PROTECTION OF RIGHTS OF MENTALLY DISABLED PERSONS IN PAKISTAN: A CRITICAL ANALYSIS IN THE LIGHT OF UNCRPD

Submitted by

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A dissertation submitted the Department of Law International Islamic University, Islamabad in partial fulfillment of the requirements for the degree of PhD (Law)

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بسم الله الرحمن الرحيم

FINAL APPROVAL

It is to certify that we have read the thesis submitted by Mr. Fazal Khalique and it is our judgment that this project is of sufficient standard to warrant its acceptance by the International Islamic University, Islamabad for the Doctorate Degree in Law.

COMMITTEE

External Examiner

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Internal Examiner

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Supervisor

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DEDICATION

Dedicated to

MY BELOVED PARENTS

LIST OF ABBREVIATIONS

AMI	Any Mental Illness
APA's	American Psychological Association
AI	Amnesty International.
BD	Bipolar Disorder
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CMD	Common Mental Disorders
CRPC	Criminal Procedure Code
CRPD	Convention on the Rights of Persons with Disabilities
CEDAW	Convention on the Elimination of Discrimination against Women
CSB	Children Services Board
CRC	Convention on the Rights of the Child
CWDs	rights of children with disabilities
DB	Division Bench
DALYs	Disability-Adjusted Life Years
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
FeMHA	Federal Mental Health Authority
GA	General Assembly
GoP	Government of Pakistan
HR	Human Rights
HRBA	Human Rights-Based Approach
HRCP	Human Rights Commission of Pakistan

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHL	International Human Rights Law
ICCPR	International Covenant on Civil and Political Rights
IHRG	International Human Rights Group
LHC	Lahore High Court
MoH	Ministry of Health
MoJ	Ministry of Justice
MoLJ	Ministry of Law and Justice
MoSD	Ministry of Social Development
MoSW	Ministry of Social Welfare
NAB	National Accountability Bureau
NADRA	National Database & Registration Authority
NBP	National Bank of Pakistan
NCHR	National Commission for Human Rights
NGOs	Non-Government Organizations
NHRC	National Human Rights Commission
NPA	National Plan of Action for Persons with Disabilities 2006
OHCHR	Office of the High Commissioner for Human Rights
PHC	Peshawar High Court
PLD	Pakistan Law Digest
PPC	Pakistan Penal Code
PPA	Pakistan Psychiatric Association
PCHR	Pakistan Centre for Human Rights
PWDs	persons with disabilities

SCMR	Supreme Court Monthly Review
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UNICEF	United Nations International Children's Emergency Fund
UNO	United Nations Organization
UNOHCHR	Office of the United Nations High Commissioner for Human Rights
UNDP	United Nations Development Programme
WHO	World Health Organization
YLD	Yearly Law Digest

TABLE OF CASES

Muhammad Mansha and 5 others vs Muqadas Sultan and 6 others, 2010 CLC 712 (LHC).

Muhammad Riaz versus Additional District and Session Judge, PLD 2018 (Lahore) 684.

Muhammad Waseem versus The state and another, 2020 PCr.LJ (Lahore), 497

Mst. Fatima vs. Abdul Qadir alaisSuhbat and Others, MLD 2010 1029

Mst Fatima Versus Abdul Qadir alias Suhbat and 8 others, 2010 CLC (Peshawar), 1727.

Mst. ShaziaNaheed vs. Public at Large and Others, PLD 2015 Lah 268.

Mst. Razia Begum vs. Pakistan, CLC 2003 587

Mst. Choto and others vs. Muhammad Ashraf and Others, PLD 2011 Lah 548

Mst. Safina Bibi vs. Muhammad Fayaz and Others, YLR 2002 3791.

Mst. SafiaBano vs. Home Department Govt of Punjab and Others, PLD 2017 SC 18.

Naseer Ahmad vs. Muhammad Khan, CLC 2015 566.

NaseebUllah vs. Special J, Anti- Terrorism Court-II and Others, PLD 2017 Bal 37

Nasir Hussain versus The State and others, 2014 PCr.LJ(Lahore), 1352.

Punjab Healthcare Commission vs. Mushtaq Ahmed Ch and Others, PLD 2016 Lah 237.

Rehan Hameed vs. Ayesha Aslam and Others, YLR 2018 731.

Safia Begum versus Additional District Judge, and others, PLD 2022 (Lahore), 833.

Sarfaraz Ali Khan vs. Federation of Pakistan and Others, PLD 2006 SC 246.

Sakina Bibi vs. Sessions Judge, Sargodha and Others, YLR 2017 Note 346.

Shadi Muhammad and others versus Abdul Rashid and others, MLD 1994(Lahore), 1856.

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Shahzad Ali vs. the State, PCr.LJ 2015 361

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Syed Ali Raza and others versus Federation of Pakistan through Secretary Ministry of Law, Islamabad and others, 2019 YLR(Sindh),129.

Syed Muhammad and Others vs. the State, PCrLJ 2005 1864

Wali Dad Khan vs. the State and Other, PLD 2011 Lah 153.

Yasmeen Jang versus Advocate General, Punjab, and others, PLD 2022 (Lahore) 495

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ABSTRACT

The right to mental health is a well-established right recognized and protected by national and international legal systems. To promote this basic right, states have enacted legislation to safeguard all people suffering from mental diseases and to retain their right to mental health. The present thesis examines the existing legislative framework, policies, and practices in Pakistan in protecting the rights of mentally disordered persons and assesses their compliance with the "United Nations Convention on the Rights of Persons with Disabilities" (UNCRPD). It further determines if the existing laws provide adequate protection for those suffering from mental illnesses or whether they require extensive revision or change in terms of implementation.

This work shows that the present legislation is somehow inefficient and the approaches used do not correspond with our state's obligation under the International Human Rights Law regime. The legislations formulated in Pakistan are in fact without taking into account the requirements of people suffering from mental diseases with due consultation of the key stakeholders. Secondly, having a character of a mixed legal system, the legislators never considered Islamic character while formulating the existing legislation on mental health. Again, Pakistan's legal and regulatory framework in prisons and courts lacks suitable protection for mentally disordered people, and a more rights-based approach to providing mental healthcare services is required. The thesis concludes with policy and legal reform recommendations for Pakistan aimed at assuring the protection and promotion of the rights of mentally ill people under the UNCRPD standards, highlighting the need for a comprehensive and integrated strategy to ensure their rights are met.

TABLE OF CONTENT

CHAPTER 1

ESTABLISHING THE THEORETICAL AND CONCEPTUAL FRAMEWORK: AN INTRODUCTION TO THE THESIS

1.1 THESIS STATEMENT

The legal and regulatory framework for mental health in Pakistan has failed to adequately incorporate the obligations under the Convention on the Rights of Persons with Disabilities, resulting in an inefficient and inadequate system. Therefore, a critical analysis of the existing legislation is necessary to develop a coherent and efficient system that meets the contemporary requirements of protecting the rights of individuals with mental disabilities in Pakistan.

1.2 BACKGROUND STUDY

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[1] Whereas, mental health is a state of well-being in which every individual realizes his or her potential, can cope with the normal stresses of life, can work productively and fruitfully, and can make a contribution to her or his community.[2] 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:

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[1]World Health Organization. "A state of complete physical mental and social well-being and not merely the absence of disease or infirmity." *Constitution of the World Health Organization basic documents* 45 (2006): 1-20.

[2] Wren-Lewis, Sam, and Anna Alexandrova. "Mental health without well-being." In *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine*, vol. 46, no. 6, pp. 684-703. US: Oxford University Press, 2021.

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.[3]

However, when the disability is the cause of prolonged mental illness, it is termed a 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.”[4]

There are no concrete or absolute internationally accepted definitions of mental health-related terminologies. The Declaration on the Rights of Disabled Persons (the Disability Declaration), adopted in 1975, broadly defines a person with disabilities as "any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities."[5] According to the definition, deficiency in mental capabilities comes under the domain of disability.

Section 1 (2) of the UK’s Mental Health Act defines mental disorder as “any disorder or disability of the mind; and “Mentally disordered” shall be construed accordingly.”[6] This definition is general and deals with every disability associated with mental disability.

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[3] Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993, Introduction, para. 17.

[4] “World Mental Health Report: Transforming Mental Health for All,” World Health Organization, accessed July 21, 2023, https://www.who.int/publications-detail-redirect/9789240049338, 7.

[5] Declaration on the Rights of Disabled Persons, G.A. Res. 3447, 30 U.N. GAOR Supp. (No. 34) at 37, U.N. Doc. A/10034 (1975), art. 1.

[6] Expert Participation, “Mental Health Act 2007,” Legislation.gov.uk, accessed August 15, 2023, https://www.legislation.gov.uk/ukpga/2007/12/contents.

According to Section 2 (1)(s) of the Indian Mental Health Care Act 2017 "mental illness" means a "substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterized by sub normality of intelligence."[7] This definition is very exhaustive and has tried to include all kinds of people suffering from mental disabilities.

Mental disability is termed as a 'mental disorder' in the Mental Health Ordinance 2001, and it means; "mental illness, including mental impairment, severe personality disorder, severe mental impairment, and any other disorder or disability of mind, and "mentally disordered" shall be construed accordingly and as explained hereunder:

> (i) "Mental impairment" means a state of arrested or incomplete development of mind (not amounting to severe mental impairment) which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and "mentally impaired" shall be construed accordingly;
>
> (ii) "Severe personality disorder" means a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;
>
> (iii) "severe mental impairment" means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and "severely mentally impaired" shall be construed accordingly."[8]

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[7] The Mental Healthcare Act, 2017 arrangement of sections - India code, accessed September 25, 2023, https://www.indiacode.nic.in/bitstream/123456789/2249/1/A2017-10.pdf, 7.

[8] The Mental Health Ordinance 2001, accessed August 23, 2023, http://punjablaws.gov.pk/laws/430a.html, 3.

This is an inclusive definition, but it is hardly clear and precise. It has composed different types of mental illnesses and seems to be repetitive and imprecise. The phrase "mental disorder" is fairly broad in range, but the terms mental impairment, severe personality disorder, and severe mental impairment, are all defined in terms that may overlap with one another and use words that can pertain or relate to aggressive or reckless behavior and therefore may lead to confusion when diagnosing or in the case of law. However, if diagnosed by behavioral description rather than clear diagnostic criteria, then the usefulness and reliability of such a definition is considerably reduced in practice.

Accordingly, the "Mentally disordered" shall be construed as (i) "mental impairment" refers to a state of arrested or incomplete mind development, not severe mental impairment, affecting intelligence and social functioning and associated with abnormally aggressive or irresponsible behavior. (ii) "Severe personality disorder" refers to a persistent disorder or disability of mind, and seems more inclined towards treatment problems.

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.[9]

In summary of this background study, the following issues will define the precise scope of this work.

[9] Panel Julius et al., “The Relationship between Physical and Mental Health: A Mediation Analysis,” Social Science& Medicine, November 8, 2017) 1.

1.2.1 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, including the Universal Declaration of Human rights (UDHR)[10], the International Cmnovenant on Civil and political Rights (ICCPR),[11] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[12], 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".[13]

Again, ICESCR 1966 States that everyone has the right to the enjoyment of the highest attainable standard of physical and mental health."[14]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.[15] Similarly, the ICCPR 1966 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". Most prominent, which Pakistan has ratified, is the "UN Convention on the Rights of Persons with Disabilities"[16]

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[10] "The Universal Declaration of Human Rights 1948.

[11] "International Covenant on Civil and political rights" adopted on 19th December 1966, was ratified by Pakistan on 23 June 2010.

[12] The International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted on 16th December 1966 was ratified by Pakistan on 17 April 2008.

[8] It Means all rights enshrined in the Document would be given to all persons with dignity, whether he is free, insane, or suffering any other disorder.

[14] Article 12, ICESCR

[15] "United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, persons with disabilities, general comment 5 (1994). Geneva, office of the High Commissioner for human rights, paragraph 34".

[16]"The Convention was adopted on 13 December 2006, at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007, and it entered into force on 3rd May 2008. So far 160 countries have signed and about 175 have ratified the convention". See; https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html last

(UNCRPD) and "its Optional protocol."[17] 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.[18] Pakistan being a member had to adopt both affirmative and negative duties while ensuring the rights of the people. We had the Lunacy Act 1912[19] in force till late, when "National Mental Health Policy" (NMHP) and "National Mental Health Program" were devised in the years 1986 and 2001 respectively, to promote mental health and decrease related disabilities, suicides, and substance abuse.[20]

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.'[21] 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 18th amendment, the "Federal Mental Health Authority"[22] was dissolved and the responsibilities were transferred to the provinces, to adopt appropriate measures for mental health legislation in provincial

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accessed 20.05.2022. The Government of Pakistan has signed and ratified the said Convention, without any reservation, on 6th July 2011. See; https://www.internationaldisabilityalliance.org/blog/pakistan-ratifies-crpdf last accessed 20.05.2022.

[17] Ibid, so far 92 countries have signed and 92 have ratified the Optional Protocol. However, Pakistan has not yet signed the Optional Protocol.

[18] Article 33 (2), *CRPD*

[19] Lunacy Act 1912 was in force, till 2001, when repealed by 'the Mental Health Ordinance 2001' adopted on 20th February 2001.

[20] "It also aimed to prevent illness, promote mental health, and care for the already ill. The program emphasized community and primary care services, and it was envisaged that the departments of psychiatry would train and supervise primary care staff (physicians and community health workers). The program also covered the links between the health sector and other organizations such as the police, prisons, and social welfare organizations." See Safdar A. Sohail and others, "Mental Health in Pakistan: Yesterday, Today and Tomorrow" in *Mental Health in Asia and the Pacific Historical and Cultural Perspective, ed*. Lewis. M (New York, Springer-Verlag New York Inc, 2017), 27.

[21] Mental health ordinance 2001. https://www.pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-cp%2BUY2Fu-sg- Last accessed20.05.2022

[22] ibid

assemblies. The *national mental health program working* under the *Federal Mental Health Authority* also disappeared.[23] 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"[24].

Sindh Assembly in Pakistan thus promulgated the "Sindh Mental Health Act 2013[25] " on September 19, 2013, while the Punjab government enacted the "Punjab Mental Health Act" in 2014[26]. The government of Punjab enacted the Punjab Mental Health Act in 2014, without proper discussion with mental health professionals.[27] 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)."[28]Khyber Pakhtunkhwa also passed an Act for mental health namely, "Khyber Pakhtunkhwa Mental Health Act, 2017" on May 15, 2017.[29] While doing this, The Mental Health Ordinance of 2001 was used as a background document with limited deviation, without considering provincial priorities[30]. The Baluchistan Mental Health Act was formulated in 2019. [31]

No effective work has been done to identify problems with 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

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[23]Safdar A. Sohail and others, "Mental Health in Pakistan: Yesterday, Today and Tomorrow" in *Mental Health in Asia and the Pacific Historical and Cultural Perspective, ed*. Lewis. M (New York, Springer-Verlag New York Inc, 2017), 27.

[24] Ibid.

[25]The Sindh Mental Health Act 2013(Act No L. of 2013)

[26]The Punjab Mental Health Amendment Act 2014 (Act No XI of 2014)

[27] Amina Tareen and Khadija Ijaz Tareen, Mental Health Laws in Pakistan, (BJpsych International; 2016), available at; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5618880/ last accessed 20.05.2022.

[28] Ibid.

[29] The Khyber Pakhtunkhwa Mental Health Act, 2017 (Act No. XVII of 2017).

[30]Asma Humayun, *Mental Health priorities; policy and legislation need to converge for mental health care and services to improve.* See https://www.dawn.com/news/1297151

[31] The Baluchistan Mental Health Act (Act No. IX of 2019)

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.[32] Apart from Government hospitals, there are several private hospitals, with no registration from a competent authority, to control and check the competency of such institutions.[33]

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 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. [34]

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.[35] The same is the case in Pakistan, where, the laws promulgated by provincial assemblies, lack implementation mechanisms, 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.[36]

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

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[32] Amina Tareen, Khalida Ijaz Tareen, Mental Health Laws in Pakistan (BJ psych International: 13:3),68-69 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5618880/ last accessed 20.05.2023.

[33] Ibid.9

[34] Amina Tareen and Khalida Ijaz Tareen, *Mental Health Laws in Pakistan*, *BJ Psych International* 13, no. 3 (2016): 68–69, accessed May 20, 2023,

[35] Rosalind F Croucher AM, *Seismic Shifts- Reconfiguring 'Capacity' in law and the challenges of Article 12 of CRPD* ("International Journal of Mental Health and Capacity Law", 2016),7.

[36] Tareen and Ijaz Tareen, "Mental Health Laws in Pakistan

control and check the competency of such institutions.[37] 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 to act 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."[38] 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.[39]

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.[40]

1.2.2 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. This is a wrong approach, as human rights and mental health are closely linked.

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[37] Ibid.9

[38] Specific Information request, OHCHR, available at; https://www.ohchr.org/Documents/Issues/Disability/.../AWAM_Pakistan_ENG.docl last accessed 27.08.2018

[39] Ibid

[40] Ibid.

"Mental health policy affects human rights, Human rights violations affect mental health, and affirmative promotion of mental health and human rights are commonly supporting."[41]

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. PSTD is a highly widespread lifetime disorder that continues for a long time having detrimental effects on health and quality of life.[42] Afghan Refugees living in camps, and people displaced internally suffer serious mental health and human rights sufferings, due to lack of proper facilitation[43]. 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.[44]

Persons suffering from mental disorders at the time of the commission of crime are not benefited from the traditional M Naghten Rule[45] and the insanity rights of such people are badly affected.

Section 84 of the 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.

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[41] Gostin L, Human rights of persons with mental disabilities: The European Convention of Human Rights. International Journal of Law and Psychiatry. Volume 23(2), 2000, 125-159 at 127.

[42] Muhammad Tahir Khalily, Mental Health problems in Pakistani Society because of violence and trauma: a case for better integration of Care (international journal of Integrated care: August 2011), 3.

[43] Ibid

[44] Ibid.

[45] Provides that defendant is entitled to acquittal if the proof establishes that; A disease of mind, caused a defect of reason, such that the defendant lacked the ability at the time of his actions to either; (a) Know the wrongfulness of his actions; or (b) Or understand the nature and quality of his actions See; Imran Ahsan Nyazee, General principles of Criminal Law, (Islamabad: Shariah Academy,2016),136

(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 by the provisions of Section 466.

(2) If such Magistrate is of the 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. [46]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', [47]as discussed under the Lunacy Act 1912. Again, the definition of lunatics, under the Lunacy Act, being wider in scope and

[46]Tariq Hassan, Asad Tamizuddin Nizami, and Sarah Hirji in their joint work ‘” Forensic psychiatry in Pakistan’ (International Journal of Law and Psychiatry”:2015) 95-104

[47] The Lunacy Act 1912 defines Lunacy as *an* idiot or a person of unsound mind'. An idiot is a natural fool who is incurable and whose lack of capacity is by birth, however, lunatics become insane after birth, and whose incapacity is, or might be temporary or intermittent. See; PLD 1961 Dacca 822

interpretation, has left the status of patients of schizophrenics, and other forms of mental disorders at the court's disposal.

