

Supreme Court of Pakistan finds carrying out the death penalty on the mentally ill to be unlawful

By Andrada Kacso and Madhuri Pillai

Bano and others v Home Department of Punjab and others

The death penalty is a form of punishment that has been condemned internationally. Many see it as an abuse of human rights with activists waging a decades long war against governments to see it eradicated from society. Many executions have involved prisoners with severe mental health conditions. Criminal justice systems around the world have stigmatised individuals suffering from mental illnesses, with few safeguards being put in place resulting in severe procedural deficiencies.

The Supreme Court of Pakistan recently ruled in a landmark case that the execution of severely mentally disabled prisoners is unlawful.¹ This decision was celebrated by human rights groups around the world, most notably the United Nations, with many awaiting to see this principle applied in future practice in Pakistan and elsewhere.

A five member bench of the Supreme Court of Pakistan, in its review jurisdiction on 7 January 2021, handed down an important decision clearly ruling that, in Pakistan, it was unlawful and inhumane to execute a person who suffered from profound mental illness.

The Supreme Court of Pakistan heard the case of three separate mentally ill petitioners who had been on death row for decades, with their appeals being dismissed on numerous occasions. Attempts to challenge this procedure in the courts had been unsuccessful until this recent decision was handed down. The Pakistan courts did not recognise mental illness as a vital factor in the behaviour of the petitioners. This has led them to a recurrence of refused petitions.

The petitioners were Imdad Ali, Mst. Kaneezan Bibi and Ghulam Abbas.

Imdad Ali was convicted of the murder of Hafiz Muhammad Abdullah on the 21st of January 2001 by shooting him with a .222 rifle. On the 27th and 28th of July 1989, Mst. Kaneezan Bibi was convicted of the murder of Mst. Maryan Bibi Aslam and five others. Ghulam Abbas was convicted for the murder of Wajid Ali and the murderous assault on Mst. Saima Bibi on the 31st of April 2006. It should be noted that, in Australia, murderous assault is equivalent to grievous bodily harm causing death.

Imdad Ali's wife submitted multiple applications for review which were all denied. Her continued fight to free Ali from the derogatory and inhumane treatment of Pakistan's prison system had, for a long time, appeared to be futile. Ali had been on death row for nearly two decades and in solitary confinement for four years when the Supreme Court of Pakistan finally heard his case. Due to the prolonged wait, Ali's mental health condition had significantly deteriorated. The representation for Ali was unstable throughout his initial hearing. Ali was unrepresented until the State appointed an Advocate for him but, later, the Advocate showed his unwillingness to represent Ali. The Court then hastily appointed another State Advocate to

¹ *Bano and others v Home Department of Punjab and others*

<https://www.supremecourt.gov.pk/downloads_judgements/c.r.p._420_2016.pdf>

his case. This combination of unsatisfactory representation may have affected Ali's chance of being afforded a fair hearing.

The learned Additional Sessions Judge Burewela who initially heard Ali's case came to the conclusion that "there is no reason to believe that Imdad Ali is of unsound mind" [4]. Evidence in Ali's trial supported the notion of him being moved to a mental institution instead of being sentenced to death. The trial judge's finding was appealed to the Learned Lahore High Court but, ultimately, this was dismissed as well. Despite the overwhelming evidence that supported the existence of Ali's mental illness, the court decided to factor in their own character judgements to determine the outcome of his case.

Ali's case was heard before the Supreme Court of Pakistan, creating a precedent for upcoming petitioners with mental illnesses.

The second petitioner, Bibi, was arrested at the age of 16. She was subjected to torturous methods by the Pakistan criminal justice system which saw her mute for nine years due to the trauma that had been inflicted on her. Bibi submitted multiple appeals to the Learned Lahore Court and the Supreme Court of Pakistan to have her case reheard but they were all dismissed. She was diagnosed with schizophrenia by the Punjab Institute of Mental Health. Like Ali, there was overwhelming evidence to suggest that Bibi had a mentally impaired mind but higher courts in Pakistan were unwilling to re-examine her case. She had been on death row for three decades.

The third petitioner, Abbas, had his appeals to higher courts also dismissed and his execution was only stayed by the Honourable Chief Justice of Pakistan. This was due to Abbas' mother petitioning that Abbas had severe learning disabilities. She stated that he suffered from reoccurring seizures and fits that saw him being prescribed antipsychotic medication. However, evidence of these matters had not been presented in Abbas' original trial resulting in his being on death row for nearly two decades.

At paragraph 15, the court stated that an individual with a mental illness is not capable of understanding the nature of their offence and its consequences as it affects the community. The High Court of Pakistan stated that "*Due to their serious mental illness, [the prisoners] are unable to understand and follow the mandatory procedures required to be followed before their execution*". When one suffers from a mental illness, a person is unable to comprehend the rationale of their execution such that administering the punishment is unjust. This case depicts that, when one lacks that capacity to understand, their execution is purposeless. The information in the *Prison Rules 1978* as a whole creates a conclusion that an accused cannot be executed if they do not understand their crime.

