.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

illness. This would allow a shift to a more rehabilitative criminal justice system which can protect the dignity of persons with mental illness.

Further, the Ontario Review Board requires that where there is only one member of the Board qualified to practice psychiatry, there must be one other member that has 'training and experience in the field of mental health and is entitled to practice medicine or psychology.'<sup>182</sup> This threshold of the Medical Board's qualifications is less stringent than that provided by the Pakistan Supreme Court. It may be appropriate to add this threshold as a guide whilst the Medical Board directives are initially implemented, given the current scarcity of psychiatrists and psychologists in Pakistan.

## 9.2 The Inaccessibility of Medical Records

As discussed earlier in this report, the Supreme Court ruled that the inquiry into a defendant's mental illness, and resulting incapacity for the purposes of sections 464 and 465 of the CrPC, relies upon an objective assessment of material and information placed before the Court, or on already available information in the police and case file.<sup>183</sup> To form an objective assessment it is imperative that the defendant and their legal representation have access to relevant medical records to ensure that the mental health of the accused is duly considered. Prior to the judgement, any discussion of access to medical records was strictly confined to mercy petitions rather than at all stages of proceedings. In doing so the Supreme Court has not recognised the fact that the defendant

and their families or legal representatives lack access to crucial medical records required as evidence to be considered by the Court.<sup>184</sup> Restricted access to medical records forms a direct violation of the fundamental right for the defendant to be dealt with in accordance with the law, guaranteed by Article 4 of the Constitution of the Islamic Republic of Pakistan 1973.<sup>185</sup>

Article 85 of the Qanun-e-Shahadat Order 1984 ('QSO') provides that documents prepared by public servants in the discharge of their official duties are public documents.<sup>186</sup> Article 87 of the QSO provides that any person with an inherent right to access public documents must be provided the documents on demand.<sup>187</sup> Accordingly, medical records detailing the mental health of a defendant form public documents which must be given if requested.

In Pakistan, this right to public documents is conferred by both statute<sup>188</sup> and common law. The Lahore High Court, in the case of *Khizer Hayat vs. Home Department & others*, recognised the legal right of legal counsel to access medical records.<sup>189</sup> There is no further law in the Qanun-e-Shahadat or precedent from Pakistan courts as to when the right to inspect public records arises. Accordingly, the right to inspect can be informed by the interpretation of the Indian courts.<sup>190</sup> The Indian High Court has held that the right to inspect public documents arises where a personal interest in the records is established. Accordingly, this also provides a family member the right to access the medical records of persons with mental illness to

<sup>182</sup> Ontario Review Board, 'About Us', ORB (Blog Post, 25 February 2011) <<http://www.orb.on.ca/scripts/en/about.asp>>.

<sup>183</sup> *Safia Bano* (n 6) [53].

<sup>184</sup> *Safia Bano* (n 6) [87].

<sup>185</sup> The Constitution of the Islamic Republic of Pakistan 1981 Art 4.

<sup>186</sup> Qanun-e-Shahadat Order 1984, art 85.

<sup>187</sup> *Ibid*, art 87.

<sup>188</sup> Qanun-e-Shahadat Order 1984, art 87; Right of Access to Information Act 2017.

<sup>189</sup> *Khizer Hayat vs. Home Department & others* (W.P No. 13010 of 2013).

<sup>190</sup> *A. K. Kaderkutty v Agricultural Income-Tax Officer* 1960 Indlaw Ker 207.

prepare for court processes, including trials, appeals and mercy petitions. Consequently, any withholding of records detailing the mental condition of a defendant or prisoner disregards the jurisprudence of the superior courts and prevents legal representatives from effectively representing their clients. Withholding medical records also violates the rights provided by the Constitution to adequate legal representation and defence,<sup>191</sup> and the right to due process.<sup>192</sup> Without access to the mental health records, crucial evidence regarding the mental health of the accused is unavailable and can result in a gross miscarriage of justice.

The issue is magnified by a general lack of medical records detailing diagnosis of mental illness, particularly for those in rural and low socioeconomic areas. Any medical records of the accused in these circumstances exist only when the accused has been thrust into the criminal justice system and received a mental health assessment.

A failure to enforce the provision of public documents on demand constitutes a significant obstruction of the defendant's right to due process, often resulting in gaps in evidence. Further steps must be taken to ensure that provision of medical records becomes normal practice. This may include making policies which clarify the need to provide public documents on demand to prison authorities.

### 9.3 Establishment of Forensic Psychiatry Facilities

Forensic psychiatry facilities are fundamentally important to support prisoners with a mental health illness.