For Example, in Inayatulllah Appealant vs the state,[48] 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 patient of Schizophrenia (suffering major mental illness). However, for the third time, the medical board held that the mental status of the accused had improved with psychotic medication. The accused was 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 the appellate court, citing the definition of schizophrenia from Wikipedia during this landmark judgment.[49]

1.2.3 ISSUES IN ISLAMIC LAW

The constitution of Pakistan names the state as "Islamic Republic."[50] 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.[51]

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[48] 2011 PCr.LJ114.

[49] ibid

[50] Rabbi, Fazal, and Syed Naeem Badshah. "Islamization in Pakistan: An analysis of the 1973 constitution." *Tahdhīb al Afkār* 5, no. 2 (2018).

[51] The term 'Islamic Law' "refers to a combination of the Shariah – the 'path to be followed', or 'right path' (45:18), that is the path of the Holy Quran and Sunnah (Quran is the holy book revealed to the holy prophet Muhammad SAW and the Sunnah, which combines his words, deeds, appearance, and tacit endorsements, comprises three instructions, according to Imam al-Shafi'i: (1) Prescription in line with what God has revealed via the Quran; (2) explanation of the Quran's main principles; and (3) prophetic judgments on subjects not covered in

One of the ultimate principles of "Maqasid al- shariah"[52], reflecting the intention of the Lawgiver is 'the preservation or protection of Aqal (intellect or reason).[53] Different terminologies like *junun, atah, safeeh* are used in fiqh[54] books regarding mental disability.

The jurists[55] 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.[56] Imam Abu Hanifa asserts that once a person reaches the age of 25, no more remains safeeh. Give him his property as it relates to the issue of his human rights. Hanafi jurists discuss the issue of mental disability in the context of

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the Quran) as the major sources of Islamic law followed by Ijma (consensus of opinion of Muslim Jurists over a matter after the demise of the Holy Prophet), Qiyas (Reasoning or anology) and other types of legal reasoning. See; Kamali, Mohammad Hashim. "Law and society: The interplay of revelation and reason in the Shariah." *The Oxford History of Islam* (1999): 107-154, and Shafi'I, M; al-Risalah, pp.52-53.

In one of the Hadith, "Muadh ibn Jabal was questioned by the Prophet Mohammed about the legal source he would use when serving as a judge and governor in Yemen. The response was, "I will judge with what is in the book of God." In response to the Prophet's question about if he could not discover a clue in God's book, Ibn Jabal mentioned the Prophet Muhammad's Sunnah. 'If you do not find a clue therein?' the Prophet then asked. "I will use my own legal reasoning," remarked Ibn Jabal. It was reported that the Prophet was quite pleased with the reply. See; Wadho, Karam Hussain. "02 Legal reasoning within the realm of Islamic Law." *Bayan-ul-Hikmah* 2, no. 2 (2016): 15-24.

[52] The Shariah aims to promote human well-being through its rules and objectives. The maqasid of Islamic law are the objectives or purposes behind the Islamic rulings. According to the maqasid al-Shariah, Sharia law's primary goals are to uphold human welfare and remove injury (maslahah). Therefore, Shariah aims to protect the life, the intellect, the religion, and the property of people, and there are several verses that command in this regard. See; Auda, Jasser. *Maqasid al-shariah: A beginner's guide*. Vol. 14. International Institute of Islamic Thought (IIIT), 2008.

[53] Imran Ahsan Khan Nyazee, Islamic Legal maxims, (federal law house; 2013), 68.

[54] Fiqh refers to 'understanding' "(According to the Prophet Mohammed, 'to whomsoever God wishes good, He gives the understanding (fiqh) of the faith)", that is the methods by which Islamic Law is determined. See Esposito, John L., ed. (*The oxford history of Islam*. Oxford University Press, 1999)107.

However, one must understand that that the Holy Quran and Sunnah are unchanging texts, whereas fiqh is a human creation that can vary over time and space but is still vital for interpretation. According to Ramadan, adding fiqh in Shariah is not a definite or authoritative decision. See Ramadan, Said. "Islamic law: Its scope and equity." (1987).

[55] Prominent school of thought in Shariah are the Hanafi, Maliki, Shafi and Hanbali or the Zahiris.

[56] Michael W. Dols, Insanity in Islamic Law, (journal of Muslim Mental Health available at; http://www.tandfonline.com/loi/ummh20 last accessed 20.05.2022

legal capacity (ahliyyah). They divide ahliyyah, into ahliyyatul-wujoob (the capacity to receive obligations) and Ahliatul Ada (the capacity to perform obligations).[57]

Now, the question that arises here is, 'What makes a mentally disabled person different from a physically disabled person?' 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 ethics and have religious implications as well. These are serious issues wherein a person's freedom is restricted and can lead to abuse.

Secondly, Pakistan being an Islamic state owns a mixed legal system,[58] based on the remains of British law and Sharia'h.[59] The co-existent legal systems, therefore should work parallel to each other, developing their scope and limitations.[60] In Countries, where religious laws are prominent, legislation should be drafted keeping in view the compatibility with other sources of law. Therefore, the issue of mental health in Pakistan must be seen in the true spirit of Islamic legal discourse.

1.2 OBJECTIVES OF THE STUDY

The objectives of the current study are.

i. To evaluate the present legal and philosophical background for the protection of the rights of mentally disabled persons in Pakistan.

ii. To evaluate the application of UNCRPD in Pakistan, about the protection of Mentally Disordered Persons and assess the efficiency of the state institutions and healthcare services provided to insane persons in Pakistan.

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[57] Nyazee, *Islamic Jurisprudence*, above
[58] Such systems are usually termed "hybrid system", "composite system", or "Legal pluralism."
[59] Imran Ahsan Khan Nyazee, *Legal System of Pakistan* (Rawalpindi: Federal Law House, 2016), 27.
[60] Ibid.

iii. To study the compliance issues along with problems faced by mentally disordered persons in Pakistan in getting their basic rights including healthcare.

iv. To see the scope of Islamic law in protecting the persons suffering from mental disorders in Pakistan.

v. To give recommendations for the enhancement of policy framework in ensuring the protection of mentally disabled persons, in the light of International Human rights law regime.

1.3 SIGNIFICANCE OF THE STUDY

The present study is significant in terms of human rights violations and challenges that mentally disabled persons in Pakistan including discrimination, social exclusion, lack of access to healthcare, and other fundamental rights. This work will help to address such problems and promote the rights of these individuals.

Furthermore, the study would help to study the existing legislation for mental health in Pakistan and check its compliance with the UN documents ratified by the state. The detailed analysis of the existing laws and Islamic law of protection for persons suffering from mental disability would ensure better protection mechanisms for these vulnerable.

The research work is also significant to understanding the challenges for the protection faced by mentally disordered persons in countries with low investment in mental health and provides understanding to promote their rights.

1.4 THEORETICAL FRAMEWORK

The theoretical framework is important for the doctoral thesis to specify the general work done in a particular area. There are different theories to discuss a particular subject. The

theoretical framework for the present study could be based on different theories. For instance, theories based on the biological feature or the disease model of mental disorder, cultural approaches to mental health, and theories from a social aspect are much more significant. For the sake of convenience, these different modes and safeguard needs for persons associated with mental health issues are discussed here.

The important philosophical work on mental disability is given by the 'deficit theory of Ellis'. The main theme of the deficit theory is that in mentally retarded individuals, several mental processes are deficit. Based on this, they are exploited and deprived of their basic rights. [61]Another important theoretical work in this regard is given by Zigler's (1969), developmental theory. This theory is quite different from that of the Ellis deficit theory of mental illness. According to developmental theory, those individuals who are suffering from mental disability are developing more slowly and, therefore, stay behind in each aspect of life. [62]

Another analytical approach is the Biopsychosocial Model of Disease (Engel, 1977). [63]This model provides the basis for understanding health and diseases. Engel's model proposes that the causes, manifestations, and outcomes of health and diseases, including mental disorders, are influenced by various bio-psychosocial factors. Stress, for example, is widely recognized by people with conditions such as heart disease or diabetes as a significant factor in aggravating their condition. The relationship between stress and disease is proportional, and the significance of a single factor - biological, psychological, or social - may vary depending on the behavioral trait or mental disorder in question. For instance, research on identical twins suggests that personality traits such as extroversion have a strong genetic component. Studies suggest that

[61] Douglas Detterman, *Theoretical notion of intelligence and mental retardation* (American journal of mental deficiency; August, 1987),3-4

[62] ibid

[63] Fried, Eiko I., Claudia D. van Borkulo, Angélique OJ Cramer, Lynn Boschloo, Robert A. Schoevers, and Denny Borsboom. "Mental disorders as networks of problems: a review of recent insights." Social psychiatry and psychiatric epidemiology 52 (2017): 1-10.

schizophrenia has a strong genetic link, but this does not imply that genetic factors solely determine the nature of the disorder, with psychological and social factors being unimportant. Social factors play a significant role in modifying the expression and outcome of mental disorders. Additionally, certain mental disorders, such as post-traumatic stress disorder, are caused by exposure to highly stressful events, such as natural disasters, combat, rape, or concentration camps.[64]

Today, this disease model is not proven effective and is usually mistreated in modern-day mental health situations. For example, Elliott Valenstein, an emeritus professor rejects the hypothesis and theories that mental illness is primarily a biochemical disorder, and he argues that people should be highly suspicious of the claim that all mental illness is primarily a biochemical disorder".[65] After a thorough assessment of the relevant scientific evidence, it was concluded that the study of mental disorders must be guided by mixed theories and, that systematically include a range of biological, psychological, and sociocultural causal features. To make it more practicable, society must first abandon the unacceptable disease model of mental disorder for people suffering from mental issues. [66]

For the present study, the researcher will apply *Maslow's hierarchy of needs theory.*[67] The Human Rights approach provides a normative framework for evaluating the extent to which the rights of mentally disordered persons in Pakistan are being protected.

Secondly, the concept of disability rights, which recognizes the rights of persons with disabilities, including mentally disordered persons, to equal treatment and non-discrimination, as well as access to education, healthcare, employment, and community participation is much more

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[64] Ibid

[65] Timothy A. Carey, *The Method of Levels: How to Do Psychotherapy Without Getting in the Way* (Living Control Systems Publ, 2006), 21.

[66] Donald J. Kiesler, *Beyond the Disease Model of Mental Disorders* (Greenwood Publishing Group, 2000).

[67] Saul McLeod, "Maslow's Hierarchy of Needs," *Simply Psychology* 1, no. 1–18 (2007).

significant. Abraham Maslow, a well-known psychologist, established the theory of the Hierarchy of Needs, which states that people have a set of hierarchical needs that must be met in an organized manner.[68] According to the notion, humans cannot completely pursue higher-level needs until lower-level needs are addressed.[69] Maslow's theory can serve as a beneficial theoretical foundation for addressing the fundamental rights and well-being of mentally challenged people in Pakistan while adhering to the norms of international human rights law.

Using Maslow's Hierarchy of Needs as a theoretical framework, this work aims to problematize Pakistani legislation regarding the protection of the rights of mentally disordered persons by providing an in-depth analysis aligned with international human rights standards, particularly the "United Nations Conventions on the Rights of Persons with Disabilities.

The reason behind the application of Maslow's need theory is that this theory properly develops a legal argument by prioritizing the needs of mentally disordered persons, through the exercise of human rights. Maslow's Hierarchy of needs theory argues that like other physically disabled persons, mental health laws can also be revised to accommodate persons with mental disabilities as equals in terms of like needs. In doing so, the Current legal practices, the case laws of Pakistani courts, and the provisions of the UNCRPD are discussed, followed by recommendations and conclusions to adopt proper measures for persons suffering from mental disorders.

The present experience in Pakistan shows that the national regulations have been unsuccessful in addressing the problems and providing a remedy to people suffering from mental disorders. Maslow's perspective is much more in line with human rights including the social model of disability, which emphasizes that disability is a social construct created by

[68] Ibid.
[69] Ibid.

society's attitudes and barriers. This approach could be beneficial in addressing the stigma and discrimination faced by mentally ill people in Pakistan, in addition to the need to eradicate social and environmental obstacles to their participation. The Asian model or the cultural aspect is somehow different from that of Western concepts. Accordingly separate chapter on Islamic law is incorporated in this thesis.

For example, Maslow's theory argues that mentally challenged people have basic physiological and safety needs like other citizens. This involves access to adequate living conditions, protection of liberty, and excellent healthcare.[70] They have the same biological needs as other citizens of the state. Right to Education must be provided in the same school setting and the educational system must be tailored to address learning demands. The right to health and the state's health system must be tailored to address the problems of individuals suffering from mental issues. Likewise, there must be proper opportunities for work and employment. Mental disability should not be a reason for the rejection of people based on mental health problems or their previous history. This is the essence of Islamic law, and Article 12 of the UNCRPD as well.[71]

The issue of access to justice for people with mental disabilities is far more serious than for ordinary citizens in Pakistan. [72] Individuals responsible for protecting people's rights in courts, such as judges, lawyers, prosecutors, police, and prison officials tasked with caring for the mentally ill, must receive appropriate training.

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[70] Ibid.

[71] Article of the UNCRPD talks for equal recognition before the law. People suffering from Mental problems have the right to be seen as equal citizens. If he lacks the capacity, let him or her assume it by proper facilitation. The constitution of Pakistan 1973 also talks for the protection of these fundamental rights.

[72] The World Justice Project's (WJP) Rule of Law Index 2021 assessment, issued in October 2021, ranked Pakistan 130th out of 139 nations in terms of adherence to the rule of law. 1. "world justice project 'rule of law index, 2021' is based on perception rather than real data," pid, accessed July 21, 2023, http://pid.gov.pk/site/press_detail/20247#:~:text=The%20World%20Justice%20Project's%20(WJP,130th%20out%20of%20139%20nations).

Another significant factor is the question of protecting people with mental disorders inside the family. Such people, like other members of the family, must be granted the ability to inherit and write valid wills. When expressed during lucid times, their requests should be respected. Such examples and other needs must necessitate a detailed analysis in light of Maslow's hierarchy of requirements.

In a nutshell, the theoretical framework for the study would aim to provide a complete understanding of the protection of the rights of mentally disordered persons in Pakistan, based on the principles of human rights. It would emphasize the importance of a public health approach to mental health policy keeping in view the hierarchy of needs for people with mental disability.

1.5 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 Muhammad Tahir Khalily et al.[73] 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

[73] Muhammad Tahir Khalily, Aziz ur Rehman, Mujeeb Masud Bhatti, Brian Hallahan, Irshad Ahmad, Muhammad Ifzal Mehmood, Shamsher Hayat Khan, and Bilal Ahmed Khan, "Stakeholders' perspective on mental health laws in Pakistan: A mixed method study," International Journal of Law and Psychiatry 74 (2021): 101647.

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 on the concept of Insanity, (junoon) mentioning its effect on Ahliatulwajub and Ahliatulada. He asserts that rights and obligations are established against an insane person based on 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 considers 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 that Muslim scholars explore the issues in depth accept the capacity test adopted in

other states or come up with new devices.[74] 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 the Muslim world.

The article "Plea of Insanity as a Defense in Pakistan and analysis of the celebrated judgments of the Supreme Court of Pakistan" by Ali Khan,[75] 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 Ahmed Ijaz Gillani 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 was 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

[74] Imran Ahsan Khan Nyazee, Islamic Jurisprudence, (Rawalpindi: Federal law house, reprint 2017),143.

[75] Ali Khan, "Plea of Insanity as a Defense in Pakistan and Analysis of the Celebrated Judgments of the Supreme Court of Pakistan," International Journal of Humanities and Social Science 24, no. 5 (2016).

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. [76]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 need for collaboration between mental health professionals, social workers, and other

[76] Muhammad Tahir khalily, *Developing an integrated approach to the mental issues in Pakistan* (journal of Interprofessional care: 2011), 378.

stakeholders to develop a comprehensive and integrated approach to mental health care in 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.

Michael 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.[77] He provides three models to understand madness; the disease model, where junoon is a dysfunction of the brain; the deviation model, which considers junoon as divergence from normative behavior; and the intelligibility model, which takes junun as deprivation of rationality or reason.[78] Unfortunately, being an Islamic state, Pakistan has yet not incorporated Islamic provisions in any of the existing mental health laws.

Michael L. Perlin in his book "International Human Rights and Mental Disability Law: When the Silenced are Heard,"[79] narrates the considerations to different issues and shocking conditions faced by mentally disabled persons, that governments neglect while formulating policy matters and regulations for the most neglected segment of the society. The author has expressed deep concerns over the willful negligence and treatment of societies ignoring the human rights of persons with mental disabilities. Despite sophisticated legal principles in terms of rights and many ratifications of the UNCRPD by states, people with mental disabilities continue to suffer from severe human rights violations. These violations are due to a lack of legal protection, comprehensive legislation, and inadequate or non-existent community care systems.

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[77] Michael W Dols, and Diana E. Immisch. "Majnūn: The madman in medieval Islamic society." (1992).

[78] Ibid.

[79] Michael L. Perlin, *International Human Rights and Mental Disability Law: When the Silenced Are Heard* (Oxford University Press, 2011).

The book provides rich materials for policymakers, governmental officials, scholars, and other mental health professionals. It is an exceptional book that delves into human rights and legal issues concerning people with mental disabilities. One of the strengths of the book is its clear and concise analysis of the intersection between mental disability and international human rights law. Perlin provides a comprehensive overview of the relevant legal frameworks, including the United Nations Convention on the Rights of Persons with Disabilities (CRPD), and examines how these frameworks have been applied in practice. Perlin also presents a wealth of case studies and real-life examples that highlight the pervasive discrimination faced by people with mental disabilities in various contexts, including the criminal justice system and involuntary psychiatric commitment. He uses these examples to argue for a human rights-based approach to mental health care and disability rights, which emphasizes the dignity, autonomy, and agency of people with mental disabilities. Overall, this book is a must-read for anyone seeking to understand the complex issues at the intersection of mental disability and human rights.

In another significant work titled; "Recognizing Human Rights in Different Cultural Contexts: The United Nations Convention on the Rights of Persons with Disabilities (CRPD)",[80] the authors Emily Julia Kakoullis and Kelley Johnson have 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 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

[80] Emily Julia Kakoullis and Kelley Johnson, *Recognizing Human Rights in Different Cultural Contexts* (Springer, 2020).

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 the 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 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 the 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, and feelings of the person in the state of capacity are given privilege over the guardian's decisions.[81] The case law analysis in Pakistan shows a different picture, where the 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,"[82] the learned authors 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

[81] Croucher, Rosalind F. "Seismic Shifts: reconfiguring' capacity' in law and the challenges of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities." *International Journal of Mental Health and Capacity Law* 2016, no. 22 (2017): 7-16.

