



## **Securing the Rights of Mentally Disordered Persons; A Legal Analysis of The Existing Pakistani Legislation**

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**Abstract:** Right to mental health is a well-established right recognized and protected under national and International law regime. States, thus have formulated legislations to maintain this right to mental health and ensure maximum protection for all persons suffering from mental disorders. Though “the right to mental health” was enshrined in the constitution and people suffering from mental problems were dealt under the Lunacy act 1912, however, provisions regarding the advancement of mental health and prevention of mental disorder was developed very late with the promulgation of Mental Health Ordinance in 2001. This was a new era and new beginning for mental health legislation. However, with the adoption of “18<sup>th</sup> amendment in the Constitution of Pakistan”, health became provincial subject and provinces have formulated their own mental Health acts. For Instance, Mental Health Acts by Sindh, Punjab, and KP were adopted in 2013, 2014, 2017 respectively, and, Islamabad Health Care Regulation Act was promulgated in 2018. This research article is an effort to analyze the existing legislation and practicability of the laws in addressing the needs of mentally disordered persons. It particularly emphasize that the legislations made so far are not timely, are inefficient and outdated, and does not comply with our states obligation under the international Law regime. Secondly, having a mixed legal system, Islamic law must be introduced in true spirit in the existing legislations on mental health.

**Key words:** Mental Health, Mental Disorder, Psychiatrists, Stigma, Islamic Law, UN-CRPD, Mental Health legislations.

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### **1. Introduction**

Health is “A state of complete physical, mental and social well-being and not merely the absence of disease or infirmity (Kühn, & Rieger, 2017), Whereas, mental health is “a state of well-being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community (Jääskeläinen et al. 2022) People suffering from mental health issues are people suffering from mental disabilities. However, there is still no internationally accepted definition of the term ‘disability.’ Nevertheless, it is satisfactory to depend on the methodology contained in the Standard Rules of 1993, which declare:

The term ‘disability’ summarizes a great number of different functional limitations occurring in any population. People may be disabled by physical, intellectual, or sensory impairment, medical conditions, or mental illness.

Such impairments, conditions or illnesses may be permanent or transitory in nature (United Nation Report on Disability, 1994).

However, when the disability is the cause of prolonged mental illness, is termed as psychosocial disability. Aligned with the Convention on the Rights of Persons with Disabilities, Psychosocial disability is “A disability that arises when someone with a long-term mental impairment interacts with various barriers that may hinder their full and effective participation in society on an equal basis with others. Examples of such barriers are discrimination, stigma, and exclusion (World Health Organization, 2022). Unfortunately, in developing countries, like Pakistan, mental health is not treated as a primary right of every citizen, and people suffering from psychosocial disabilities or facing insanity, are considered the subject of the rights only. However, it is pertinent to mention that mental health is just as crucial to the health of individuals, communities, and nations as physical health (Ohrnberger, Fichera, & Sutton, 2017).

## 2. Literature Review

Some of the significant works on mental health and related issues are reviewed as foundation work for this study. The prominent studies are mostly found in other jurisdictions, though with a few exceptions. Therefore, the most relevant scholarly works of Western scholars and professional groups on the concept of mental health emphasizing the violations of human rights, and the role of culture or religion in policy and legislation are discussed to find the gaps in the prevailing mental health laws of Pakistan. The article "Stakeholders' Perspective on Mental Health Laws in Pakistan: A Mixed Method Study" authored by Khalily et al (2021) which presents a comprehensive exploration of mental health laws in Pakistan from the viewpoints of diverse stakeholders. The research employs a mixed-method approach, combining qualitative and quantitative data collection techniques, including interviews, surveys, and content analysis. The study provides valuable insights into the challenges of implementing mental health laws in Pakistan, addressing critical issues like stigma, accessibility, and awareness. The inclusion of mental health professionals, legal experts, policymakers, patients, and families contributes to the study's strength and validity. Moreover, the examination of the intersection between mental health laws and cultural factors is commendable.