At paragraphs 20 and 21 of the judgement, Dr. Mowdat Hussain Rana testified before the Supreme Court of Pakistan that, without expert advice from professionals in the mental health field, it cannot be ascertained if an accused has a mental condition. The result of the condition is that the prisoner cannot adequately defend themselves or understand the retributive aspect of their sentence. This is problematic as an accused will not feel guilt or remorse for their actions, the main aim of retributive justice, and will not understand that what they did was wrong. The community will get no justice from an unrepentant convict and this creates further injustice in Pakistan's society.

In 2019, the Medical Board declared Ali insane and highlighted the possibility that, at the time he committed murder, he was mentally incapacitated.² Having been affected by insanity, it would be beyond the mentality of Ali to understand the moral consequence of his action. Bibi and Abbas, years prior, had provided evidence of their being mentally ill but they were still held on death row and refused permission to bring appeals to present this evidence before a court.

There is a profound need to convert a death penalty into imprisonment for life for the mentally ill. A defendant suffering from mental illness is incapable of making their own defence and instructing their counsel. In this effect, a mentally ill accused cannot be treated like regular individuals. Dr. Rana stated that “*A mentally ill individual with impairment of judgement and insight cannot be treated at par with a normal criminal*” [19]. This is important in analysing the principles and facts of this case, as none of the lower courts factored in evidence of mental illness in the initial trials or refused to hear appeals of petitioners’ cases on grounds of insanity. They were treated as though they were of sound mind. Hence the need for other foreign jurisdictions to factor in this principle when hearing cases involving an accused with mental health illnesses.

The Court, notably and extensively, looked to other jurisdictions who incorporated the death penalty in their criminal sentencing. The definition of “mental disorder” by the United Kingdom was examined by the Court to mean “*any disorder or disability of the mind*”. The Court then looked to India’s *Mental Healthcare Act 2017* for a definition. The laws in India were appreciative of the everchanging research and knowledge of mental disorders and left a window open for a judge to factor this in. Both of these definitions were broad and appreciative of the vastness of the effect a mental disorder can have on a person’s personality and psychological characteristics. Pakistan’s previous laws are notably absent of an analogous definition and of tolerance for mental health in its criminal justice system.

United States’ jurisprudence was also considered. The Eighth Amendment of the United States Constitution does not allow a death sentence to be imposed upon someone who is mentally ill. This is due to the individual not being able to understand their actions such that the penalty had no retributive value. In the case of *Panetti v Quarterman*,³ a standard of competency test was established to help the courts decide whether an accused was mentally fit to be executed.

It is important to note that all of the countries mentioned had incorporated values and principles outlined in international treaties, United Nations resolutions against the death sentence and determinations by the World Health Organisation (WHO), in deciding on the content of the term “mental illness” and how it might be applied in the context of the death penalty. Pakistan has now set an example for avoidance of usage of the death penalty in cases where the accused has mental illnesses. Hopefully, other jurisdictions which are still retentionist of capital punishment will, at least, implement the legal rules and procedures developed by the Pakistan Supreme Court to ensure that mental health issues are properly considered in all capital cases.

The Court concluded that a declaration of insanity results in life imprisonment instead of the death penalty. It was ordered for Abbas to be transferred to the Punjab Institute of Mental Health in line with his imprisonment terms and Ali and Bibi’s sentence be converted to life imprisonment.

² Ibid 79.

³ *Pannetti v Quarterman*, 551 U.S 930 (2007).

The Supreme Court of Pakistan ordered a complete reform of mental treatment in the Pakistan prisons. The Court issued orders to provincial governments put in place amendments to reflect the decision in the case. Moreover, the Court ordered that the prison rules should also be amended at federal government level to establish a high security forensic mental health facility for the training of mental health clinicians to treat and diagnose prisoners with mental health conditions. Training was also ordered for court staff in handling a mentally ill accused. It was ordered that the Government notify psychiatrists and two psychologists from the Medical Board to evaluate mentally ill prisoners on death row. As a consequence of these directions, the procedure of the law in Pakistan will be beneficially impacted and will set an example for other jurisdictions to follow to meet the ends of justice.

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Additional Resources:

Rida Tahir, 'Supreme Court of Pakistan prohibits execution of condemned prisoners with mental illnesses: A promising start towards reforming Pakistan's death penalty problem?', *Oxford Human Rights Hub Blog* (online, 15 March 2021)

<<https://ohrh.law.ox.ac.uk/supreme-court-of-pakistan-prohibits-execution-of-condemned-prisoners-with-mental-illnesses-a-promising-start-towards-reforming-pakistans-death-penalty-problem/>>

Foundation for Fundamental Rights and Reprieve, *The Pakistan Capital Punishment: A Study of the Capital Jurisprudence of the Supreme Court of Pakistan Study* (Capital Punishment Study, March 2019) <<https://reprieve.org/wp-content/uploads/sites/2/2019/04/Pakistan-Capital-Punishment-Study.pdf>>

Haroon Janjua, 'Pakistan ends death penalty for prisoners with severe mental health problems', *The Guardian* (online, 12 February 2021) <<https://www.theguardian.com/global-development/2021/feb/12/pakistan-ends-death-penalty-for-prisoners-with-severe-mental-health-problems>>