

The Death Penalty and Mental Illness in Pakistan's Courts: A Critical Analysis

Safia Bano v Home Department, Government of Punjab

PLD 2021 SC 488

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Introduction

Safia Bano v Home Department, Government of Punjab is a landmark judgment decided by the Supreme Court of Pakistan that highlights the ban on execution of a death sentence of accused suffering from mental illness.¹ Previously, the Court had not recognised mental illness as being a factor that could render the death sentence unjust. This is evident in the earlier judgment² of the Supreme Court whereby it held that schizophrenia did not constitute a 'permanent mental disorder' clearing the way for the execution of a mentally ill man convicted of murder.

In this unprecedented decision, the apex court ruled that where a condemned prisoner is suffering from a recognised mental disorder that impairs their ability to comprehend the rationale and reason behind their punishment, then carrying out the death sentence will not meet the ends of justice. Additionally, the verdict also dictates the institution of boards of medical professionals under all provinces to ascertain the mental health of prisoners. The case note begins by tracing the facts of the case and the arguments presented by both the parties, followed by the *ratio* of the decision. It then analyses the court ruling by positing two theoretical claims, which entail that such sentencing is principally unfair and ineffective. Towards the end, the entire judgment is summed up by laying out the impact of this decision within the legal framework of Pakistan.

Facts

I. Imdad Ali's Case

The defendant (Imdad Ali) was indicted by the Sessions Court for committing the murder of Hafiz Muhammad Abdullah in 2001. In response to his framing of charge, the defense counsel submitted an application under Section 465³ Code of Criminal Procedure 1898

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¹ PLD 2021 SC 488.

² *Safia Bano v. Home Department, Government of Punjab* PLD 2017 SC 18.

³ Code of Criminal Procedure 1898, s 465:

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

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

("CrPC") for holding an inquiry to determine the competence of the accused to face trial which was dismissed by both trial court and High Court respectively. His wife, Safia Bano who appeared as DW-1 and stated before the trial court that the accused occasionally talked about "supernatural beings" and "metaphysical elements," but "symptoms of abnormality" became frequent a year prior to the occurrence of the murder. Nevertheless, Imdad Ali was convicted under Section 302⁴ Pakistan Penal Code ("PPC") and sentenced to death. An appeal was filed by him which was dismissed by the High Court, reinforcing his death sentence. As soon as his black warrants were issued, Imdad Ali's wife unsuccessfully filed a constitutional petition in the High Court and later in the Supreme Court. In response, she filed a Civil Review Petition⁵ alongside another petition filed by Inspector General Prisons, Punjab for review of the judgment. Additionally, a criminal review petition was also filed by the State through Prosecutor General Punjab, praying the Court to convert the death sentence to life imprisonment on account of the accused's mental illness.

II. Kaneezan Bibi's Case

Kaneezan Bibi was sentenced to death on six counts under Section 302(b) and 34⁶ PPC for committing the murder of Maryam Bibi, Aslam, Shaukat, Liaqat, Razia and Safia in 1991. Her criminal appeal was dismissed by the Lahore High Court in 1994, upholding her death sentence. In 2010, she filed in the High Court for converting her punishment to life imprisonment on the ground of mental ailment which was dismissed. Subsequently, her execution was stayed for three weeks by the President of Pakistan and she was referred to the Punjab Institute of Mental Health ("PIMH") which revealed she was suffering from schizophrenia. It is important to note that neither during trial nor before the learned High Court at the time of hearing of her appeal was the plea of mental ailment urged on her behalf. In 2018, the Chief Justice of Pakistan took suo notice of her case and ordered it to be clubbed with Imdad Ali's case.

III. Ghulam Abbas's Case

In April 2005, the defendant (Ghulam Ali) was convicted and sentenced to death by the District Courts Rawalpindi under Section 302(b), 449⁷ and 324⁸ of the PPC for committing the murder of Wajid Ali and for carrying out a murderous assault on his wife, Mst. Saima

⁴ Pakistan Penal Code 1860, s 302:

Whoever commits *qatl-e-amd* shall, subject to the provisions of this Chapter be: (b) punished with death or imprisonment for life as *ta'zir* having regards to the fact and circumstances of the case, if the proof is either in the forms specified in Section 304 is not available. The ingredients of this offence include a felonious intention and an injury causing the death (PLD 1976 SC 377).

