

MENTAL HEALTH AWARENESS TOOLKIT FOR LAWYERS



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PREFACE

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

*Mst. Safia Bano vs Home Department, Government of Punjab
Judgment of the Supreme Court of Pakistan, Feb 2021.*

It is estimated that 15%-25% of Pakistan’s population suffers from mental illness. In addition, the severe lack of mental health awareness and training (generally in Pakistan and specifically in the criminal justice system) means that many individuals never get diagnosed or treated, and hence are unjustly convicted and sentenced.

Taking a client’s mental health into account becomes increasingly important given that 32 criminal offences are punishable by death in Pakistan. Failure to uphold the rights of defendants with mental illness has resulted in the execution of vulnerable individuals, and may do so again if this obligation is not taken seriously.

Domestic law provides offenders suffering from mental illness 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 Criminal Procedure Code (CrPC) provides safeguards for an accused who suffers from mental illness during the trial. The enforcement of these safeguards does not allow the executions of prisoners with mental illness. Chapter 18 of the Pakistan Prison Rules 1978 (PPR) provides 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 to their competency to be executed.

In February 2021, in the case of Mst. Safia Bano vs Home Department, Government of Punjab, the Supreme Court issued a landmark judgment which provides broad guidelines for managing offenders living with mental illness. The judgement bans capital punishment for prisoners with mental illness. It also directs Federal and Provincial authorities to set-up special forensic mental health facilities and provide training and awareness programs on forensic mental health for medical personnel, social workers, police, prison staff, lawyers, judges, magistrates and other court personnel.

This manual seeks to help legal professionals, specifically criminal defence lawyers who have clients suffering from mental illness, to respond appropriately to their clients and ensure that their client's rights to due process and a fair trial are protected. In doing so, it examines the rights and protections granted to mentally ill offenders at various stages of the criminal justice system: pre-trial, during the trial and post-conviction.

The detail on the diagnosis and symptoms of various mental health conditions has been gathered in collaboration with both local and international medical professionals. This manual has been drafted by Eman Ahmed, with assistance from Zainab Mahboob of Justice Project Pakistan.

INTRODUCTION

GOALS

- Provide an overview of mental health, mental illness and challenges, specifically in relation to the law and judicial process.
- Highlight the rights and protections accorded to mentally ill offenders/defendants at various stages of the criminal justice process.
- Highlight relevant international laws and legal instruments, that deal with the treatment of offenders suffering from mental illness.

BENEFITS

- Increased capacity of lawyers to act in the best interest of their client.
- Increased knowledge of rights and protections accorded to offenders suffering from mental illness under domestic law, specifically at the time of arrest, during the trial, and while they are in prison.
- Increased knowledge of the rights and protections granted to offenders with mental illness in accordance with international obligations and Islamic laws.

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

TOPICS COVERED

This training is divided into 5 modules covering:

- Mental health and mental illness
- Pre-trial: Rights at the time of arrest
- The Trial: Legal and procedural safeguards
- Post-trial: Appeals, Mercy Petitions and prison rules
- International law and Islamic law

01

MENTAL HEALTH & MENTAL ILLNESS

INTRODUCTION

Lawyers do not have a duty to diagnose or treat mental disorders, but they do have a duty to act in the best interest of their client and ensure they are treated fairly, in accordance with domestic law and international obligations.

Rule 156 of The Pakistan Legal Practitioners and Bar Council Rules, 1976 expressly mentions: "An advocate owes entire devotion to the interests of the client, warm zeal in the maintenance and defence of his rights and the exertion of his utmost learning and ability to the end that nothing be taken or be withheld from him save by rules of law legally applied. No fear of judicial disfavour or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defence that is authorised by the law of the land, and he may expect his advocate to assert every such remedy or defence."

In order to carry out this duty diligently, lawyers must assess their client's competence and fitness to stand trial since it has an impact on every aspect of their case, criminal or civil.

It is therefore important that legal professionals understand the nature of mental illness and are aware of its signs and symptoms, so that they are able to respond appropriately.

LEARNING OBJECTIVES

- Mental health and mental illness
- Causes and symptoms of mental illness
- Can mental illness be cured?
- Cyclical nature of mental illness
- Legal classifications of mental illness
- How you can tell if your client may have a mental illness
- What you should know if your client has a mental illness

WHY YOUR CLIENT'S MENTAL HEALTH IS IMPORTANT?

A client's mental health should concern lawyers since it affects the lawyer-client relationship and the case itself. For example, in a criminal case if your client is suffering from mental illness, it may determine their culpability and legal defenses available to them. In civil cases, for example, the question of competence can be vital while determining guardianship or validity of contracts.

If a client is suffering from mental illness it can affect:

- their memory
- their reliability
- the voluntariness of their statements
- their ability to follow legal proceeding
- their ability to make decisions
- their ability to meaningfully participate in their trial
- their legal responsibility for an offence
- their sentencing determination
- where and how they are to serve their sentence

WHAT IS MENTAL HEALTH?

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

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

WHAT IS MENTAL ILLNESS?

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

There are more than 200 classified forms of mental illness. Some of the more common disorders are depression, bipolar disorder, dementia, schizophrenia and anxiety disorders. Symptoms may include changes in mood, personality, personal habits and/or social withdrawal.

WHAT ARE THE SYMPTOMS OF MENTAL ILLNESS?

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

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

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

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

WHAT ARE THE CAUSES OF MENTAL ILLNESS?

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



GENETICS

Mental illness can often be hereditary and run in the family.



IMBALANCE IN BRAIN CHEMISTRY

Mental illness can be the result of an imbalance in the naturally occurring chemicals in the brain and body.



ENVIRONMENT

Mental illness can develop if a person is/was living in a stressful environment, such as poverty or where there is abuse.



TRAUMA AND STRESSFUL EVENTS

Mental illness can develop due to traumatic and stressful events, such as a car accident, the death of a loved one or being sentenced to prison can also lead to mental illness.