The Supreme Court's commitment to establishing high-security facilities is commendable and signifies an important step towards recognising the rights of the defendant and prisoners with mental health issues. However, this directive sets out requirements of the Provincial Mental Health Acts which obligated the government to establish forensic psychiatric facilities for mentally ill prisoners, pursuant to sections 6 and 55.<sup>193</sup> In reality, prisoners are rarely transferred to these facilities and provided with the requisite treatment. Government hospitals themselves are reluctant to take on mentally ill prisoners owing to the lack of resources and training on dealing with such patients.

The current provision of forensic psychiatry has largely operated on an 'as required' basis culminating in the demand now far exceeding the supply. The Pakistani Government has indicated that the number of persons in prisons is 2.2 times greater than the prison capacity.<sup>194</sup> Whilst there is no official data demonstrating the number of mentally ill persons in prison, a 2011 study indicated that 62.5% of female inmates were suffering from psychiatric illnesses.<sup>195</sup> The overcrowding of prisoners partnered with the seeming prevalence of mental illness necessitates effective forensic psychiatry facilities being available. Currently, the provision of forensic psychiatric services largely resides within the prison itself, or in mental health hospitals where the prisoner is cared for by a general duty mental health professional. There are no specialised high-security forensic facilities in the country. Further, the available forensic beds are generally in prison cells or isolated hospital wards shared by

<sup>191</sup> The Constitution of the Islamic Republic of Pakistan 1981 Art 10.  
<sup>192</sup> Ibid, Art 10A.

<sup>193</sup> The Mental Health Ordinance 2001 (VIII OF 2001), ss 6, 55.

<sup>194</sup> Pakistan Law Commission 1997, Report on Jail Reform, Government of Pakistan, Pakistan Law Reform Commission.

<sup>195</sup> Fatima Bilal and Khalid Saeed 'Psychiatric Morbidity among the Female Inmates of District Jail Ayyala, Rawalpindi' (2011) *Rawal Medcial Journal* 36(2) 129, 130.

multiple inmates further impeding the effectiveness of these facilities.

Consequently, it is imperative to maintain an engaged focus on this area to counter the neglected field of forensic psychiatry to effectively cater for prisoners with mental illness. To do so the initiative must be partnered with commitment from the government through additional funding in this area.

#### 9.4. Regularly Updated Mental Health Training Programs

The Supreme Court has also directed the federal and 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.<sup>196</sup> A forensic mental health assessment (FMHA) is an evaluation conducted by a mental health professional to provide relevant clinical and scientific data to be used in criminal proceedings.<sup>197</sup> Short certificate courses are a solution to efficiently bring multiple professionals up to date with the perception, handling or evaluation of persons with mental illness. It is important to highlight that the Court did not direct that the courses be tailored to the industry involved. For example, training programs should first seek to destigmatise mental illness. This is particularly important for police and prison personnel, who may directly interact and supervise a person with mental illness. Implementing uniform standards for FMHAs in evaluating the competency of a defendant to stand

trial, and for capital sentencing, would ensure consistency. It can also reduce individual biases of psychiatrists, clinical psychologists, social workers, police and prison personnel once they are equipped with the understanding of personal biases and how this colours their perception of persons with mental illness.

As the directive develops, training, short certificate courses and standards of practice should be regularly updated according to new discoveries in scientific research. This is a crucial factor which must be considered for psychiatrists and psychologists, due to their possible role in the Medical Board. It has been shown that mental health professionals can be influenced by irrelevant information.<sup>198</sup> The training and short certificate courses should seek to educate professionals about any subconscious biases, to aid in achieving fair FMHAs.

The Supreme Court has also directed the Federal Judicial Academy and the Provincial Judicial Academies to establish training courses for trial court judges, prosecutors, lawyers and court staff on mental illness, including forensic mental health assessments.<sup>199</sup> Therefore, each program should retain similar aims of reducing prejudice and implicit bias, understanding how mental illness impacts cognitive behaviour and subsequent actions, and be capable of developing alongside new scientific evidence. It should be noted that the Supreme Court has not directed judges of the Court of Session, the High Court, or the Supreme Court to undertake the

<sup>196</sup> Safia Bano (n 6) [87].

<sup>197</sup> Kirk Heilbrun et al. 'Principles of forensic mental health assessment: implications for neuropsychological assessment in forensic contexts' (2003) *Assessment* 10(4) 329.

<sup>198</sup> Patricia Zapf, 'Cognitive Bias in Forensic Mental Health Assessment: Evaluator Beliefs About Its Nature And Scope' (2018) 24(1) *Psychology, Public Policy, and Law* 1, 10.

