

EXPLAINER

Safeguarding the Rights of Mentally Ill Defendants: The Supreme Court of Pakistan's Landmark Judgment

JUSTICE PROJECT PAKISTAN

BACKGROUND

Imdad Ali, 57-year-old severely mentally ill prisoner, suffered more than 18 years on death row without proper treatment. He was sentenced to death in 2002 for fatally shooting a religious teacher. During the course of his incarceration, he has been repeatedly diagnosed with paranoid schizophrenia, and several medical reports have confirmed over the years that he is suffering from psychotic symptoms actively and is "a treatment-resistant case." He spent the last four years in solitary confinement in the hospital cell of district jail, Vehari, owing to the nature of his mental illness. In Sept 2020, he was shifted to Punjab Institute of Mental Health (PIMH).

Kanizan Bibi and her employer were arrested for killing the employer's wife and children. She suffers from severe schizophrenia and spent more than 30 years in prison. She was arrested in 1989 as a juvenile and sentenced to death in 1991. She has always maintained her innocence. Kanizan was Pakistan's only woman prisoner scheduled to be executed. In 2000, her first execution warrant was issued but it was halted by the President of Pakistan. She was first shifted from Lahore Central Jail (Kot Lakhpat) to Punjab Institute of Mental Health (PIMH) in 2006 and then again in 2018 and was constantly being treated for her mental illness. During the course of her incarceration, her medical condition deteriorated so much that she has not spoken a word in decades.

Ghulam Abbas was arrested in September 2004 for fatally stabbing his neighbour over 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 SC 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 SC in September 2020, declared that Ghulam is suffering from schizophrenia.

In 2018 the Supreme Court took suo moto notice of Kanizan Bibi's case and ordered the constitution of a medical board to evaluate her mental health. Subsequently, the Court clubbed Imdad Ali and Ghulam Abbas' cases with Kanizan Bibi's and ordered a medical evaluation of all 3 mentally ill prisoners. Justice Project Pakistan represented and litigated on behalf of all 3 prisoners and argued that they were ineligible to be executed because of their severe mental illnesses. If executed, Pakistan would be in violation of Articles 9 and 14 of its Constitution as well as the international instruments, such as International Covenant on Civil and Political Rights (ICCPR) that Pakistan is a signatory to. The medical board's report would assist the court in deciding whether they are in fact mentally ill or not and therefore whether they are 'fit for execution'. The then-Chief Justice Saqib Nisar had observed that it is "*beyond sense or reason that we execute mentally ill individuals*".

After a wait of 23 months, this case was scheduled for hearing on 17th September 2020. The case was heard by a five member bench of the Supreme Court, headed by Justice Manzoor Ahmad Malik and comprising Justice Mansoor Ali Shah, Justice Ijaz UI Ahsan, Justice Sardar Tariq Masood, and Justice Mazhar Alam Miankhel, which ordered the reconstitution of a special medical board to evaluate 2 of the prisoners with mental illness and submit a report within 3 weeks. **On 15th December 2020, the Board declared all three prisoners to be severely mentally ill.**

After holding marathon hearings since September 2020, on 10th February 2021 the Supreme Court of Pakistan commuted the death sentences of Kanizan and Imdad to life imprisonment and delivered a landmark judgment that reinforces 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 in the criminal justice system; at the time of arrest, during investigation, trial and sentencing, in order to ensure that they are to guarantee due process. It has also barred the execution of individuals who are severely mentally ill.

WHAT DOES THE SUPREME COURT JUDGMENT SAY?

- **On whether a mentally ill condemned prisoner can be executed:**

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.”**

However, the Court clarified that **not every mental illness shall automatically qualify for an exemption from carrying out the death sentence**; it will only be applicable where a Medical Board consisting of mental health professionals certifies after a **thorough examination and evaluation** that the **condemned prisoner no longer has the higher mental functions to appreciate the rationale and reasons behind the sentence of death awarded to him/her**. To determine whether a condemned prisoner suffers from such a mental illness, the Federal Government (for Islamabad Capital Territory) and each Provincial Government shall constitute and notify, a Medical Board that is composed of qualified psychiatrists and psychologists from public sector hospitals.