[82] Bernadette McSherry and Penelope Weller, *Rethinking Rights-Based Mental Health Laws* (Hart Publishing, 2010), https://research.monash.edu/en/publications/rethinking-rights-based-mental-health-laws.

the Rights of Persons with Disabilities" makes it appropriate to review how 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."[83] 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 the mentally disordered is missing in Pakistan, and, as such the individuals suffering from mental health issues are not dealt with 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 causes further distress and humiliation. The negative approach of the people has portrayed 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 programs 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

[83] McSherry and Weller.

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 to 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 Michael Perlin, [84] who tries to find the connection between mental disorders and the execution of the 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 an in-depth analysis of case laws to demonstrate the methods by which 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 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, and Bruce Westmore in the book 'Crime and Mental Health Law in New South Wales: A Practical Guide for Lawyers and Health Care Professionals beautifully explained

[84] Michael L. Perlin, *Mental Disability and the Death Penalty: The Shame of the States* (Rowman & Littlefield, 2013).

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.[85] 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 court proceedings or analyze various psychiatric illnesses, where courts have grossly violated human rights, without recourse to medical examination.

1.6 RESEARCH QUESTIONS

1.What are the philosophical foundations for international human rights instruments related to mental health?

2.What is the role of UNCRPD in the protection of mentally disabled people?

3.To what extent is Pakistani jurisprudence in compliance with international best practices, and does it fulfill the purpose of protecting mentally disabled persons?

4.How does Islamic law treat the issue of mental health, and to what extent is it compatible with modern international instruments?

These, inter alia, are the major questions that will be addressed in this dissertation.

1.7 RESEARCH METHODOLOGY

Since the thesis is to analyze the existing legal framework of mental health in Pakistan. The doctrinal legal approach is considered to discuss a variety of statutes and case laws. The

[85]Dan Howard, Bruce Westmore, '*Crime and mental health law in New South Wales: a practical guide for lawyers and health care professionals* (Chatswood, NSW: 2005), 94.

analytical study of texts and case laws (precedents)[86] are done to understand the issue of mentally disabled people. The study further takes into account different domestic and international laws on mental health and human rights, the documents and reports of the United Nations, and the World Health Organization's toolkits to ensure compliance with international human rights standards. As Pakistan has borrowed most of the laws from the English legal system, mental health laws are also not immune from English laws, and, both Pakistan and UK are members of UNCRPD. Thus, analysis of English Mental Health laws from a historical perspective and academic writings are also discussed. Similarly, scholarly articles, reports of international monitoring organs, and materials for policymakers are part of the research.

The data collected for this study comprise both primary and secondary sources. Primary sources include legislation, case laws, focus group discussions, and case studies of courts. Secondary sources include literature reviews, policy documents, and legal frameworks related to human rights and mental health in Pakistan. The study finally analyze material data based on studies and research of government agencies and non-governmental organizations involved in mental health policies and practices in Pakistan.

1.8 STRUCTURE OF THE STUDY

This thesis consists of seven chapters including the conclusion and recommendations.

Chapter one of the thesis provides an understanding of the theoretical framework for the current study. The chapter discusses Maslow's Hierarchy of Needs theory as the main framework along with the discussion of Symptom theory, Deficit theory, and Cultural Relativism. Maslow's

[86] The practice where the decisions of higher courts are binding on lower courts and even on the same courts themselves. See Article 189 of the constitution of Pakistan, which gives finality to the decisions of Supreme Court, Article 201 to the decisions of High Courts and 203GG to the decisions of Federal Shariat Court.

theory of Hierarchy of needs declares that right is categorically distributed in the form of proper chains. This aspect of the theory is very close to the human rights model and the rights-based approach of the UNCRPD. This chapter further provides a basic understanding of the thesis by presenting the thesis statement, statement of the problem, the significance, and Literature Review. It also discusses the existing problems of human rights law, criminal law, and Islamic law, of Pakistan in addressing the problems of mentally ill people. Finally, the chapter outlines the framing of issues, research methodology, and the overall structure of the study.

Chapter two of the thesis examines the protection of mentally disordered persons within the framework of international human rights law, keeping in view Pakistan's obligation as a state. The chapter first discusses the types of rights and the essential connection between mental health and human rights. The provisions for mental health rights in international conventions such as the UN Charter, International Bill of Human Rights, European Convention on Human Rights, UN Principles for the Protection of Persons, UN Declaration on the Rights of Mentally Disordered Persons with Mental Illness, and UNCRPD are also examined. The role of Human Rights Councils and Supervisory Bodies is addressed as well in the chapter. It also considers the requirements of mental health legislation needed to comply with international standards, such as difficulties with identifying mental disorders, involuntary admissions, competency assessment, and financial and communal rights.

The chapter then focuses on the UNCRPD's scope in protecting the rights of mentally disabled people and the responsibility of nations under this treaty. The chapter provides an overview of the numerous rights guaranteed by the UNCRPD, describing the fact that these rights cover more than the issue of mental health. This chapter discusses the UNCRPD's primary features, the role of its optional protocol, and the way these provisions have been examined in

Pakistan. The UNCRPD requires member states to carry out responsibilities within their jurisdiction concerning the rights of mentally affected people. It also examines the management and overall implementation of the UNCRPD in Pakistan through an in-depth analysis of the UNCRPD's national and international monitoring structures. A detailed analysis of the numerous challenges faced by Pakistan in adopting and effectively implementing the convention has been provided.

Chapter three explores the legal framework in Pakistan addressing mentally disturbed persons. It starts with the concept of the state's responsibility to respect, preserve, and fulfill human rights to mental health and examines the state's duty to facilitate rights for people with mental illnesses. It further presents a brief overview of common law and its impact on the Pakistani legal system, including mental health legislation. The chapter looks at mental health legislation in England, such as the Lunacy Act of 1912, the Mental Health Act of 1959, and the Mental Health Act of 1983, and how this influenced Pakistani legislation. The present mental health legislation in Pakistan, including the Mental Health Ordinance 2001 and provincial legislation, is thoroughly analyzed. The chapter also examines national modes of protection and highlights issues with mental health legislation, such as the lack of a national mental health policy, resource distribution, legislative matters, and coordination between federal and federating units, political tensions, and discrimination in mental health rights. To identify the loophole and legal problems, various Pakistani laws/policies, and statutory efforts, are examined to see whether protection of the rights of mentally disabled persons remained or turned an important issue in Pakistan in line with the UNCRPD.

Chapter four of the thesis protects the rights for mentally disordered individuals under Islamic law. Keeping in view the mixed nature of the Pakistani legal system based on common

law and Shariah, the chapter discusses the key provisions of the Constitution of Pakistan, and the Objective Resolution 1949, to advance an understanding of this relationship. The discussion revolves around the sources of Islamic law, the definition, and the concepts of mental disability according to Shariah. The various categories of mental disability in Islam, are discussed along with the fundamental objectives of Shariah. Moreover, the chapter thoroughly analyzes the rights and liabilities of mentally disabled individuals, including their criminal responsibility and the scope of the insanity defense. A juristic approach toward the status of mental health asylums within the bounds of Islamic law is also presented for consideration.

Chapter five of the thesis gives an in-depth analysis of case laws based on the interpretation of mental health regulations and court practices in Pakistan's legal structure. The chapter begins with the interpretation to provide a more complete understanding of the approaches used in addressing mental health issues within the justice system. Then the significant decisions of Pakistan's Supreme Court and high courts are analyzed, providing the problems with mental health issues. The chapter concludes with implications of the interpretation of mental health laws and court practices in Pakistan, that lead significantly to the understanding of mental health rights within the nation's legal system.

Then the thesis provides with thesis conclusion and recommendations, giving arguments for future research. It presents the conclusions of the research in the form of a proposed federal Mental Health Legislation, with a view of replacing the current split legislation and complying with the UNCRPD and other international standards. The chapter provides what should be addressed in creating legal reforms and implementing effective disability-specific legislation by emphasizing the major effects of this model enactment.

CHAPTER 2

PROTECTION OF MENTALLY DISABLED PEOPLE IN INTERNATIONAL HUMAN RIGHTS LAW

2.1 INTRODUCTION

One of the most important goals of the international community has been to protect and promote human rights. International human rights regimes have been instrumental in the development of legal frameworks to safeguard the rights of everyone, irrespective of their status or condition. Mentally ill individuals make up one of society's most abandoned classes. Mild to severe mental illnesses can have a major impact on a person's ability to engage in the community, particularly the enjoyment of their human rights. It examines the relationship between international human rights regulations and the rights of people with mental illnesses. It will look at the numerous international agreements on human rights aimed at protecting the rights of people with mental illnesses, including the United Nations Convention on the Rights of Persons with Disabilities.

Additionally, the philosophical foundations of human rights instruments emphasizing the need to employ a human rights-based approach to mental health and recognize the rights of mentally ill people as essential to the realization of human rights and protect the rights of mentally disabled persons. It will further look at the process of ratification by states and the difficulties faced in national obligations and compliance. It will explore the difficulties in defining mental disorders, as well as the importance of the protection of mentally disordered people's rights under international human rights legislation.

2.2 CATEGORIES OF RIGHTS

Before proceeding to explore the legal discourse surrounding the protection of human rights for individuals facing mental disorders, it is appropriate to establish a clear distinction and examine the various classifications of rights. This study will focus on the realms of legal rights, moral rights, human rights, and fundamental rights, engaging a comprehensive consideration of these different aspects.

A **legal right** is an interest that is recognized and protected by the law.[87] It implies that the subjects of these rights can enforce them through a court of competent jurisdiction. The law compels the person who is obligated to fulfill the corresponding duty, even by force. This is precisely what is defined as 'the command of the sovereign backed by sanctions.'[88] Protection for such rights is granted under the national laws of the state. Now the question arises as to whether mentally disabled persons, especially in Pakistan, have access to courts to enforce their legal rights. Do civil and criminal laws protect their ownership and other rights in the same way they protect other segments of society? These types of questions will be addressed in chapter four of the thesis.

Secondly, **Moral Rights** are rights that are neither recognized nor protected by the law.[89] This means that such rights lack the authority to be implemented through ordinary courts. Moral Rights are standards that are considered either good or bad within society and are protected by reason or natural justice. The theory of natural law maintains that certain natural interests belong to a person due to his or her original freedom granted by nature, whether the law considers it or not.[90]

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[87] Imran Ahsan Khan Nyazee, *Jurisprudence* (Islamabad: Institute of Advanced Legal Studies, 2007), 243.
[88] Ibid, p. 109.
[89] Ibid, p. 243
[90] Ibid.

The question arises as to whether persons suffering from mental disorders are regarded the same as others in the community or integrated into society as civilized citizens. The issue of stigma attached to mentally disordered persons is more aligned with morality rather than legal rights. Islamic law, therefore, emphasizes this issue, considering it a source of virtue. Consequently, chapter five highlights the protection of mental health under Islamic law.

Thirdly, a **Fundamental right** is a right that is considered by a court to be explicitly or implicitly expressed in a constitution.[91] In Pakistan, fundamental rights are enshrined in Articles 8 to 28 of the Constitution of Pakistan 1973.[92] These rights are justiciable and those individuals whose fundamental rights are infringed can file a writ petition under Article 199 in the High Courts[93] and under Article 184[94] in the Supreme Court of Pakistan.

Though fundamental rights are guaranteed to every citizen without any distinction, however, the matters concerning the fundamental rights of persons suffering from mental illnesses are different from those of ordinary citizens who easily avail themselves of such rights. People suffering from mental illnesses have no freedom of assembly, freedom of expression, right to privacy, right to equality, or other fundamental rights due to the nature of the illness they are suffering from. Therefore, they need special attention to be included as per the norms of International human rights guidelines.

Fourthly, **Human Rights** are the rights inherent to all individuals, irrespective of their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[95] The concept of human rights acknowledges that these rights are granted to

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[91] Noah Webster, *Merriam-Webster Dictionary* (New York: Pocket Books, 1977).

[92] Pakistan's National Assembly approved the Constitution on April 10, 1973. Two days later, on April 12, 1973, the Assembly's President authenticated it.

[93] Ibid.

[94] Ibid.

[95]"Human Rights," United Nations, accessed July 9, 2023, https://www.un.org/en/global-issues/human-rights.

every person solely based on their humanity without any distinction.[96] These rights are universal (cover all countries and people living today), and are safeguarded by both national and international organizations.[97] Therefore, individuals with mental disabilities do not need to demonstrate their capability to responsibly exercise specific rights under human rights principles. The fundamental nature of human rights can be used as a foundation to integrate people with mental disabilities into society and combat unjust treatment against them.

Here are some essential features of human rights:

I. Human rights are founded on the notion of respecting the dignity and worth of every human being.

II. Human rights are universal, meaning they apply to all people equally and without discrimination.

III. Human rights are inalienable, except in rare occasions where limited restrictions, such as lawful imprisonment, may be justified.

IV. Human rights are interdependent, interrelated, and indivisible, which means that a violation of one right often has an impact on the respect for other rights. As a result, all human rights are equally significant and necessary in protecting the dignity and worth of every individual.[98]

The current study, therefore, largely emphasizes human rights-based protection towards individuals with mental health disabilities and the general safeguards in Pakistan.

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[96] As for instance see; "Article 2 Universal Declaration of Human Rights", "Article 2(1) of the International Covenant on Civil and Political Rights," and the "Article 2(2) of the International Covenant on Economic, Social and Cultural Rights."

[97] It is criticized that human rights are Western-centric and not universally applicable. Furthermore, such rights are subject to restrictions if a person is found guilty under penal laws. See; Www.ohchr.org, accessed July 9, 2023, https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf, 24.

[98] UN Human Rights Office accessed July 27, 2023, https://www.ohchr.org/sites/default/files/Documents/Publications/HRhandbooken.pdf, 3.

2.3 NECESSITY OF HUMAN RIGHTS PROTECTION FOR STATES

As discussed above, States protect their citizens' rights through different laws, free from discrimination. Constitutional laws protect fundamental rights, while substantive and procedural laws ensure legal rights through civil and criminal remedies. Moral rights unlike legal rights lack enforceability at the national level. Additionally, states try to safeguard human rights by becoming part of national and international organizations, and actively complying with their obligations.

Human rights are a kind of moral rights that every person has simply by their humanity. In other words, human rights, like natural rights, are universal moral rights.[99] However, these moral norms are not typical regulations that primarily govern interpersonal behavior, such as the prohibition of lying or violence.[100] Human rights, again, may also exist as legal rights at the national level, taking the form of civil and fundamental rights (constitutional rights), or as legal rights within international law.[101] The human rights movement seeks the universal existence of all human rights in all four ways.

Again, human rights are political norms dealing mainly with how people should be treated by their governments and institutions. Human rights are standards that must be satisfied if a society's law is to be appropriate. [102]Human rights involve a subcategory of political rights that

[99] John Tasioulas, "Human Rights, Legitimacy, and International Law," OUP Academic, May 21, 2013, https://academic.oup.com/ajj/article/58/1/1/152203, 2.

[100] Nyazee, Jurisprudence, 93.

[101] Ibid.

[102] John Rawls, The Law of Peoples (Cambridge, MA: Harvard University Press, 1999), 65

describe the outer limits of a rational understanding of human dignity.[103] When a government violates these rights, it demonstrates disregard for the dignity of its citizens, and, such violations damage the government's good faith, hence also its acceptability.[104]

2.4 RELATIONSHIP BETWEENMENTAL HEALTH AND HUMAN RIGHTS

Mental health is a challenging topic in our culture, often resulting in the discrimination and social isolation of individuals suffering from mental disorders. Those in need of more medical care and support usually depend on the state to safeguard their rights. On a global scale, poor mental health is a significant contributor to disability, with illnesses such as depression and anxiety ranking among the top 25 causes of disease burden. This impacts individuals of all genders across various life stages and situations, covering the whole of a person's life journey.[105]

More than 1 in 10 people are living with a mental health condition at any one time.[106] Globally, mental illness affects almost one in every three individuals during their lifetime and nearly one in five individuals in 12 months.[107] The Global Burden of Disease study attributes approximately 15% of years of life lost to mental disorders, establishing mental illnesses as one of the leading causes of disability worldwide.[108]

It's important to note that poor mental health not only affects a person's psychological well-being but also has consequences for their physical health, leading to a significant decrease

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[103] According to Dworkin, the concept of dignity encompasses a dual requirement: (a) a community should regard the well-being of its members as equally and objectively significant, and (b) it should honor their individual autonomy in determining what constitutes success in their own lives. See; Ronald Dworkin, Justice for Hedgehogs (Cambridge, MA: Harvard University Press, 2011), Ch. 9.

[104] Ibid.

[105] S Mudasser Shah, Taipeng Sun, Wei Xu, Wenhao Jiang, and Yonggui Yuan, "The mental health of China and Pakistan, mental health laws and COVID-19 mental health policies: a comparative review", *General Psychiatry* 35: 5 (2022), 1.

[106] "Mental Health and Human Rights." OHCHR. Accessed July 3, 2023. https://www.ohchr.org/en/health/mental health-and-human-rights.

[107] Steel, Z., et al. "The global prevalence of common mental disorders: a systematic review and meta-analysis 1980-2013." International Journal of Epidemiology 43, no. 2 (2014): 476-493

[108] Arias D;Saxena S;Verguet S;, "Quantifying the Global Burden of Mental Disorders and Their Economic Value," EClinical Medicine, accessed July 4, 2023, https://pubmed.ncbi.nlm.nih.gov/36193171/.

in life expectancy. Additionally, the quality of mental health facilities plays a key role in shaping the human rights landscape within a country. In nations with inadequate mental health support, there is a higher rate of human rights violations, including degrading treatment, abuse, violence, and other infringements of basic rights.[109]

Therefore, human rights violations have an injurious effect on mental health, while respecting human rights has a positive effect on it. The connections between mental health and human rights can be summarized as follows:

(1) "Mental health policies or laws such as coercive treatment or practices can affect human rights; (2) Human rights violations like torture and displacement harm mental health.

(3) Actively promoting mental health and human rights mutually strengthen each other."[110]

Human rights and mental health being deeply connected are supplementary approaches that can enhance humanity. Mental health is vital for human rights since it allows people to engage in political and social life. Conversely, Human rights are essential for mental health because they ensure protection, freedom from harm, and the ability to express opinions that promote mental well-being. That is why, all the International human rights treaties, including the Universal Declaration of Human Rights, The ICCPR, The ICESCR, United Nations Declarations on the Rights of Disabled and Mentally Retarded Persons, Principles for the Protection of Persons with Mental Illness, and the UNCRPD affirm that individuals suffering from mental health are entitled to equal treatment.[111]

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[109] Ibid.