SUBSTANCE ABUSE

Drugs and alcohol can also trigger mental illness. Substance abuse can also make it more difficult to recover from mental illness.

CAN MENTAL ILLNESS BE CURED?

There are no cures for mental illness. However, symptoms can be managed with psychotherapy and medication. This can improve an individual's quality of life and allow them to live a more fulfilling life despite their difficult conditions.

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

CYCLICAL NATURE OF MENTAL ILLNESS

The cyclical nature of some is discussed below:

- Bi-polar disorder is such that in some patients the episodes alternate after every few months or few years; while still in others these alternate very frequently, at times on a daily basis. The lucid intervals in between the episodes are usually maintained with the help of medication as well as avoiding stressful situations or loneliness.
- Schizophrenia and related psychosis can also present as cyclical in nature

with periods of better psycho-social functioning in between. Factors which help manage symptoms include medication, supportive environment, as well as avoiding illicit substances.

- Anxiety and stress related disorders as well as eating disorders can also present cyclically.
- Personality disorders present problems in perceiving and thinking about self and others, emotional instability and behavioral problems in psycho-social domains as well as impulse control. These disorders are enduring and persistent, meaning they can start in childhood or adolescence and continue into adulthood. The severity of the symptoms increases and decreases with periods of lucid intervals in between and throughout the individual's life.
- Disorders of cognitive functioning, such as dementia, are progressive and irreversible. It tends to present with memory deficits progressing to problems in speech, sensory functions and executive functions.
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HOW DOES THE LAW CLASSIFY MENTAL ILLNESS?

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

I. INTELLECTUAL DISABILITIES:

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

reasonable extent depending on the severity of the disorder as well as the support available.

II. PERSONALITY DISORDERS:

People with personality disorders have long-standing patterns of thinking and acting that differ from what society considers usual or normal. The inflexibility of their personality can cause great distress and can interfere with many areas of life, including social and work functioning. People with personality disorders generally also have poor coping skills and difficulty forming healthy relationships. Because they do not believe they have a disorder, people with personality disorders often do not seek treatment on their own.

III. SEVERE MENTAL DISORDERS:

Severe mental disorders are mental health conditions involving changes in emotion, perception, thinking, cognition, and behavior (or a combination of these). Severe mental disorder may be caused by a reaction to environmental stresses, genetic factors, biochemical imbalances, or a combination of these. Severe mental disorders are characterized by delusions, hallucinations, leading to impairment of insight and judgment thus resulting in arrested or incomplete mental development, abnormally aggressive and irresponsible conduct.

HOW YOU CAN TELL IF YOUR CLIENT MAY HAVE A MENTAL ILLNESS?

Below are some cues you should look out for when trying to assess if your client may be suffering from mental illness.

LANGUAGE DIFFICULTIES:

In talking with your client, you may note that your client doesn't follow a logical train of thought. The client may exhibit other language difficulties, including incoherence, use of made-up language, changing subject mid-sentence, giving monosyllabic answers, racing speech, consistently repeating themselves etc.

PARANOID STATEMENTS:

Your client may make paranoid statements or accusations and exhibit irrational fears. For example, a fear of leaving the jail cell or a belief that their fellow inmates want to kill them, or their food has been poisoned.

ALTERED REALITY:

Your client may hear voices and see things that are not there, or may be confused about people and surroundings.

MEMORY AND ATTENTION ISSUES:

Your client may exhibit a limited attention span or amnesia.

EMOTIONAL INSTABILITY:

Your client may be emotionally unstable, be severely anxious, hostile, irritable or laughing at inappropriate times. They can also seem depressed or show no emotion at all.

UNUSUAL SOCIAL INTERACTIONS:

Your client may have trouble relating to others, may be estranged from family and friends, have difficulty perceiving social cues, have a lack of inhibition or be overly confrontational.

THINGS TO KNOW IF YOU SUSPECT YOUR CLIENT IS SUFFERING FROM MENTAL ILLNESS?

Lawyers by and large are not trained mental health professionals and therefore are not equipped to diagnose mental illness. However, in the normal course of speaking with their client, lawyers should be able to determine if there is an issue with the client's capacity. Below are some important points to keep in mind, if you suspect your client has a mental illness.

YOU HAVE AN ETHICAL OBLIGATION TO ZEALOUSLY AND DILIGENTLY REPRESENT YOUR CLIENT

If your client is suffering from mental illness, this may affect their culpability for an offence and allow for alternative legal defences. As a lawyer, you have an ethical obligation to zealously and diligently represent your client, and this includes exploring appropriate legal pathways and filing relevant motions. An attorney's failure to do so is a violation of their client's constitutional right to a fair trial and due process.

YOU SHOULD KNOW YOUR CLIENT'S MEDICAL HISTORY

Based on your initial observations, if you suspect the client may have a mental illness you should investigate further. If the client is willing to talk about their mental health history, ask if they have ever been diagnosed and treated for a mental or emotional disorder.

If the answer is yes, ask who treated them, what they were treated for, where they were treated and for how long.

BE TACTFUL AND PATIENT IN YOUR QUESTIONING

Mental illness carries with it social stigma and there may be some clients who may hide that they have a mental illness, in particular if they are in prison. Clients may fear being committed to a mental hospital, being victimized by other inmates or being forced to take medication. In other cases, clients may not understand that they are mentally ill, especially if they have never been formally diagnosed.

In such situations blunt questions such as "Do you have a mental illness?" will not work. Instead ask if they are on any medications or if they have ever been hospitalized. You should also ask your client if they have had any prior convictions. Remember, your client may not be willing to confide in you straight away and it will require patience on your part. It is important that you speak simply and in a non-judgmental manner.