⁵ C.R.P No. 420 of 2016.

⁶ Pakistan Penal Code 1860, s 34:

When a criminal act is done by several persons, in furtherance of the common intention of all, each such person is liable for that act in the same manner as if it were done by him alone.

⁷ Pakistan Penal Code 1860, s 449:

Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with imprisonment for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

⁸ Pakistan Penal Code 1860, s 324:

Whoever does any act with such intention or knowledge, and under such circumstances, that, if he by that act caused *qatl*, he would be guilty of *qatl-e-amd*, shall be punished with imprisonment for either description for a term which may extend to ten years, and shall also be liable to fine, and, if hurt is caused to any person with such act, the offender shall, in addition to the imprisonment and fine as aforesaid, be liable to the punishment provided for the hurt caused.

Bibi. The Lahore High Court dismissed the defendant's criminal appeal in 2010 and subsequently Supreme Court did the same in 2016. As a last resort, Ghulam Ali sought a review petition and mercy petition in 2018 and 2019 respectively, both of which were rejected, resulting in the issuance of his black warrants for execution.

The petitioner filed a constitutional petition under Article 184(3)⁹ of the Constitution of the Islamic Republic of Pakistan ("Constitution"), challenging the execution sentence on the grounds that the accused was suffering from intellectual disability, documented history of mental illness preceding his confinement, and that he was prescribed antipsychotic medication. While entertaining the petition, the Chief Justice of Pakistan stayed Ghulam Ali's execution and the following issues were framed:

- (i) How should the trial Court deal with the plea of an accused if he/she was suffering from a mental illness at the time of the commission of the offence;
- (ii) How should the trial Court deal with the plea in case the accused is mentally incapable of making his/her defence; and
- (iii) whether a mentally ill prisoner should be executed

Pleadings and Court Ruling

The learned counsel for Ghulam Ali contended that he had been suffering from cognitive/intellectual impairment,¹⁰ which prevented him from understanding and following the procedure required under law before the execution could be carried out. He relied on the Prison Rules 1978¹¹ and submitted that the death sentence should be commuted into life imprisonment due to the mitigating factor of mental illness. In addressing the issue of mental illness, both amicus curie stressed upon the stigmatisation of mental disorders, noting that such disorders could only be diagnosed by a highly trained and professional psychiatrist or psychologist through a rigorous process.

They further observed that the impairment of the mental functioning of a prisoner would prevent them from understanding the rationale behind their execution, and thereby fail to act as a deterrent for society at large or serve as a vehicle of retributive justice to the aggrieved party. However, such rationale applies only in cases where it is medically proven that the accused in question is suffering from mental illness that substantially impairs their ability to understand the nature of their sentencing.

⁹ The Constitution of Islamic Republic of Pakistan 1973, Article 184(3):

Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article.

The integral component for the invocation of Article 184(3) is (i) matters of public importance resulting from (ii) infringement of fundamental right.

¹⁰ A condition that involves problems with general mental abilities that affects intellectual functioning (such as learning, problem solving, judgement) and adaptive functioning (activities of daily life such as communication and independent living) *American Psychiatric Association* <<https://www.psychiatry.org/patients-families/intellectual-disability/what-is-intellectual-disability>> accessed 10 November 2021.

¹¹ Rule 443, 444, 445, 453 and 455, Pakistan Prison Rules 1978.