[110] Sebastian Porsdam Mann, Valerie J Bradley, and Barbara J Sahakian, "Human Rights-Based Approaches to Mental Health: A Review of Programs," Health and human rights, June 2016, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5070696/.

[111] Different provisions of these human rights documents provide for the protection of Mental Health See OHCHR | Home, https://www.ohchr.org/sites/default/files/Documents/Publications/Compilation1.1en.pdf. Last accessed July 22, 2023.

From the discussion, it is obvious that mental health is thus strongly linked to basic human rights. There is a notable correlation between enhanced living standards and increased civil and political liberties with the prevalence of mental disorders. Similarly, the realization of people's economic, social, and cultural rights plays an important role in creating settings favorable to healthy mental health results.

2.5 THE ROLE OF MODERN INTERNATIONAL HUMAN RIGHTS LAW IN PROTECTING THE RIGHTS OF PERSONS SUFFERING FROM MENTAL DISABILITY

National health policies and regulations frequently restrict the personal liberties of people with mental illnesses in the name of protecting their interests, but unintentionally deny them the same benefits as everyone else. Despite the goal to help, official authorities deprive these people of their fundamental rights.[112] The main issue emerges from the concept of mental illness itself, in which the State has the responsibility for assisting persons who struggle to function properly in society. However, this protective interference can also result in violations of human rights.[113]

International human rights law, therefore, better protects their rights than ordinary restrictive procedures adopted by states. Human rights are legally protected by human rights law, which safeguards the fundamental freedoms and human dignity of individuals and communities. These rights take several forms, including treaties, customary international law, principles created by international organizations, and other legal sources.[114]

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[112] Wexler, David B. *Mental health law: Major issues*. Vol. 4. Springer Science & Business Media, 2013.
[113] Saks, Elyn R. *Refusing care: Forced treatment and the rights of the mentally ill*. University of Chicago Press, 2010.
[114] Lawrence O Gostin, "The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health" (George Town law faculty publication, 2004), 22-23, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1088&context=facpub Last accessed July 3, 2023

International human rights law plays a vital role in safeguarding mental health by allowing global scrutiny of mental health policies and practices, which is unique to international rights protection. It also offers permanent protections that are independent of ordinary political processes.[115] Furthermore, human rights are inherent to individuals by their humanity and are not dependent on government benevolence or the need for justification based on socially acceptable behavior.[116]

For instance, the ICCPR and the ICESCR served as the foundation for establishing enforceable human rights protections. These conventions were started that concentrated on particular populations as a result of the realization that some historically marginalized communities including mentally disabled persons may be more susceptible to human rights violations. It is to be noted that "Drafters of the International Bill of Human Rights did not include disabled persons as a distinct group vulnerable to human rights violations. None of the equality clauses of any of the three instruments of this Bill, the UDHR (1948) the ICCPR (1966), and the ICESCR (1966) mention disability as a protected category."[117]

Again, the UN has recognized those with disabilities as deserving of specific legislative protection for the first time with the publishing of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).[118]

Hence, member states including Pakistan need to bring in line their mental health policies with the requirements set by International Human Rights Law. Doing so ensures the protection and respect of the rights and well-being of individuals facing mental health challenges. These

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[115] Gostin, "The Human Rights of Persons with Mental Disabilities: 2023

[116] Ibid

[117] Ibid.

[118] Michael L. Perlin, International *human rights and mental disability law: When the silenced are heard.* (UK: Oxford University Press, 2011), 27.

policies should cover various aspects, including access to quality mental health services, non-discrimination, privacy, informed consent, and the prevention of torture, and cruel, inhuman, or degrading treatment.[119]

By aligning policies with International Human Rights law standards, states can lay a solid foundation for promoting mental health and safeguarding the rights of individuals. This benefits not only those directly affected by mental health conditions but also contributes to nations' overall well-being and social structure. It represents a key step towards building comprehensive and rights-based societies that prioritize all citizens' mental health and dignity. Thus, it is vital to study and analyze the human rights regimes after the United Nations for protecting the rights of people suffering from mental health.

2.5.1 THE ROLE OF THE 1945 UN CHARTER

Since its adoption as a binding treaty in 1945, the United Nations Charter inflicts upon member states the responsibility to willingly support and protect the human rights of all individuals, irrespective of their racial, gender, ethnic, or religious differences.[120] The preamble to the United Nations Charter reflects the global community's unwavering commitment to reaffirm their belief in inherent and fundamental human rights, as well as the dignity and significance of every human being. One of the basic goals of the United Nations is to develop international collaboration to promote and safeguard human rights and fundamental freedoms for all individuals, without any discrimination.[121]

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[119] All the Basic Human rights instruments including the International Bill of Rights contain provisions ensuring these basic rights.

[120] Charter of the United Nations, 1945.

[121] Ibid, Preamble of the UN Charter.

Similarly, the charter mandates the General Assembly to assist in the realization of human rights and fundamental freedoms for all individuals, ensuring that there is no discrimination based on race, gender, language, or religion. Furthermore, it seeks the GA to conduct studies and make recommendations to promote international cooperation in the economic, social, cultural, educational, and **health fields**.[122] Thus, the ongoing evolution of International human rights law after the Second World War and the implementation of practices of different instruments within the United Nations system has significantly enhanced the protection of human rights for individuals with mental disabilities.[123]

The system of human rights protection worldwide is based on regional and Universal organizations. Regional organizations in America, Europe, and Africa have developed their systems to address the issue of human rights violations in their jurisdiction.[124] These regional systems have grown simultaneously with the United Nations' international human rights institutions, sharing many values and purposes with the UN system. Likewise, the Universal organizations are either chartered-based or treaty-based. Again, the character of these Universal human rights organizations is either general,[125] dealing with all classes of people, or specific,[126] dealing with a specific class of people. The process of protecting and promoting human rights started with the UDHR and the later complementary covenants discussed below.

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[122] Ibid, Article 13-1(b),

[123] A series of various human rights documents including the UN Charter, the International Bill of Human rights, Principles for the protection of persons with Mental illness, UNCRPD and other instruments formulated over a period of time talk for the protection and promotion of the rights of persons suffering from mental issues. See; UN Human Rights Office, https://www.ohchr.org/sites/default/files/Documents/Publications/Compilation1.1en.pdf, accessed July 4, 2023.

[124] For example, the "Inter-American system for the protection of human rights was developed by the organization of American states. Similarly, right from the formulation of UDHR, the European Convention for the Protection of Human Rights was developed in 1950."

[125] ICCPR, ICESCR, or the UNCAT are general organizations talking about all classes of people.

[126] Though their character is universal but deal with specific groups like The UNCRC dealing with child protection or CEDAW discussing women's rights and *UNCRPD* dealing with disabled persons only.

2.5.2 THE ROLE OF HUMAN RIGHTS CONVENTIONS

Starting from the International Bill of Rights[127] various human rights conventions, resolutions and principles established by the United Nations play a vital role in advancing and safeguarding the rights of individuals with mental disabilities.

Since its formulation in 1948, The "Universal Declaration of Human Rights"[128] has been the most important and influential of all United Nations pronouncements. It guarantees the right to a standard of living that ensures health, and well-being and includes essential provisions such as food, clothing, housing, medical care, and necessary social services. [129]These rights are provided to all classes of the human family without any discrimination. For instance, Article 2 of the Declaration states;

> Everyone is entitled to all the rights and freedoms outlined in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Furthermore, no distinction shall be made based on the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing, or under any other limitation of sovereignty.[130]

Despite not being precisely mentioned as a prohibited ground for discrimination, disability is included within the category of "other status" and accordingly falls under the umbrella of forbidden distinctions. Therefore, people facing mental disability are also entitled to

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[127] Together, the UDHR 1948 and the two Covenants ICCPR and ICESCR promulgated in 1966 are known as the International Bill of Human Rights.

[128] 'Universal Declaration of Human Rights, adopted by General Assembly resolution 217 A (III) of 10 December 1948.

[129]Ibid, art. 25(1).

[130] Ibid, art. 2.

the rights under the declaration. It is better to mention Article 1 of the Declaration, which lays down the philosophy on which the Declaration is based, reads: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”[131] This points out the Declaration's basic ideas, declaring that every individual (including people suffering from mental disorders) has the inherent right to freedom and equality that cannot be taken away. It emphasizes that humans, as rational and moral beings, possess unique features that distinguish them from other beings, and as a result, they are entitled to certain rights and freedoms that other creatures on Earth do not have.

Furthermore, the Universal Declaration's universal nature ensures that it remains relevant for all people, regardless of whether their governments have officially adopted its ideas or ratified the complementary Covenants.[132]

Similarly, articles 6 to 27 of the “International Covenant on Civil and Political Rights”[133] protect a wide variety of human rights. Article 6 guarantees the right to life, whereas Article 7 forbids torture and other cruel, inhuman, or humiliating treatment or punishment. Slavery, the slave trade, servitude, and forced labor are all prohibited under Article 8. Article 9 protects against arbitrary arrest or custody, and Article 10 requires the humane treatment of individuals detained. Article 11 makes it illegal to arrest someone only for failing to fulfill a contractual duty. Article 12 of the Covenant guarantees freedom of movement and residence, as well as constraints on the deportation of lawfully residing aliens (Article 13). Article 14 ensures equality

[131] Ibid, art. 1.

[132] Fact Sheet No. 2 (Rev.1), the International Bill of Human Rights.

[133] The International Covenant on Civil and Political Rights” was adopted in 1966 by the General Assembly by its resolution 2200 A (XXI) of 16 December and entered into force in 1976.

before the courts and fair guarantees in criminal and civil processes, and Article 15 forbids retroactive criminal legislation.

Article 16 affirms the right to be recognized as a person in the eyes of the law, whereas Article 17 demands the preservation of one's privacy, family, home, correspondence, honor, and reputation. Freedom of mind, conscience, and religion (Article 18), as well as freedom of opinion and expression (Article 19), are guaranteed, as is the ban on war propaganda and hatred advocacy (Article 20). The right to peaceful assembly (Article 21) and freedom of association (Article 22) are recognized in the Covenant. Article 23 recognizes the freedom to marry and have a family, as well as the idea of equality within marriage. It ensures the preservation of children's rights (Article 24) and the right to participate in public affairs, vote, and have equal access to public service (Article 25).

The Covenant ensures equality before the law and equal protection (Article 26), as well as the rights of ethnic, religious, and linguistic minorities in the territories of State parties (Article 27). Finally, Article 28 established a Human Rights Committee tasked with overseeing the implementation of the Covenant's rights.

All these rights are available to all human beings irrespective of the fact a person suffers from mental health issues or not. For instance, the Human Rights Committee in its General Comment No. 36 on Article 6 of ICCPR states that:

> States parties must refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis with others, such as persons whose serious **psychosocial or intellectual disabilities** impede their effective defense, and on persons who have limited moral culpability. They should also refrain from executing persons who have a diminished ability to understand the reasons for their sentence, and persons whose execution would be exceptionally cruel or would lead to

exceptionally harsh results for them and their families, such as persons of advanced age, parents of very young or dependent children, and individuals who have suffered serious human rights violations in the past.[134]

Like ICCPR, the provisions of the International Covenant on Economic, Social, and Cultural Rights[135] from Articles 6 to 15 recognize different rights including Article 12 which states that "the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[136] Thus, it guarantees the right to health of persons suffering from mental problems with a progressive approach.

The Committee on ICESCR officially approved General Comment No.5 (1994) concerning individuals with disabilities, highlighting the significance of economic, social, and cultural rights within the framework of disability.[137] This General Comment No. 5 states that "States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability - related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities."[138] Hence, states must ensure, through consistent monitoring, an accurate understanding of the specific issues present within the state. This includes the necessity to implement adapted policies and programs that address the

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[134] "International Covenant on Civil and Political Rights", Human Rights Committee, General Comment No. 36 Article 6: right to life, CCPR/C/GC/36, 3 September 2019.

[135] The "International Covenant on Economic, Social, and Cultural Rights was adopted by the General Assembly by its resolution 2200 A (XXI) of 16 December

[136]"International Covenant on Economic, Social and Cultural Rights," OHCHR, accessed July 9, 2023, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

[137] CESCR, General Comment No. 5: Persons with Disabilities, adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994, contained in Document E/1995/22.

[138] "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." See; Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993, Introduction, para. 17.

identified requirements. Furthermore, states should take action to enact legislation where needed and eliminate any discriminatory laws. Accordingly, Pakistan's obligations as a state under ICCPR and ICESCR require ensuring sufficient budget allocation for mental health and mental health services, and when needed, seeking international cooperation. The application of these instruments in true spirit is vital in this context. Since the Declaration and the covenants that make up the International Bill of Human Rights are general and do not specifically deal with mental health issues, the United Nations has adopted additional declarations, resolutions, and principles-based documents explicitly dealing with the rights of persons with mental illness. Efforts will be made to figure out those UN general and specific documents that talk about the protection of the rights of mentally disordered persons.

Moving forward, the "Human Rights in the Administration of Justice: Protection of Persons Subjected to Detention or Imprisonment"[139] provides particularly for the protection of those detained or imprisoned, by ensuring their fundamental rights and dignity. The enforcement of the Standard Minimum Rules for the Treatment of Prisoners is critical because it establishes principles for humane and fair treatment, creating a just criminal justice system in which all individuals' rights and well-being, including prisoners, are honored and protected. Ensuring the rights of people facing disabilities says, "The medical officer shall report to the director whenever he considers that prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment."[140]

As per Rule 30, prisoners are entitled to fair treatment and protection against brutal punishments. They will not be penalized unless there is a legal foundation, and double

[139] adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

[140] Ibid, Rule 25 (2).

punishment is prohibited. Furthermore, before any penalty affecting their Physical or mental health is enforced, prisoners must be informed of the alleged offense, given the opportunity to defend themselves, and examined by a medical officer. The medical officer will visit prisoners subjected to these punishments daily and notify the director if they consider that the punishment should be terminated or modified for the prisoner's physical or mental health.[141]

Similarly, The United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990"[142] serve as a crucial framework to safeguard the rights and well-being of young individuals in detention. These rules were adopted to ensure fair and friendly treatment of juveniles around the world, and they provide essential guidelines for their protection and rehabilitation. The rule of these rules highlights the importance of providing comprehensive and adequate medical treatment to juveniles imprisoned in detention institutions. This treatment includes both preventative and effective measures, as well as mental health services. The purpose is to eliminate stigma, increase self-esteem, and facilitate community integration. On admission, juveniles should be evaluated by a physician to document any evidence of prior ill-treatment and to identify medical issues that require attention. Medical treatments should be aimed at detecting and treating physical or mental illness, substance misuse, or any other issue that is delaying integration. Adequate medical facilities and qualified personnel must be available, and any concerns regarding a juvenile's health in detention must be communicated as soon as possible. If a juvenile has a mental illness, they should be treated in a specialized facility, and plans should be made for continuous mental health care after they are released.[143]

Again the inspections of detention units must be conducted by qualified medical professionals from the inspection authority or the public health service. These medical officers

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[141] Ibid, Rule 30 (1, 2, 3, 4, and 5.)
[142] General Assembly resolution 45/113 (14 December 1990).
[143] Ibid, Rule 49, 50, 51,52,53

should assess compliance with standards regulating the physical environment, hygiene, housing, food, exercise, and medical services, as well as other elements affecting juveniles' physical and mental health. Furthermore, every juvenile should be able to speak with any inspecting officer privately.[144]

Moreover, all professionals must ensure the total safety of minors' physical and mental health, including protection from physical, sexual, and emotional abuse or exploitation. They must act quickly to provide medical attention whenever it is required.[145]

Health personnel, particularly physicians in charge of prisoners' and detainees' well-being, must ensure that they receive equal protection for their physical and mental health, as well as medical treatment of the same quality as individuals who are not imprisoned or detained.[146] Participating in any procedure to restrain a prisoner or detainee is a violation of medical ethics for health personnel, particularly physicians unless the action is essentially medical in nature. It must be deemed necessary to protect the physical or mental health and safety of the prisoner, detainee, or those concerned, and it must not endanger their well-being.[147]

The Convention on the Rights of the Child (CRC),[148] is a historic international convention that emphasizes the vital role of protecting children's rights and well-being worldwide. The CRC establishes a comprehensive framework that recognizes children as rights-holders, entitled to protection and involvement in matters impacting their lives, with an unaltered commitment to promote the best interests of all children. The agreement, which highlights non-

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[144] Ibid, Rule 73.

[145] Ibid, Rule 87(d).

[146] "Principle 1, Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," Adopted by General Assembly resolution 37/194 of 18 December 1982.

[147] Ibid, Principle 3.

[148] Convention on the Rights of the Child, adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25, on 20th November 1989 and entered into force: on 2 September 1990, by article 49.

discrimination, assures that every child, regardless of color, gender, ability, or circumstances, is given equal opportunity and a loving environment for their physical, mental, and emotional development.

It prioritizes their right to survival, education, health, and safety from exploitation, abuse, and neglect, allowing them to flourish and constructively contribute to their communities. It is stated that a child with mental or physical disabilities should have the opportunity to experience a complete and respectable life, in circumstances that protect dignity, foster self-sufficiency, and encourage the child's active participation in the community.[149] The convention further emphasizes that "States Parties recognize the right of a child who has been placed by the competent authorities for care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement."[150]

These provisions set a critical need for member states to recognize and protect the rights of children who have been placed in the care, protection, or treatment of competent authorities for their physical or mental well-being. It urges these states to make periodic assessments of the child's treatment, and it must consider all other relevant circumstances related to the child's position. Member states must actively protect the best interests of the child by developing a system that could regularly monitor the child's situation to ensure their rights and welfare are respected and maintained.

Again, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief[151] says, "Practices of a religion or belief in which a child is brought

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[149] Ibid, Article 23.
[150] Ibid, Article 25.
[151] Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief Proclaimed by General Assembly resolution 36/55 of 25 November 1981

up must not be injurious to his physical or mental health or his full development, taking into account article 1, paragraph 3, of the present Declaration."[152]

The provision highlights that the practices of any religion or belief system in which a child is raised should never harm the child's physical or mental health or hinder their full development. It draws attention to Article 1, paragraph (3)[153] of the declaration, which addresses the importance of protecting children from any religion or belief-based practices that could adversely impact their overall well-being and growth.

States therefore must implement systems that allow for regular and thorough assessments of the treatment and circumstances of children put in their care to comply with these provisions. Secondly, they must take steps to ensure that religion or belief-based practices to which children are exposed are consistent with non-discrimination principles and are not harmful to their physical and mental health or restrict their overall growth. By actively adhering to these requirements, member states demonstrate their commitment to protecting the rights and well-being of every child under their jurisdiction, fostering an environment in which children may flourish and reach their full potential without being exposed to harmful or discriminatory practices.

Likewise, the "Rights of Indigenous Peoples and Minorities 1989"[154] is an important document that points out the fundamental rights and guarantees provided to Indigenous and minority populations. This document is of great importance in safeguarding the dignity, well-being, and empowerment of these marginalized communities. Article 25 of the Convention, says.

