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ARTICLE

Reshaping Insanity in Pakistani Law: The Case of Safia Bano

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Abstract
This Article analyzes the 2021 judgment of the Supreme Court of Pakistan in the case of Mst. Safia Bano v. Home Department, Government of Punjab. The case has garnered significant local and international attention due to the Court's ruling that a death sentence may not be carried out on a defendant who has a mental illness. Setting the case against the backdrop of Pakistan's Islamic and colonial contexts, this article argues that the Supreme Court has reshaped the insanity defense in Pakistani law by placing the determination of a defendant's mental state mainly in the hands of medical professionals. However, the Court's reliance on medical professionals and the subsequent downplaying of the "moral capacity" element of the insanity defense—a determination of law made by courts—has created an obstacle for courts to punish offenders more stringently in future cases due to the popular belief that mental health professionals are ill-equipped to answer broader questions of justice for victims and society. The article recommends that this issue can be remedied by establishing an objective legal test for insanity that considers Islamic law, Pakistani precedent, and advances in medical science.

Keywords: Insanity defense; mental health; Pakistani law; capital punishment; Islamic law

1. Introduction

On February 10, 2021, the Supreme Court of Pakistan issued its final judgment in the case of *Mst. Safia Bano v. Home Department, Government of Punjab.*[1] The case was an amalgamation of three murder cases and addressed questions regarding how courts should determine a defendant's mental status, and whether a defendant suffering from diminished mental capacity should be subject to the death penalty. In a modification of the established precedent, the Supreme Court annulled the sentence of execution for each defendant and stated that no death sentence should be carried out "if a condemned prisoner, due to mental illness, is found to be unable to comprehend the rationale and reason behind his/her punishment."[2] The Supreme Court also directed the government to undergo more extensive reforms, including amending all federal and provincial laws to match the Court's judgment, changes to the country's prison rules and jail manuals, the training of government personnel in matters of forensic psychology, and the establishment of medical boards to assess all convicts and death row prisoners.[3]

The *Safia Bano* judgment has been praised by several organizations inside and outside Pakistan, lauding it as a step towards broader prison reform. Sarah Bilal, the executive director of a local non-governmental organization ("NGO") called Justice Project Pakistan, stated that "[i]t is a monumental

[1]Safia Bano v. Home Department, Govt. of Punjab, 488 PLD SC (2021).
[2]*Id.* at 38.
[3]*Id.* at 49-50.

judgment not only in terms of how it looks to uphold the rights of people with psychosocial disabilities but also how it binds the federation and provinces to uphold the standards of due process and fairness."[4] One of the judges who issued the *Safia Bano* decision, Justice Syed Mansoor Ali Shah, stated that the decision "has opened the gates of science to walk into our courtrooms." In his view, "[t]he judgment speaks about the basic concept of human dignity. Human dignity encapsulates the notion that every person has inherent equal worth."[5]

This Article discusses the details of this critical case, analyzing the questions raised and answered in the decision by Pakistan's highest court. It places the judgment against the backdrop of the country's legal heritage, particularly the framework of Islamic law (*sharīʿa*) and the colonial history of the insanity defense in the Indian Subcontinent. The article argues that although the judgment is a landmark in the country's legal development, it goes too far in accepting the determination of medical experts and reduces the vital role of the judge in moderating the use of the insanity defense. As acknowledged by the Court, there is a strong public belief that defendants can escape the law's harshest punishments by faking mental illness and that medical professionals, with their immediate focus on patient well-being, cannot address questions of societal justice. As a result, cases like those addressed by the *Safia Bano* have a broader societal impact that must be considered. The imbalance created by the Court favoring medical experts' opinions may negatively impact the perceived legitimacy of the Pakistani legal system. Thus, justice in Pakistan can only be served by re-balancing the scientific and legal elements of the insanity defense. A two-pronged approach to medical and legal insanity should be adopted, acknowledging the country's Islamic, historical, and legal heritage, as well as advances in medical science.

The article begins by briefly summarizing the *Safia Bano* judgment, focusing on the facts of the case presented and the main questions answered by the court. It then turns to the majority approach to the definition and treatment of insanity in Islamic jurisprudence (*fiqh*), showing how this approach was integrated into the criminal codes of nineteenth-century British India and adapted in post-Partition Pakistan to form the current understanding of the law. Using this background, the article will focus on three key issues raised by *Safia Bano* decision: reliance upon a medical definition of mental illness, a focus on the procedure in the courts, and the conflict between the reformative and retributive nature of criminal law.

2. Summary of the Cases and Legal Questions

Safia Bano was an amalgamation of three similar commutation petitions to Pakistan's Supreme Court, each of which sought to commute sentences of death passed by lower courts because of each defendant's lack of mental capacity: the cases of Imdad Ali, Kaneezan Bibi, and Ghulam Abbas.

Imdad Ali

In the first case, Imdad Ali was accused of murdering Hafiz Muhammad Abdullah in 2001 in the Vehari district of Punjab, outside the city of Multan. He was forty-two at the time. No attorney was willing to represent him; even the initial counsel appointed by the state refused to continue Imdad Ali's defense. The trial was able to proceed only after the state appointment of a second attorney. The case was initially tried by an Additional Sessions Judge, who convicted and sentenced him to death on January 9, 2002.[6]

During the trial, Imdad Ali's counsel asked the court to determine whether he was of unsound mind and unfit to stand trial. The trial judge refused and did not consult a medical board or refer the matter to medical experts, noting that he had no reason to believe Imdad Ali was of unsound mind.[7]

[4]Haroon Janjua, *Pakistan Ends Death Penalty for Prisoners with Severe Mental Health Problems*, The Guardian (Feb. 12, 2021), https://www.theguardian.com/global-development/2021/feb/12/pakistan-ends-death-penalty-for-prisoners-with-severe-mental-health-problems [https://perma.cc/5XYW-WGDZ].