However, upon closer inspection, the research predominantly relies on qualitative data, such as interviews and content analysis, with only limited information on the quantitative component. Another issue of concern is the lack of in-depth analysis and discussion of the existing mental health laws in Pakistan. While the article focuses on stakeholders' perspectives, it fails to provide a thorough examination of the legal framework itself. This neglect diminishes the study's effectiveness in identifying specific areas of law that require improvement, hindering its potential impact on policy development and legislative reform in the mental health sector.

Professor Imran Ahsan Nyazee a renowned scholar of Islamic Law and Jurisprudence, in his monumental work “*Islamic Jurisprudence*” elaborates the concept of Insanity, (junoon) mentioning its effect on *Ahliatulwajub* and *Ahliatulada*. He asserts that rights and obligations are established against an insane person on the basis of *Insaniah*, as he is a human being. However, he negates ahliatulada (no liability for ibadah and punishments and all his transactions are void). He further narrates that though fuqaha consider insanity to negate performance, they do not define the term ‘insane’ in detail. Professor Nyazee shows his deep concerns about the capacity test of *M Naghten rules test*, and other similar tests as inadequate, in assessing insanity. He strongly suggests the Muslim scholars to explore the issues in depth or accept the capacity test adopted in other states or come up with new devise (Imran, 2017). It would have been better, if the learned author had critically analyzed the mental health laws in the light of Islamic jurisprudence, in the better interest of Muslim world.

Micheael W. Dols in his book, *Majnun: the madman in medieval Islamic Society* declares that the medieval Islamic Civilization permitted much wider freedom to the interpretation of unusual behavior as compared to modern western society, and much greater freedom to the disturbed, non-violent individual (Dols, 1992). He provides three models to understand madness; the *disease model*, where junoon is a dysfunction of brain; the *deviation model*, where considers junoon as divergence from normative behavior; the *intelligibility model*, which takes junun as deprivation of rationality or reason (Ibid). Unfortunately, being an Islamic state, Pakistan has yet not incorporated Islamic provisions in any of the existing mental Health laws.

The article "Plea of insanity as a defense in Pakistan and analysis of the celebrated judgments of the Supreme Court of Pakistan" by Ali (2014) falls short of providing a comprehensive and well-researched analysis. While the topic

of the insanity defense in Pakistan is undoubtedly important, the article lacks depth and fails to present a clear understanding of the subject matter. It however probes into the various evolutionary phases of the law concerning insanity in Pakistan, shedding light on the challenges faced in the practical implementation of justice for mentally ill individuals in the country. However, the article falls short in its analysis of the legal deficiencies that prevent the Criminal Justice System of Pakistan from granting reprieve to mentally ill individuals, thereby subjecting them to undignified and unjust executions or criminal prosecution.

In the Article *Psychiatry Health Laws in Pakistan* by Gilani et al., (2005) assert that the problem of obsolete legal terminologies has been discussed by ascertaining the definition of mental illness provided by Mental Health Ordinance 2001. Though this work itself is written before the formulation of split mental health acts, however, it provides a brief overview of the history of mental health laws in Pakistan and the challenges faced by the country in providing adequate psychiatric care to its citizens. The author then goes on to discuss the legal framework governing psychiatric care in Pakistan, highlighting the various laws and regulations in place to protect the rights of patients and ensure the ethical practice of psychiatry. The author provides numerous examples and case studies to support their points, which adds credibility to the article. One weakness of the article is that it can be somewhat dense and technical at times, which may make it difficult for readers who are not familiar with the legal and regulatory framework of psychiatric care in Pakistan to fully understand the author's arguments. Additionally, the article focuses primarily on the legal and regulatory aspects of psychiatric care in Pakistan and does not explore deeply the social and cultural factors that may impact the delivery of mental health services in the country.