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[152] Ibid, Article 5

[153] Article 1 (3) of the declaration says, "Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."

[154] Indigenous and tribal people's Convention, 1989 (no. 169) was adopted on 27 June 1989 by the general conference of the international labor organization at its seventy-sixth session entry into force: 5 September 1991

1. Governments shall ensure that adequate health services are made available to the people concerned or shall provide them with resources to allow them to design and deliver such services under their responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.

2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in cooperation with the people concerned and consider their economic, geographic, social, and cultural conditions as well as their traditional preventive care, healing practices, and medicines.

3. The health care system shall give preference to the training and employment of local community health workers and focus on primary health care while maintaining strong links with other levels of health care services.

4. The provision of such health services shall be coordinated with other social, economic, and cultural measures in the country.[155]

The provision is highly relevant in terms of its application in shaping the state's mental health legislation. The document prioritizes health and provides for the government's responsibility to ensure that adequate health services are provided to all individuals, including those with mental problems so that they can enjoy the best possible physical and mental health. The provision recognizes the need to customize mental health care to the population's economic, geographic, social, and cultural situations by requiring health services to be community-based and planned in collaboration with the concerned individuals.

Furthermore, the emphasis on training and engaging local community health professionals stresses the significance of developing a long-term and easily accessible mental health treatment system. This provision supports a holistic approach to mental health by fostering the coordination of health services with other social, economic, and cultural measures,

[155] Ibid, Article 25(1).

recognizing that mental well-being is influenced by a complex interaction of elements other than medical treatment.

'The Declaration on the Rights of Mentally Retarded Persons' is also a significant instrument adopted by General Assembly resolution 2856 (XXVI) on 20 December 1971.[156] To declare and recognize the equal rights of people with mental retardation as people. To help individuals attain their full potential, the declaration places a strong emphasis on their right to appropriate medical treatment, education, training, and rehabilitation. It also fights for their right to live with their families or in a communal environment wherever possible, as well as for their right to economic security, the ability to work and contribute, and the chance to do so.[157]

The rights of people who are mentally retarded include protection from exploitation and abuse, and if any rights must be restricted, they must be subject to appropriate legal safeguards, expert appraisal, periodic review, and the right of appeal. The declaration urges action on a national and worldwide level to defend and promote the rights of people with mental retardation as a common ground and point of reference.[158] The Declaration stresses the importance of people with intellectual impairments living with their families rather than being institutionalized, and it encourages them to be active members of their communities.[159] The Declaration advocated for disabled people to receive home-based care, either with their natural families or with foster families who received practical help.[160]

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[156]"Declaration on the Rights of Mentally Retarded Persons," OHCHR, accessed July 25, 2023, https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-mentally-retarded-persons.

[157] Ibid.

[158] Ibid.

[159] Ibid.

[160] Ibid, Article 4.

The European Convention on Human Rights, also known as the Convention for the Protection of Human Rights and Fundamental Freedoms,[161] is yet another monumental tool used to enact and enforce rights contained in the Universal Declaration of Human Rights in Europe. Though the provisions of the Convention are general, yet are very significant in the protection of people suffering from mental disorders. For example, Article 2 discusses the right to life, Article 3 bans torture, Article 5 discusses liberty and security, Article 6 discusses the right to a fair trial, Article 8 discusses respect for private and family life, and Article 14 condemns discrimination.[162]

The United Nations formally designated the years 1983 to 1992 as the "Decade for Disabled Persons," a significant step in protecting the rights of mentally disordered individuals. In this regard, the Human Rights Commission selected two special rapporteurs to address human rights breaches and promote the well-being and rights of people with disabilities, especially those suffering from mental illnesses. The principles for the protection of persons with mental illness and the improvement of mental health care (MI principles, 1991) were officially endorsed by the United Nations General Assembly after a rigorous drafting process that began in the late 1970s, and amid intense debate among mental health professionals and civil libertarians. This document serves as a comprehensive international declaration outlining the rights of individuals with mental illness.[163]

Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care,[164] provide 25 important principles that especially rely on human rights,

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[161] European Convention on Human Rights was opened for signature on November 4, 1950, in Rome, and went into force on September 3, 1953

[162] "The ECHR and Mental Health Law," The ECHR and mental health law - Mental Health Law Online, accessed July 21, 2023, https://www.mentalhealthlaw.co.uk/The_ECHR_and_mental_health_law, 1.

[163] Gostin, "The Human Rights of Persons with Mental Disabilities," 38.

[164] "Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care," OHCHR, accessed July 23, 2023, https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-protection-persons-mental-illness-and-improvement.

emphasize dignity, autonomy, and non-discrimination, ensuring that those with mental disorders have the same needs and access to proper care without fear of abuse or exploitation. These principles serve as a critical tool in advancing mental health care globally, by promoting a more inclusive and friendly society that supports the rights and well-being of all, regardless of their mental health status. Although not legally binding, these principles hold significant influence in the interpretation of treaty obligations.[165]

The instrument first provides definitions of different concepts followed by the principles. The principles are not binding but are useful guidelines for national incorporations. Therefore, these human rights-based principles are discussed below to highlight their importance for the protection of mental health.

Principle 1 provides a human rights framework for mentally impaired people regardless of their mental health status. The idea emphasizes the fundamental freedoms and fundamental rights that all people with mental illnesses or those being treated for mental illnesses deserve. As part of the health and social care system, this principle advocates their entitlement to the finest mental health care possible. It promotes the humane and respectful treatment of people with mental illnesses, protecting them from exploitation, abuse, and degrading treatment.[166]

Discrimination based on mental illness is completely forbidden, and persons have the right to exercise all civil, political, economic, social, and cultural rights recognized in numerous international instruments. A fair and independent tribunal must be involved when deciding on a person's legal capacity due to mental illness, ensuring the person's representation by counsel.

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[165] Eric Rosenthal and Leonard S. Rubenstein, "International Human Rights Advocacy under the 'Principles for the Protection of Persons with Mental Illness,'" 16 International Journal of Law and Psychiatry 257, 268 (1993).

[166] Office of the United Nations High Commissioner for Human Rights (OHCHR), "Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care" (Geneva: OHCHR, 1991), Principle 1, Fundamental Freedom, and Basic rights.

Measures must be taken to protect the interests of people who are unable to manage their affairs by their condition. The first principle guarantees sufficient safeguards and protections for individuals with mental illnesses to preserve their dignity, autonomy, and human rights.[167]

Principle 2 emphasizes the need to provide greater attention to protecting minors' rights within the scope of these Principles and by domestic laws regarding minors' protection. If necessary, a personal representative who is not a family member may be appointed to ensure proper protection.[168] Principle 3 provides a person with a mental illness the right to live and work, as far as possible in the community. [169]Whereas, Principle 4 states that mental illness determinations should follow internationally accepted medical standards. It strictly forbids basing such determinations on factors like political, economic, or social status, cultural background, conflicts, or non-conformity with prevailing beliefs. Past treatment history alone cannot justify a current or future illness. Moreover, classifying someone as mentally ill is only permissible for reasons directly linked to mental health or its consequences.[170]

Principle 5 provides that no one can be forced to undergo a medical examination for mental illness unless it follows a procedure authorized by domestic law. [171]Principle 6 talks about the confidentiality of information regarding people suffering from mental illnesses.[172]

Principle 7 is highly important and talks about community-based treatment. It provides that every patient is eligible to receive treatment and care in their local community, to the extent possible. If treatment occurs in a mental health facility, the patient should have the right to be

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[167] Ibid.
[168] Ibid, Principle 2.
[169] Ibid, Principle 3.
[170] Ibid, Principle 4.
[171] Ibid, Principle 5.
[172] Ibid, Principle 6.

treated near their home or with their relatives and friends, and they should be permitted to go back to their community as soon as possible. Likewise, each patient has the right to have treatment that is responsive to their cultural background.[173] This principle is significant as patients in developing countries like Pakistan have different cultural backgrounds and hence different necessities.

Principle 8 provides that every patient has the right to suitable health and social care, equal to that provided to other ill individuals, and they must be protected from harm, including unjustified medication, abuse, and actions causing mental distress or physical discomfort. [174]This is what Maslow's theory of needs demands basic rights followed by social care.

Principle 9 requires that every patient has the right to treatment in the least restrictive environment and with the fewest restrictive measures that are necessary for their health needs and the safety of others. Their treatment and care must be based on a personalized plan prepared in cooperation with the patient, reviewed regularly, and updated as needed by experienced specialists. Mental health care must comply with ethical standards designed for mental health practitioners, including internationally accepted standards such as the United Nations General Assembly's Principles of Medical Ethics, with no misuse of mental health knowledge and abilities. Finally, the goal of treatment should be to safeguard and empower every patient's freedom.[175]

Principle 10 says that Medication must be administered solely for therapeutic or diagnostic purposes, meeting the patient's best health needs, and never for the convenience of

[173] Ibid, Principle 7.
[174] Ibid, Principle 8.
[175] Ibid, Principle 9.

others, while adhering to known or demonstrated efficacy and being prescribed by a legally authorized mental health practitioner with proper record-keeping.[176]

The crux of principle 11 is that no patient shall be treated without their informed consent, except in limited circumstances, and that any such treatment must be based on relevant grounds, with the patient's best interests and rights considered. The patient's right to refuse or discontinue treatment is emphasized, and therapy may be delivered without informed permission in specific cases if authorized by law and found necessary to prevent necessary harm. Physical restraint or involuntary isolation is permitted only in approved instances and must be documented in the patient's medical records to ensure humane conditions and to inform the personal representative, if appropriate. Sterilization is not allowed as a treatment for mental illness, and significant medical operations require informed permission or independent assessment. Intrusive and irreversible therapies, such as psychosurgery, necessitate real informed permission and approval from a neutral third party. Clinical trials and experimental therapies require informed consent or approval from a competent review body, and patients have the right to appeal their treatment to a judicial or independent authority about their treatment.[177] This and other necessary principles were later made part of the UNCRPD and are binding requirements from member states.

The core of principle 12 is that when a patient is admitted to a mental health facility, must be informed of their rights, including an explanation of those rights and how to exercise them, in a language they know. If the patient is unable to grasp this information, it should be conveyed to their representative or a person who is prepared and capable of representing their interests. A

[176] Ibid, Principle 10.
[177] Ibid, Principle 11.

patient with the necessary capacity may also appoint someone to be informed on their behalf and another to represent their interests to facility authorities.[178]

Principle 13 emphasizes the rights and conditions in mental health facilities, including the patient's right to be recognized as a person before the law, privacy, freedom of communication, and freedom of religion or belief. The living arrangements in these facilities should be similar to regular life, with possibilities for enjoyment, education, daily living goods, and active occupation and vocational rehabilitation. Patients should not be subjected to forced labor and should have the freedom to choose the type of job they want to do, and any labor should be fair and not abusive, with the patient receiving sufficient remuneration.[179]

According to principle 14, mental health facilities should have the same access to resources as any other health establishment, including qualified employees, proper equipment, professional care, and thorough treatment. Each patient should be given privacy as well as an individualized therapeutic plan. Regular inspections by competent authorities should be conducted to guarantee compliance with these standards on the conditions, treatment, and care of patients in these facilities.[180]

Then Articles 15, 16, and 17 talk about involuntary admissions, the facilities available, and the review mechanism. For instance, principle 15 says that involuntary admission to a mental health facility should be prevented whenever possible, and access to these facilities must be considered the same as access to any other medical facility. Patients who are not admitted involuntarily have the right to leave the facility at any time, unless certain criteria for their

[178] Ibid, Principle 12.
[179] Ibid, Principle 13.
[180] Ibid, Principle 14.

retention as involuntary patients are met, as specified in Principle 16, and they must be told of this right.[181]

Principle 16 then states that involuntary admission to a mental health facility is only permitted if a qualified mental health practitioner authorized by law determines that the person has a mental illness and meets specific criteria, such as the risk of significant deterioration in their condition or the likelihood of harm to themselves or others. In such situations, the first admission should be for only a short period, pending assessment by a recognized review body, and the patient must be informed of the reasons for hospitalization as soon as possible. A competent authority, as defined by domestic law, must allow the hospital to receive involuntarily admitted patients. In some situations, consultation with a second mental health practitioner, independent of the first, is required before involuntary admission or confinement can occur.[182]

The core of Principal 17 is that a judicial or independent review body should be formed by domestic law to oversee decisions about involuntary admission or retention of individuals in mental health facilities. This body performs periodic reviews, supported by skilled and impartial mental health practitioners, to determine if the criteria for involuntary admission are still met. Patients have the right to request release or voluntary status at suitable intervals, and the mental health practitioner responsible for the case the case has the authority to order discharge if the requirements for retention are no longer met. Furthermore, patients or their representatives have the right to appeal to a higher court against decisions concerning admission or retention in a mental health facility.[183]

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[181] Ibid, Principle 15.
[182] Ibid, Principle 16.
[183] Ibid, Principle 17.

Principle 18 says that there should be procedural safeguards in place to protect the rights of patients in mental health facilities. Patients have the right to select and appoint their legal counsel, with free legal assistance available if necessary. When appropriate, interpretation services should be made available. At any hearing, patients and their counsel can request and present relevant evidence and reports. They have the right to access their records, except in extraordinary circumstances where doing so could result in serious damage. Patients, along with their representatives and lawyers, have the right to attend and participate in hearings, and they have the right to seek the appearance of certain individuals, unless doing so puts at risk their safety. Decisions about hearing privacy and reporting should the patient's wishes as well as the possible harm to their health or well-being of others. The final decision and its reasoning must be presented in writing, with copies provided to the patient and their representatives, and publishing of the decision must take into consideration privacy, open administration of justice, and the potential for harm to health or safety.[184]

Principle 19 states that individuals, including past patients, have the right to access information from their health and personal records kept by a mental health facility. However, this right may be limited to protect the patient's health or the safety of others. If relevant material is omitted, the patient or their counsel must be notified and allowed to seek judicial review. Furthermore, upon request, any written remarks made by the patient, personal representative, or counsel must be included in the patient's file.[185]

According to Principle 20, persons receiving criminal sentences or detained during criminal proceedings who are found to have or are suspected of having a mental disease should

[184] Ibid, Principle 18.
[185] Ibid, Principle 19.

get the best available mental health care as per Principle 1 of the document. These individuals are fully entitled to the protections of these Principles, with only necessary exceptions that do not prejudice their rights under relevant instruments. Domestic law may allow competent authorities to order their admission to a mental health facility based on independent medical advice. Individuals suffering from mental illnesses should always be treated by Principle 11.[186] All patients, including previous patients, have the right to file complaints by domestic legislation.[187]

Principle 22 urges States to establish sufficient procedures to monitor adherence to these Principles, examine mental health facilities, address complaints, and take appropriate disciplinary or legal action against professionals who commit misconduct or violate the rights of patients.[188] Principle 23 says that the States should adopt and implement these Principles through appropriate legislative, judicial, administrative, educational, and other measures, which should be reviewed regularly. They are also responsible for actively promoting these Principles through relevant and active strategies.[189]

Principle 24 provides for the scope of these principles stating that these principles apply to every individual admitted to a mental health facility. [190]Any existing patient rights, including those recognized in applicable international or domestic legislation, shall not be diminished, or restricted under the pretext that these Principles either do not recognize or accept them to a lesser extent. [191]The reason to provide a brief overview of the MI principles is to highlight their significance in shaping mental health legislation and to adopt these principles while deciding cases related to mental disability in Pakistan.

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[186] Ibid, Principle 20.
[187] Ibid, Principle 21.
[188] Ibid, Principle 22.
[189] Ibid, Principal 23.
[190] Ibid, Principal 24.
[191] Ibid, Article 25.

Similarly, The "Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1993[192] have been framed based on the knowledge gained during the United Nations Decade of Disabled Persons (1983-1992), with the International Bill of Human Rights, encompassing the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women, along with the World Programme of Action concerning Disabled Persons, serving as the fundamental political and ethical principles underlying these Rules."[193]

The objective is to ensure that individuals with all sorts of disabilities have the same rights and obligations as others and to eliminate obstacles that hinder their full participation in society. States, therefore, are responsible for taking appropriate actions, with active involvement from persons with disabilities and their organizations as partners.[194] The instrument consists of 22 rules integrating the human rights perspective of the decade and set out a standard that was to be internationally adopted when devising policies for people with disabilities. Though the document lacked the legal authority to be enforced, the acts of the government demonstrated a strong commitment to developing and implementing fair treatment policies for people with disabilities.

Bengt Lindqvist, the Special Rapporteur on Disability from 1994 to 2002, stated that the Standard Rules though do not provide systematic coverage of the needs and rights of people with developmental and psychiatric disorders. He does, however, recognize that the Standard Rules

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[192] 'Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by General Assembly resolution 48/96 of 20 December 1993.

[193] Ibid, Article 13.

[194] Ibid, Article 14, 15.

provide useful guidance on active social participation, which is not particularly covered in the MI Principles. Lindqvist emphasizes the complementary qualities of these two sets of standards, the Standard Rules, and the MI Principles, and recommends their joint application to people with mental disorders.[195]

2.5.3 UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The UNCRPD[196] was negotiated and drafted for six years. It started on December 19, 2001, when the General Assembly established an Ad Hoc Committee by resolution No. 56/168, and it ended on December 13, 2006, during a General Assembly plenary session. The Ad Hoc Committee, which was tasked with assessing convention proposals as a result of strong advocacy from the disability community, was scheduled to meet for the first time in July 2002.[197]

The Ad Hoc Committee held eight rounds of deliberations that served as the foundation for the UNCRPD. States as well as several international, regional, and national organizations participated in these debates, which were crucial to the document's creation. The UNCRPD and its optional protocol were approved at the UN's New York headquarters on December 13, 2006. On March 30, 2007, these papers were made available for signing. The Convention and the Optional Protocol both entered into force on May 3, 2008, following the conclusion of the

[195] Gostin, "The Human Rights of Persons with Mental Disabilities,"

[196] Adopted on 12th December 2006 by the Sixty-first session of the General Assembly by resolution A/RES/61/106, and entered into force on 3rd May 2008, in accordance with article 45(1). https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities last accessed 28.08.2023

[197] Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, A/57/357, August 27, 2002.

required ratifications.[198] Pakistan signed the convention on September 25, 2008, and ratified it on July 5, 2011. [199]

2.5.3.1 A BRIEF INSIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Individuals with disabilities were not recognized in the 1945 UN Charter or the 1948 Universal Declaration of Human Rights, but it took years for the UN to identify disability as a human rights issue. Four phases can be identified in this development. During the first phase (1945–1970), UN policy neglected people with disabilities. They became familiar as rehabilitation subjects during the second phase (1970–1980). They were human rights objects in the third phase (1980–2000), but in the fourth phase (after 2000), they at last became human rights subjects.[200]

The UNCRPD consists of 50 Articles. Articles 1 to 4 of these 50 Articles explain the objectives, definitions, principles, and obligations of member states. Articles 5 to 9 discuss in much detail the accessibility, gender equality, non-discrimination, and the rights of children with disabilities. Articles 10 to 30 guarantee the protection of the rights of people with disabilities (PWDs), whereas Articles 24 to 28 outline the defense of fundamental rights, which include employment, education, and health. Similarly, the monitoring and implementation processes for member states are fully outlined in Articles 31 through 33.[201]

Articles 34 to 50 further explore various structural features. These consist of the ratification procedure, the formation of the "Committee on the Rights of Persons with

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[198] See: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities last accessed 28.08.2023

[199] Pakistan ratifies the CRPD, by IDA September 21, 2011, https://www.internationaldisabilityalliance.org/blog/pakistan-ratifies-crpd last accessed July 20.2023.