[5]*Safia Bano Case Judgment Lauded*, The Express Tribune (Mar. 18, 2022), https://tribune.com.pk/story/2348552/safia-bano-case-judgment-lauded [https://perma.cc/E9WT-6BCT].

[6]Safia Bano v. Home Department, Govt. of Punjab, 488 PLD SC 3-5 (2021)

[7]*Id.*

Additionally, at several points throughout the trial, the defense counsel asked the court to question the doctor who had examined Imdad Ali before the murder; each application was also turned down.

When the case was appealed to the Multan High Court, Imdad Ali's wife, Mst. Safia Bano, testified that a few years before the alleged crime, Imdad Ali had spoken of seeing "supernatural beings" and "metaphysical elements."[8] She also stated that a doctor of the Services Hospital in Lahore, Dr. Ihtisham ul Haq, had indicated that "symptoms of abnormality" in Imdad Ali were clear to him one year before the alleged incidents. He had recommended Imdad Ali for treatment at the Lahore Mental Hospital.

But at the end of the trial, the court upheld Imdad Ali's death sentence and dismissed the appeal. Imdad Ali further appealed to the Pakistani Supreme Court, which rejected it on October 19, 2015. His mercy petition to the President of Pakistan was similarly turned down, and a "black warrant" was issued, ordering his execution on July 26, 2017. Five days before the execution, Safia Bano filed a petition to examine Imdad Ali's mental health. Her petition was rejected by the Additional Sessions Judge, the High Court, and the Supreme Court. Immediately thereafter, Safia Bano again filed a review petition with the Supreme Court and the Inspector General of Prisons, Punjab, to convert Imdad Ali's sentence to life imprisonment based on his unsound mental state. The most recent ruling of the Supreme Court, and the subject of this article, is the result of this review.[9]

Kaneezan Bibi

Similar circumstances took place in the case of Mst. Kaneezan Bibi, who was convicted of six murders she committed at the age of twenty-four during the night between July 27 and 28, 1989, in the Toba Tek Singh District, Punjab. All her appeals between 1989 and 2000 were dismissed, including the mercy petition before the President of Pakistan, and her death sentence was upheld.[10] Over the next eighteen years, she continued to appeal and file further petitions to the courts. Ultimately, based on a report that she had schizophrenia, the Supreme Court combined this case with Imdad Ali's.

Ghulam Abbas

Finally, on September 2, 2004, twenty-three-year-old Ghulam Abbas murdered a man named Wajid Ali and assaulted his wife in the Rawalpindi District of Punjab. All appeals to the courts to observe his mental status were rejected, and a warrant was issued for his execution on June 18, 2019. Before his execution could be carried out, Ghulam Abbas's mother filed a constitutional petition requesting the Supreme Court to stay the execution because her son suffers from several mental illnesses, including intellectual disability, which predated his confinement in jail. She pleaded that her son has a documented history of learning disabilities and was prescribed antipsychotic medication.[11] She requested that a Special Medical Board examine her son. The Chief Justice of the Supreme Court accepted her petition and stayed his execution one day before it was to be carried out, combining his case with those of Imdad Ali and Mst. Kaneezan Bibi.

The cases' ensuing legal questions

In examining these three cases, the Pakistani Supreme Court framed their common issue by posing three questions:

1. How should a trial court deal with a mental illness claim?
2. How should it determine the capacity of an offender to stand trial?
3. Should a mentally ill convict be executed?[12]

[8] *Id.* at 5.
[9] *Id.* at 5-6.
[10] *Id.* at 6-7.
[11] *Id.* at 7-8.
[12] *Id.* at 8-9.

In its February 10, 2021 judgment, the Supreme Court converted the death sentence of each defendant to life in prison and answered each of the questions posed. In answering the first, the Court stated that the onus to prove that the accused had a mental illness lies on the defendant. However, they may benefit from any documentary evidence to support their claim.[13] In answering the second question, the Court ruled that when the accused claims to be incapable of making their defense, the trial court must take it "seriously while keeping in mind the importance of procedural fairness and due process guaranteed under the Constitution and the law."[14] However, the Supreme Court also emphasized the importance of objectively considering all the available material and evidence.[15] The judgment further stated that "medical opinion is *sine qua non* in such an inquiry"[16] and that defendants claiming diminished mental capacity must be examined by a Medical Board. That report should detail the defendant's psychopathology, intellect, mood, emotions, cognition, and insight.[17] Simultaneously, the prosecution may also submit its evidence, which the defense may be allowed to cross-examine. Once these reports are furnished, the court may decide whether the accused is fit to undergo the trial.