Muhammad Tahir Khalily in his work *“Developing an integrated approach to the mental issues in Pakistan”*, says that the Healthcare system's response to mental health issues are not compatible with the international standard, as mental illnesses aggravate. Mental health problems have reached an enormous amount in Pakistan, and therefore, need a collective policy to manage challenges. The government can be convinced of a strategic plan, incorporated within their national development and health strategies (Tahir Khalily, (2011). Since the author is a professor of Psychology, he has mainly focused his research on post conflicts and mental disorders from psychological aspects. It is thus the need for time to focus on both legal and psychological aspects that need huge modification and revision. He draws on his extensive experience as a mental health professional and academic to provide insights into the complex issues facing mental health care in Pakistan. He also provides a detailed analysis of the social, cultural, and economic factors that contribute to the high prevalence of mental health issues in Pakistan.

The author argues that mental health care cannot be treated in isolation and highlights the needs for collaboration between mental health professionals, social workers, and other stakeholders to develop a comprehensive and integrated approach to mental health care into the broader health care system. This work further provides a clear and compelling case for an integrated approach to mental health care, and it offers practical recommendations for how to achieve this goal in addressing the urgent mental health needs of Pakistan's population.

In another significant work titled; *“Recognizing Human Rights in Different Cultural Contexts: The United Nations Convention on the Rights of Persons with Disabilities (CRPD)”* Kakoullis, E. J., & Johnson, K. (2020) explained the journey of the “United Nations Convention on the Rights of Persons with Disabilities” (CRPD), as explained and transformed from International Human Rights Law into national legislations or policies in different cultural contexts. The idea of Culture obviously plays a significant role in determining legislation and dealing with the rights of different segments of society. Therefore, starting from the perspective of ‘culture’, ‘disability’ and ‘human rights’, the book presents the journey of the CRPD from the international to national level, its practice of ratification, the progression of implementation, and then the process of monitoring the CRPD’s implementation mechanisms in States Parties in cultural frameworks. Therefore, UN-CRPD must be seen and interpreted keeping in view diverse cultures, illuminating variations in the concept of ‘culture’. This book is important for the thesis as it narrates and stresses culture-based legislation and the practical application of the laws to protect the rights of those suffering from mental disorders. Unfortunately, this aspect is missing in Pakistani Context, as most of the legislation is transplanted and imported, without considering rich Islamic and cultural traditions.

Rosalind F Croucher AM, in his article on *Seismic Shift –reconfiguring capacity in law and the challenges of Article 12 UNCRPD*, narrated that mentally disabled persons need to reside in the society and should be given due recognition. Article 12 talks of equality in rights and thus emphasizes the guardian as the supportive decision maker and not substitute decision maker. Thus, it differentiates legal capacity from mental capacity as enunciated in

section 4 of the UK mental capacity Act, where the wishes, feelings of the person in the state of capacity are given privilege over guardian's decisions (Croucher, 2016). The case law analysis in Pakistan, show a totally different picture, where majority of the relatives in disguise of guardianship take undue advantage, and create problems for the person without any support.

Bernadette McSherry and Penelope Weller in their book, "*Rethinking Right-based mental Health Laws*," (McSherry, Weller, 2010) have discussed the historical aspect and role of the International Human Rights documents, the gaps between law and practice, and the access to mental health Services provided by states. The beginning of the "United Nations Convention on the Rights of Persons with Disabilities" makes it appropriate to review the way in which the rights of individuals are balanced against State interests in protecting them from injury to themselves or others. "Rights-based legalism" is a term used to describe mental health laws that refer to the rights of individuals with mental illnesses somewhere in their provisions." The book, thus addresses some of the current issues and problems arising from rights-based mental health laws. The book stresses the significance of moving away from the restrictions of a negative rights attitude to mental health laws towards more positive rights of social contribution. It further inspires the formulation of legal provisions providing basic facilities of cure, detention, and care that are practicable and adapt to international human rights Instruments. Such a right-based approach governing rights towards mentally disordered is missing in Pakistan, and, as such the individuals suffering from mental health issues are not dealt the way other victims of physical disabilities are treated.