[200] Valentina Della Fina, Rachele Cera, and Giuseppe Palmisano, eds., The United Nations convention on the rights of persons with disabilities: A commentary (Cham, Switzerland: Springer, 2017).

[201] Ibid.

Disabilities" and the "Conference of States Parties," as well as the requirements for government reporting to the CRPD and the avenues of cooperation between state members. Notably, the UNCRPD has created innovative bodies like the "Committee on the Rights of Persons with Disabilities" and the "Conference of States Parties.[202]

Similarly, the optional protocol[203] for the CRPD contains 18 articles. Optional Protocol to the UNCRPD enables the Committee to examine individual complaints. In case of alleged violations of the Convention by State parties. The brief overview shows:

Article 1 says that the States recognize the Committee's power to investigate Protocol violations, except non-parties to the Protocol.[204] Articles 2 to 7 tell that the Committee has the authority to reject communications that meet certain requirements, such as anonymity or the absence of evidence. Such letters are confidentially sent to States, and they may also ask for clarifications or ask for interim measures. It performs confidential reviews, advises States and petitioners, and, in cases of serious breaches, can start probes. The Committee may ask for updates and States may report activities taken in response to questions.

Similarly, Articles 8 to 12 narrate that the States have the option to declare that the Committee is not subject to their jurisdiction. The depositary is the UN Secretary-General. The Protocol is available for accession, ratification, and signature. Regional organizations are allowed to announce their authority and take part in elections. The Protocol becomes operative with the tenth ratification, with later signatories implementing their deposits.[205]

Articles 13 to 18 provide that Incompatible reservations are prohibited, and those that have already been made may be canceled. State Parties must agree with and ratify amendments.

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[202] Ibid.

[203] The optional protocol was also adopted on 13th December 2006 by the sixty-first session of the United Nations General Assembly by resolution a/res/61/106 available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-persons-disabilities last accessed on 28.08.2023

[204] Article 1, Optional Protocol to UNCRPD.

[205] Article 8-12, Ibid.

States may leave the Protocol with a year's notice. The text of the Protocol is available in accessible formats, and it is understood to be legitimate in many different languages.[206]

States who are party to the convention are not bound by the optional protocol unless they sign it, because it is necessary to ratify afresh. Again, it depends on the member states whether they participate in the complaint's mechanism or not.

2.5.3.2 RIGHTS UNDER THE UNITED NATIONS CONVENTION FOR PERSONS WITH DISABILITIES AND MENTAL HEALTH

Though there is no specific provision to defend the rights of mentally disabled people. However, states becoming party to the convention are required to make their national laws in line with the convention. The UNCRPD provides a series of human rights for persons facing impairments including mental health impairment. Therefore it requires a detailed analysis of the convention's provisions.

This convention is the first comprehensive document addressing the needs of persons suffering with disabilities. Article 1 of the convention States that the purpose of the treaty is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[207] Therefore, all people with disabilities including people facing mental disorders should be able to enjoy their human rights equally, and, Article 1 seeks to promote respect for their inherent dignity.

[206] Article 13-18, Ibid.
[207] Article 1, CRPD

This is the instrument that specifically discusses and promotes several basic human rights for persons with disabilities.[208] For instance, the convention provides for persons with disabilities the right to equality and the right to be treated without prejudice.[209] It talks about the rights of children[210] with impairments and women[211] with disabilities. It discusses the individual's right to life,[212] liberty, and security.[213] It covers equal recognition before the law[214] and access to justice.[215] It speaks about defending one's character[216] or freedom from torture and other terrible treatment.[217] It speaks to the right to healthcare,[218] education,[219] equal opportunities to work,[220] and social protection.[221]

2.5.3.3 RELEVANCE OF THE CONVENTION TO THE HUMAN RIGHTS OF MENTALLY DISORDERED PERSONS

The convention is not specifically designed to protect the rights of people suffering from mental disabilities however, according to the UN-CRPD, people with disabilities are those who have persistent mental or intellectual impairments.[222] It represents a shift away from the "medical model" of disability towards a social approach by attempting to expose and address prejudices

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[208] All these rights are generally available to all other persons under general and specific human rights documents.

[209] Article 5, CRPD.

[210] Article, 7, Ibid.

[211] Article 6, Ibid.

[212] Article 10, Ibid.

[213] Article 14, Ibid.

[214] Article12, Ibid.

[215] Article 13, Ibid.

[216] Article17, Ibid.

[217] Article 15, Ibid.

[218] Article 25. Ibid.

[219] Article 24, Ibid.

[220] Article 27, Ibid.

[221] Article 28. Ibid.

[222] The term ‘disability’ is used in sense of ‘impairment’ in several clauses on discrimination that says about “discrimination on the basis of disability.” See Article 5, Article 28(2)

and environmental barriers faced by those with impairments. [223] The human rights approach to disability is an alternative provided by the CRPD. Although it is not a complete replacement for the social model of disability, the human rights framework strengthens it and provides a mechanism for enforcing the convention.[224]

The convention further requires ratifying countries to harmonize their legal systems, rejecting forced medical interventions and announcing perpetual legal capacity. The convention's drafting required a lengthy process and unprecedented early involvement from human rights organizations. There are questions about the UN-CRPD's potential usefulness in treating all facets of mental health, especially emergencies, even as it serves as the primary legal foundation for mental health laws in ratifying nations.[225]

All other existing human rights treaties lack adequate emphasis on the multifaceted barriers to inclusion and participation faced by individuals with disabilities including people suffering from mental health disabilities.[226] The UNCRPD, on the other hand, covers these issues in detail and empowers the world's largest minority. The UNCRPD, which was the first legally binding agreement on disability rights, rejects perceptions that people with disabilities are the subject of deprivations and declares their equal entitlement to all community rights and protection without any discrimination.[227]

This convention is thus complementary to the human rights regime and fills in the gaps in international human rights legislation by incorporating new rights like spreading awareness and

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[223] Richard M. Duffy, and Brendan D. Kelly. "Concordance of the Indian Mental Healthcare Act 2017 with the World Health Organization's checklist on mental health legislation." *International journal of mental health systems* 11:1 (2017), 2.

[224] Della Fina, Cera, and Palmisano, The United Nations convention on the rights of persons with disabilities, 41.

[225] Duffy and Kelly, "Concordance of the Indian Mental Healthcare Act 2017," 2.

[226] For instance, the UDHR, ICCPR, ICESCR, CEDAW, CRC, and other human rights do not specifically address the rights of disabled children, women and other segments of society.

[227] Article 5, UNCRPD

promoting equality for everyone, along with stricter definitions of rights and increased state responsibilities towards disabilities.

2.6 UNITED NATIONS MECHANISM FOR SUPERVISION

The UN human rights system is based on legally binding instruments. Once a legally binding instrument is in place, the mechanism should be there for monitoring and implementation. Periodical reports are provided to the UN Human Rights Council. The United Nations HR system is comprised of two basic types of bodies responsible for developing and protecting human rights: Charter Bodies (bodies under the UN) and UN HR Treaty Bodies. [228]

2.6.1 CHARTER- BASED BODIES

These bodies are established by provisions enshrined in the United Nations Charter. They have broad human rights mandates to carry out the UN's main objective of promoting human rights. Decisions and actions are taken through majority voting, allowing for collective decision-making on human rights issues.[229]

The Human Rights Council (HRC)[230] is the primary United Nations Charter Body entrusted with human rights issues. The Human Rights Council was established by the General Assembly in 2006 to be more efficient and successful than its predecessor, the Human Rights Commission. One of its primary duties, comprised of forty-seven UN member nations, is to

[228]Promoting and protecting human rights in the UN system, accessed July 28, 2023, https://humanrights.gov.au/sites/default/files/content/education/hr_explained/download/FS8_UN.pdf, 1.

[229] Ibid.

[230] Established by General Assembly resolution 60/251 of 15 March 2006. Convenes in Geneva for regular sessions thrice a year and holds special sessions when necessary. It Submits reports to the General Assembly.

undertake periodic reviews of all UN member states' human rights records every four years, giving recommendations for improvement.[231]

The Human Rights Council has formed several subsidiary bodies to help promote and preserve human rights. The Universal Periodic Review Working Group meets three times a year and reviews sixteen countries at each session, to complete a four-year cycle of all 193 UN Member States. The Working Group does not produce sessional reports but instead publishes reports for each country reviewed. The Human Rights Council Advisory Committee, comprised of 18 experts, operates as an expert think-tank and succeeded the Sub commission on the Promotion and Protection of Human Rights. Special Procedures, which include special rapporteurs, independent experts, and working groups, conduct investigations and reports on specific human rights situations. The document symbols used in special procedure reports differ depending on the entity to which they are presented.[232]

Before the formulation of HRC in 2006 there was the 'Commission on Human Rights', a subsidiary of the 'Economic and Social Council', which finished its final session in March 2006, and its work is continued by the Human Rights Council. It was founded in 1946, holding annual and special sessions as needed. Working documents, summary meeting records, and sessional reports were issued under specific symbols. Resolutions and decisions were not published separately in paper format but may be recovered individually through the Charter-based bodies database. The Sub-Commission on the Promotion and Protection of Human Rights, a key subsidiary of the Commission, operated from 1947 to 2006 and reported to the Commission until its final report was submitted to the Human Rights Council. Various ad hoc working groups and

[231] Promoting and protecting human rights, supra.
[232] United Nations accessed July 29, 2023, https://research.un.org/en/docs/humanrights/charter.

special procedures reported to the Commission and the Sub commission. These procedures continue reporting to the Human Rights Council and its subsidiaries.[233]

The most recent information can be found on the OHCHR (the United Nations High Commissioner for Human Rights) special processes webpage. The Office of (OHCHR) was founded after the 1993 World Conference on Human Rights. Its principal objective is to prevent human rights violations and ensure human rights protection through international collaboration and the coordination of UN human rights projects. Since 1994, special procedures have convened as a group every year, with the report delivered by a note from the High Commissioner. The OHCHR conducts a wide range of activities from its headquarters in Geneva, and it operates in areas where there are major human rights violations through field offices and participation in UN peacekeeping missions.[234]

The HR council works in two ways. Complaints are received by the communication group and the operation group starts inquiry whether justified or not, and reports to the council, and the matter may be taken by the Security Council. Dialogue with the member country is done and the country would respond to such issues in the country. The provisions of the countries may be interpreted by the states to ascertain what was intended while signing the instrument.

2.6.2 TREATY-BASED BODIES

Treaty-monitoring bodies are responsible for overseeing and encouraging conformity to certain human rights treaties. As a result, their focus is limited to countries that have ratified the relevant treaties. Several human rights treaties have established such monitoring agencies to oversee State Parties' compliance with treaty obligations. The Committee on UNCRPD, for

[233] Ibid.
[234] Ibid.

example, monitors State Parties' compliance with the UNCRPD whereas the Human Rights Committee on ICCPR oversees State Parties' compliance with ICCPR.[235] Treaty Bodies review reports from State Parties on their treaty compliance, and some treaty bodies may get individual complaints of treaty body noncompliance.

Treaty Bodies evaluate periodic reports presented by States Parties to execute treaty commitments. They also consider ‘shadow reports,' which are submissions from non-governmental organizations and national human rights institutions that provide extra information beyond government reports. Treaty Bodies provide recommendations (Concluding Comments or Recommendations) based on their assessments to assist States Parties in improving compliance with their treaty obligations.[236]

2.7 SUPERVISORY MECHANISM OF THE UNCRPD

The United Nations provides a proper procedure for the implementation of different instruments. Once legally binding instruments are in place the mechanism should be there for monitor and implementation. For every treaty body, there is a proper supervisory mechanism.

The Committee on the Rights of Persons with Disabilities is an expert organization that monitors and implements the Convention in member countries.[237] Each State Party to the Convention shall submit to the Committee, through the Secretary-General of the UN, a comprehensive report on measures taken to implement its obligations under the present Convention and on progress made within two years of its entry into force.[238] States Parties are

[235] Ibid.
[236] Ibid.
[237] Article 34, UNCRPD
[238] Article 35 (1),

required to submit subsequent reports at least every four years, or whenever requested by the Committee.[239] Three crucial points must be there in the subsequent document:

i. "The report will include details on the execution of concluding observations from the preceding report, including instances of non-implementation or problems.

ii. Member States will evaluate additional legal and suitable procedures for implementing the UNCRPD.

iii. Information will be provided on any ongoing or emergent issues experienced by PWDs in achieving fundamental freedoms in civil, political, and other areas of life."[240]

From the discussion, it is obvious that if the initial report is submitted more than two years after the Convention's signature, the initial Convention-specific document should include sufficient accurate information about the pertinent judicial, legislative, and other texts by the UNCRPD to protect the rights of persons with disabilities including people who suffer from mental disorders. After every four years, regular periodic reports are subsequently presented to the CRPD.

The second thing is the UNCRPD's monitoring system and enforcement measures at the national level. Article 33 calls for national monitoring and outlines four key provisions for meeting this standard: "appointment of one or more focal points for respective domestic implementation, establishment of a coordination mechanism within government, creation of an independent mechanism, and full participation of persons suffering from disorders." Although member States have been given considerable discretion to establish national implementation

[239] Article 35 (2)

[240] United Nations Report of the Committee on the Rights of Persons with Disabilities, 25 https://www.refworld.org/pdfid/4eef033a2.pdf Last accessed July 16, 2023.

frameworks, the convention recognizes that compliance with international human rights treaties must be made at the domestic level.[241]

It is to be noted that the convention has stressed international cooperation with member states in the national implementation of the convention.[242] These measures include "capacity building, including through the exchange and sharing of information, experiences, training programs and best practices,' [243]the 'facilitation of research programs and access to scientific knowledge,' [244]and 'technical and economic assistance, including the facilitation of access to accessible and assistive technologies.'[245]

Articles 34-39 of the UNCRPD and the Optional Protocol to the UNCRPD, establish a framework for global monitoring and implementation. The Optional Protocol to the UNCRPD includes two separate implementation and monitoring procedures. The first is an inquiry procedure that allows the CRPD to investigate violations of the Convention. The CRPD reviews periodic reports submitted by States for this purpose.[246] A periodic report must be submitted within two years of the State's accession to the Convention. Later member states must submit a report at least every four years. In conjunction with periodic reports, the CRPD may request additional information from States under Article 36, paragraph 1. The CRPD guides State Parties in the preparation of reports. The UNCRPD inquiry procedure is not new and is similar to other human rights monitoring systems. However, the CRPD holds a regular conference of member states to discuss enforcement issues.

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[241]Articles 33 (1)(2)
[242] Article 32.
[243] Article 32(1) (b).
[244] Article 32(1) (c).
[245] Article 32(1) (d).
[246]Convention 2006, Article 35.

The Committee's second international monitoring procedure is to receive individual complaints regarding violations of their rights. State Parties must have ratified the optional protocol to be eligible for this. When domestic remedies have been exhausted, the protocol authorizes the CRPD to handle individual complaints.[247] Once the complaint is admitted, CRPD may conduct an independent investigation.[248] The complaint procedure is extremely effective in putting pressure on the states. It examines complaints not only from individuals who have been wronged but also from groups who make claims on their behalf based on the convention.[249]

2.8 PAKISTAN'S COMMITMENT TOWARDS HUMAN RIGHTS AND UNCRPD

Pakistan has ratified numerous human rights treaties, notably the UN Convention on the Rights of Persons with Disabilities. Since then, Pakistan has made serious attempts to comply with the methods stated in those agreements. Pakistan signed the Universal Declaration of Human Rights in 1948. Pakistan's 1973 Constitution emphasizes equality before the law[250] and equal protection of rights for all people. To that end, Pakistani people are granted essential rights and freedoms under the Constitution. It includes 25 rights, 15 of which are civil and political, and the remaining 10 are social and economic, such as the eradication of exploitation,[251] personal security,[252] the right to a fair trial,[253] and freedom of trade, company, or profession.[254]

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[247] Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities 2006, Article 1-5.
[248] Ibid, Article 6-7.
[249] Articles 4 (3) and 33 (3).
[250] Article 25, 1973 Constitution of Pakistan.
[251] Ibid, Article 3.
[252] Ibid, Article 9,
[253] Ibid, Article 10A.
[254] Ibid, Article 18.

Pakistan ratified ICESCR in 2008 and ICCPR in 2010 but didn't sign the two optional protocols and has shown its commitment to the covenant by implementing major legislation, including the formation of several bodies and acts. "Legislations such as the Harassment of Women at Workplace (Amendment) Act 2022, the Transgender Persons (Protection of Rights) Act 2018, the National Education Policy Framework 2018, and the Enforcement of Women's Property Rights Act 2020 demonstrate Pakistan's commitment to human rights. Furthermore, legislation such as the ICT Rights of Persons with Disabilities Act 2020, the National Committee for the Implementation of the UN Convention on the Rights of the Child, the Legal Aid and Justice Authority Act 2020, the ICT Senior Citizens Act 2021, The Enforcement of Women's Property Rights Act 2020, Legal Aid and Justice Authority Act 2020, National Action Plan on Business and Human Rights 2020 and the Ehsaas Programme demonstrate the country's efforts to promote and protect the rights of various segments of society."[255]

Pakistan has submitted its initial report under Articles 16 and 17 of the ICESCR in October 2015. The report covered developments and information from 2008 to 2014, acquired through extensive consultative discussions with stakeholders and data provided by the government. In June 2022, the government submitted its second Periodic Report on the ICESCR.[256] Similarly, Pakistan has submitted its maiden report on ICCPR to the HRC in October 2015, complying with Article 40 of the ICCPR. Pakistan has consistently filed periodic reports, and the second periodic report is currently in the process of submission.[257]

The Convention against Torture (CAT) was adopted in 1984, and Pakistan signed on in April 2008, ratifying it in June 2010. In response to this pledge, Pakistan drafted the Torture and

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[255] Information and learning material on core human rights ... - mohr, accessed July 29, 2023, https://www.mohr.gov.pk/SiteImage/Misc/files/Information%20and%20Learning%20Material%20on%20Core%20Human%20Rights%20Convention.pdf, and 10.