The Court considered the third question the most important: it found that the principles of retributive justice are not furthered if a condemned prisoner does not understand the rationale and reason behind the punishment.[18] However, the Court clarified that this benefit should not be automatic, and could only be granted when a Medical Board believes that the person has a mental illness that removes the prisoner's capacity to understand the reasons for the punishment.[19]

The Supreme Court's ruling did not explicitly discuss the historical background against which the case arose, but the development and use of the insanity defense in Pakistani law are directly connected to two important historical influences. The first is Islamic law (*sharīʿa*) and the understanding of premodern Muslim jurists (*fiqh*). According to Article 2 of the Pakistani constitution, the country's official religion is Islam, and the country's laws are to conform with "the Injunctions of Islam as laid down in the Holy Quran and Sunnah."[20]

The second influence is the body of legal development that grew during the colonial period, when many of the laws in force at the time of the Partition of Pakistan and India in 1947 – namely the Indian Penal Code of 1860 – were brought directly into the Pakistani system. Familiarity with this legal background is crucial to the modern understanding of the insanity defense in Pakistan.

3. Insanity in Islamic Law

In Islam, the mitigation of criminal liability in cases of reduced mental capacity is based on a Prophetic statement (*ḥadīth*): "The pen [of God that records bad deeds] is suspended for three [individuals]: One who is asleep until he awakens, a child until he reaches puberty, and the insane until his reason returns."[21] This *ḥadīth* was narrated by the Companion Alī b. ʿAbī Ṭālib as part of a case during the rule of the Second Caliph ʿUmar b. al-Khaṭṭāb. A woman was brought before ʿUmar and accused of committing an extramarital affair (*zinā*). After reviewing the case and consulting other community members, Umar

[13] *Id.* at 21.
[14] *Id.* at 29.
[15] *Id.*
[16] *Id.* at 31.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Pakistan Const. art. 2 & 227.
[21] Muḥammad b. ʿĪsā b. al-Ḍiḥāk al-Tirmidhī, Sunan al-Tirmidhī, Abwāb al-Ḥudūd, bāb mā jāʾa fī man lā yajib al-ḥudūd, ḥadīth no. 1423 4:32 (1975); Aḥmad b. Shuʿayb b. ʿAlī al-Nasāʾī, al-Mujtabā min al-Sunan, ḥadīth no. 3432 6:156 (1986); Aḥmad Ibn Ḥanbal, Musnad al-Imām Aḥmad b. Ḥanbal, ḥadīth no. 24738 6:100 (1432 AH); Abū Dāwūd Sulaymān b. al-Ashʿath al-Sajistānī, Sunan Abī Dāwūd, ḥadīth no. 4398 6:452 (2009); Muḥammad b. Yazīd al-Qazwīnī Ibn Mājah, Sunan Ibn Mājah, Kitāb al-Ṭalāq, bāb Ṭalāq al-maʿtūh wa ʾl-ṣaghīr wa ʾl-nāʾim, ḥadīth no. 2041 1:658 (ND).

determined that she was guilty and, because the woman was married (*muḥṣana*), the punishment prescribed by the Prophet should apply: death by stoning (*rajm*).[22] When news of ʻUmar's ruling reached ʻAlī, he rushed to the Caliph and reminded him that the Prophet had forbidden the punishment of the mentally ill. The woman was reportedly prone to temporary bouts of insanity, and there was doubt whether her crime occurred during one of these instances. When confronted with this possibility and the *ḥadīth*, ʻUmar annulled his ruling and released the woman.[23]

In the following centuries, jurists (*fuqahāʾ*) would build upon this *ḥadīth* to construct two categories of reduced mental capacity for adults: mentally impaired (*maʻtūh*) and insane (*majnūn*). In the former, an individual's ability to reason (*ʻaql*) was non-existent from birth. According to the twentieth-century Syrian jurist Wahba al-Zuḥaylī, "[The mentally impaired have] a weakness in their awareness and comprehension and confuse their words. Sometimes they speak like a sane person while at other times they resemble the insane."[24] Insanity, on the other hand, occurred when the reason of an otherwise sane individual was impaired – literally "covered (*satara*)" – as the result of a physical or spiritual ailment. Insanity could be permanent (*muṭbiq*) or temporary (*ghayr muṭbiq*), potentially lasting only a few moments.[25] If an individual committed a crime during either of these states, no punishment is to be applied because "their actions, whether in speech or action, are invalid and carry no legal effect."[26] According to the nineteenth-century Ottoman civil code, the *Mecelle*, "[a] permanently insane person takes the ruling of a child that has not reached the age of discernment (*al-ṣaghīr ghayr al-mumayyaz*)."[27]

Little discussion exists in Islamic legal texts about how insanity is determined. Modern studies on the subject, such as Michael Dols', suggest that insanity was based on local custom (*ʻurf*) and not determined via medical evaluation. He stated that in traditional manuals of Islamic jurisprudence (*fiqh*), "[t]here was a comparable [to Graeco-Roman, Jewish, and Christian canon law] brevity about insanity, a comparable failure to define it, and a comparable disregard of medical knowledge or expertise."[28] Building on this idea, Oussama Arabi stated that "[t]he determination of madness was taken to be unproblematic, and the legal nullity of the mad person's transactions was considered a matter of course that required no intervention from the judge."[29]

However, other evidence in pre-modern Islamic discussions modifies this understanding. For example, in the Mālikī school of law, a person who had bought a slave could return them to their previous owner if they were determined to have gone insane within the first year after the purchase.[30] This right of return could only be issued by a judge, who would have to determine whether the slave had indeed been insane during the year based on evidence provided to the court. In the Shāfiʻī school, the jurist al-Nawawī (d. 676/1277) suggested that medical experts be consulted by a judge who was unsure about the nature of an individual's insanity.[31] The intervention of a judge and the use of evidence to determine insanity was thus standard practice from the earliest stages in Islamic courts.[32]

Although never explicitly defined in juristic texts, the determination of insanity in the Islamic system was based on a legal decision made by a judge with the support of evidence provided by witnesses or medical experts. The key to the judge's decision was whether an individual's reason was impaired to the point that rendered them unable to discern (*tamyīz*) the legal and moral implications of their actions. Again, jurists often equated the legal capacity of the mentally ill to that of children who had not reached puberty (*bulūgh*).