Julio Arboleda-Florez and Norman Sartorius in their book, *Understanding the Stigma of Mental Illness: Theory and Interventions*, have generally analyzed the issue of stigma and its effect on mentally ill people, which cause further distress and humiliation. The negative approach of the people has portrait them as violent and dangerous for society. This book, therefore, describes the issue of stigmatization at the level of the individual and elaborates in detail on the different aspects of stigma including the Self-imposed stigma due to shame, or fear of guilt, socially imposed stigma due to social labeling or biases, and structurally imposed stigma produced by state policies or practices that violate the rights of the mentally ill. The book then briefly narrates programmes aimed to minimize stigma and promote awareness of stigma in mental health, through different means. There is no such written book, except a few research articles, on the issue of stigma and mental health in Pakistan, highlighting the problems faced by mentally disordered persons at the national level. Unfortunately, the issue of stigma regarding mental health is highly dominant in Pakistani society, especially in village communities. It is therefore highly appropriate to discuss and develop mechanisms as how to approach and measure this disturbing collective problem.

"*Mental disability and the death penalty: the shame of the states*," is another prominent work by Perlin (2013) who tries to find the connection between mental disorders and the execution of death penalty and highlights the chains of policy choices that need instant change, and suggest some submissions that might implicitly improve the situation. He further highlights the biased approach adopted at all stages of the trial and the sentencing process. The author has done in-depth analysis of case laws to demonstrate the methods in which the persons suffering from mental disabilities fail to receive fair treatment during death penalty trials. The death penalty is irrationally accomplished in cases regarding defendants with mental disorders. The book has discussed the major discrepancies shockingly overlooked at all levels of the criminal justice system, afforded by states in general, and societies, regarding victims suffering from mental disorders. He urges for a new attitude and greater consideration of the problems that have gone unnoticed. The issues raised are much relevant to the problems faced by mental health victims in leading Pakistani cases, and the right to a fair trial without any discrimination is lacking in different criminal matters.

Dan Howard, Bruce Westmore in the book '*Crime and mental health law in New South Wales: a practical guide for Lawyers and health care professionals*' has beautifully explained the gap between psychiatry and the law, and the problems that exist in the field. The book has thoroughly analyzed a wide group of psychiatric illnesses, and conditions that may be encountered in psychiatric reports, the issues surrounding fitness to stand trial, mental health services, and the powers of magistrates, to deal with mentally disabled persons (Howard & Westmore, 2018). The learned author has beautifully analyzed case laws in the Australian context, whereas, such, a type of case law analysis has not been done from a Pakistani perspective. Thus, there is a dire need to interpret various courts proceedings or analyze various psychiatric illnesses, where courts have grossly violated human rights, without recourse to medical examination.



### 3. Issues in Human Rights

Pakistan is a signatory to several UN human rights instruments, which guarantee the basic right to health, including the right to mental health. For instance, the *International Bill of Rights* (UDHR, ICCPR, and ICESCR,) directly and indirectly, deal with the rights of mentally disabled persons. The Universal Declaration of Human Rights (UDHR, 1948) says.

*“All human beings are born free and are equal in dignity and rights”.*

Similarly, Article 12 of the (ICESCR, 1966) States;

*“Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health.”*

The covenant deals with the economic, cultural, and social rights of everybody without discrimination, and general comment 5 of the ICESCR, discusses the rights of disabled persons, including those suffering from mental issues. Similarly, the ICCPR provides “civil and political rights for people with mental disabilities, such as freedom from torture and other cruel, inhuman or degrading treatment, right to liberty and security of person, right to marry and equal recognition before the law” (ICCPR, 1966). Most prominent, which Pakistan has ratified, is the “*UN Convention on the Rights of Persons with Disabilities*” and “its Optional protocol (Seatzu, 2018). This Convention, lays much emphasis on the member states, to streamline their domestic laws according to the provisions of the Convention, and set up an independent mechanism to protect, respect, and progress on the implementation of the Convention (Article 32, CRPD). Pakistan being a member had to adopt both affirmative and negative duties while ensuring the rights of the people. Though we had the Lunacy Act 1912 in force till late, when “*National Mental Health Policy*” (NMHP) and “*National Mental Health Program*” were devised in the year 1986 and 2001 respectively, to promote mental health and decrease related disabilities, suicides, and substance abuse.