<sup>199</sup> Safia Bano (n 6) [87].

course. It is unclear whether this is an intentional choice given that courts in the appellate jurisdiction would not need to specifically evaluate the defendant at trial for the purposes of applying section 465 of the CrPC. In the same vein, a magistrate of District Courts or Judicial Magistrates' courts only have the power to hear offences which are not punishable by death.<sup>200</sup> The provision of professional training for court personnel at all levels provides a uniform approach. This is encouraged as superior courts may be asked to review the application of these procedures if a case is appealed.

### 9.5. Psychiatry in Pakistan

The judgement fails to recognise the current status of psychiatry in Pakistan, resulting from a general lack of understanding in the public about the various types of mental illness, lack of training facilities and most importantly lack of enough mental health professionals. The slow progress of psychiatry in Pakistan has restricted its necessary growth and ensured it remains in its infancy. Despite Pakistan's large population, the number of graduating medical professionals is exceedingly low in addition to a minimal proportion of those graduates going on to complete at least one year of training in mental healthcare.<sup>201</sup> The latest statistics suggest that there are only 400 psychiatrists, 125 psychiatric nurses, 480 mental healthcare psychologists and 600 mental healthcare workers to cater for the mental health needs of over 180 million citizens.<sup>202</sup>

### 9.5.1. Challenging the social, cultural and religious landscape

Islam plays a crucial role in informing the value system of Pakistan's society and shaping the present social climate. This is enshrined through the Federal Shariat Court which was established in 1980 to determine whether certain provisions are 'repugnant to the injunctions of Islam.'<sup>203</sup> Such provisions require the government to take the necessary steps to modify the law to ensure they conform with the 'injunctions' of Islam.

The tenets of the Islamic faith promote peace and forgiveness, and the proper care of individuals who are mentally ill is greatly desirable. In fact, the first psychiatric hospitals were found in Islamic countries such as Afghanistan (705 AD) and Egypt (800 AD). However, as with any society, Pakistan is subject to common stigmas surrounding mental health: that they are untreatable; the individual is unpredictable and a danger to others; and that they are to blame for their mental illness.<sup>204</sup> Consequently, defendants suffering from mental illness face a dual stigma - firstly, being an offender, and secondly their mental illness.

Under Islamic law capital punishment is permissible for intentional murder and Fasad fil-ardh ('spreading mischief in the land'). The Pakistan Penal Code notes that offences relating to or amounting to 'defiling' the Quran and using 'derogatory remarks' against the Prophet Muhammad are punishable by death.<sup>205</sup> This is particularly problematic for individuals with mental illness, as a

200 Code of Criminal Procedure, s 30.

201 Tariq Hassan, AT Nizami and MS Asmer, 'Forensic psychiatric service provision in Pakistan and its challenges' (2017) 14(2) BJPsych International 40, 40.

202 Psychiatry in Pakistan: 1947-2006: a new balance sheet. Gadit AAJ Pak Med Assoc. 2007 Sep; 57(9) 453-63; [http://www.who.int/mental\\_health/pakistan\\_who\\_aims\\_report.pdf](http://www.who.int/mental_health/pakistan_who_aims_report.pdf).

203 Pakistan Constitution Part VII Chapter 3A.

204 Monica Zolezzi et al. 'Stigma Associated with Mental Illness and its treatment in the Arab Culture: A Systematic Review' (2018) International Journal of Social Psychiatry 64(6) 597.

common symptom of psychotic disorders, such as schizophrenia, are religious-themed delusions of grandeur.<sup>206</sup> In this instance, individuals experiencing a religious-themed delusion are likely to violate such laws, receiving little sympathy from an outraged public. Indigent defendants who are mentally ill are often victims of this law, for example, homeless and wandering persons seeking shelter and food around holy sites and graveyards, where the potential for unknowingly committing this offence is high. Such individuals should be processed under the provisions of the Provincial Mental Health Acts that allow them to be routed or kept in custody for assessment or treatment in a government psychiatric facility. Therefore, training and sensitisation for judges, lawyers, medical practitioners, police and jail staff alike would be an integral part of any reform framework. The trainings must be mandatory (with a set minimum number of hours) and create an understanding of mental illness, domestic legislation, international best practices and fair trial standards in relation to mentally ill persons

### 9.5.2. Public Education

A key aspect to implementing this judgement is altering the public perception of mental health by promoting anti-stigma measures. This process of norm diffusion will be most effective through a coordinated effort from both localised psychiatric and religious bodies. The production of educating information by respected religious authorities in newspapers and other media sources can challenge the

common stigma held by the public. It is of particular pertinence that this education targets members of the public who are willing to implement their own justice so as to not so readily resort to violence.