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[22]Wael Hallaq, Sharīʻa, Theory, Practice, Transformations 317 (2009).

[23]Khalīl Aḥmad al-Sahāranfūrī, Badhl al-Majhūd fī Ḥall Abī Dāwūd 12:472-3 (2006).

[24]Wahba al-Zuḥaylī, al-Fiqh al-Islāmī wa Adillatuhu 4:127-8 (1985).

[25]*Id.* at 128.

[26]*Id.* at 127.

[27]ʻAlī Ḥaydar, Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām 2:700 (2003).

[28]Michael Dols, Majnun, The Madman in Medieval Islamic Society 451 (1992).

[29]Oussama Arabi, *The Regimentation of the Subject: Madness in Islamic and Modern Arab Civil Laws*, *in* Baudouin Dupret, ed., Standing Trial: Law and the person in the modern Middle East 271 (2004).

[30]Saḥnūn b. Saʻīd al-Tannūkhī, al-Mudawwana al-Kubrā 3:373-74 (1994).

[31]Ron Shaham, The Expert Witness in Islamic Courts: Medicine and crafts in the service of law 69 (2010).

[32]Muḥammad b. ʻUmar al-Kindī, Kitāb al-Wulāt wa Kitāb al-Quḍā 345 (1908).

4. British Conceptions of Insanity and their Integration into Pakistani Law

In Britain, the legal discussion of insanity proceeded along similar lines to the Islamic system. For example, jurist Matthew Hale (d. 1676) divided defendants with diminished mental capacity into three categories: an "idiot" who was mentally impaired from birth, a person who was temporarily or permanently insane, and a "drunk."[33] This was later expanded upon by William Hawkins (d. 1750), who stated that the insane were "those under a natural disability of distinguishing between good and evil, as infants under the age of discretion."[34] This definition introduced a moral requirement and equated the legal capacity of the insane to that of children, ideas discussed earlier by Muslim jurists. Court practice in the later eighteenth and nineteenth centuries cemented this understanding, culminating with the infamous M'Naughten Rules of 1843. These rules stated that a person would not be responsible for their actions if

> at the time of the committing of the act, the party accused was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.[35]

Therefore, legal developments in Britain conceived the defense of insanity as containing two elements. The first was a test of "cognitive capacity," or whether a mental illness had left a defendant "unable to understand what he was doing."[36] This could be determined by either introducing expert testimony from mental health professionals or by the judge examining the defendant's mental state. The second test was "moral capacity," or whether the illness at hand rendered a defendant "unable to understand that his action was wrong."[37] This test has largely been considered solely in the hands of the court, determined by the judge or jury.[38] As a result, the defense of insanity must be legally determined and is not solely reliant upon the recommendations of mental health experts.

During the nineteenth century, the rules of insanity developed in the case of M'Naughten were incorporated into the South Asian legal system through codes introduced by the British colonial government. Article 84 of the Indian Penal Code (IPC) of 1860 stated in its general exceptions to punishment that "[n]othing is an offense 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 law."[39] Explainers of the code described this to mean precisely what English judges had reached with the M'Naughten Rules. The only difference in the IPC was that the phrase "unsoundness of mind" replaced the British "disease of the mind."[40] The exception for insanity applied "whether the want of capacity is temporary or permanent, natural or supervening, whether it arises from disease or exists from the time of birth."[41] The explainers of the code also provided the same two-pronged test developed by the M'Naughten Rules, stating:

> Madmen, especially those under the influence of some delusion, may have capacity enough to know the nature of the act, but unless they also know that they are doing 'what is either wrong or contrary to law,' they are not responsible. A common instance is, where a man fully believes that the act he is doing (e.g., killing another man) is done by the immediate command of God: he acts under the delusive belief that what he is doing is by the command of a superior power which supersedes all human laws.[42]

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[33]Homer Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12:2 Ca. L. Rev. 112 (1924).
[34]*Id.* at 113.
[35]M'Naughten's Case, 8 Eng. Rep. 718 (H.L. 1843).
[36]*Id.*
[37]Kahler v. Kansas, 589 US 2 (2020).
[38]*Id. at* 3.
[39]Indian Penal Code § 84.
[40]*Id.*
[41]Walter Morgan & Arthur George Macpherson, The Indian Penal Code with Notes 61 (1863).
[42]*Id.*

An example of the importance of the "moral capacity" element in Indian law can be observed in a case brought soon after the IPC was brought into force. In 1864, a barber from the northern-Indian city of Aligarh named Tota was accused of murdering his five-year-old daughter when he took her in his arms and jumped into a well as part of a suicide attempt. Immediately after jumping into the well, Tota called for help and was rescued by nearby villagers, although they failed to save his daughter. The lower court judge found Tota guilty and sentenced him to life in prison because calling for help, in the court's opinion, was evidence that Tota understood the legal and moral ramifications of his actions and could not be insane. The appellate court (Nizamut Adawlut) reversed the ruling stating that, although there was no medical evidence regarding the defendant's mental state, his suicide attempt was enough to prove his diminished mental state and ruled for his acquittal.[43]