After hearing both sides in-depth, the Court firstly went on to define “mental illness” and acknowledged the inclusion of the terms “mental disorder”,¹² “mental impairment”,¹³ “severe personality disorder”,¹⁴ “severe mental impairment”,¹⁵ and “mentally disordered prisoner”¹⁶ in the provincial legislation.¹⁷ The Court at this point examined the definitions used in various other jurisdictions such as United Kingdom and India. Under the legal framework of UK, mental disorder is defined as ‘*any disorder or disability of the mind.*’¹⁸ Similarly, Section 2(1) of the Indian Mental Healthcare Act 2017¹⁹ defines it as a ‘*substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterized by subnormality of intelligence.*’ To add, Section 3(1) which follows the latest edition of the International Classification of Disease (ICD) of the World Health Organization (“WHO”) adds on to state that ‘*Mental illness shall be determined in accordance with such nationally or internationally accepted mental standards (including the latest edition of the International Classification of Disease of the World Health Organization) as may be notified by the Central Government.*’

The aforementioned definitions from various other jurisdictions reveal that the terms “mental illness” or “mental disorder” are interchangeably used at various instances but collectively both are used to refer to mental ailments. Taking into account the advanced and latest editions of the definitions used worldwide, one of the objections raised by the Court was the limited scope of meaning of the terms “mental illness” and “mental disorder”. Hence, they observed that each province shall update the definition as part of their provincial laws in order to conform to the evolving list of recognised mental health disorders as set out by WHO. Similarly, the Court directed the substitution of redundant, discriminatory terms such as “lunatic” and “unsound mind” with more accurate terms.

In addressing the first issue at hand, the Court drew an analogy between the accused’s state of mind at the time of the commission of the offence and their mental condition prior to the commencement of their trial. The former will be dealt with under Section 84²⁰ of the PPC,

¹² (n 1) [29]. Mental disorder means ‘mental illness, including mental impairment, severe personality disorder, severe mental impairment and any other disorder or disability of mind and “mentally disordered” shall be construed accordingly and explained hereunder’.

¹³ (n 1) [29]. Mental Health Ordinance 2001, s 2(m)(i) states that ‘mental impairment’ refers to a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning and is associated with abnormally and aggressive or seriously irresponsible conduct on the part of the person concerned.

¹⁴ (n 1) [29]. A persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.

¹⁵ (n 1) [29]. A state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of person concerned and “severely mentally impaired” shall be construed accordingly.

¹⁶ (n 1) [29]. A person who is a prisoner 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 Code of Criminal Procedure 1898, Section 30 of the Prisoners Act 1900, Section 130 of the Pakistan Army Act 1952, Section 143 of the Pakistan Air Force Act 1953, or Section 123 of the Pakistan Navy Ordinance 1961.

¹⁷ Punjab Mental Health (Amendment) Act 2014.

¹⁸ Mental Health Act 2007.

¹⁹ Indian Mental Healthcare Act 2017, section 2(1)(s).

²⁰ Pakistan Penal Code 1860, s 84.

while the latter that addresses the second issue raised was held to be governed by Sections 464 and 465 of the CrPC. On this point, the Court stressed that Section 84 and its interpretation under *Khizar Hayat v The State*²¹ entails that the defence of *insanity* can only be availed by the accused if they can prove that they were labouring under such defect that prevented them to know the nature and the consequence of the act.²² Similarly, the onus to prove this is on the accused.²³

This, in turn, leads us to the second issue to assess the procedure to be followed in situations where the mental functioning of the accused impairs them from pleading with their defence. The Court, on this point, laid great emphasis on Section 464 and 465 of the CrPC, which deals with the procedure to be followed in the trial court and Court of Sessions and High Courts, respectively. On a plain reading of both these sections, one can assert that if the court is of the opinion that the accused is of unsound mind and incapable of making their defence, further proceedings shall be postponed. It is pertinent to note here the two steps involved in interpreting these sections. The first one is that it must appear to the court that the accused is of unsound mind, and only then the second stage would follow, requiring the judge to make an inquiry into the matter.²⁴ However, the question to embark upon is whether a subjective criterion would be sufficient to determine the outcome of the case without seeking the opinion of a professional medical expert. In this regard, reliance was placed on a plethora of cases involving different interpretations of the aforementioned sections.