- **On commutation of Kanizan and Imdad’s death sentences to life imprisonment**

- In the case of **Imdad Ali** whose mental illness predates the commission of the offence, the Supreme Court observed that the Trial Court had formed a subjective view on Imdad’s mental illness after asking a few questions, without having recourse to the materials annexed with the application filed on behalf of Imdad and without considering any argument advanced by counsel. The Court observed that the Trial Court formed an opinion on a crucial legal issue without considering holistic information and that such “slipshod” approach could not be condoned. The Supreme Court further noted that the issue of Imdad’s mental illness had not been considered adequately by the High Court either. It noted that when Imdad’s lawyer did not appear, the High Court asked another lawyer to take up the matter and argue it the very next day. The Court found that this hasty approach cannot be appreciated in matters that involve life and death of a convict. As such, the Supreme Court opined that even without touching upon Imdad’s mental health condition, the above irregularities constitute sufficient reason to suggest that Imdad’s death sentence be converted to life imprisonment.
- The Supreme Court also drew attention to the fact that a medical board constituted in 2019 found that Imdad was likely to be mentally ill with schizophrenia at the time of commission of the offence. Keeping in view the irregularities in the trial and Imdad’s mental condition and relying on the legitimate expectation for life, the court commuted his sentence of death to life imprisonment. The court also noted that Imdad has been imprisoned for the last 20 years and thus has already served out a large portion of his life sentence.
- In the case of **Kanizan** whose mental illness onset was after the commission of the offence and after her incarceration, the court reproduced the medical board reports wherein it was identified that Kanizan suffers from a severe lifelong mental illness. The court also noted that she had been imprisoned for over 31 years. She had thus served out longer than a life sentence. Recognizing the legitimate expectation for life, the court converted her sentence of death to imprisonment for life.
- In both Imdad and Kanizan’s case, the court directed that they be transferred to the Punjab Institute of Mental Health (“PIMH”) for treatment and rehabilitation in accordance with provisions of Prison Rules. When their sentences are completed, the court has directed that they are to be examined again by a Medical Board that is to be notified by the Government of Punjab. As per the directions of the court, they are to be released from the hospital when the Medical Board opines **“that they are fit for themselves and for the society”**. Despite the differing circumstances of Imdad and Kanizan’s cases - one who was noted as mentally ill before the commission of the offence and the other whose illness is only documented during her incarceration- the Court extended the benefit of commutation of the death penalty to life imprisonment to both mentally ill persons.

- **On the definition of mental illness**

The Court directed that restrictive terms like “unsoundness of mind” be replaced with internationally recognized definitions of mental illness and mental disorder. It opined that limited definition of the terms “mental disorder” or “mental illness” should be avoided, and the Provincial Legislatures may, in order to better appreciate the evolving nature of medical science, appropriately amend the relevant provisions of the mental health laws to cater to medically recognized mental and behavioral disorders as notified by WHO through its latest edition of International Classification of Disease (“ICD”). In this vein, the Court has recognized that outdated and derogatory terms such as “lunatic” and “insane” in the CrPC, Prison Rules and the PPC be replaced with terms that are more inclusive and sensitive.

- **On how the trial Court should deal with the plea of an accused that he/she was suffering from mental illness at the time of commission of offence as well as before the commencement or during trial**

The Court held that where the accused raises any specific plea, permissible under the law, including a plea under section 84 of the Pakistan Penal Code (“PPC”), the onus to prove such plea is on the accused. However, while proving such a plea, the accused may benefit from any material, oral or documentary, produced/relied upon by the prosecution.

Regarding the plea of the accused before or during trial, the Court made the following observations:

- i. Whenever the trial Court is put to notice, either by express claim made on behalf of the accused or through Court’s own observations, regarding the issue of incapability of an accused to understand the proceedings of trial and to make his/her defence, this shall be taken seriously while keeping in mind the importance of procedural fairness and due process guaranteed under the Constitution and the law. To this end, the accused can lead the evidence and adduce evidence in his/her claim. Moreover the head of the Medical Board shall appear as a witness in Court can be cross examined by both the prosecution and the defence.
- ii. While forming a *prima facie* tentative opinion, the Court may give due consideration to its own observations in relation to the conduct and demeanor of an accused person. 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 an accused person to face the proceedings of trial.
- iii. A *prima facie* tentative opinion cannot be formed by the Court only on the basis of such questions posed to the accused. The Court is required to objectively consider all the material available before it, including the material placed/relied upon by the prosecution.
- iv. Once the Court has formed a *prima facie* tentative opinion that the accused may be incapable of understanding the proceedings of trial or make his/her defence, it becomes obligatory upon the Court to conduct an inquiry to decide the issue of incapability of the accused to face trial due to mental illness.
- v. The Court must have the accused examined by a Medical Board, to be notified by the Provincial Government, that consists of qualified medical experts in the field of mental health. Such experts shall examine the accused and opine on whether the accused is capable or otherwise to understand the proceedings of trial and make his/her defence.
- vi. The medical report/opinion must be detailed and structured with specific reference to psychopathology (if any) in the mental functions of consciousness, intellect, thinking, mood, emotions, perceptions, cognition, judgment and insight.

- **On the consideration of mental illness as a ground for clemency**

In relation to Ghulam Abbas’s case, the 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.”*

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 report of Medical Board constituted by this Court on 21.09.2020 and a copy of this judgment, and be reconsidered in light of this judgment. 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 judgment.”*

In doing so, the Court has 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.

- **Impact on existing legislation and rules**

The Court directed the Federal Government and all the Provincial Governments to immediately make necessary amendments in the relevant laws and the rules in the light of observations given in this judgment, and that the Prison Rules should be appropriately amended so as to bring the jail manuals of all the Provinces in harmony.