Therefore, as in Britain and Islamic legal practice, the defense of insanity in the IPC was a legal determination. Not every defendant with a mental disease ascertained by medical experts could take advantage of the exception. Subsequent rulings from the post-Partition Indian Supreme Court have confirmed this understanding, stating "every person suffering from mental illness is not *ipso facto* exempt from criminal liability"[44] and that "a court is concerned with legal insanity, not medical insanity."[45]

The Pakistan Penal Code (PPC) brought the definition of IPC into the country's legal system post-Partition verbatim in Section 84. Before 2021, cases brought before the Pakistani Supreme Court consistently confirmed that insanity was a legal determination that should be distinct from medical evaluations. In *Khizar Hayat v. The State* (2006), the Court ruled that "not every person, who is mentally diseased, *ipso facto*, is exempted from criminal responsibility." Medical experts "would at the most furnish the Court with data to the existence, character, and the extent of the mental disease. Thereafter the job of the Court to see whether the accused was legally insane at the time of the commission of a crime or not."[46]

With the summary of the facts of the case and the Islamic and historical background in mind, this Article now turns to three issues raised by the Supreme Court in its ruling. Namely, this Article looks at the Court's treatment of the "two-pronged" approach of medical and legal insanity introduced in the Pakistani system through the M'Naughten Rules in the colonial period, how the Court suggested that the onset of mental illness should be determined, and the impact of the ruling on the broader question of retributive justice.

5. Medical vs. Legal Definition of Insanity

Perhaps the most critical issue raised by the Supreme Court in its ruling is the distinction between the medical and legal definitions of insanity. As stated above, the M'Naughten Rules— integrated into South Asian law through the IPC and PPC and confirmed by the Supreme Courts of both India and Pakistan— have consistently held that the determination of insanity is legal and not medical. Medical evidence may be presented, and the "cognitive capacity" element may be satisfied using expert reports. However, it is ultimately the trial court's determination whether the second element, "moral capacity," was not present to allow the defendant access to the defense of insanity.

In *Safia Bano*, the Pakistani Supreme Court seems to have turned away from the previous approach, deferring to medical experts' opinions if a judge appreciates that the defendant might have a mental illness. For example, in the case of Imdad Ali, the Court chastised the "slipshod approach of the trial court," calling attention to the 2019 report of the Medical Board, which stated, "it is likely that illness had already started at the time of the crime, and he might have committed murder under the delusional belief

[43]Government v. Tota, NA Nwp 1 Aligarh 211 (1864).
[44]Surendra Mishra v. State of Jharkhand, 11 SCC 495 (2011).
[45]Hari Singh Gond v. State of Madhya Pradesh, 16 SCC 109 (2008).
[46]Khizar Hayat v. The State, PLD Lahore 470 (2005).

of persecutions (insanity)."[47] The Court also highlighted the opinion of the Medical Officer of Services Hospital, Lahore, which stated, "In his opinion, Imdad Ali seemed to be suffering from schizophrenia, and he referred him to a Mental Hospital for further management and evaluation."[48] In the case of Kaneezan Bibi, the Court focused entirely on the presence of a Medical Board report from 2020, which stated that "[s]he has been diagnosed as having severe lifelong mental illness 'schizophrenia.' She will need lifelong treatment. Psychiatric tools could not be applied because of her mental status."[49] Finally, in the case of Ghulam Abbas, the Court cited that his attorney's petition for mercy based on mental illness "is endorsed by the report of the Medical Board constituted by this Court."[50] The Supreme Court also criticized the President of Pakistan, who had rejected an earlier mercy petition and stated, "there is nothing on record to show whether the ground of mental illness was taken into consideration."[51] The Court ordered a new petition be filed, "along with copies of his entire medical history/record, copies of the report of the Medical Board constituted by this Court on 21.09.2020 and a copy of this judgment."[52]

In each of these three cases examined by the Supreme Court, consideration was given to the second element of the M'Naughten Rules—the "moral capacity" of the defendant to understand what they were doing was contrary to law—only *after* the Medical Board had submitted its report and its recommendations considered. If the Board concluded that a defendant developed a mental illness at any time, the Board's evaluation was accepted as a valid determination of insanity. This can be most clearly seen in the case of Kaneezan Bibi, as the medical report relied upon by the court was contradicted by another produced just two years earlier, in 2018, which determined that "it is likely that Kaneezan Bibi was not suffering from schizophrenia (insanity) at the time of committing the crime and for 11 years following that."[53] The Court ignored this contradictory report, preferring the later report confirming her "lifelong" mental illness.