[256] Ibid, 14.

[257] Ibid, 11.

Custodial Death (Prevention and Punishment) Bill, 2020, which aligns national legislation with CAT principles. Torture is defined in the Bill by Article 1(1) of the Convention, with penalties ranging from three to ten years in jail. Public workers who fail to prevent or aggravate torture would face criminal charges. The Senate Functional Committee on Human Rights approved the bill in July 2020, and it is now before the National Assembly for discussion. Torture by law enforcement agencies would be criminalized for the first time if the bill is passed. Pakistan submitted its Initial Report under Article 19 of the CAT in January 2016, confirming its commitment to respecting the covenant's rights and addressing implementation issues. The country is prepared to submit its second Periodic Report in 2024.[258]

Pakistan signed the CRC (Convention on the Rights of the Child) on November 12, 1990, and subsequently ratified two optional protocols: one on children in armed conflict on November 17, 2016, and another on child sales, prostitution, and pornography on July 5, 2011. Pakistan consistently submits its reports to the relevant treaty body, following an extensive national consultative process. The reports are thoroughly discussed in inter-ministerial and civil society forums, and their feedback is incorporated into the final document. The combined sixth and seventh periodic reports are due to be submitted to the Committee in 2022, ad still pending in 2024.[259]

Adherence to international documents such as the ‘Universal Declaration of Human Rights’, the ‘International Covenant on Civil and Political Rights’, the ‘International Covenant on Economic, Social, and Cultural Rights,’ and others, which indirectly address mental health and the protection of the rights of people with mental disorders, reflects the state's dedication to this essential cause. Likewise, Pakistan has signed similar other important human rights treaties.

[258] Ibid, 24.
[259] Ibid, 29.

The international and regional human rights documents emphasize that all people have rights as a result of their humanity. As a result, people with mental diseases shouldn't have to prove they should have their rights.[260]

Similarly, Pakistan after signing the UNCRPD has made some serious efforts to protect the rights of disabled persons including people facing mental disability. Realizing the value of the human rights of individuals with disabilities, Pakistan ratified and signed the UNCRPD in 2010. Pakistan has so far tried to enact legislation to comply with the convention. Nevertheless, Pakistan occasionally tried to integrate disabled people into normal community activities even before the UNCRPD.[261]

It is noteworthy to mention that the constitution of Pakistan talks about the rights of all citizens. The constitution states, "All citizens are equal before the law and are entitled to equal protection of law, and there shall be no discrimination based on sex."[262] Similarly, the constitution guarantees all basic rights to its people without any discrimination and encourages to formulation of necessary legislation in this regard.[263]

It is important to note that before the 18th Amendment to the Pakistani Constitution, the subject of disability was handled by the Ministry of Social Welfare and Special Education However, following the devolution of powers, the Provincial Governments are mandated to create policies, plans, and laws to protect the rights of PWDs, and the Ministry of Human Rights is in charge of implementing the "Convention on the Rights of Persons with Disabilities" to

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[260] Lawrence Gostin & Lance Gable, "The Human Rights of Persons with Mental Disabilities: a global perspective on the application of human rights principles to Mental Health," 20-121.

[261] Sana Gul, "Disability policies in Pakistan: The way forward." *Pakistan Journal of Applied Social Sciences* 11:1 (2020), 62.

[262] Article 25(1) (2), Constitution f Pakistan 1973.

[263] Ibid, Article 8 to Article 28, Article 38.

better coordinate and carry out international obligations at the national level. [264]The provinces have accordingly regulated different disability laws.

After the 18th amendment Pakistan formulated its provincial mental health laws, and despite the fact the country signed the UNCRD, Pakistan submitted its maiden report in 2020, which was due in 2013. However, the report submitted to the UN did not mention any such details. Only provisions under points 48 and 148 enumerate Pakistan's commitment in this regard. Paragraph 48 says;

> 'The Mental Health Ordinance 2001', repeals the Lunacy Act, 1912 with amendments in the laws relating to the treatment and care of mentally disordered persons. It emphasizes better care, treatment, and rehabilitation services by mobilizing and encouraging communities. Through this, the federal mental health authority is responsible for regulating the treatment of persons with mental disorders, the duration of periods of detention of persons with mental disorders, provides for judicial proceedings for the appointment of a guardian of the person, as well as to make provision for the protection of basic human rights of persons with mental disorders.[265]

This provision talks about the amended 2001 act instead of providing detailed insight into the provincial acts. Similarly, paragraph 148, states nothing about the improvements made in this context. The paragraph states as under;

> The Mental Health Ordinance 2001 repealed the Lunacy Act, of 1912. To provide better health care and prevention of mental disorders, the Ordinance: (i) provides to establish the federal mental health authority, and regulates its powers and functions; (ii) CRPD/C/PAK/1 25 ensures to protection of human rights of persons with mental disorders; (iii) deals with regulating the duration of periods of detention of persons with mental disorders; (iv) deals with leave and

[264] Ibid

[265] Initial report submitted by Pakistan under article 35 of the Convention, due in 2013: Convention on the Rights of Persons with Disabilities, Geneva: UN, 15 Oct. 2020 https://digitallibrary.un.org/record/3888757?ln=en last accessed 15.06.2023

discharge of persons with mental disorders from psychiatric facilities; and v) provides for judicial proceedings for appointment of a guardian of person and manager of the property of persons with mental disorders.[266]

These paragraphs are evident and show the seriousness of the state towards the actualization of the rights of mentally disordered persons. It can be said that in Pakistan, laws on disabled persons are still traditional and do not fully incorporate UNCRPD guidelines. According to Section 33, it lacks regulations that guide its implementation.

2.9 MASLOW'S NEED THEORY, UNCRPD, AND THE HUMAN RIGHTS-BASED APPROACH

Human rights are inherent like humanity and are bestowed on all simply for being human. Every individual should be entitled to fundamental rights under this protected framework. These rights cover a wide range of issues, including personal security, the right to a good level of life, and the opportunity to obtain justice. Individuals should neither be deprived of essential liberties nor be devoid of the requisites vital for their sustenance.[267]

Maslow's five-stage framework of needs also discusses these rights in two categories: deficiency needs and growth needs. The first four levels are often referred to as deficiency needs (D-needs), whereas the top tier is referred to as growth or being needs (B-needs).[268]

Deficiency needs to revolve around basic survival requirements, such as living, food, and sleep, as well as safety needs such as security and protection from harm. Because they serve as a means to an end, behaviors arising from these needs are perceived as being motivated by a lack.

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[266] Ibid.

[267] For instance, see the rights available under UDHR 1948.

[268] Saul Mcleod, "Maslow's Hierarchy of Needs Theory," Simply Psychology, July 26, 2023, https://www.simplypsychology.org/maslow.html, 1.

These deficient demands originate as a result of deprivation and are identified as motivators when they become unsatisfied. Furthermore, the desire to meet such cravings grows stronger with time. For example, the longer a person goes without food, the more intense their hunger grows.[269]

Initially, Maslow claimed that individuals must first address lower-level deficit requirements before proceeding to higher-level growth needs. However, he later stressed that satisfying a need does not follow a strict "all-or-nothing" pattern. He admitted that his prior words may have given the impression that a need must be met before the next one emerges. When a deficit need is partially met, it fades, and our activities tend to become habitually geared toward meeting the next set of unmet requirements. These future requirements take precedence. Nonetheless, the desire for expansion of requirements persists and can even intensify when aggressively pursued.[270]

This is true about the rights of people suffering from mental disorders. Accordingly, the system should be tailored according to the demands of people suffering from mental health problems. For instance, the history of a person should not be a reason for the rejection of a person while selecting for a job or employment. Similarly, they must be seen as equal citizens. They have the right to an adequate standard of living and equal recognition before the law.[271] They also possess capacity, if not help them to gain to assume. For this purpose, the people responsible in courts and prisons, the police, and the prison staff to be properly trained regarding the rights of people facing mental health issues. Similarly, the Family members must take responsibility to ensure their protection at home. They must not be compelled by guardians and must be given the opportunity for supported decision-making instead of surrogate decision-

[269] Ibid.
[270] Ibid.
[271] This is also the essence of article 12 of the UNCRPD.

making. The family must ascertain their wishes in the property as, the right to inherit, make a will or other rights must be protected.

To ensure the protection of mentally disabled persons, the rights enshrined under the UNCRPD in conjunction with other human rights instruments including the ICCPR, ICESCR, and CAT, must be taken into account.

According to Maslow's hierarchy of needs, human needs are arranged in a hierarchical framework, with basic physiological demands at the bottom and more advanced self-actualization needs at the top. The needs that are prioritized in this hierarchy are:

1) Physiological needs, which are necessary for survival;
2) Safety needs, which are related to stability and control;
3) Love and Belongingness needs, which are related to relationship interactions;
4) Esteem Needs, which are related to self-worth and recognition; and
5) Self-actualization Needs, which are related to realizing one's potential.[272]

Within the context of the CRPD, the theory assumes greater significance, particularly in the protection of the rights of people who are dealing with mental health conditions. To create a deeper knowledge of the relationship between this theory and these people's rights, some of the CRPD's most important articles will be discussed.

2.9.1 THE RIGHT TO AN ADEQUATE STANDARD OF LIVING AND SOCIAL PROTECTION

Article 28 of the UNCRPD states:

[272] PhD Saul Mcleod, "Maslow's Hierarchy of Needs Theory," Simply Psychology, July 26, 2023, https://www.simplypsychology.org/maslow.html, 2.

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

a. To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

b. To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;

c. To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;

d. To ensure access by persons with disabilities to public housing programmes;

e. To ensure equal access by persons with disabilities to retirement benefits and programmes.[273]

Maslow's theory of physiological requirements is deeply related to the terrible living circumstances of people suffering from mental health, including poor conditions, a lack of necessities, and isolation. According to Maslow's hierarchy, people must first meet their most fundamental physiological needs—such as those for food, drink, shelter, and safety—before moving on to more complex requirements. As emphasized by CRPD Article 28, residents of residential facilities struggle to achieve these basic physiological needs, which harms their general well-being and limits their ability to seek higher needs like interaction and self-improvement.

[273] Article 28, UNCRPD.

2.9.2 THE RIGHT TO INFORMED CONSENT AND ENJOYMENT OF MENTAL HEALTH

Under the CRPD all forms of forced treatment and placement are prohibited, even in case of psychosocial disabilities. The removal of legal capacity is also prohibited. The CRPD requires that States develop and ensure a supported decision-making mechanism instead of substituted. There should be a human rights approach to mental health. Article 25 of the CRPD talks about the enjoyment of the highest attainable standard of physical and mental health. It states:

> States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination based on disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:
>
> a. Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;
>
> b. Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;
>
> c. Provide these health services as close as possible to people's own communities, including in rural areas;
>
> d. Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;
>
> e. Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

f. Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.[274]

Article 25 of the CRPD affirms the right to health for people with disabilities within the context of human rights, requiring equitable access to healthcare services. It requires services to be inclusive, community-based, and respectful of people's dignity, emphasizing that lack of access is discrimination and denial of health care. It is critical to distinguish disability from health because some disabled people require additional health care, with Article 25 emphasizing the importance of informed consent.[275]

The article highlights that as human beings, people want security, employment, and physical or mental health as these are the safety demands of living in a society. The barriers to accessing necessary mental health care, particularly in countries like Pakistan, match Maslow's hierarchy of demands for safety. Lack of a secure and safe environment for people's well-being is reflected in the difficulty to obtain appropriate mental health services owing to accessibility, cost, or quality difficulties. Promoting confinement over community-based care is equivalent to neglecting the need for a safe social environment in Maslow's theory of human motivation. Maslow's hierarchy of demands for safety is reflected in CRPD Article 25, which highlights the need to safeguard people's safety and well-being by offering high-quality care and support. This emphasis is on equitable, physical and mental health services.[276]

States are therefore specifically required by Article 25 of the Convention on the Rights of Persons with Disabilities to offer health treatment to individuals with disabilities only upon receiving their free and informed agreement. Therefore, it is the responsibility of health

[274] Article 25, CRPD

[275] R Lombard-Vance, Richard, Evelyn Soye, Delia Ferri, Emma McEvoy, Malcolm MacLachlan, and Sari Sarlio-Siintola. "Applying the 'human rights model of disability 'to informed consent: Experiences and reflections from the SHAPES project." Disabilities 3, no. 1 (2023): 28-47.

[276] McLeod, "Maslow's Hierarchy."

professionals to guarantee that consent is obtained before beginning any medical procedure. Individuals with psychosocial disabilities are entitled to the same treatment, including the freedom to accept or reject medical treatment. Article 25 of the constitution of Pakistan 1973 also states that every citizen is equal before the law and has a right to equal protection under it.[277]

2.9.3 THE RIGHT TO LEGAL CAPACITY AND SUPPORTED DECISION-MAKING

Under the CRPD Removal of legal capacity is also prohibited. The CRPD requires that States develop and ensure a supported decision-making mechanism instead of a substitute. Rather there should be a human rights approach to mental health. Similarly, Article 12 of the CRPD, also corresponds with Maslow's theory's demands for safety. It places a strong emphasis on giving people with disabilities equal standing under the law and giving them the same legal competence as everyone else. Similar to Maslow's hierarchy of requirements for safety, the article stresses the necessity for adequate safeguards to prevent abuse while respecting the individual's rights and preferences and promoting a secure atmosphere. [278]The Supreme Court of Pakistan in the case of Dr. Shahnawaz Munami & Others, ordered the federal and provincial governments to ensure people suffering from disabilities equal participation in society. The government was told to take specific/concrete action in this regard. The court further instructed the government to "make every possible effort to ensure that existing laws are vigorously implemented."[279]

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[277] Article 25, 1973 constitution.

[278] Article 12, UNCRPD

[279] Dr. Shahnawaz Munami and Others *vs. The Federal Government of Pakistan and others,* Constitutional Petition No.64, 2013.

Again, the core of Article 14 CRPD states that people with disabilities must have the same freedom and security as everyone else. The article emphasizes that a person's impairment should not be used as justification for restricting their freedom and stresses the significance of treating disabled people with respect for their human rights, which is consistent with Maslow's hierarchy of requirements for security and safety.[280]

Due to being usually considered incapable of making important life decisions independently, people with mental and intellectual disabilities frequently experience violations of their legal competency rights. Admissions to residential facilities and medical treatment take place anywhere without informed permission. Article 12 of the CRPD underscores equality before the law and reiterates the right to exercise legal competence and have a voice in decisions that affect them.[281]

As per the provisions of Article 12 of the UNCRPD, every individual with a disability, including those with psychosocial disabilities, is entitled to equal status before the law and should be afforded the same legal capacity as others. It lays out two benefits of personal autonomy: the encouragement of personal autonomy through assisted decision-making and the respect for one's own decisions formed by personal will and preferences.

Decision-making is supported when it comes from friends or trustworthy resources. The matter of guardianship, which often results in loss of freedom and excessive protection and involves substituting individuals with mental disabilities' decision-making capacity, is addressed under Article 12. Absolute guardianship ignores shifted capacity in different aspects of life and at different times. The most recent updates highlight the due process and

[280] T Minkowitz, Tina. "Why Mental Health Laws Contravene the CRPD–An Application of Article 14 with Implications for the Obligations of States Parties." Available at SSRN 1928600 (2011).

[281] C De Bhailís, Clíona, and Eilionóir Flynn. "Recognising legal capacity: commentary and analysis of Article 12 CRPD." International Journal of Law in Context 13, no. 1 (2017): 6-21.

promote alternatives like limited supervision. Supported decision-making, acknowledged by Article 12, reflects a shift towards autonomy and customized support by involving people as key decision-makers while permitting different levels of assistance.[282]

To Maslow's safety needs, Article 14 emphasizes liberty and security and states that disabilities cannot be used as an excuse for an arbitrary or illegal denial of liberty.

2.9.4 THE RIGHT TO ACCESS TO COMMUNITY-BASED SERVICES

Article 19 CRPD talks about the right to live independently and be included in the community by stating:

> States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
>
> a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
>
> b. Persons with disabilities have access to a range of in-home, residential, and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
>
> c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.[283]

This article of the Convention emphasizes that people with disabilities have an equal right to live in their communities and should have access to the same choices as everyone else. States are

[282] Dinerstein, Robert. "Implementing legal capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The difficult road from guardianship to supported decision-making." (2012).

[283] Article 19, CRPD.

required to put into place strong policies that guarantee the full inclusion and involvement of people with disabilities in society. To do this, it is necessary to provide housing options, access to a range of support services, including personal help, and assurance of an equal distribution of community resources while staying responsive to the requirements of people with disabilities.[284]

The difficulties faced by people with disabilities, which include exclusion and limits in numerous areas of life, are consistent with Maslow's theory's notion of the need for love and belongingness. These people cannot participate in the community, receive an education, find employment, or access assistance programmes. The stress placed on their right to live in the community, select their living arrangement, and receive the support they need in CRPD Article 19 reflects their basic need for acceptance, participation in social activities, and belonging—all of which are essential components of Maslow's love and belongingness stage in the hierarchy of needs.[285]

2.9.5 THE RIGHT TO FREEDOM FROM TORTURE AND CRUEL, INHUMAN, OR DEGRADING TREATMENT

Article 15 of the CRPD says:

1. No one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.
2. States Parties shall take all effective legislative, administrative, judicial, or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman, or degrading treatment or punishment.[286]

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[284] EV Bannister, Emma Wynne, and Sridhar Venkata Puram. "Grounding the right to live in the community (CRPD Article 19) in the capabilities approach to social justice." International Journal of law and Psychiatry 69 (2020): 101551.

[285] McLeod, "Maslow's Hierarchy."

[286] Article 15, CRPD.

The primary assertion of this article is that no person should ever be subjected to torture or any other cruel, inhuman, or degrading treatment, regardless of their impairments. It emphasizes in particular that no medical or scientific experiments should be carried out without the subjects' informed consent. Governments must establish thorough legislative, regulatory, and judicial safeguards to guarantee that people with disabilities are equally protected against torture and other ill-treatment.[287] In "Malik Ubaidullah vs. Government of Punjab, Justice Mansoor Ali Shah ordered that even "derogatory words" be removed from official documents. Concerning the legal status, the existing framework of disability laws was declared medically focused. It required that the laws be based on the "social model" of disability, which requires society to remove and modify unfair obstacles rather than insisting on individual impairment."[288]

Similarly, Article 16 places a focus on all-encompassing measures to protect people with disabilities from all types of exploitation, violence, and abuse, including aspects based on gender. In addition to independent oversight of the facilities that serve children, it calls for support systems and protective services that are gender- and age-sensitive. The article addresses the necessity of the affected individuals' physical, cognitive, and psychological recovery, fostering their well-being, dignity, and autonomy. Additionally, it calls for the creation of robust regulations and laws to monitor, look into, and punish cases of exploitation, abuse, and violence against people with disabilities.[289]

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[287] JE Lord, Janet E. "Shared Understanding or Consensus-Masked Disagreement? The Anti-Torture Framework in the Convention on the Rights of Persons with Disabilities." Loy. LA Int'l & Comp. L. Rev. 33 (2010): 27.