*Ata Muhammad v The State*²⁵ involved a criminal appeal case under Section 302 PPC. The Lahore High Court observed that in interpreting Sections 464 and 465 of the CrPC, the Magistrate or the court is to follow the subjective view to the situation that arises before them followed by an inquiry.²⁶

The Court further observed that this obligation to make an inquiry aims to ensure that their belief must not rest on mere speculation; rather, it must fulfil its satisfaction. In any case, if and when such inquiry concludes that the mental functioning of the accused is such that they are prevented from making their defence or understanding the nature of the act, they will be acquitted.²⁷ However, such satisfaction can only suffice with medical evidence at hand and by carrying out an objective assessment of the material and information placed before the court. Furthermore, such medical opinion involves the accused being examined by an expert professional medical officer in the field of mental health, i.e., a psychologist. On this foundation, the Court ruled that any subjective approach taken by them has to be supplemented by evidence and inquiry.

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

²¹ *Khizar Hayat v The State* 2006 SCLR 1755.

²² *The State v Balahari Das Sutradhar* PLD 1962 Dacca 467.

²³ *Ghulam Yousaf v The Crown* PLD 1953 Lahore 213, whereby the Court held that in case of pleading Section 84 Pakistan Penal Code, the onus will be on the accused suffering from the defect.

²⁴ On plain reading of Section 465 Code of Criminal Procedure (CrPC), it appears that it should be adhered to if any accused, before the Court of Sessions or High Court, appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the court shall determine the *unsoundness* and *incapacity* and only if such is proved, then proceed onto holding an inquiry as held in *Raja Aurangzeb v The State* 1968 PCr.LJ 1930 and affirmed in *Wali Dad Khan v The State* PLD 2011 Lahore 153, [5].

²⁵ *Ata Muhammad v The State* PLD 1960 Lahore 111, [12].

²⁶ *Sher Afzal v The State* PLD 1960 Peshawar 66, [4].

²⁷ *Abdul Wahid v The State* 1994 SCLR 1517.

With respect to the issue of whether the accused suffering from mental illness can be executed, the Court acknowledged that there existed no explicit provision that places any express restriction on their execution. Despite that, Rule 107²⁸ of the Pakistan Prisons Rules 1978 does make mention of unsound prisoners awaiting execution.

In light of this, the Court referred to the jurisprudential development in this area among other jurisdictions, notably the United States (U.S.) and India. Under the U.S. legal framework, this contention was solved in *Ford v Wainwright*,²⁹ which laid out that the Eighth Amendment prohibited the state from executing a person who is insane. The rationale behind this verdict was that by executing one who is declared incapable of understanding their crime would be violative of the principles of humanity and serve no retributive justice. Similarly, in *Madison v Alabama*,³⁰ Justice Powell stated that the death penalty's "retributive force depends on the defendant's awareness of the penalty's existence and purpose."

The Indian jurisprudence in the case of *Shatrughan Chauhan v Union of India*³¹ also barred the execution of an insane person and accorded them protection by virtue of Article 21³² of the Indian Constitution. A similar approach was followed in *X v State of Maharashtra*,³³ whereby the principles of proportionality were discussed³⁴, and the courts reaffirmed that the defence is only applicable, whereby the offender is substantially impaired to such extent that they are unable to understand the nature and purpose behind their sentencing. Disorders such as schizophrenia and its dissociative disorders would fall under this category.³⁵

Reliance was also placed on various Conventions including the International Covenant on Civil and Political Rights,³⁶ the Convention on Rights of Persons with Disabilities³⁷, and the United Nations Rules³⁸ and Resolutions, all of which collectively urge states not to impose the death penalty or execute a person suffering from any form of mental disorder.

²⁸ The Pakistan Prisons Rules 1978, Rule 107(iv):

In case where the condemned prisoner takes plea of young or old age, *unsound mind or ill-health*, two copies of the Medical report by the Medical Officer, of the prison shall also be submitted, stating therein the correct age, ailment, infirmity etc. as the case may be.

²⁹ *Ford v Wainwright* 477 U.S. 399 (1986).

³⁰ *Madison v Alabama* 586 U.S. 2 (2019).

³¹ *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1.

³² The Constitution of India, art 32:

No person shall be deprived of his life or personal liberty except according to a procedure established by law.