Reducing the importance of the "moral capacity" element of the M'Naughten Rules, limiting it to only the question of "cognitive capacity," was an approach recently taken up by the Supreme Court of the United States in the case of *Kahler v. Kansas* (2021). In 1996, the state legislature of Kansas amended its rules regarding the defense of insanity, stating, "It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense." This change meant that "evidence of a mentally ill defendant's moral incapacity – or indeed, of anything except his cognitive inability to form the needed *mens rea* – can play no role in determining guilt."[54] Ultimately, the Supreme Court decided that the Kansas statute did not violate the right to due process under the law according to the Fourteenth Amendment to the Constitution, and the matter was left to the state courts to decide as "no single version of the insanity defense has become so ingrained in American law to rank as 'fundamental.'"[55]

6. Determining the Onset of Mental Illness

Accepting that the determination of medical experts is the key to establishing insanity, the ruling of the Pakistani Supreme Court also focused on how a judge was to determine whether a medical evaluation of a defendant was warranted. After examining the relevant sections of the Code of Criminal Procedure and case law, the Court ruled that any lower court should first assess whether there is a "reason to believe" or that it "appears to the court" that the defendant is unfit to stand trial. This should be an objective opinion,

[47] Safia Bano v. Home Department, Govt. of Punjab, 488 PLD SC 40 (2021).
[48] *Id.*
[49] *Id.* at 46.
[50] *Id.* at 48.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 45.
[54] Kahler v. Kansas, 589 US 4 (2020).
[55] *Id.* at 2.

based upon an "assessment of the material and information placed before the Court or already available on record in the police file and case file."[56] The judge may also conduct an initial investigation, assessing the mental health condition of an accused

> [b]y asking him/her questions such as why he/she is attending the Court; whether he/she is able to understand the proceedings which are being conducted (trial); whether he/she is able to understand the role of the people who are a part of the trial; the basic procedure may be explained to him/her to assess whether he/she is able to understand such procedure and whether he/she is able to understand such procedure and whether he/she is able to retain information imparted to him/her; whether the accused is able to understand the act committed by him/her and what the witnesses are deposing about his/her act; and whether he/she is able to understand the evidence being produced by the prosecution against him/her.[57]

If the court develops a "*prima facie* tentative opinion" based on this questioning (and on a general observation of the evidence) that an individual might be incapable of understanding the court proceedings, "it becomes obligatory upon the Court to embark upon conducting an inquiry to decide the issue of incapacity of the accused to face trial due to mental illness. Medical opinion is *sine qua non* in such an inquiry."[58]

This section of the ruling coalesces two different determinations within the defense of insanity: whether the defendant was insane at the time of the act and whether that state existed during the trial. According to the M'Naughten Rules and established practice in Pakistani law as described above, for a defendant to use the insanity defense, they must have been insane *at the time the crime was committed.* Whether they were insane during the court proceedings and whether they could understand court procedure is a necessary but secondary issue.

The Court seemed to be aware of this differentiation, stating in earlier sections of its judgment that "any person who seeks the benefit of section 84 PPC must prove that at the time of committing the act, he was laboring under such defect of reason as to not know the nature and consequences of the act he was doing."[59] However, the Court then tied the use of the insanity defense to sections 464-465 of the Code of Criminal Procedure (CrPC), necessitating the initial assessment by the judge, which could, if they developed a *prima facie* opinion of the defendant's mental state in front of the court, require a mental inquiry. Additionally, in the questions listed above that a lower court judge may ask to develop that opinion, the Court stated that they might ask "whether the accused is able to understand the act committed by him/her," and not simply whether the defendant understood the procedure of the court.[60]

Both points suggest that the Court ultimately believes determining the onset of insanity to be immaterial to accessing the defense of insanity. This understanding has significant ramifications on the use of the insanity defense in two ways. Firstly, it creates a situation where a defendant, who might have been sane when they committed their crime, could retroactively access the insanity defense under section 84 of the PPC to avoid punishment. So long as they had at some point of time before, during, or even long after the crime (eleven years, in one report discussing Kaneezan Bibi), developed a mental illness that would be obvious enough to a judge through their initial questioning, it would be enough to require a suspension of the court proceedings pending a medical inquiry into their mental state.[61]

Secondly, this understanding further cements the Pakistani Supreme Court's reliance upon medical professionals as the primary assessors of mental capacity, delaying the impact of the legal definition of insanity until after a medical determination has been made. For example, in the case of Imdad Ali, the

[56]Safia Bano v. Home Department, Govt. of Punjab, 488 PLD SC 30 (2021).
[57]*Id.*
[58]*Id.* at 30-31.
[59]*Id.* at 20.
[60]*Id.* at 30.
[61]*Id.*

lower court was criticized for "merely [relying] upon its own observation and after asking a few questions formed a subjective view on the matter [of mental capacity] without having recourse to the material annexed with the application."[62] However, at the outset of its ruling, the Supreme Court stated that the lower court had received an application from the defense under section 465 CrPC, requesting an inquiry into the defendant's mental competence, and heard arguments in 2002. Following that proceeding, "the learned trial Court disposed of the said application by observing that there is no reason to believe that Imdad Ali is of unsound mind, as referred to in section 465 CrPC."[63] The Supreme Court's negative view of the opinion developed by the lower court as "subjective"[64] suggests a low bar for forming a *prima facie* opinion of diminished capacity and that, even if the slightest indication exists that a defendant has a mental illness, the matter should be immediately sent to mental health professionals.