In 2001, *Mental Health Ordinance* was promulgated, repealing the *Lunacy Act 1912*, of British India. The Ordinance amended the law relating to the treatment of mentally disordered persons, to provide provisions for their care, supervision of properties and to inspire community care in the upgradation of mental health and prevention of mental disorder (Mental Health Ordinance, 2001). This ordinance was not passed from the parliament into law, consequently, it failed.

On 8th April 2010, when health became a provincial subject after the 18<sup>th</sup> amendment, the “*Federal Mental Health Authority* was dissolved and the responsibilities were transferred to the provinces, to adopt appropriate measures for mental health legislation in provincial assemblies. The *National Mental Health Program* disappeared too, as it was working under the *Federal Mental Health Authority* (Safdar A. Sohail and others, 2017). In 2011, the “Federal Ministry of Health, under whose authority the NMHP was to be overseen, was eradicated, and all health matters were shifted to the four provincial ministries of health”.

Sindh Assembly in Pakistan thus promulgated the law (Sindh Mental Health Act, 2013) on September 19, 2013, while the Punjab government enacted the law in 2014 (*Punjab Mental Health Act, 2014*). The government of Punjab enacted the Punjab Mental Health Act in 2014, without proper discussion with mental health professionals (Amina Tareen and Khadija Ijaz Tareen, 2016). The act itself was “the modification of 2001 ordinance, by replacing the words ‘Federal Government’ with ‘Government’ as reported by the Law and Parliamentary Affairs Department (Government of Punjab).” Khyber Pakhtunkhwa passed mental health law on 15<sup>th</sup> May 2017, (*Khyber Pakhtunkhwa Mental Health Act, 2017*). While doing this, The *Mental Health Ordinance of 2001* was used as a background document with limited deviation, without considering provincial priorities (Asma Hamayun, 2016). Similarly Baluchistan enacted Mental Health law in 2019 (Baluchistan Mental Health Act, 2019).

No effective work has been done to identify problems within the existing laws. The background Mental Health Ordinance 2001, the Sindh Mental Health Act 2013, the Punjab Mental Health Act 2014, and the KP Mental Health Act 2017, are not in line with Pakistan’s state obligations under CRPD. For instance, the laws promulgated by provincial assemblies, lack implementation mechanisms, as there are no recognized or identified authorities in policy or law, which the psychiatrist or relative of the patient could access in a state of emergency (Amina and Khalida tareen, 2016). Apart from Government hospitals, there are a number of private hospitals, with no registration from a competent authority, to control and check the competency of such institutions. While drafting the 2001 ordinance, and Sindh Mental Health Act 2013, Pakistani and UK Psychiatrists worked on the proposed legislation, without due recourse and consultation with the stakeholder institutions, parliamentarians, psychologists,

legal practitioners, and consumers, which, later resulted in a lack of facilities for a person with mental issues. Persons suffering from mental health are usually considered dangerous and are confined in a mental asylum, keeping them away from the public, thus depriving them of their basic rights. In fact, this is a wrong approach, as human rights and mental health are closely linked. Mental health policy affects human rights, Human rights violations affect mental health, and positive promotion of mental health and human rights are mutually reinforcing (Amina and Khalida tareen,2016).