CHECK YOUR CLIENT'S PRISON RECORDS

If your client is already in jail, you should ask to see their medical records, as all jails are required to do a basic health screening at intake. You should talk to your client's family, as they would have the most current information on your client's health. Additionally, you should look at the police report to see if your client was behaving oddly at the time of

arrest. You should also talk to the jail staff to ask if they have witnessed any unusual behaviour.

If your client has a criminal record and has been previously convicted of a crime, check if a medical board was set-up under CrPC Section 464 to establish your client's fitness to stand trial. If a board was previously set-up, you should check the submitted medical report.

If you are still not certain about your client's competence, you should get them evaluated by a mental health professional.

RAISE THE ISSUE OF YOUR CLIENT'S COMPETENCE WITH THE PRESIDING MAGISTRATE/JUDGE

You should raise the issue of your client's fitness to stand trial with the judge/magistrate. At this point you should submit any relevant records (medical, police, previous convictions etc.) to the judge. Once you have raised the issue of your client's competence, the judge/magistrate is legally required to adjourn the trial and conduct an inquiry into the accused's fitness to stand trial.

An attorney's failure to raise the issue of their client's competence is a violation of their client's constitutional right to a fair trial and due process

INCARCERATION IS HARMFUL TO PEOPLE WITH MENTAL ILLNESS

Prison is a stressful environment for most people. This is all the more true for those who are suffering from mental illness since incarceration can further worsen

their stability and be detrimental to their physical health. Individuals with mental illness are more likely to be victimized by other inmates. Additionally, they may not be provided with certain medications and proper treatment in prison.

OFFENDERS SUFFERING FROM MENTAL ILLNESS CANNOT BE EXECUTED

According to the Supreme Court "...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...". In effect, the Supreme Court barred the death penalty for offenders suffering from mental illness at the time of committing the offence. This is also applicable to offenders who developed mental illness later, while in prison, waiting for the sentence to be carried out.

Executing mentally ill offenders is against all norms of international law and is also forbidden under Islamic law.

OVERCOME YOUR PREJUDICES

There are a lot of popular misconception surrounding mental illness. Some feel offenders often use mental illness as an excuse for their behavior. If you are representing a person with mental illness, you must overcome your own biases and social prejudices regarding mental health issues. Mental illness is neurobiological and is like any other medical ailment.

REVIEW

MENTAL HEALTH AND MENTAL ILLNESS

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

CAUSES OF MENTAL ILLNESS

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

HOW TO TELL IF YOUR CLIENT MAY HAVE A MENTAL ILLNESS?

- Language difficulties
- Paranoid statements
- Altered reality
- Memory and attention issues
- Emotional instability
- Unusual social interactions
- Behavioural issues

LEGAL CLASSIFICATION OF MENTAL ILLNESS

- Intellectual Disability
- Personality Disorder
- Severe Mental Disorder

THINGS TO KNOW IF YOU SUSPECT YOUR CLIENT IS SUFFERING FROM MENTAL ILLNESS

- You have an ethical obligation to zealously and diligently represent your client
- Be tactful and patient in your questioning
- You should know your client's medical history
- Check your client's records
- Raise the issue of your client's fitness to stand trial with the presiding magistrate/judge
- Incarceration is harmful to people with mental illness
- Under domestic and international law, offenders suffering from mental illness cannot be executed
- Overcome your own prejudices



RIGHTS AT THE TIME OF ARREST

INTRODUCTION

All offenders in the criminal justice system are accorded some basic rights. Those suffering from mental illness are given additional protections.

As a lawyer it is your duty to ensure your client's rights have not been violated and they have been given the full protections granted to them at various stages of the criminal justice system. This includes pre-trial, at the time of their arrest; during their trial; and post-trial while they are in prison.

This module looks at the protections granted to offenders, specifically those suffering from mental illness, at the time of arrest.

LEARNING OBJECTIVES

- Rights and protections at the time of arrest

THE ARREST

For most, the police is the first point of contact with the criminal justice system. The Code of Criminal Procedure, 1898(CrPC) provides the police with a broad range of powers. CrPC Sections 54, 55 and 167 give the police the power to arrest and detain any person who may have been involved in any cognisable offence without a warrant. CrPC Section 47 and 49 give the police the power to enter and search land and buildings and CrPC Section 51 gives the police the power to search persons.

However, these powers are curbed by key constitutional guarantees as well as procedural provisions, which ensure that

due process is followed. These limits grant certain protections to offenders, including specific ones aimed at those with mental illness. As a lawyer, specifically a criminal defense lawyer, it is vital that you are aware of these safeguards so that you can ensure your client is treated in accordance with the law.

PROTECTIONS FOR ARRESTED PERSONS

RIGHT TO KNOW REASON FOR ARREST

According to Article 10 of the Constitution, even if your client has been arrested in a cognizable offence without

ARTICLE 10, CONSTITUTION OF PAKISTAN 1973

Safeguards as to arrest and detention

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention.

a warrant they still have to be informed of the grounds of their arrest. A police officer is required to do this at the time of arrest as soon as possible.

RIGHT TO CONSULT/BE DEFENDED BY A LEGAL PRACTITIONER OF THEIR CHOICE

Article 10 of the Constitution gives all offenders the right to consult a lawyer, at the time of being taken into custody, and choose an advocate to defend their case.

This constitutionally guaranteed right, and a vital element of a fair trial and due process, is crucial if the accused is suffering from mental illness. A competent lawyer and one who is sensitized to mental illness, would be able to better assess the accused and get them diagnosed by a mental health professional from the outset.

Additionally, allowing detainees access to their lawyer's, lets the lawyer collect evidence regarding the mental state of the accused at the time of arrest, and ensure it is part of the police report.

RIGHT TO BE PRODUCED BEFORE A MAGISTRATE WITHIN 24 HOURS OF THE ARREST

According to CrPC Section 61, if your client has been arrested by the police without a warrant, they cannot be held in police custody for longer than 24 hours without being produced before a magistrate. This right is also conferred by Article 10 of the Constitution.