In *Maneka Gandhi v Union of India* AIR 1978 SC 597, the Supreme Court of India held that right to life and personal liberty of a person can be deprived by law on the condition that the procedure prescribed by law is reasonable, fair and just.

³³ *X v State of Maharashtra* (2019) 7 SCC 1.

³⁴ (n 22) [60].

³⁵ *Ibid.*

³⁶ The International Covenant on Civil and Political Rights (ICCPR) was ratified by Pakistan on 23rd June 2010. Article 7 ICCPR states 'No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.'

³⁷ Convention on Rights of Persons with Disabilities (CRPD), art 15.

³⁸ Rule 109(1) United Nations Rules for the Treatment of Prisoners urges State parties that people who are diagnosed with severe mental disabilities and/or health conditions shall not be detained in prisons and must be transferred to mental health facilities as soon as possible.

With respect to Imdad Ali's case, the Court stressed that the issue of his mental health was not appreciated by both the trial Court as well as the High Court in terms of Section 465 CrPC. The report produced by the Medical Board constituted to examine the mental health of Imdad Ali clearly stated that it was likely that his mental illness had already started at the time of the crime and he might have committed murder under the delusional belief of persecutions (insanity). The medical records of 2000 (prior to the date of his crime) also reveals that Imdad Ali was examined by a Medical Officer in Lahore who is also of the view that he seemed to be suffering from schizophrenia.

Taking into account the documents available on record, the Court further observed sufficient reasons to warrant the conversion of death sentence into life imprisonment. First and foremost, the trial court failed to consider the prosecutions motive due to lack of proper assistance which automatically qualifies as a ground for review and conversion of death sentence into life imprisonment. Secondly, since Imdad had spent more than 20 years behind the bars, the principle of legitimate expectancy of life allows such conversion.³⁹ Thus, by drawing parlance from these two reasons, his conviction remained maintained with the death sentence being formally reduced to life imprisonment.

In Kaneezan Bibi's case, the medical reports received showed no indication of any psychotic illness (insanity) at the time of examination and the medical board was of the view that she was not suffering from schizophrenia at the time of her commission of offence. However, the Court observed the need for a re-examination whose report revealed that she had been diagnosed with severe lifelong mental illness "schizophrenia." The Court further observed that Kaneezan Bibi was behind bars for the past 32 years which fits a case for legitimate expectancy of life. Therefore, her conviction remained maintained but death sentence on six counts was reduced to life imprisonment.

Prior Case Law

The courts observation in this judgment deeply revolves around various mental health laws, predominantly, the ones relating to insanity in the legal framework of Pakistan. Therefore, it is pertinent to assess the jurisprudential development on the said subject.

Any mental disorder severe enough that it prevents a person from having legal capacity and excuses the person from criminal or civil responsibility constitutes insanity.⁴⁰ The defense of insanity was first laid in the seminal case of M'Naghten which propounded the M'Naghten rule. The Court in the case acquitted Mr. Mc Naghten on the grounds of insanity by laying out a criterion such that the accused must be suffering from: i) a disease of mind: and ii) caused by a defect of reason at the time of the commission of offence.⁴¹ In addition, the Durham Rule extended the scope of the defense of insanity by adding that the accused could not be convicted if it is proved that while committing the unlawful act, they were suffering from a mental disease or mental defect.⁴²

Under the legal framework of Pakistan, insanity finds its place under Section 84 PPC.⁴³ In *Hafizan v. Wali Muhammad*, the Supreme Court of Pakistan upheld the verdict of the High

³⁹ *Sikandar Hayat v State* PLD 2020 SC 559.

⁴⁰ Black's Law Dictionary.

⁴¹ *R v. M'Naghten* (1843) 8 E. R. 718; (1843) 10 Cl. & F. 200.

⁴² *Durham v. United States* 214 F.2d 862.

⁴³ Pakistan Penal Code 1860, s 84.