### 9.6 The Limitations of the Jurisprudence followed in the Pakistan Supreme Court

The Pakistani Supreme Court referred to the decision in the US Supreme Court 1986 case of *Ford v. Wainwright*.<sup>207</sup> The Pakistani Court followed the 'rationale test' established in *Ford*. The test can be interpreted as follows:<sup>208</sup>

1. A condemned prisoner's burden is to make a substantial showing that their "mental illness prevents them from 'rational[ly] understanding' why the [government] seeks to [execute them]."
- 1.1. The substantial threshold showing can be satisfied based on brief and/or unsworn documents.
- 1.2. A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it;
- 1.3. It is against public interest to execute a prisoner who doesn't understand the community's purpose in execution of the punishment.
- 1.4. If a prisoner makes a "'substantial threshold showing of insanity' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness."
- 1.5. The absence of a *Ford* hearing for clients who demonstrate the substantial threshold showing of insanity will result in a violation of Art. 4 and Article 10A of the Constitution of the Islamic Republic of Pakistan, 1973.

<sup>205</sup> Pakistan Penal Code 1860, art 295.

<sup>206</sup> Tateyama Masato et al. 'Transcultural Study of Schizophrenic Delusions. Tokyo versus Vienna and Tubingden (Germany)' (1998) *Psychopathology* 31(2) 59.

<sup>207</sup> *Ford v Wainwright*, 477 U.S. 399 (U.S. 1986).

<sup>208</sup> *Ibid.*

The Ford test is an extremely positive step towards acknowledging the ultimate incompatibility of the death penalty with persons suffering from mental illness. However, the test has not been strictly followed in the US, inviting warranted concern about its future implementation in Pakistan. The application of the test in the recent case of *United States v. Lisa Montgomery* demonstrates the limitations to the application of this test.<sup>209</sup>

<sup>209</sup> *United States of America v Montgomery*, 21-1074 1, 7 (8th Cir. 2021).

## 3.3 CASE STUDY

# *UNITED STATES V. LISA MONTGOMERY*

The Appellate Court's disregard of Montgomery's mental illness in the case of *United States vs Lisa Montgomery*<sup>210</sup> demonstrates that a court may ignore a defendant's protection under Ford. Whilst similarly, there may be significant implementation issues with the *Safia Bano v The Home Department* case.<sup>211</sup> Whilst acknowledging that a defendant suffering from mental illness may lack the competence to understand the purpose of their punishment is a step forward for Pakistan, it is important to ensure that all courts follow this precedent.

Lisa Montgomery had a number of serious medical health diagnoses. She was diagnosed with complex PTSD, bipolar disorder with psychotic features, major depression and temporal lobe epilepsy.<sup>212</sup> Her mother's alcoholism caused damage to her brain before she was born. Montgomery was also subject to substantial abuse and neglect at the hands of her mother and also various men in her life.<sup>213</sup> Montgomery was beaten by her mother and stepfather throughout her childhood. From a young age, she was repeatedly raped by her stepfather and his friends. Her mother sold her for sex in exchange for payment of utilities and services, telling her that she had to "pay for her own room."<sup>214</sup> Montgomery was subjected to many egregious acts of violence until the time of the offending.

Montgomery's execution was ordered to take place on 12 January 2021. On 8 January 2021, Montgomery's attorney filed a petition for a Writ of Habeas Corpus, attempting to rely on the Ford principle that she was not "competent to be executed."<sup>217</sup>

<sup>210</sup> Ibid.

<sup>211</sup> *Safia Bano* (n 6).

<sup>212</sup> *Montgomery v Barr*, 1 CV 20 1, 14 [43] (D.C.C. 2020).

<sup>213</sup> Ibid 7 [24].

<sup>214</sup> Ibid 8 [24].

<sup>215</sup> *United States of America v Montgomery*, 21-1074 1, 7 (8th Cir. 2021).

<sup>216</sup> *Montgomery v Barr*, 1 CV 20 1, 14 [43] (D.C.C. 2020).

<sup>217</sup> Celeste Fremon, 'US District Court Grants Lisa Montgomery Last Minute Stay Of Jan. 12 Execution, Scheduled As Part Of President's 13-Person Killing Spree', *Witness LA* (Article, 12 January 2021) <<https://witnessla.com/us-district-court-in-southern-indiana-grants-lisa-montgomery-last-minute-stay-in-her-jan-12-execution/>>.