In our criminal justice system only a magistrate/judge has the power to rule

on a person's competence. If your client is mentally ill, this appearance before a magistrate is your first opportunity to raise the issue of your client's fitness to stand trial. According to Section 464 of the CrPC, if the magistrate has reason to believe that the accused is of unsound mind and incapable of making their defence, the magistrate is legally obligated to inquire into this fact.

FREEDOM FROM DETENTION AFTER 24 HOURS

The police must complete their initial investigation within 24 hours. After 24 hours they must either release the detained person or charge them with a crime.

If the police are unable to complete their investigation within 24 hours, CrPC Section 167 allows them to detain any arrested person for a maximum of 15 days. However, this can only be done when the detained person, along with the police officer's diary entries, are produced before a magistrate. This is a mandatory requirement of the law.

The purpose of the detained person appearing before the magistrate to obtain remand, is to allow the detainee or their lawyer an opportunity to notify the magistrate if any illegal action has been taken by police for the purpose of extorting a confession. Lawyers should also take this opportunity to again raise the issue of their client's fitness to stand trial.

RIGHT TO BE SILENT

Article 13 of the Constitution, right against self-incrimination, states that “no person can be compelled to be a witness against himself.” In keeping with this, the accused has a right to remain silent during interrogation. Police officers cannot force an arrested person to give statements or answer any questions.

RIGHT TO BE RELEASED ON BAIL

Section 496-497 CrPC require that whenever a police officer arrests a person without a warrant for a non-bailable crime, they have the right to be released on bail. However, bail is not granted if there is reason to believe that the arrested person is guilty of an offence punishable with death or with imprisonment for ten years or greater.

If your client is suffering from mental illness and has been accused of offences punishable by death or 10 years or greater imprisonment, they should still be granted bail. Section 497 CrPC provides, “that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.”

NO UNNECESSARY RESTRAINT

According to Section 50 CrPC, “The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.” This protection is vital, in particular if your client is suffering from mental illness, as unnecessary restraints or force can worsen their condition.

RIGHT TO BE TRANSFERRED TO A MENTAL HEALTH FACILITY AND BE EXAMINED BY A MEDICAL PRACTITIONER

If your client is suffering from mental illness at the time of arrest, you can ask the police to use their powers under the provincial Mental Health Acts to transfer your client to a mental health facility instead of police custody. The Mental Health Acts (passed by Sindh in 2013, Punjab in 2014, Khyber Pakhtunkhwa in 2017, and Baluchistan in 2019) allows the police to transfer an arrested person 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 require 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.
- The **application for admission of treatment** can be made by two medical practitioners, subject to the detainee falling under the above-mentioned criteria. The maximum period for detention is six months.

In short, a person's first point of contact with the criminal justice system is the police, at the time of their arrest. Even at this pre-trial stage there are various protections and rights granted to all, and some additional ones to those suffering from mental illness. Timely intervention at this stage can divert cases to mental health facilities and, if the case goes to trial, help in collecting proper evidence regarding competence to stand trial.

MENTAL HEALTH ACT(S)

The provincial Mental Health Acts allow an officer, who has reason to believe a person in a public place is suffering from a mental disorder that requires immediate care or control, to remove that person to a place of safety for their own protection or for the protection of other persons. This detainment must not exceed 72 hours. Further, it is only for the purposes of enabling the patient to be examined by a psychiatrist or a nominated medical officer, and for 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. The provincial Mental Health Acts also prescribe the method for an emergency hold in cases where the patient wishes to leave but the psychiatrist in charge believes that they are still suffering from mental disorder to such a degree that it is necessary for their safety and the safety of others, that they be kept in detention.

REVIEW

Rights and protections at the time of arrest:

- Right to know reason for arrest
- Right to consult/be defended by a lawyer of their choosing
- Right to be produced before a magistrate within 24 hours
- Freedom from detention after 24 hours, if they have not been charged with a crime
- Right to remain silent
- Right to be released on bail
- Should not be put in unnecessary restraints
- Right to be transferred to a mental health facility



PROCEDURAL & LEGAL SAFEGUARDS

INTRODUCTION

Once the offender has been charged, the next step is the trial. Recognizing the vulnerability of those suffering from mental illness, during the trial there are specific legal pathways open to them and they are accorded special procedural protections.

Since mental illness may diminish a person's legal culpability for a crime, PPC Section 84 allows a mentally ill defendant to use the insanity defence. If your client has a mental illness, it is your ethical and professional obligation to suggest the insanity defence allowed by PPC Section 84. This is particularly true in criminal cases, where there is a possibility of receiving the death penalty.

There are also procedural precautions that protect the rights of due process and a fair trial, of a defendant suffering from mental illness. Chapter 34 CrPC provides procedural safety measures, by mandating specific steps the court must take if the accused is suffering from mental illness.

This module examines the provisions stipulated in the CrPC and PPC in detail.

LEARNING OBJECTIVES

- PPC section 84: Insanity defence
- CrPC 464-465: Procedural Safeguards

PPC SECTION 84: INSANITY DEFENCE

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

The insanity defence is found in Section 84 of the Pakistan Penal Code (PPC) which states: “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.”

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

These are:

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

An individual who knows the nature of his act but, because of a mental disorder, fails to understand that the act itself is wrong, is relieved from criminal responsibility.

R v Porter, 1933

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

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

If your client does take the insanity defence the burden of proof is on you, as the defence attorney, to prove on the balance of probabilities that the defendant is of unsound mind.

PROCEDURAL SAFEGUARDS: HOW THE TRIAL SHOULD BE CONDUCTED

If the issue of your client's mental illness has not been raised at the time of the arrest or while they were in police custody, as a diligent lawyer you should bring it to the Court's notice. While it is best to do so as soon as possible, at the start of the trial, you can raise the issue of competence at any point during the trial. You can do this by submitting relevant medical records, and by asking the presiding judge/magistrate to adjourn the trial and determine the accused's fitness to stand trial.