7. Addressing the Retributive Nature of Punishment

The Pakistani Supreme Court's reliance on medical professionals, and its downplaying of the relevance of the onset of mental illness, reflects an evolution in the Court's understanding of the rationale behind capital punishment in Pakistani law. This shift can be most clearly seen in the Court's discussion of the testimony provided by an *amicus curia* named Brigadier (Retd.) Professor Dr. Mowadat Hussain Rana, a renowned professor of psychiatry. In his remarks, Dr. Rana stated that "in case the condemned prisoner is suffering from a mental illness making him/her incapable of understanding the retributive rationale behind his/her execution, the execution will serve no purpose either to him/her or to the society."[65]

The relationship that mental illness shares with the larger question of the purpose of a country's legal system has been subject to significant debate in the twentieth century. Barbara Wootton (d. 1988), a British sociologist and criminologist, argued that if the purpose of a criminal system was to prevent "socially damaging actions," an examination of a defendant's state of mind—*mens rea*—should only take place after conviction to determine which punishment would be most suitable to ensure that the crime was not committed again. This was particularly important for cases of mental illness, reiterated the renowned British positivist HLA Hart, because "general definitions of mental health are too vague and too conflicting" and that "there simply are no clear or reliable criteria."[66] Hart advocated that the English Mental Health Act of 1959, which stated that the reports of two doctors confirming that the defendant was suffering from a broad definition of "mental disorder," was sufficient, and would allow courts to order detention for medical treatment instead of a penal sentence.[67]

The Pakistani Supreme Court's ruling seems to agree with this approach, citing Dr. Rana's testimony in cases when a condemned prisoner had developed mental illness post-conviction, which stated that in such cases:

> The execution of the sentence would serve no purpose. [Dr. Rana] amplified that the retributive idea behind punishment is that it should not only serve as a deterrent, but also make one realize that he/she committed a wrong which has resulted in punishment. In the absence of such realization, due to an involuntarily induced mental disorder or illness, execution of a sentence loses its significance and may fail the test of proportionality attached to retributive justice.[68]

To further emphasize this point, the Court relied upon case law from the United States and India, focusing on the 2019 U.S. Supreme Court's ruling in *Madison v. Alabama*.[69] In that case, the Court

[62] *Id.* at 38-39.
[63] *Id.* at 4.
[64] *Id.* at 38.
[65] *Id.* at 12.
[66] H.L.A. Hart, Punishment and Responsibility: Essays in the philosophy of law 196 (2008).
[67] *Id.* at 205.
[68] Safia Bano v. Home Department, Govt. of Punjab, 488 PLD SC 13 (2021).
[69] Madison v. Alabama, 586 US (2019).

confirmed the earlier precedent established in *Panetti v. Quarterman,* which barred execution of defendants who cannot comprehend the reasons for their punishment, and vacated the death sentence of a defendant because he had suffered several strokes and was diagnosed with vascular dementia following his conviction. [70] The Pakistani Supreme Court paid special attention to *Panetti's* implications of the Eighth Amendment of the U.S. Constitution and highlighted that executing a defendant when they do not understand their punishment was both morally wrong and lacked "retributive value."[71] As a result, the Pakistani 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."[72]

This development is significant, particularly as it relates to Islamic Law and its position in Pakistani Law. For example, the twentieth-century Egyptian jurist Muḥammad Abū Zahra (d. 1974) described punishment as that which falls "as a retributive injury upon the perpetrator…It [punishment] contains harm to society. Still, the law of [seeking] benefit and [preventing] corruption necessitates it because the crime has injured wider society. A murderer has injured the entire community, and if he is left without punishment, he will continue to murder the innocent."[73] The proper application of the law represented the total sense of "general justice," which "establishes rights and prevents injustice." At the same time, however, the importance of general justice that arises from applying capital punishment must be tempered with what Abū Zahra spoke of as "specific mercy (*raḥma khāṣṣa*)," or "a feeling for the frailty of the weak and the pain of those injured."[74]

Indeed, this balance was partially introduced to the Pakistani legal system following the Court's recommendations in the Criminal Law (Amendment) Act 1997, which was the first law that barred the execution of offenders who were minors or insane at the time they committed their crimes.[75] However, these amendments left out the more general recommendation by the Supreme Court in the case that led to these amendments: *Federation of Pakistan v. Gul Hassan Khan.* In that case, the Court found sections 299 to 338 of the Pakistan Penal Code "repugnant to the injunctions of Islam" because they, among other things, "do not exempt a non-pubert and an insane offender from the sentence of death in case of murder."[76] The ruling did not specify whether it referred only to the mitigation of the death penalty when a person was insane during the commission of the crime, or to a more general body of circumstances. Until *Safia Bano*, courts adhered only to the narrower definition.

As a result, the Pakistani Supreme Court refined the country's criminal justice philosophy in cases of capital punishment to focus more on the importance of retribution and the treatment of the individual defendant, balancing those with concerns regarding justice in society at large. The Court now incorporates a broader reading of the ruling in the case of Gul Hassan Khan and, by ensuring that no one suffering from mental illness is executed regardless of whether the mental illness was present at the commission of the crime or at the time of execution, brought the law closer to the balance envisioned by the principles of Islamic Law.

8. Conclusion

The ruling of the Pakistani Supreme Court *Safia Bano v. Home Department, Government of Punjab* marks a significant development in Pakistani case law. Primarily, the ruling has brought Pakistan's treatment of mental health patients more in line with international standards and treaties ratified by Pakistan, particularly Resolution 2000/65 of the United Nations, which encourages states "not to impose

[70] Panetti v. Quarterman, 551 US 930 (2007).
[71] Safia Bano v. Home Department, Govt. of Punjab, 488 PLD SC 35 (2021).
[72] *Id.* at 38.
[73] Muḥammad Abū Zahra, al-Jarīma wa'l-'Uqūba fi'l-Fiqh al-Islāmī: al-'Uqūba 6 (ND).
[74] *Id.*
[75] Pakistan Criminal Law Act, art. 306 (1997).
[76] Federation of Pakistan v. Gul Hassan Khan, PLD Peshawar 1 (1980).

the death penalty on a person suffering from any form of mental disorder or to execute any such person," as well as the International Covenant on Civil and Political Rights (ICCPR) and the Convention on Rights of Persons with Disabilities (CRPD), both of which discourage the implementation of cruel, inhuman, and degrading punishment. Additionally, the Court has refined the nature of punishment in criminal law by promoting treatment while clarifying an essential point of retributive justice: that a defendant must be able to "comprehend the rationale and reason behind his/her punishment"[77] at the time it is carried out. This final point is critical to the Court's connection to the principles of Islamic Law, although not discussed explicitly in its ruling.