Court which reduced the death sentence of Wali Muhammad to transportation of life on grounds of suffering from schizophrenia a year prior to the date of occurrence of his crime.⁴⁴ Similarly, in *Muhammad Iqbal v. State*,⁴⁵ the defendant was convicted on the murder of his wife and sentenced to death. In defence, the learned counsel argued that he was suffering from schizophrenia and was administered electric shock treatment to calm him down. The Court quashed his conviction by placing reliance on the case of *Abdullah v. State* which held:

If the accused is able to prove substantial impairment to his mental responsibility due to even partial or border line insanity so as to affect his knowledge as provided in section 84 P.P.C. he would be entitled to a favourable verdict on the plea of insanity. As to how he is to establish the above requirement, the answer is that the fact need not be proved as scientifically certain but can be established on the balance of probabilities and on proper resolution of doubts.⁴⁶

The plethora of cases cited take the view of the instant case in supporting the verdict and reducing the death sentence to life imprisonment on an account of accused suffering from a mental condition.

In a recent judgment, the Supreme Court of Pakistan took a different view in ascertaining whether schizophrenia could constitute as a permanent mental disorder. The case involved an earlier appeal of the instant case whereby the wife of Imdad Ali (defendant) filed an appeal requesting the court to reduce the defendant's death sentence to life imprisonment on grounds of insanity which she pleaded before all subordinate courts. The Court first went onto describe schizophrenia and observed:

A severe mental disorder (or group of disorders) characterized by a disintegration of the process of thinking, of contact with reality, and of emotional responsiveness. Delusions and hallucinations (especially of voices) are usual features, and the patient usually feels that his thoughts, sensations, and actions are controlled by, or shared with, others. He becomes socially withdrawn and loses energy and initiative.⁴⁷

It drew parlance from the case of *Smt. Rita Roy v. Sitesh Chandra* which observed that each case of schizophrenia has to be considered on its own merits.⁴⁸ The Court further illustrated that schizophrenia was not a permanent mental disorder and is recoverable by drugs, vigorous psychological and social management and rehabilitation. For these reasons, it fails to fall within the ambit of "mental disorder" as defined in Mental Health Ordinance 2001.⁴⁹ However, it is important to distinguish this case from the instant one which ruled that schizophrenia falls within the ambit of a permanent mental health disorder. In doing so, the Supreme Court of Pakistan overruled the earlier judgment.⁵⁰

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

⁴⁴ *Hafizan v. Wali Muhammad* 1968 SCMR 73.

⁴⁵ *Muhammad Iqbal v. State* 1985 PCRLJ 2462.

⁴⁶ *Ibid* [6].

⁴⁷ Concise Medical Dictionary (Oxford Medical Publications, 1980) 566.

⁴⁸ AIR 1982 Cal. 138.

⁴⁹ (n 2) [10].

⁵⁰ (n 1) [77].

Analysis

The following analysis has two theoretical aims. Firstly, it argues that the execution of mentally ill prisoners is an ineffective and unfair tool that is retributive rather than rehabilitative in nature. Secondly, it is posited that the execution of those who are mentally ill is principally unfair, such that it should be banned irrespective of whether it can act as a successful means by which to achieve retributive justice. Such analysis is put forward in support of the Supreme Court verdict, which ultimately redefines the pre-existing legal narrative in Pakistan to one that accommodates rather than alienates those suffering from mental illness.

With regard to the first strand of analysis, it is first necessary to clarify the aims of both retributive and rehabilitative justice. As Daly notes, retributive justice uses state power to inflict punishment on wrongdoers, primarily through imposing ‘censure for past offences’ on convicted criminals.⁵¹ Meanwhile, rehabilitative justice is more focused on exploring how we can deter criminal acts whilst encouraging law-abiding acts amongst the public.⁵² Ultimately if the Supreme Court had decided in *Safia Bano v. Home Department, Government of Punjab* that the death penalty should be imposed on a mentally ill prisoner, it would have endorsed a purely retributive form of justice. Under such a model, punishment is ‘upheld for its own sake rather than for any particular benefit.’⁵³ In this case, and as acknowledged by the Supreme Court, there is negligible to no material benefit of imposing such harsh criminal censure on a mentally ill prisoner: the extent to which they understood why their actions were wrong was limited due to their mental illness; hence, the ability of the death penalty to awaken their moral conscience prior to execution as to the inherent wrongness of their acts is limited. Whilst the aforementioned analysis could potentially be used to explain the non-desirability of the death penalty itself in a wider sense, and such theoretical questions are beyond the scope of this article.