As part of this process, the Court first forms a prima facie tentative opinion on the accused's state of mind and fitness to stand trial. If the Courts tentative opinion

is that the accused is not fit, the Court is bound to order an in-depth examination by a medical board, receive the medical board's report and summon the medical board to court to provide expert testimony. Based on all of this the Court makes its final decision regarding the accused's fitness to stand trial.

If the Court's final decision is that the offender is capable of standing trial, the case proceeds according to standard rules and regulations. If the Court decides that the accused is not fit to stand trial, the Court has discretionary powers to either grant bail in accordance with CrPC Section 466(1), or to commit the defendant to safe custody.

The following sections examines in detail the Court's inquiry into the accused's fitness to plead, including the requirement of a medical board.

INQUIRY INTO FITNESS TO PLEAD

According to CrPC Chapter 34 Sections 464-465, if the Court has "reason to believe" that a defendant is suffering from mental illness, or if the defendant "appears to be of unsound mind" the Court is obligated to adjourn the trial and conduct an inquiry to determine a defendant's fitness to plead.

If a defense lawyer believes or suspects that their client may be suffering from a mental illness, it is their ethical obligation to raise the issue before the Court. Once the judge/magistrate has been made aware of this, they are legally bound to

adjourn the trial and conduct an inquiry into the accused's state of mind and fitness to stand trial. Even if the defence has not raised the issue, CrPC section 464 requires a judge/magistrate to adjourn the trial and conduct an inquiry into the defendant's fitness to plead if they themselves have observed the defendant to be of "unsound mind" and incapable of making their defence.

However, a diligent defence attorney should not rely on the judge to take note but should raise the issue themselves. 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 unjustly

sentenced to death because he was assigned counsel minutes before the cross examination. Since his counsel was not aware of his family history of mental illness, he did not move to have Muneer examined by a medical board.

PRIMA FACIE OPINION

As part of the inquiry, the Court should first form an initial tentative opinion on the accused's competence. In doing so, judges/magistrates rely on their own observations and an objective review of relevant documents that have been submitted.

This is an opportunity for defense lawyers to persuade the presiding judge/magistrate that their client is not fit to stand trial. Relevant documents defense lawyers should submit can

MANDATORY PROCEDURES

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

include the police file and the case file, any psychiatric assessment that has been conducted previously, the defendant's social history, mental health records, testimonies from family and community members, and any records of the defendant's family history that can shed light on the defendant's genetic predispositions.

If the Court's prima facie opinion is that the accused is fit to stand trial, the case can resume and the trial can continue as per normal rules and regulations.

However, if the Court's prima facie opinion is that the accused is not fit to stand trial, it then becomes incumbent upon the court to conduct a more thorough and formal investigation into the accused competence

MEDICAL BOARD

As part of this formal investigation, the Court must set up a medical board to examine the accused.

Medical board's report

Once the medical board has examined the accused, they have to submit a detailed report to the Court. According to

the Supreme Court, the report submitted by the medical board should not be a mere diagnosis of the accused's mental illness. Instead, the report should examine the accused's mental illness in relation to specific mental functions.

These mental functions are:

- Consciousness
- Intellect
- Thinking
- Mood
- Emotions
- Perceptions
- Cognition
- Judgment
- Insight

A disorder of any of these functions causes an inability to separate right from wrong as seen in the eyes of the law. A defendant is required to have all these mental abilities and an absence of any one will result in the accused not being fit to stand trial.

Medical board's testimony

Once the medical board has submitted its report, the Court should summon the lead psychologist/psychiatrist to provide oral evidence as a Court witness.

IMPORTANCE OF MEDICAL BOARD'S TESTIMONY

A trial court order was set aside by the High Court and declared contrary to the doctor's certificate, because the trial court had not examined the doctor. It was held that the order was contrary to Section 464-466 CrPC, and should be set aside on the ground that the doctor must be examined and cross examined before the Court. [PLD 1985 Kar 549. See also 1996 PCrLJ 1366 (DB 23 1997 SCMR 239) .

SUPREME COURT JUDGEMENT

If it is established that the accused does suffer from a mental illness, given the cyclical nature of mental illness (and depending on the severity of accused's illness as well as their medical history) there is a possibility that the accused was also suffering from the mental illness at the time of the offence. Since it is nearly impossible to demonstrate beyond a reasonable doubt that the accused committed the offence while lucid, it is unlawful under domestic law, Islamic law and international law to award the death penalty to a person suffering from mental illness, as defined by the Mental Health Ordinance and Acts.

The prosecution and defence should be given an opportunity to examine and cross-examine the medical expert. The prosecution may also be allowed to produce evidence which it deems relevant to the defendant's mental health.

Defence lawyers should be vigilant that this vital step of questioning the medical board in person is not skipped by the Court, as it can be detrimental to their client.

IF A DEFENDANT IS FOUND INCAPABLE TO STAND TRIAL?

If the inquiry reveals that the defendant is of unsound mind and is incapable of making his defence, a diligent defence lawyer should ask the Court to adjourn the trial and ensure that the defendant

gets the required medical treatment. In accordance with CrPC Section 466(1), the Court can release the defendant if they receive sufficient security that the person with mental illness:

- will be properly taken care of,
- prevented from injuring themselves or other people, and
- will appear before the Court when required.

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 Court to be detained in safe custody as it sees fit. The Court must report this action to the Provincial Government. At this time the Court's powers, under CrPC Section 265(K), may also be petitioned to obtain an early acquittal.