No doubt, Pakistan has made mental health legislation in provinces, yet it has declined to address the issues of mentally disordered persons. Mental healthcare is still not a main concern in the health system of Pakistan. There are several lacunas and problems, which need to be resolved to comply with countries' obligations under various International human rights instruments. For instance, while drafting the 2001 ordinance and Sindh Mental Health Act 2013, Pakistani and UK which artists worked on the proposed legislation, without due recourse and consultation with the stakeholder institutions, parliamentarians, psychologists, legal practitioners, and consumers, which, later resulted in a lack of facilities for a person with mental issues(Amina and Khalida tareen, 2016).

Unfortunately, implementation is a big issue in countries where the federal system shares responsibilities between federal governments and provincial governments, a document like CRPD cannot be implemented in true spirit (Croucher R.F, 2016). The same is the case in Pakistan, where, the laws promulgated by provincial assemblies, lack implementation mechanism, as there are no recognized or identified authorities in policy or law, which psychiatrist or relative of the patient could access in a state of emergency.

Another big problem is the creation of private hospitals to deal with mentally disordered persons. These private hospitals are mostly without registration from a competent authority, to control and check the competency of such institutions (Tareen, 2016). The "Office of the High Commissioner", in its report considered the existing laws of Pakistan as not suitable to tackle the problems and needs of disabled persons, and the mechanisms provided are not operational for implementation. The "National Plan of Action (NPA) for Persons with Disabilities" was approved with the goal of acting within the following five years, i.e., by 2011, and making appropriate recommendations up to 2025. The primary goal was to include early intervention, assessment, and medical treatment, as well as education, training, employment, rehabilitation, research and development, advocacy and mass awareness, sports and recreation, barrier-free physical environments, institutional strengthening, and adequate funding (OHCHR, 2018). However, most of the steps remained in the papers, and the measures taken were not up to the mark due to insufficient and proper policies.

Being a member of UNCRPD since July 2011, no plans were articulated for its application, which gave the impression that the government is uninterested in the implementation, and this attitude gave an impression of not observing the human rights of the disabled population of Pakistan. Even, the government officials make lame excuses and do not submit report in time to the Human Rights Council, regarding the implementation of the Convention.

#### **4. Issues in Criminal Law**

Persons suffering from mental health are usually considered dangerous and are confined in a mental asylum, keeping them away from the general public, thus depriving them of their basic rights. In fact, this is a wrong approach, as human rights and mental health are closely linked. "Mental health policy affects human rights, Human rights violations affect mental health, and affirmative promotion of mental health and human rights are commonly supporting (Gostin, L, 2000).

Pakistan is facing multiple challenges after 9/11, because of terrorist and suicide attacks. People facing terrorist attacks or drone victims and Victims of warfare suffer severe mental disorders or suffer serious shocks such as post-traumatic stress disorder. PTSD is a highly widespread lifetime disorder that continues for a long time having detrimental effects on health and quality of life (Khalily M.T, 2011). Afghan Refugees living in camps, and people displaced internally suffer serious mental health and human rights sufferings, due to lack of proper facilitation. The violations of human rights affect the mental health of people with disabilities in direct and indirect ways. For example, severe human rights violations of rape, torture, or genocide badly affect mental health and put them in stress, anxiety, or depression (Ibid, 2011).Persons suffering from mental disorders at the time of the commission of crime are not benefited from the traditional M Naghten rule and the insanity rights of such people are badly

affected (Nyazee, I. A. K, 2010). Section 84 *Pakistan Penal Code* and sections 461-475 of *CrPc* deal with the subject of Lunatics, more specifically mentally disabled persons; however, there are serious concerns about these provisions. For example, section 464 *Crpc* deals with the procedure in case of the accused being lunatics as.

(1) “When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defense, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Provincial Government directs, and thereupon, shall examine such surgeon or other officer as a witness, and shall reduce the examination to writing.

(1-A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of Section 466.

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defense, he shall record a finding to that effect and, shall postpone further proceedings in the case.”