However, the Court's judgment also illuminates a serious issue. By placing the assessment of mental illness primarily in the hands of medical professionals and by downplaying the legal elements of insanity, it has taken a matter that has long been the role of the judge out of the courts and into the halls of psychiatric hospitals. This approach is problematic because, although medical opinions are necessary for assessing a defendant's mental state, it is not necessarily sufficient to evaluate a defendant's ability to rely upon the defense of insanity. Such a determination requires a holistic understanding of the intricacies of the law and the impact of the defendant's crime upon society, matters that only the legal process can legitimately determine.

The stance of the Pakistani Supreme Court potentially opens the door for problems in future cases. For example, it may further complicate an already severe trust problem in the Pakistani legal system. As stated by Dr. Rana in his *amicus* testimony, there is a sizeable public belief that "mental illness can be very easily feigned to circumvent the law."[78] Although Dr. Rana argued this was a misconception, and that scientific processes exist to determine mental capacity, the Court's current ruling provides no solace to the public that justice will be adequately served. Defendants who might have been sane at the time their crime was committed, or suffered from a lighter form of mental disease during the court proceedings, could too easily escape punishments proportionate to their acts, because the court would be required to transfer the matter to medical professionals once they have developed a simple *prima facie* doubt as to a defendant's mental state.

This issue has already surfaced in the later 2021 case of the murder of Noor Mukaddam, the daughter of a former Pakistani diplomat. The defendant, Zahir Jaffer, kidnapped Noor after she rejected his marriage proposal, torturing and ultimately beheading her in his home. Jaffer's defense counsel submitted petitions that he suffered from mental illness and should not be subject to the death penalty. An Islamabad court in January 2022 rejected the claim, stating that Jaffer was using mental illness "just to get rid of criminal liability" and sentenced him to death one month later.[79] The claim was never referred to a medical board, and some legal experts have suggested that his death sentence could be overturned based on the precedent set by *Safia Bano*.[80]

9. Recommendations

To be effective, the treatment of mentally ill defendants in the Pakistani legal system must incorporate three central elements. Firstly, courts must be mindful of the approach to the concept of insanity in Islamic law, the legal tradition that forms the foundation of Pakistan as a modern state. Secondly, courts must be aware of the history and the impact of colonialism on the development of the law. Finally, courts must consider recent developments in medical science, balancing them with the two other elements to

[77] Safia Bano v. Home Department, Govt. of Punjab, 488 PLD SC 38 (2021).

[78] *Id.* at 10.

[79] *Noor Mukadam Case: Court rules Zahir Jaffer not suffering from mental illness*, Daily Pakistan (Jan. 7, 2022), https://en.dailypakistan.com.pk/07-Jan-2022/noor-mukadam-case-court-rules-zahir-jaffer-not-suffering-from-mental-illness [PERMA CC]; *Zahir Jaffer awarded death sentence in Noor murder case*, The Express Tribune (Feb. 24, 2022), https://tribune.com.pk/story/2345083/zahir-jaffer-awarded-death-sentence-in-noor-murder-case [PERMA CC].

[80] Hasnaat Malik, *How Noor Mukadam's Case is a Test for Country's Judiciary*, T-Magazine, (Nov. 7 2021), https://tribune.com.pk/story/2328141/justice-for-noor-mukadam-all-eyes-on-court [PERMA CC].

create a system that instills confidence and promotes a broader sense of justice that ensures that those who commit crimes receive the full punishment they are due.

This Article recommends that the Supreme Court of Pakistan restate and refine the role of the legal definition of insanity, considering both developments in forensic psychology and the principles of Islamic Law. Using the language of the *Daubert* standard of evidence articulated in U.S. jurisprudence, judges should be confirmed as the "gatekeepers" of the legal process, and the expert testimony and reports of mental health professionals should be subject to scrutiny before their admission.[81] The Court should also further examine the question of "moral capacity" currently present in the law and supported by Islamic understandings of the insanity defense.

These goals can be achieved using a modified two-pronged approach already outlined in the present wording of the PPC. Firstly, medical reports should be presented to courts and evaluated using a new "test of severity," mentioned by the Pakistani Supreme Court when examining the Indian case of *X vs. The State of Maharashtra.* In that case, the Indian Supreme Court suggested that the test "simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature or purpose behind the imposition of such punishment."[82] This is indeed a low bar, and would require a further step to examine the moral capacity of the defendant, one that only the court could determine. Secondly, a new "moral capacity test" should be established by a joint committee consisting of legal and Islamic experts that focuses on the defendant's ability to discern whether what they did was morally wrong, not simply contrary to the law.

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[81]Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579 (1993); Nouman Rasool & Muzamal Rasool, *Challenges for expert evidence in the justice system of Pakistan*, 8:2 J. of Forensic Sci. & Med. 62-7 (2022).

[82]*X v. The State of Maharashtra* 7 SCC 1, 44-45 (2019).

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