To conclude, recognizing the vulnerability of offenders with mental illness, there are safeguards in place that ensure that their rights of due process and a fair trial are protected. This includes PPC Section 84, which allows offenders with mental illness to take the insanity defence; and CrPC Sections 464-465, which stipulate mandatory procedures to be followed if the Court has reason to believe the accused is suffering from mental illness. As a defence lawyer, you should be vigilant that due process is followed and your clients avail the full protections granted to them under the law.

REVIEW

INSANITY DEFENCE

If a person has a mental illness when committing an offence, they may not have the requisite *mens rea* and may be acquitted on the basis of the insanity defence. Three of the four conditions of section 84 PPC must be satisfied for the insanity defence to be applicable. These are:

- Commission of an offence
- Unsoundness of mind
- Accused is incapable of understanding the nature of the offence
- Accused doesn't understand the difference between right and wrong

PROCEDURAL SAFEGUARDS

There are also procedural precautions that protect the rights of due process and a fair trial, of a defendant suffering from mental illness. CrPC Chapter 34 provides procedural safety measures, by mandating specific steps the Court must take if the accused is suffering from mental illness.

These mandatory procedures require the Court to:

- Form a prima facie opinion on the accused's fitness to stand trial
- Order a medical board to examine the accused and submit its report
- Call the medical board to Court and question the board in person

If the accused is found incapable to stand trial, Court must adjourn trial under sections 464-465 CrPC and grant bail in accordance with section 466(1), or to commit the defendant to safe custody.

APPEALS, MERCY PETITIONS & PRISON RULES



INTRODUCTION

If the accused has been tried and convicted, there are still options available a diligent defence lawyer should pursue. These include appealing the case and submitting Mercy Petitions (if the accused is convicted of murder).

Additionally, if your client has a mental illness and is in prison, there are specific regulations that govern how they are to be treated, where they are to be kept, how they are to be transferred etc. These are meant for the protection of your client and as a diligent lawyer not only must you follow the required procedures, you should ensure prison guards, superintendents, medical officers etc., are also following the stipulated rules and procedures.

LEARNING OBJECTIVES

- Appeals
- Mercy Petitions
- Conditions while imprisoned

APPEALS

If your client has been tried and convicted by a trial court, they have a right to appeal and have a higher court re-examine their case. In all cases, an appeal has to be filed by the aggrieved party in front of the appellate court.

However, in cases where a defendant has been sentenced to death by a lower court, an instant appeal is automatically filed with the High Court of the province. The High Court re-evaluates the evidence collected in the subordinate court and confirms or overrules the sentence.

If your client's mental illness was not taken into account by the lower court, or the mandatory procedures stipulated in CrPC Section 464-465 were not followed, you should raise the issue of competence in front of the High Court as soon as possible.

If the High Court confirms the death penalty, you can appeal to the Supreme Court of Pakistan. The right to appeal to the Supreme Court has been granted to all by the Constitution, Article 185. All appeals to the Supreme Court have to be made within 30 days of the High Court order. Once an appeal has been submitted, the execution of a condemned prisoner is postponed. If the Supreme Court also confirms the death penalty, you can submit a Mercy Petition to the President of Pakistan.

MERCY PETITIONS

If your client's appeal has been rejected by the Supreme Court, they still have the option of filing a Mercy Petition seeking a presidential pardon. Article 45 of the Constitution of Pakistan grants the President of Pakistan the authority to pardon death row defendants by accepting Mercy Petitions.

HOW MANY TIMES CAN A MERCY PETITION BE SUBMITTED?

Generally, a Mercy Petition can only be submitted once. However, there are two instances when a Mercy Petition can be submitted re-submitted:

- (i) where the petitioner has not received notice of the outcome, or
- (ii) where there are fresh grounds to submit a Mercy Petition.

The second exception allows a prisoner who may have developed a mental illness after the sentence, while in prison, to submit a fresh Mercy Petition based on his changed circumstance.

Apart from the President's office, the other government departments/ministries involved in the Mercy Petition process are: the Prison Departments, Provincial Home Departments, Ministry of Interior, Ministry of Human Rights and Ministry of Law and Justice.

PRISONS DEPARTMENT

A Mercy Petition should be submitted in writing with the relevant Prison Superintendent. The Superintendent should forward it to the Provincial Home Department within 5 days of the dismissal of your client's final appeal. The Mercy Petition can be submitted by the prisoner themselves, one of their relatives or a representative/lawyer appointed by the prisoner.

The Superintendent must dispatch the Mercy Petition to the Provincial Home Department with a covering letter, stating the date fixed for execution and certifying that execution is pending till the orders of the Provincial Home Department.

The following documents should be attached to the Mercy Petition:

- Summary of the case
- Details of all cases/applications filed before the civil/military courts/other forums
- Latest medical examination report of the prisoner by a medical board
- 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.

A case file is to be maintained by the Superintendents in all prisons, for each prisoner in their custody who has submitted a Mercy Petition. A separate register of condemned prisoners who are eligible to submit Mercy Petitions is also to be maintained, which should contain all relevant records and reasons for delay.

PPR RULE 104(IX)

PPR Rule 104(ix) allows the Prison Superintendent to stay an execution under "exceptional circumstances" and seek instructions from the government. If a criminal defense lawyer feels that their client developed mental illness after the trial while in prison, they should ask the Prison Superintendent to stay the execution as developing a mental illness can be an exceptional circumstance.

If the Mercy Petition is rejected, the Superintendent must recheck the complete case including the medical condition of the prisoner and send the case for issuance of a black warrant within 5 working days. If the condemned prisoner's medical condition has changed, the execution is to be postponed and a new Mercy Petition should be submitted.

PROVINCIAL HOME DEPARTMENT

Once the Provincial Home Department has received the Mercy Petition from the Superintendent, they must send it to the Ministry of Interior in 5 working days. The Provincial Home Department is meant to appoint a dedicated focal person for handling and processing Mercy Petitions till their final conclusion.

In case the Mercy Petition is rejected, the Provincial Home Department must notify the relevant prison authorities in 3 working days after receiving notification from the Ministry of Interior.