The above provisions talk about the assessment criteria for Lunatics. The mentally disabled person would be detained under section 466 or 471 of the code, and the friend of the relative would be assured by the government, that the person is under care. But unfortunately, there is no check and balance that the patient is being well cared for (Tariq Hassan and Asad Tamizuddin Nizami, 2015). This is not a realistic approach in terms of human rights. Again, like advanced countries, the test of ‘capacity to stand trial’ is not mentioned in *Crpc*. Though The Lunacy Act of 1912 stood repealed by the Mental Health Ordinance and Provincial Mental Acts, the fact remains that both substantial and procedural criminal laws use the words ‘lunatics’ or ‘lunacy’, as discussed under the Lunacy Act 1912 (PLD 1961 Dacca 822). Again, the definition of lunatics, under the Lunacy Act, being wider in scope and interpretation, has left the status of patients of schizophrenics, and other forms of mental disorders at the court's disposal.

For Example, in *Inayatullah Appealant vs the state*, (2011 PCr.LJ114), the medical board was constituted three times, to examine the mental status of the accused, which was charged under section 302 PPC for murder. Surprisingly, the first constituted board had no single psychiatrist who could judge his mental capacity. The Medical board two times declared the accused the patient of Schizophrenia (suffering major mental illness). However, for the third time, the medical board held that the mental status of the accused has improved with psychotic medication. The Accused got convicted by the learned trial court for murder under section 302 *ppc* on three counts. On appeal, the decision was reversed, as the learned judge of the trial court didn’t meet the statutory requirements of examining the medical board. Again, it is surprising to see appellate court, citing the definition of schizophrenia from Wikipedia during this landmark judgment.

## 5. Issues in Islamic Law

The constitution of Pakistan names the state as “Islamic Republic”. It explicitly states that Islam is the state religion of Pakistan. It also upholds God sovereignty over the entire universe. It asserts that all laws must be compatible with the “the injunctions of Islam as laid down in the Holy Quran and Sunnah” and the future legislation will be in accordance with these injunctions.

Secondly, the country owns a mixed legal system, based on the remains of British law and Sharia’h (Imran Nyazee, 2016). The co-existent legal systems, therefore should work parallel to each other, developing their own scope and limitations. In Countries, where religious or customary laws are prominent, legislation should be drafted keeping in view the compatibility with other sources of law. The issue of mental health thus must be seen in true spirit of Islamic legal discourse.

One of the ultimate principles of “Maqasid al- shariah”, reflecting the intention of the Lawgiver is ‘the preservation or protection of Aqal (intellect or reason) Jurists have written extensively on the importance of the preservation and protection of intellect. Different terminologies like junun, atah, safeeh are used in fiqh and *usoolulfiqh* regarding mental disability. Hanafi jurists discuss the issue of mental disability in the context of legal capacity (ahliyyah). They divide ahliyyah, into *ahliyyatul-wujoob* (capacity to receive obligations) and *Ahliatul Ada* i.e., the capacity to perform obligations, ( Imran Nyazee, 2019)..

Fuqaha have narrated verses of the Holy Quran like “test the orphan...” or “don’t give safeeh their property.” Alshafi interpret this verse as there are two tests for orphan and the insane to deliver them their property: being

mature and of right judgment. Thus, Shafie interprets to appoint guardian in all cases for insane and fool (Michel Dols, 2007). Imam Abu Hanifa asserts a person once reach the age of 25, no more remains Safeeh, give him his property, as it relates to the issue of his Human right.

Now, the question that arises here is, 'What makes a lunatic or insane person different from a physically disabled person?' Not only lunatics but individuals with any other mental disorder like schizophrenia are also considered partially insane by the law. Another question that arises is, 'Can we detain a physically disabled person?' If not, then why is a mentally disabled person arrested or detained in an asylum? These are not only questions of human rights but also of ethics and have religious implications as well. These are serious issues wherein a person's freedom is restricted and can lead to abuse.