The district court accepted the Ford rationale, issuing a stay of execution to “allow the Court to conduct a hearing to determine Ms Montgomery’s competency to be executed.”<sup>218</sup> However, the Federal Government issued an emergency motion to vacate the stay, claiming that Montgomery understood her crime and why she was subject to the scheduled execution.<sup>219</sup> There was no mention of her mental illnesses or trauma in the application. Despite an objection to the motion filed on Montgomery’s behalf, the United States Court of Appeal moved to vacate the stay, overruling the district court’s decision.

Lisa Montgomery was executed by lethal injection on 13 January 2021.

The Court of Appeal’s vacation of the stay demonstrated the limits to which the Ford principle can be applied. The Court of Appeal emphasized that “last minute stays of executions should be the extreme exception, not the norm”, finding that Montgomery’s extreme complex mental disorders and circumstances did not meet such an exception.<sup>220</sup> The Court of Appeal stated that Montgomery’s legal team had the opportunity to bring the writ at an earlier date, stating that the delay was intentional and “appears strategic.”<sup>221</sup> They held that the circumstances of Montgomery’s request did not override the “strong presumption” that a claim should not be granted where a “claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.”<sup>222</sup> However, the Court of Appeal makes no mention of the defence’s arguments in relation to the supposed delay. The defence reminded the Court that beyond Montgomery’s mental health concerns, their argument regarded the unlawfulness of the Government’s setting of the execution date in late 2020.<sup>223</sup> The execution was stayed due to COVID-19 concerns, yet the Government proceeded to set a date, sparking appeals on the defendant’s behalf. There was therefore no delay, as Montgomery’s legal team had filed their motions to pursue her constitutional and statutory rights by the beginning of 2021.<sup>224</sup> It appears that the rationale in Ford was disregarded in this case, due to the supposed delays in filing the applications.

The Court of Appeal also stated that their decision to vacate the stay was a result of the merit of Montgomery’s claims against the Ford criteria. It is not contentious that Montgomery met the criteria in Ford. She was known to disassociate constantly, struggling to know “what is real and what is not.”<sup>225</sup> She regularly experienced hallucinations, psychosis and mania, clearly affecting her rational understanding of her environment. It can therefore not be disputed that Montgomery’s awareness was not comparable to a person exhibiting a “rational understanding”, as stipulated in the Ford test. However, Montgomery’s arguments were undermined as the medical experts she relied upon had not had recent contact with her.<sup>226</sup> According to the judgement, Montgomery’s most recent contact with a testifying expert was in 2016. Whilst constant contact and medical updates were desirable for Montgomery’s ongoing treatment, her major mental health issues continued to affect her understanding and awareness of her surroundings. The Court of Appeal found that the “stale” observations by her medical experts “cannot support a claim about her current mental health”, not only undermining the overwhelming impact of Montgomery’s trauma but disregarding the scientific basis of her many illnesses.<sup>227</sup>

218 *Montgomery v Warden of USP Terre Haute*, 2 CV 21 1, 21 (S.D. Ind. 2021).  
[https://www.supremecourt.gov/DocketPDF/20/20A124/166086/20210112220057161\\_20A124%20Montgomery%20-%20Ford%20Stay%20Opp%20Appx..pdf](https://www.supremecourt.gov/DocketPDF/20/20A124/166086/20210112220057161_20A124%20Montgomery%20-%20Ford%20Stay%20Opp%20Appx..pdf)  
 219 *Montgomery v Watson*, No. 21-105 (7th Cir. 2021).  
 220 *Ibid.* 2.  
 221 *Ibid.*  
 222 *Ibid.*  
 223 Kelley Henry and Meaghan Vergow, ‘Opposition to Application to Vacate Stay Of Execution of Impending Appeal’, (Court Submission, 12 January 2021) 18  
[https://www.supremecourt.gov/DocketPDF/20/20A125/166088/20210112222722909\\_Montgomery%20Stay%20Opp%20Final%20PDF-A.pdf](https://www.supremecourt.gov/DocketPDF/20/20A125/166088/20210112222722909_Montgomery%20Stay%20Opp%20Final%20PDF-A.pdf).  
 224 *Ibid.* 18.  
 225 *Montgomery v Barr*, 1 CV 20 1, 3 [5] (D.C.C. 2020).  
 226 *Montgomery v Watson*, No. 21-105 (7th Cir. 2021).  
<https://cases.justia.com/federal/appellate-courts/ca7/21-1052/21-1052-2021-01-12.pdf?ts=1610483412>  
 227 *Ibid.*