- **On establishment of forensic and training facilities**

The Supreme Court has also directed the Federal Government and all the Provincial Governments to immediately establish/create High Security Forensic Mental Health Facilities in the teaching and training institutions of mental health for assessment, treatment and rehabilitation of under trial prisoners and convicts who have developed mental ailments during their incarceration. This is the first time that a direction has ever been passed to set up forensic facilities by a superior court. This is also in accordance with the Mental Health Ordinance, 2001 which requires such facilities to be set up as they are essential for the understanding of complex mental disorders. The Court has further directed the Federal Government and all the Provincial Governments to immediately launch training programs and short certificate courses on forensic mental health assessment for psychiatrists, clinical psychologists, social workers, police and prison personnel. Furthermore, the Federal Judicial Academy, Islamabad and all the Provincial Judicial Academies shall also arrange courses for trial Court judges, prosecutors, lawyers and court staff on mental illness including forensic mental health assessment.

WHO BENEFITS FROM THE JUDGMENT?

- Condemned prisoners on death row who suffer from psychosocial disabilities
- Under-trial and convicted prisoners with mental illness

IS THE JUDGMENT IN LINE WITH PAKISTAN'S INTERNATIONAL LAW OBLIGATIONS?

- The United Nations has released a statement welcoming the recent landmark judgment by the Supreme Court of Pakistan restricting the use of the death penalty on severely mentally ill prisoners. The statement is endorsed by eight leading UN experts Agnès Callamard, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; Gerard Quinn, Special Rapporteur on the Rights of Persons with Disabilities; Nils Melzer, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Elizabeth Broderick (Chair), Melissa Upreti (Vice Chair), Dorothy EstradaTanck, Ivana Radačić, and Meskerem Geset Techane, the Working Group on Discrimination Against Women and Girls. This statement by the UN is remarkably important as it appreciates efforts made by Pakistan with regard to human rights obligations and the use of the death penalty. The landmark judgment brings Pakistan in line with the recommendations of the UN Human Rights Committee that oversees Pakistan's compliance with the International Covenant on Civil and Political Rights (ICCPR), which Pakistan is a signatory to.

- In 2007, the UN General Assembly adopted a resolution calling upon all states:

'To progressively 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' (UN General Assembly Resolution 62/149: Moratorium on the use of the death penalty)

- The **International Covenant on Civil and Political Rights (ICCPR)**, which Pakistan ratified in 2010, urges countries practicing the death penalty to not impose it "on a person suffering from any mental or intellectual disabilities or to execute any such person".
- The **Human Rights Committee** in their **Concluding Observations** to Pakistan in **2017** noted that "*No one with serious psychosocial or intellectual disabilities is executed or sentenced to death, including by establishing an independent mechanism to review all cases where there is credible evidence that prisoners who are facing the death penalty have such disabilities and reviewing the mental health of death row inmates*".
- In its **Follow-up to the Concluding Observations** in **2019**, the Committee stated that it "*regrets that no information was provided on measures taken to prevent executions or the imposition of the death sentence on persons with serious intellectual or psychosocial disabilities*".
- A year later, in **2020**, **four Special Rapporteurs** (on torture - persons with disabilities - extrajudicial executions - and right to enjoy physical and mental health) alongside the **Working Group on discrimination** against Women and Girls, **wrote to the Government of Pakistan** raising concerns over the '**unfair trial, lengthy pre-trial detention, torture and inhumane conditions of detention**' of **Kanizan Bibi** and called upon them for information.
- The UN Economic and Social Council (ECOSOC) in 1984 adopted "[Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.](#)" In the same year, the Safeguards were endorsed by consensus by the UN

General Assembly. The Safeguards guaranteeing protection of the rights of those facing the death penalty constitute an enumeration of minimum standards to be applied in countries that still impose capital punishment.¹

The Third Safeguard states:

“3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.”

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.

When deliberating upon the question of ‘whether a mentally ill condemned prisoner should be executed?’ the Honourable Supreme Court made specific references to relevant international human rights law.

- The court referred to **Rule 109 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)**

“1. Persons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.

2. If necessary, other prisoners with mental disabilities and/or health conditions can be observed and treated in specialized facilities under the supervision of qualified health-care professionals.

3. The health-care service shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment”

- It further drew attention to ‘**Resolution 2000/65**’ adopted by the **United Nations Commission on Human Rights** in the year 2000, whereby all the States who still sustain death penalty were urged “*not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.*”
- In support of the ‘**contention that cruel, inhuman or degrading punishment shall not be awarded**’, the court made reference to the **International Covenant on Civil and Political Rights (ICCPR)** and the **Convention on Rights of Persons with Disabilities (CRPD)**, both ratified by the Government of Pakistan.



Justice Project Pakistan is a non-profit organization based in Lahore that represents the most vulnerable Pakistani prisoners facing the harshest punishments, at home and abroad. JPP investigates, litigates, educates, and advocates on their behalf. In recognition of our work, in December 2016, JPP was awarded with the National Human Rights Award, presented by the President of Pakistan.

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¹ <http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIIndex.aspx>