However, this case note goes beyond arguing that the Supreme Court’s decision was correct because a retributive justice model is purely undesirable. Even if one was to concede that there is weight to the idea that executing mentally ill prisoners may fulfil certain utilitarian goals inherent in models of retributive justice; for example, acting as a deterrent to wider society from committing criminal acts or restoring the moral balance in the eyes of victims who were wronged, it is still principally unfair to do so. The process of criminal censure on behalf of the state is not only concerned with attempting to punish crime in a clinical sense but in ensuring that defendants have fair trials, a principle that is considered a constitutionally protected right in Pakistan.⁵⁴ It is posited that the execution of the death sentence on mentally ill prisoners infringes this right, as their ability to understand the charges against them or even to comprehend the moral undesirability behind their own actions is limited. In addition, it is true that “justice must not only be done, but must also be seen to be done”.⁵⁵ Criminal sanction is exclusively under the authority of the state, and imposing the irreversible penalty of execution on a mentally ill prisoner would threaten the legitimacy of the judicially sanctioned punishments in Pakistan. The argument here is not that

⁵¹ Kathleen Daly, ‘Restorative versus Retributive Justice’ (2002) 4(1) *Punishment and Society* Sage Publications 55.

⁵² *Ibid.*

⁵³ David Lyons, ‘Punishment as Retribution’ <<http://web.uncg.edu/dcl/courses/vicecrime/pdf/m7.pdf>> accessed 02 November 2021.

⁵⁴ Constitution of Islamic Republic of Pakistan 1973, Article 10-A.

⁵⁵ *Rex v. Sussex Justices* [1924] 1 KB 256, Lord Hewart.

courts should refrain from issuing unpopular verdicts; rather, it is that the lack of normative justification underpinning the execution of mentally ill prisoners could have wider implications for the rule of law in Pakistan. Therefore, the Supreme Court's verdict, in this case, is welcomed.

However, it must be noted that the current state of the law is not without its problems. The burden of proof for establishing the existence of mental illness lies on the accused, which limits their ability to convince fact-finders that the defence even applies to them. This is exacerbated by the fact that mentally ill prisoners may lack the legal advice and technical knowledge to understand that they are suffering from a certain mental illness and thereby work toward proving it. Given the lack of easily accessible, affordable psychiatric help in Pakistan, defendants are at a disadvantage not due to any fault of their own but due to the inadequacy of the federal healthcare infrastructure.⁵⁶ Ultimately, it is unreasonably and extremely difficult for defendants to be able to utilise this defence, which in turn highlights a gap in the fair application of the law.

Conclusion

It is clear that the verdict has opened a new chapter of progressive jurisprudence with regard to the treatment of mentally ill prisoners. In an unprecedented step, it accords protection to one of the most marginalised and stigmatised segments of society. The decision of the Supreme Court in this case is particularly important when we view it through the paradigm of rehabilitative justice, which can be distinguished from retributive justice in that it does not aim to inflict punishment as an end in itself. Despite this optimism, we are cautious not to overstate the implications of the verdict. The burden of proof remains with the accused, thereby potentially limiting the extent to which the case paves the way for a more rehabilitative and just framework for the justice system of Pakistan. This concern is compounded by the fact that mentally ill prisoners, like many suspects who go through the criminal justice system of Pakistan, are unlikely to have the means to be able to easily access the sophisticated legal advice necessary to successfully exercise this defence. This would imbibe a certain extent of arbitrariness within the application of the law, as those who lack the legal knowledge and advice to exercise this defence will be left without redress.

⁵⁶ Editorial, 'Pakistan's mental health-care system woefully deficient' *The News International* (Islamabad, 22 October 2021) <<https://www.thenews.com.pk/print/902087-pakistan-s-mental-health-care-system-woefully-deficient>> accessed 8 November 2021.