### 9.6.2. Panetti v. Quarterman<sup>228</sup>

In the *Safia Bano v The Home Department* case, the Pakistani Supreme Court also referred to the 'standard of competency' adopted in the US case of *Panetti v Quarterman*.<sup>229</sup> However, in *Panetti v Quarterman*, the US Supreme Court rejected the standard adopted by the Fifth Circuit Court without attempting to provide a standard to govern all competency determinations.<sup>230</sup> The decision detailed the required awareness as a 'rational understanding', yet failed to provide a definition, instructing lower courts to conduct their own analyses.<sup>231</sup> Whilst attempting to offer broader protections for defendants with mental illness, the US Supreme Court contradicted itself as the retributory aims seeking to punish an offender described in the *Panetti v Quarterman* decision do not align with rational understanding.<sup>232</sup> This contradiction arises as to satisfy 'rational understanding', the defendant must share society's understanding of the reasons for their execution. Public consensus is at the core of retribution and to impose a rational understanding of what is largely a subjective topic leaves little guidance for other courts to implement a sound standard for competency.<sup>233</sup> The inability to define a public consensus of understanding to support its decision, as well as the reality that no such consensus exists, impedes any protections in future mental competency determinations.

### 9.7. Lower Court Reception

For the Pakistani Supreme Court decision in *Safia Bano v the Home Department* to be adequately implemented, the precedence must be applied correctly by lower Pakistani courts. Although the doctrine of precedent operates to facilitate court consistency, there are hurdles within the Pakistani legal system that make this process difficult. There have been many instances where in reaching their decisions, Courts have relied on reported judgements that are not the highest authority. Supreme Court judgements in Pakistan are not always reported and therefore the reception of precedent can be problematic. The gap in jurisprudence between the Pakistani courts is evident through the high rate of overrulings by the Pakistani Supreme Court in death sentences. The Supreme Court has overruled 85% of death sentences by lower courts during appeals primarily on the basis of faulty investigations and evidence.<sup>234</sup>

<sup>228</sup> *Panetti v Quarterman* 551 U.S. 930 (2007) ('Panetti').

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid* 959.

<sup>231</sup> *Ibid* 959-963.

<sup>232</sup> Richard Bonnie 'Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity' (2007) *Ohio State Journal of Criminal Law* 5(1) 257, 274-276.

<sup>233</sup> Chris Koepke 'Panetti v Quarterman: Exploring the Unsettled and Unsettling' (2008) *Houston Law Review* 45(4) 1383, 1410.

<sup>234</sup> Justice Project Pakistan, *Counting the Condemned* (Report, October 2018).

# CHAPTER 10

## The Way Forward – Recommendations

### 10.1 Arrest

10.1.1. Developing Reforms to the process of arrest

10.1.2. Adhering to legal procedure

### 10.2 Trial

10.2.1 Adopt an evidence-based approach when considering mental impairment

10.2.2 Considering mental illness during trial

### 10.3 Sentencing

10.3.1 Developing sentencing guidelines for the mentally ill

10.3.2 Implement pre-sentence hearings

### 10.4 Imprisonment

10.4.1 Improvements in legislation

### 10.5 Presidential Pardons/Mercy Petitions

### 10.6 Execution

It is important to implement pathways to shift societal perceptions of mental illness and forensic psychiatry as this largely perpetuates the issue and restricts necessary change. The fundamental directives of the Pakistani Supreme Court in *Safia Bano* must be realised, including the establishment of high-security forensic facilities, the implementation of medical boards, and the initiation of regularly updated mental health training programs. Effective implementation also requires the engaged focus of the legislature to provide financial resources to aid in the development of infrastructure to accommodate these directives. It is apparent that mass reform must be initiated in each stage of the criminal justice system to protect the rights of accused persons with mental illness on death row. This final section offers specific recommendations in line with each section discussed in this report.

#### 10.1.1. Developing Reforms to the process of arrest

Reform must be made to the process of arrest on an enforcement, legislative, criminal justice, institutional and policy level. The existing procedure outlined in the CrPC must be effectively enforced. A defendant must only be taken to custody with a warrant, and without a warrant only if there is reasonable evidence to justify such arrest. The police must observe the time limits for holding such person in custody which are outlined in the law, to avoid a defendant being placed in circumstances of abuse and torture. There must be legislative reform ensuring that the law is amended to

include procedures to train those conducting arrests and to train Magistrates on how to identify mentally ill persons. Further to this, a law to criminalise torture, one that provides an independent investigative mechanism and adequate avenues of redress for victims, is necessary. There must also be reform that ensures that Pakistan fulfils all obligations as outlined under international law, including the UNCAT and ICCPR.