## **6. Case Law Analysis Regarding Mentally Disordered Persons in Pakistan**

Some of the case laws decided by Pakistani courts since the promulgation of *Mental Health Ordinance 2001*, are critically analyzed. Though mental health legislations have been changed but the acts are not much functional in terms of application in courts. For instance, the courts have rejected right of insanity plea to “*stand fit for trial*” or the plea is being misused by the disordered persons or their guardians.

In famous case of “*Mst. Safia Bano vs Govt of Punjab and Others*” (PLD 2017 SC 18), Imdad Ullah who was accused person under 302(b) was convicted for murder. He took the plea of being affected by the ailment of “Schizophrenia” right from the trial stage but could not succeed. His wife filed a petition in the Supreme Court on the same plea, but the same was dismissed. The Supreme Court held that mental sickness could not be used to delay the execution of death sentence, awarded to the convict. His wife filed the petition on the basis of the same ailment but she stressed that before execution he required medical treatment so that he might be able to make a valid will.

Similarly, in *Wali Muhammad vs The State*, petition was dismissed and the plea of insanity on the basis of hypomania was rejected by the appellate court, retaining the decision of trial court (PLD 2011 Lahore 153).

In another case titled; *Shahzad Ali vs The State and Others* (2015 P Cr. LJ 361) the petitioner Shahzad Ali killed two persons and took a plea before trial court that he was a person of unsound mind and remained under treatment. The trial court referred the matter to DHQ hospital to form a medical board and investigate the issue of mental illness. The medical board submitted its report that he (the accused) was suffering from schizophrenic illness and is not fit to stand trial. However, one year later, the same board made a report illustrating that the petitioner is not suffering from any active psychiatric illness at present and he is fit to stand trial. A decision was given against him by the trial court. He filed revision petition which was again dismissed.

In *Sarfraz Ali Khan vs Federation of Pakistan and Others* (PLD 2006 SC 246) Sarfraz Ali Khan a government servant was suspended from office on the basis of physical fitness by the medical board, and was rejected for higher post. Such type of discriminatory measures, are usually taken for victimization. However, it is good that the case was dismissed by the Supreme Court in Appeal, and it was held by the Supreme Court that a civil servant cannot be superseded or ignored on the ground of ailment unless he is medically declared unfit by medical board under the rules.

In The case of *Mst. Fatima vs Abdul Qadir Alias Subhat and 8 others* (2010 MLD 1029) it was asserted in the review petition that an insane person has been made guardian of another insane person. The court disposed of the matter. The court further stated that it does not invalidate the appointment, considering it necessary to protect the property of the two persons, unless and until any harm is caused to the interest of the minor.

In the case of *Ahsin Arshad and Others vs Advocate General, Punjab* (PLD 2018 Lahr 9) the petitioners were living in New York but wanted to manage the property of their mother who claimed to be mentally ill. They sought the consent of the learned Advocate General but the same was turned down and it was held that they were not residing within the jurisdiction of the court of protection. The petitioners challenged it before the Lahore high court. LHC also dismissed the petition and held that the court of protection has to administer the property of a mentally disordered person which requires constant monitoring and this can only be done if the mentally disordered person and the guardian or the manager resides within the jurisdiction of the court of the protection.

## **Conclusion**

The work provides, that in order to meet the current challenges and protect the rights of persons suffering from



mental issues in Pakistan, mental health legislations must be revised keeping in view our own cultural background. In this regard, the consultation of all stake holder institutions, mental health professionals, Parliamentarians, religious members and consumers including mental health patients and their family members is necessary. Furthermore, more secure Mental Health services compatible with International health legislations and human rights standards are required for mental health patients. For Instance, our legislation should encourage and facilitate community based treatments and discourage all involuntary admissions and their justifications that abuse persons suffering from mental disability. There must be a Federal mental health authority or “*Federal mental health Commission*” like the “*Australian Mental health commission*” as a federal agency to coordinate, for effective implementations, and ensure health care facilities.

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