MINISTRY OF INTERIOR

The Ministry of Interior, on receiving the Mercy Petition from the Provincial Home Department, prepares a summary of the case and recommendations within 3 working days for the Prime Minister's Office.

Within 3 days of receiving the President's decision through the Prime Minister's office, The Ministry of Interior issues an express letter to the concerned Provincial Home Department.

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.

MINISTRY OF HUMAN RIGHTS & MINISTRY OF LAW AND JUSTICE

Mercy Petitions of prisoners condemned by civil courts are routed through the Ministry of Human Rights to the Prime Minister's office. The Ministry of Human Rights has 3 days to add its comments to the file and send it forward.

Mercy Petition of prisoners condemned by military courts under the Pakistan Army Act 1952, shall be sent to the Prime Minister via the Ministry of Law and Justice. The Ministry of Law and Justice has 3 days to add its comments to the file and send it forward.

CONDITIONS WHILE IMPRISONED

Given that prisoners suffering from mental illness are more likely to be bullied and victimized by other inmates and may be a danger to themselves and others, there are certain regulations put in place for their protection. If your client is suffering from mental illness and is in prison, as a vigilant lawyer it is incumbent upon you to ensure procedures are being followed and your client is granted their rights.

There are two sets of domestic laws that deal with prisoners who have mental illness: Mental Health Ordinance, 2001 and Pakistan Prison Rules. In addition, a recent Supreme Court judgment issued on 10th February, 2021, will also guide the treatment of mentally ill prisoners going forward.

MENTAL HEALTH ORDINANCE, 2001

Sections 54 and 55 of the Punjab Mental Health Ordinance, 2001, also deal specifically with prisoners who have mental illness. Section 54 requires the Inspector General of Prisons, or any person he empowers, to visit the prisoner once at least every six months to ascertain the prisoner's state of mind. Section 55 of the Ordinance require special security forensic psychiatric facilities to be developed by the Government to house prisoners and offenders with mental illness. This section also requires admission, transfer or removal of prisoners in such facilities to be under the administrative control of the Inspector General of Prisons.

LANDMARK SUPREME COURT JUDGMENT

In a landmark judgment of Supreme Court in the case of Mst. Safia Bano vs Home Department, Government of Punjab, issued on 10th February 2021, the Supreme Court of Pakistan ruled that enforcing the death penalty for prisoners living with a serious mental illness "will

not meet the ends of justice." The judgment reads "... 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."

Not all mentally ill prisoners will be considered exempt from the application of the death penalty. This exemption will be applicable in cases where a Medical Board believes 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." Of equal importance, this judgment is also a milestone since it 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 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 assessments.

IMPORTANT TO REMEMBER...

If your client is suffering from mental illness and is awaiting the outcome of an appeal or a Mercy Petition, it is important to remember that uncertainty and fear of the unknown can further worsen their condition. It is therefore vital that throughout the process of appealing or submitting a Mercy Petition, lawyers keep their client updated and informed about key dates and decisions.

DOMESTIC LAW
PRISON RULES 1978 (PAKISTAN)
CHAPTER XVIII
MENTAL PATIENT- GENERAL

RULE 433: DEFINITION OF A MENTAL PATIENT

A mental patient is defined as an idiot or person of unsound mind



**RULE 435:
SEPARATION OF
MENTAL PATIENTS**

If a person is found, or supposed to be, a mental patient (whether detained or confined in prison), they shall be kept separate from other prisoners

**RULE 436: MENTAL
PATIENTS TO BE
CONSIDERED
DANGEROUS UNTIL
CERTIFIED HARMLESS**

A mental patient is considered dangerous until the Medical Officer has certified that they are harmless.

The Superintendent and Medical Officer shall from time to time give:

- Directions for the proper guarding of the mental patient; AND
- Warn prison officers of any symptoms which may necessitate greater watchfulness

**RULE 434: CLASSES
OF MENTAL PATIENTS**

Mental patients detained in prison are classified as either:

1. Non-criminal – those who have committed no crime, but are sent for medical observation under the provisions of the Lunacy Act
2. Criminal – those who are accused of having committed a crime, or have been found to have committed a crime.

PRISON RULES 1978 (PAKISTAN)
CHAPTER XVIII
MENTAL PATIENT NON-CRIMINAL

RULE 434: DEFINITION OF A MENTAL PATIENT

Non-Criminal mental those who have not committed a crime, but are sent to prison for medical observation under the provisions of the Lunacy Act.

RULE 448: PROCEDURE WHEN A SENTENCE IS ABOUT TO EXPIRE

When an insane prisoner cannot be transferred to a mental hospital before their sentence expires, the prisoner shall be detained in prison.

On the expiry of their sentence, they shall be treated as a non-criminal mental patient.

RULE 437: NON-CRIMINAL MENTAL PATIENT

These patients shall be detained in a mental hospital.

If there is no mental hospital, they shall be detained in a civil hospital or dispensary – wherein the District Officer deems it suitable accommodation for the custody of a mental patient.

In other cases, these patients shall be a district prison.

RULE 438: DETENTION OF NON-CRIMINAL PATIENTS; PROCEDURE WHEN PERIOD EXPIRES

The maximum period a non-criminal mental patient can be detained for observation is 30 days.

If the maximum period lapses, the Superintendent shall address:

- the Coordination Officer; OR
- the officer under whose warrant the the non-criminal mental patient is detained

pointing out that the authorised period has lapsed.

Furthermore, the Superintendent shall request:

- an order for the release of the non-criminal patient; OR
- the transfer of the patient to a mental hospital

If the Superintendent has not received the court's order, they shall report the matter to the Inspector General

REVIEW

APPEALS

- All appeals have to be filed with an appellate court.
- Where a defendant has been sentenced to death by a lower court, an instant appeal is automatically filed with the High Court of the province.
- The decision of the High Court can be contested by filing an appeal with the Supreme Court.
- All appeals with the Supreme Court have to be filed within 30 days.