Reforms in the criminal justice sector should include the circulation of SOPs to the lower judiciary and to the police which contain step-wise procedures on dealing with cases of torture and cases of mentally ill persons to develop sensitivity; training on the identification and treatment of mentally ill persons; trainings to build capacity for all officials who handle cases of torture and mentally ill persons; an update of the methodology on conducting investigations; and documenting cases of torture and those concerning mentally ill persons for all officials involved including medical and mental health professionals. Finally, as per JPP's Follow-Up Report in 2019, psychological assessments should be made mandatory at the time of arrest and admission into prison for all prisoners.<sup>235</sup>

#### 10.1.2. Adhering to legal procedure

Furthermore, the focus of arrest should be to protect both the public and individuals suffering with mental illness. Merely arresting individuals to punish them for their behaviour paves the way for police officers to abuse their arrest powers. Instead, officers should be empowered with the skills to

empathetically deal with persons of mental illness. Therefore, the procedures under the Provincial Mental Health Acts should be adhered to. Specifically, the procedure under Section 19 of the Provincial Mental Health Acts must be followed as it facilitates the removal of mentally ill persons found in public spaces to safe custody by law enforcement authorities.

#### 10.2.1 Adopt an evidence-based approach when considering mental impairment

Pakistan should adopt an evidence-based approach to the consideration of mental impairment during trial. The focus should be on well-founded expert opinion as to the nature and effects of the mental impairment operating on the mind of the defendant as opposed to the diagnostic label and conflicting definitions of mental impairment between jurisdictions.

#### 10.2.2 Considering mental illness during trial

In line with the principles highlighted under international law and in the seminal Supreme Court case, it is imperative that judges consider the mitigating and supervening effect of mental illness during trial. Even if such information is not strictly mentioned in the pleadings, a judge should be able to consider this information if it is presented to him during the later stages of the trial. As such, the recommendations of the Supreme Court of Pakistan in the case of Safia Bano, should be implemented by the provincial

and federal government. This will also entail training of judges and other stakeholders as stipulated in the judgement.

There should be legislative reform to amend the standard for identifying mental disorders. It is imperative to consider such information during the trial as it affects the outcome of the sentence that is to be passed. Further, there should be reform to direct that prison personnel must provide medical records at the defendant's family or their legal representatives' request. The head of the Medical Board investigating the mental capacities of a defendant shall also be examined as Court witness and such examination shall be reduced in writing. Both the prosecution and defence should be given an opportunity to cross examine him in support of their respective stance. Thereafter, if the defendant wishes to adduce any evidence in support of his/her claim, then he/she should be allowed to produce such evidence, including expert opinion with the prosecution given an opportunity to cross examine.

#### 10.3.1 Developing sentencing guidelines for the mentally ill

To enhance the prospect of a fair trial in accordance with Pakistan's international obligations, procedural safeguards should be installed for mentally ill persons. The UK Sentencing Council's draft sentencing guidelines for mentally ill offenders provide useful direction.<sup>236</sup> These guidelines provide recommendations on effectively accommodating for mentally ill

defendants. This is of particular relevance to defendants who have been sent for observation or are incapable of making their defence under Rule 440 of the Prison Rules. Sentencing guidelines should thus be developed that take the following considerations into account:<sup>237</sup>

- Did the individual's condition impair their ability to exercise appropriate judgement, make rational choices or think clearly?
- Did they seek help, and fail to receive appropriate treatment or care?
- Were there any elements of premeditation or pre-planning in the offence?
- If the offender exacerbated their condition by drinking or taking drugs, were they aware of the potential effects of doing so?

The ways in which mental impairment may have a bearing on the sentencing of a defendant should be expressly and specifically identified as has been the case in Victoria through its Verdins principles.<sup>238</sup> Such an approach would allow for the mental impairment of the defendant to be expressly considered and allow for a sentence to be imposed which is appropriate in the circumstances. Importantly, such a clear pronouncement of principle would allow for targeted and specific evidence to be led as to the mental health of the defendant and therefore would support a desirable evidence-based approach when considering mental impairment as opposed to a diagnostic label approach. A set of objective criteria for diagnosing mental illness should be established. Alternatively, an independent mechanism should be developed to review cases where there exists credible

evidence of mental impairment or intellectual disability.

### 10.3.2 Implement pre-sentence hearings

Matters of sentencing require a set of factors to be presented to the Court, which are entirely different to those highlighted at the time of conviction. For a judge to adequately give due regard to all information relevant to matters of sentencing, a separate sentencing hearing is required. Pakistan should amend its CrPC and the supporting legislation to provide for bifurcated trials.

### 10.4.1 Improvements in legislation

The language in the Prison Rules should be amended and improved in line with the Supreme Court's directions in the case of *Safia Bano and Others v. the State*. Furthermore, the Provincial Mental Health Acts does not cover temporary mental impairment and thus falls short of the overarching sentiments of international conventions that Pakistan has ratified.<sup>239</sup> It should be amended to incorporate the definition of disability included in the CRPD. The definition of a mental patient under the Prison Rules and the Provincial Mental Health Acts should explicitly cover mentally impaired prisoners. Additionally, the scope of the definition of mental illness should be broadened to encompass temporary mental impairment to meet best practice under the CRPD.

Amending the definition as suggested above will address the issues of stigma that remain prevalent in the Pakistan community. A study on "Perceptions About the Cause of Schizophrenia and

<sup>237</sup> Ibid.

<sup>238</sup> Verdins Principles: Mental Illness and Sentencing <<https://www.gotocourt.com.au/criminal-law/vic/verdins-principles/>>

<sup>239</sup> See *Safia Bano* (n 6).

the Subsequent Help Seeking Behaviour in a Pakistani Population” found that only 30% of participants regarded mental illness as the underlying cause of psychotic symptoms.<sup>240</sup> Problematically, the vast majority of participants in the study attributed schizophrenia to ‘God’s will’, ‘superstitious ideas’ and other extraneous factors.<sup>241</sup> The current wording of the section undermines the role of mental illness in driving a mentally impaired person’s actions.

Further to this, a psychologist and welfare officer should be appointed in every prison to ensure prisoners’ mental, physical and social health are taken care of. All prisoners should be assessed by a psychologist and medical officer upon admission to prison to determine what their on-going care needs are. Prisoners on medication for mental illness are to be closely monitored by the psychologist. Mentally ill prisoners should be transferred to psychiatric and forensic facilities and mental health professionals should visit such mentally ill prisoners frequently to provide the Inspector-General with updates. That prisoners are to be evaluated by a medical board constituted of reputable professionals.

### 10.5 Presidential Pardons/Mercy Petitions

The failure to comply with international standards relating to the rational exercise of the power of pardon is just one area in which Pakistan has fallen short in relation to its resumption of executions. It is, however, one that is easily remedied if the following recommendations are seriously considered: Firstly, the current policy line of declining mercy petitions should be

immediately and publicly disavowed, and data relating to the President’s power to provide pardons since 2014 should be published.

Furthermore, the process of submission of mercy petitions by prison authorities on behalf of death row prisoners who lack legal representation must be reformed in such a way that at the very least, it is ensured that the petitions are detailed and that the families of prisoners on death row are consulted by the prison authorities during the process of submission of mercy petitions. In order to do this, it is additionally necessary that prisoners are educated on their right to clemency.

For the sake of transparency, it is recommended that all decisions taken on mercy requests be accompanied by a public written reasoning. In cases concerning mercy petitions submitted on behalf of prisoners with serious mental and/or physical ill-health, the Government of Pakistan should exercise careful consideration with a view to commuting their sentences.

### 10.6 Execution

Comparative jurisdictions, including India and the USA that retain the death penalty have opined that the executions of mentally ill prisoners is a violation of the right to life and dignity. There is emerging consensus that executing a person who cannot comprehend the nature of a death sentence and its connection to a crime violates the prohibition on cruel, inhuman or degrading punishment. Similarly in jurisdictions that no longer impose the death penalty, mental illness such as schizophrenia constitute a mitigating factor that warrant lessor culpability

<sup>240</sup> Zafar et al, ‘Perceptions About the Cause of Schizophrenia and the Subsequent Help Seeking Behaviour in a Pakistani Population – Results of a Cross-sectional Survey’ (2008) 8(1) BMC Psychiatry 56.

<sup>241</sup> Ibid.

and/or sentences. The execution of persons suffering from a mental illness is contrary to widely accepted human rights norms and contradicts the minimum standard of human rights set forth in several international human rights instruments, as outlined below.<sup>242</sup>

As a retentionist state, Pakistan has come under significant international scrutiny for its treatment and execution of mentally ill prisoners. The law regarding the execution of mentally ill persons in Pakistan was not compliant with the standards established under international law. Through *Safia Bano*, the Supreme Court of Pakistan has made a landmark decision to safeguard the rights of mentally ill individuals accused of a crime. This judgement, however, needs to be codified through amendments made to Pakistan's criminal law statutes. In order for Pakistan to bring its judicial and incarceration practice in line with the Constitution and international obligations, the criminal justice system needs to provide meaningful protection to persons suffering from mental illness at all stages of arrest, trial, sentencing and detention.

<sup>242</sup> William A Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge University Press, 2002) 1-3.



Justice Project Pakistan is a non-profit legal action firm representing the most vulnerable Pakistanis facing the harshest punishments at home and abroad. JPP Investigates, litigates and educates on their behalf.

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