MERCY PETITIONS

- If your client's appeal has been rejected by the Supreme Court, they still have the option of filing a Mercy Petition seeking a presidential pardon.
- All Mercy Petitions have to be filed within 5 days of the Supreme Court's judgment.
- Apart from the President's office, other government officials/departments/ministries involved in the Mercy Petition process are:
 - Jail Superintendents,
 - Provincial Home Departments,
 - Ministry of Interior,
 - Ministry of Human Rights and Ministry of Law and Justice.

- Documents to be submitted with the Mercy Petition include:
 - Summary of the case.
 - Details of all cases/applications filed before the civil/military courts/other forums.
 - Latest medical examination report of the prisoner by a medical board.
 - 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.
- The decision of the President is final.

CONDITIONS WHILE IN PRISON

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

INTRODUCTION

Pakistan is a signatory to numerous international treaties which require additional legal protections for vulnerable criminal defendants such as those suffering from mental illness. Some of those protections include the right to be treated humanely, not be executed and the right to seek clemency. These are granted by the International Covenant on Civil and Political Rights (“ICCPR”); the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”); the International Covenant on Economic, Social and Cultural Rights (“ICESCR”); and Convention on the Rights of Persons with Disabilities (“CRPD”).

Unfortunately, the obligations associated with these treaties are not properly understood and implemented within Pakistan. This module will therefore briefly outline Pakistan’s obligations under these treaties as well as the rights granted to mentally ill persons, under relevant international laws, to help stakeholders better understand and meet their duties towards mentally ill prisoners.

Additionally, in keeping with domestic and international laws, Islamic jurisprudence too gives protections to offenders with mental illness. Under Islamic law, offenders suffering from mental illness are recognized to be lacking *mens rea* or intent and therefore cannot be held culpable. Islamic law requirements are also examined in this module.

LEARNING OBJECTIVES

- Rights of mentally ill offenders under international law
- Rights of mentally ill offenders under Islamic law

INTERNATIONAL LAW

Pakistan is a signatory to numerous international treaties which require member states to provide legal protection for vulnerable criminal defendants such as mentally ill prisoners.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The ICCPR contains civil and political rights protecting individuals from government actions that infringe upon their liberty, privacy, and freedom of expression and association. The ICCPR, which Pakistan ratified in 2010, urges states that have not yet abolished the

death penalty to not impose it “on a person suffering from any mental or intellectual disabilities or to execute any such person.”

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.

The ICCPR also requires that “the reform and social readaptation of prisoners” is an “essential aim” of imprisonment. The UN Human Rights Committee stated that “in

ICCPR

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. 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.”

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.

cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.”

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. 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.”

UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

Pakistan signed the UNCAT in 2008. This convention imposes an obligation on State Parties to prevent any acts of torture (Article 4 & 16) within their territory and also grants several protections, including the right of a victim of torture to file a complaint.

Further, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has described the imposition and

UNCAT

Article 1

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

enforcement of the death penalty in the case of persons with mental disabilities as particularly cruel, inhuman and degrading and in violation of Articles 4 and 16 of the UNCAT. Likewise, the Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that “it is a violation of death penalty safeguards to impose capital punishment on individuals suffering from psychosocial disabilities.”

MANDELA RULES

UN Standard Minimum Rules for the Treatment of Prisoners (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.

The following Mandela Rules are relevant to the treatment of mentally ill prisoners:

- **Rule 1:** Prisoners with mental ill-health must be treated with humanity and respect for their inherent dignity.
- **Rule 2:** All prisoners must be protected from discrimination, including on the grounds of their mental health status.
- **Rule 24:** Mental healthcare and support must be provided at the same level of care as in the community.
- **Rule 25:** Prisons should retain a sufficient number of specialists on their staff, including psychiatrists and psychologists.

- **Rule 33:** States have an obligation to provide adequate treatment and care for the mental health of all prisoners, and to mitigate the effects of imprisonment on mental well-being.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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.” This Convention is binding on member states, including Pakistan.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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.” The right to health puts two distinct obligations on government. The first to provide services necessary to maximise health. The second to protect against and prevent unhealthy or dangerous conditions.

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.

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.

ICESCR

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

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." However, legislatures and Islamic scholars struggle to precisely define what constitutes insanity.

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.

Secondly, three characteristics define competence:

- (i) the ability to reason ('agil');
- (ii) the ability to be fully responsible ('mukallaf');
- (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.

Thirdly, sufficiently severe intellectual disability in Islamic law is considered equivalent to insanity. 'Severe' intellectual disability was clarified to include disabilities that impairs 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.

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."

REVIEW

INTERNATIONAL LAW, BASIC PRINCIPLES

- All prisoners have a human right to the highest attainable standard of physical and mental health. **(ICESCR, Article 12);**
- States have an obligation to provide adequate treatment and care for the mental health of all prisoners, and to mitigate the effects of imprisonment on mental well-being. **(Mandela Rules 24, 25 and 33);**
- Mental healthcare and support must be provided at the same level of care as in the community. **(Mandela Rule 24);**
- Prisons should retain a sufficient number of specialists on their staff, including psychiatrists and psychologists. **(Mandela Rule 25);**
- Prisoners with mental ill-health must be treated with humanity and respect for their inherent dignity. **(Mandela Rule 1);**
- All prisoners have the right to protection from exploitation and abuse, including torture and ill-treatment. **(CRPD, Article 16; Convention against Torture, Article 2; Mandela Rule 1);**
- Prisoners with mental health conditions have the right to equal recognition before the law. **(CRPD, Article 12);**
- All prisoners must be protected from discrimination, including on the grounds of their mental health status. **(Mandela Rule 2).**

ISLAMIC LAW

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

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



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