[288] *Malik Ubaidullah vs. Government of Punjab,* PLD 2020 SC 599.

[289] Peter Bartlett, and Marianne Schulze. "Urgently awaiting implementation: the right to be free from exploitation, violence and abuse in article 16 of the convention on the rights of persons with disabilities (CRPD)." International journal of law and psychiatry 53 (2017): 2-14.

As people experience violence, isolation, and a lack of autonomy, the situations described in inpatient facilities and social care homes mirror Maslow's theory's erosion of self-esteem demands. Many experience boredom and loneliness, endure mistreatment and overmedication, and as a result, lose confidence in themselves. In recognition of the regaining of self-esteem in Maslow's hierarchy, CRPD Articles 15 and 16 highlight the need to stop torture, exploitation, and abuse whilst facilitating recovery and reintegration in a setting that respects dignity and self-respect. The necessity of preserving people's autonomy and well-being, which are comparable to requirements for self-esteem, is reinforced by Article 16's emphasis on independent monitoring.[290]

2.10 CONCLUSION

The chapter has done a thorough assessment of the protection of rights for people with mental illnesses within the context of international human rights legislation while taking Pakistan's obligations as a state into account. It has discussed mental health-related provisions in key international treaties and the role of Human Rights Councils and Supervisory Bodies. Similarly, the chapter discussed important issues such as recognizing mental diseases, involuntary admissions, competency evaluation, and financial and communal rights. It identified the challenges that people with mental illnesses confront, such as stigma, discrimination, and limited resources.

The findings of the chapter show human rights-based approach to mental health is necessary to ensure the rights of people with mental illnesses, which is vital to the total realization of rights for all. Certain complexities are inherent in the UNCRPD's role in defending the rights of people with mental illnesses while also evaluating the responsibilities placed upon

[290] Self-esteem needs, McLeod, "Maslow's Hierarchy."

Pakistan under the treaty. Again, the UNCRPD emphasized the commitment to defending the rights of people with mental disabilities living inside their borders beyond general disability.

From the discussion it was found that Pakistan being a member of different human rights instruments directly or indirectly is bound to protect people suffering from mental disabilities. Again, reforms in national legislation are required based on values that respect the dignity and autonomy of mentally ill people and enable them to participate meaningfully in society. Moreover, there is a critical need for increased knowledge and education about mental health and rights.

CHAPTER 3

PROTECTION OF MENTALLY DISABLED PEOPLE IN NATIONAL LEGISLATION

3.1 INTRODUCTION

This chapter provides a review of mental health legislation in Pakistan, with much focus placed on the rights of individuals affected by mental disorders and the country's legal framework regarding these rights. Leading from the general overview of the Global Action Plan, as well as the regional strategy set by the World Health Organization to address the issues of mental health, the research evaluates whether the common law principles shape the legal response in Pakistan. It has taken a number of key considerations of the elements regarding English legislation on mental health-including the Lunacy Act of 1912, the Mental Health Act of 1959, and the Mental Health Act of 1983-contained in discussion in respect of how they have contributed to the formation of Pakistani legislation. It also offers a comparative approach to understanding how the development of legal standards in England has gone on to impact on the development of Pakistan's legislation on mental health.

A thorough review is done on the current mental health legislation in Pakistan, such as the Mental Health Ordinance 2001 and its adaptations in provinces. This study tries to identify potential legal loopholes and stumbling blocks that avert the effective protection of rights of those afflicted with mental illnesses in Pakistan. Against this backdrop, this analysis uses the UNCRPD as a yardstick for judging whether the legislative efforts of Pakistan align with international standards on rights relating to mental health.

3.2 GLOBAL ACTION PLAN FOR MENTAL HEALTH

Mental health and well-being are essential for all of us to live enriched lives, reach our greatest potential, contribute to our communities, and exhibit endurance in the face of stress and challenges. Patients with mental illnesses frequently experience long-term disability as a result of challenges to accessing mental health services, such as limited treatment availability and long wait times.[291]

The WHO created the 2013-2030 Mental Health Action Plan to promote mental health, prevent mental illnesses, care for patients, hasten their recovery, protect their human rights, and reduce the death and disability rates among those suffering from mental illnesses. Specific actions are proposed for Member States as well as international and national partners to achieve WHO's plans and objectives.[292]

This is a fact that mentally disabled persons are part of the human family, and therefore, should get all basic rights without any discrimination. World Health Organization in "Mental Health Action Plan 2013-2020" of the 66th World Health Assembly, stressed minimizing human rights violations and promoting quality care in mental health"[293] Again, the State should devise mental health strategies, actions, and interventions for treatment, prevention and promotion in compliance with the CRPD and other international and regional human rights frameworks;[294] It must be ensured that mentally disabled persons can exercise full range of human rights and access high quality, culturally-appropriate health and social care in a timely way to promote recovery, attain the highest level of physical and mental health, and participate fully in society,

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[291] Philippe, Tristan J., Naureen Sikander, et al.." *JMIR mental health* 9, no. 5 (2022): e35159.

[292] Om Prakash, Singh. "Comprehensive mental health action plan 2013–2030: We must rise to the challenge." Indian Journal of Psychiatry 63, no. 5 (2021): 415-417.

[293]WHO, Mental Health Action Plan 2013-2020, last accessed 25.06.2018, available at; http://www.who.int/mental_health/publications/action_plan/en/

[294] Ibid

free from stigmatization, discrimination and human rights violations.[295] The quality Rights monitoring toolkit has also validated and standardized tools for monitoring quality of care and human rights in mental health facilities, and has highly stressed the facilitation and promotion of human rights towards mentally disabled persons.[296]

3.3 REGIONAL STRATEGY FOR MENTAL HEALTH AND THE MODELS OF PROTECTION

Regional strategies are made by states to develop their mental health policies. The vision, goals, and objectives are set first for the promotion of Mental Health and the protection of people suffering from mental disabilities. Proper consultation is made with NGOs, health professionals, members of the prosecution, and experts of other stakeholder institutions. States take into account the problems faced by people with mental disabilities, the services provided, and the involvement of the community to ensure protect the Human Rights of people facing mental disorders.

The various mechanisms and models of protection are adopted by states at domestic and International levels to ensure protection for adolescents, and people suffering from stress, anxiety, and mental disorders based on the resources. Some of the key models adopted worldwide are discussed below.

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[295] Ibid.

[296] WHO Quality Rights Tool kit, Assessing and improving quality and human rights in mental health and social care facilities, available at; http://apps.who.int/iris/bitstream/handle/10665/70927/9789241548410_eng.pdf;jsessionid=C8EF6FB1F87476B6209FE9CAF16A109C?sequence=3 last accessed 28.08.203

3.3.1 BALANCED CARE MODEL

To protect the needs of persons suffering from mental illnesses, mental health services should be organized to protect their human rights. The services should be community based and the amount of service care needs to be rationalized. The balanced care model promotes services from low resources i.e. from the primary care needs of the people in the psychiatric units towards medium and then to a higher level. The services are to be provided from lower levels to higher levels, and a single version of care across the globe is unattainable for several reasons.[297]

Accordingly, Primary care in low-resource settings must focus on improving the identification and treatment of people with mental illnesses by community or primary healthcare. In addition, medium-resource settings can establish strong mental health services, including outpatient clinics, community mental health teams, acute in-patient services, longtime community residential care, and work/occupation of people with mental disorders. In addition to primary care and medium mental health services, high-resource settings can also provide specialized services of like nature.[298]

Different views are prevailing that care to be either provided in psychiatric hospitals or community care should replace specialized hospital care. The balanced care model suggests to adopt comprehensive care in a mental health setting based on community care and hospital care. Since the resources are different in different states for mental health, therefore the balanced care model has proposed the above three different settings for low, middle, and high-income countries. In countries like Pakistan where the investment in mental health is very low, specialized services cannot be provided and the primary care settings need to be improved.

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[297] Graham Thornicroft, and Michele Tansella. "The balanced care model for global mental health." Psychological medicine 43, no. 4 (2013): 849-863

[298] Ibid

3.3.2 STEP CARE MODEL

Mental health systems must strike a balance between caring for people with mental illnesses and supporting the prevention of mental illness at the individual, family, and municipal levels. If individuals and communities are to benefit from efficient and effective mental health services, then Primary Health Networks must focus on system architecture.[299]

The step care model is important because it works in stages based on resource and service requirements. For example;

"1. Self-care with or without assistance may be web-based, and may or may not be supervised by a health professional.

2. Community-based care delivered by a general practitioner or other generalist clinician of BHU

3. Community-based specialist care is typically provided by a community-based mental health team of DHQ hospitals and;

4. Tertiary specialist care will be required as an exception rather than the norm."[300]

This type of setting is workable in countries like Pakistan. This again needs proper legislative and policy framework and more importantly, awareness-raising among health professionals, community social workers, citizens, and family members of people suffering from mental health issues.

[299] David Perkins, Stepped Care, System Architecture and Mental Health Services in Australia. International Journal of Integrated Care, 16(3), (2016).16. DOI: https://doi.org/10.5334/ijic.2505

[300] Ibid

3.3.3 COLLABORATIVE CARE MODEL

The collaborative care model is the approach to integration in which primary care providers, care managers, and psychiatric consultants collaborate to provide care and monitor patients' progress. The model is presented to be effective in terms of cost and clinically for a variety of mental health conditions, in a variety of settings, and with a variety of payment mechanisms.[301] It is not the doctor, but the plan is designed by the family members of the patient with the assistance of nurses or psychologists as primary care providers. Then evidence-based care is provided by a nurse or well-trained person to provide therapy or medication. Finally, a psychiatric consultant would be supervising such primary units or services in person or by phone.[302]

The primary care units are to be supervised by specialists and the community health workers must check the compliance, supported by family care services. The psychiatric services can be shifted from big to low-level hospitals and the existing resources must be used rationally. It is because the specialist doctors are never willing to go to community hospitals. He may visit such hospitals timely and may be supported by staff at the community level, who will be checking the day-to-day things. Iran has trained health workers nurses and community volunteers are there to bring the patients and there is a kind of specialized and non-specialized services provided to patients.[303]

Though step care model is more suitable for Pakistan, yet it is important to understand that in low-income countries non- specialized services are provided to patients, and in countries

[301] Jürgen Unutzer, and et al."The collaborative care model: An approach for integrating physical and mental health care in Medicaid health homes." Health Home Information Resource Center (2013): 1-13.

[302] Ibid.

[303] Behzad Damari and et al. "Transition of mental health to a more responsible service in Iran." Iranian journal of psychiatry 12, no. 1 (2017): 36.

with high resources specialized services are provided in the form of health, education, housing, and employment. To attain a more developed structure in Pakistan, resource pooling and financing are very important. Again, this is possible only when all relevant stakeholders are taken into account to ensure maximum protection and cooperation towards mentally ill persons.

3.4 NATIONAL OBLIGATIONS OF STATES TOWARDS FACILITATION OF RIGHTS TO MENTALLY DISORDERED PERSONS

State Parties are required to take concrete steps to improve the human rights situation of individuals with mental impairments. Most notably, the CRPD emphasizes respect for the inherent dignity of every human person as well as equality. The specific sections of the CRPD describe what this involves in terms of the fulfillment of well-established human rights and fundamental freedoms, including the right to liberty,[304] the right to equal treatment under the law,[305] and the right to the best possible standard of health. [306]The UNCRPD obliges states to ensure certain duties to ensure the rights of persons suffering with disabilities.[307]

3.4.1 RESPONSIBILITY TO RESPECT

'Duties to respect' prevent the state from undue interference in the right holder's sphere of autonomy. For example, the State should refrain from promulgating legislation, which discriminates against persons with mental disabilities.[308] This obliges states to change or remove

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[304] States parties must provide "persons with disabilities with access to various types of assistance for exercising their legal capacity and consent provided under Article 14, UNCRPD."

[305] "States parties are required not to deny people with disabilities the right to make and pursue their own decisions, nor to allow substitute decision-makers to consent on their behalf. States parties must instead provide persons with disabilities with access to various types of support arrangements for exercising their legal capacity, including the offering of consent". Article 12, Ibid.

[306] Article 25, IBID.

[307] Article 4, CRPD

[308] Lawrence O Gostin, The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health, (George Town law faculty publication; 2004), 22-23 https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1088&context=facpub last accessed 26.08. 2023

any laws, rules, customs, or practices that discriminate against people with disabilities; additionally, refrain from acting in a way that is against the Convention.[309]

3.4.2 RESPONSIBILITY TO PROTECT

This deals with the action of states preventing third parties from undue interference in the right holder's sphere of autonomy and security. For example, the state should enact legislation to protect persons with mental disorders from inhuman and degrading treatment and prevent acts of discrimination because of mental disability in securing different rights of housing, employment, and health. State should adopt the necessary steps to prevent discrimination against people with disabilities by individuals, groups, and private businesses.[310]

3.4.3 RESPONSIBILITY TO FULFIL

Here state action is required to identify the difficult situations, and provide remedy as an aid or facilitate the right holder. For example, duties to fulfil include the provision of adequate mental health services in times of need and protection from ill-treatment from private mental health care providers. The member states accordingly must adopt all necessary administrative, legal, and other means to carry out the rights outlined in the Convention accessible information should be made available and training should be encouraged.[311]

3.5 THE ROLE OF ENGLISH LAWS IN SHAPING THE PAKISTANI LEGAL SYSTEM

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[309] Marine Uldry, Theresia Degener, "*Towards Inclusive Equality: 10 Years Committee on the Rights of Persons with Disabilities",* University of Applied Sciences Rhineland-Westphalia-Lippe Immanuel-Kant-Strasse 18-2044803 Bochum Germany

[310] Ibid.

[311] Ibid.

The term ‘Legal system’ is not a technical legal term, nor is it significant in the day-to-day administration of law.[312] However, it is critical to keep the state's machinery running smoothly. Pakistan's legal system is a hybrid of Shariah law and English common law. [313]

Modern English law may be traced back to the Norman Conquest in 1055 when King William created a strong central government and began the job of standardizing laws. In the early phases, there was no centralized legal system, and justice was administered by local Barons according to local norms. To address this, King William sent traveling judges, sometimes known as Royal Commissioners, who met with local inhabitants. They would either settle disputes according to local customs or refer complex legal concerns to the royal court in London. By 1250 AD, a new legal structure known as Common Law had formed. This body of law, formed by judicial rulings, created the bedrock of England's legal system, founded in long-standing norms. Common Law, is therefore called "the judge-made law of England based on customs."[314]

Over time, a new legal notion known as Equity emerged. The common law courts left a hole that equity addressed by providing redress when their remedies fell short of addressing certain injustices. Initially, getting justice entailed petitioning the king's court. However, when the number of cases mounted, they were submitted to chancellors, who presided over cases on the king's behalf. These chancellors devised a set of ideas known as equitable principles, which were influenced by moral right and wrong as well as concepts borrowed from Roman and Islamic law.

A significant turning point took place in 1474, when a chancellor gave a judgment in their own right, establishing equity courts as a unique legal system distinct from common law

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[312] Joseph Raz, "The Identity of Legal Systems," California Law Review 59, no. 3 (May 1971): 795. Online available at https://www.jstor.org/stable/3479604, 795, Last accessed August 12, 2023.

[313] Imran Ahsan Khan Nyazee, *Legal System of Pakistan* (Lahore: Federal Law House: 2018), 18.

[314] Muhammad Munir, Precedent in Pakistani Law (Oxford: Oxford University Press, 2014), 35.

courts. These equity courts established their own set of rights and remedies, creating a dualistic legal landscape. The presence of these two judicial systems proved inconvenient, frequently subjecting litigants to lengthy hearings and increasing costs. The disadvantages caused by the competing systems remained until 1873-75 when the Judicature Act allowed the merger of common law and equity courts. [315]This merger put an end to the long-standing problem of legal fragmentation. The legal framework in Pakistan today incorporates both common law and equity concepts, with all related rights and remedies available within the same judicial framework.

3.5.1 IMPACT OF ENGLISH LAWS ON MENTAL HEALTH LAWS OF PAKISTAN

Historically, the Pakistani legal system adopted colonial law for local application after getting independence in 1947. As a result, Pakistan legal system retains fundamental common law elements (such as binding precedent and delegated legislation) while continuously adopting Islamic law inside the existing common law framework. The British Parliament passed the Indian Independence Act 1947, which partitioned British India and created India and Pakistan on August 15, 1947. Section 18(3) of the Indian Independence Act states:

> That the law of British India and of the several parts existing immediately before the appointed day shall as far as applicable with necessary adaptations, continue as the law of each of the new Dominions and the several thereof until other provision is made by laws of the legislature of the Dominion in question or by any other legislature or other authority having power in that behalf.[316]

[315] Albert Kenneth Roland Kiralfy. *The English legal system*. Sweet & Maxwell, 1960), 105.
[316] Muhammad Munir, Precedent in Pakistani Law, 8.

The Pakistan (Adaptation of Existing Laws) Order 1947 and the Central Acts and Ordinance Order 1949 made the required changes in Pakistan. Similarly, each Pakistani constitution from 1956 to 1973 included a clause allowing existing legislation to continue. Article 224 of the 1956 constitution, article 225(1) of the 1962 Constitution and article 280(1) of the 1972 interim constitution, all provided for the continuation of the pre-existing laws. [317]Article 268(1) of the presently enforced 1973 constitution also provides that "except as provided by this article, all existing laws shall subject to the constitution, continue in force so far as applicable and with the necessary adaptations until altered, or repealed by the appropriate legislature."[318]

Healthcare, especially mental health, changed after British colonization as well. British systems and custodial care dominated and influenced mental health care in India. Lahore Mental Hospital provided this service to a large part of the country following independence in 1947.[319]This was the reason that during the nineteenth and twentieth centuries, people with psychiatric disorders were largely treated and managed in major hospitals, following British traditions. The primary purpose of institutionalizing those suffering from mental diseases was to separate them from society. Over time, however, it became evident that those people required community care and therapy. This movement certainly received well-deserved recognition in Pakistan during the twentieth century.[320]

After the creation of Pakistan, most of the laws that were followed in the British Subcontinent were adopted as they are now. One of such laws that was put in place was about

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[317] Ibid, 9.

[318] Ibid.

[319]Javed, Afzal, al Muhammad Nasar and others, Mental Healthcare in Pakistan, Taiwanese Journal of Psychiatry 34(1):p 6-14, Jan–Mar 2020. Last accessed July 12, 2023, https://journals.lww.com/TPSY/Fulltext/2020/34010/Mental_Healthcare_in_Pakistan.3.aspx

[320] Ibid.

mental health.[321] The Mental Health Law, which was called the Lunacy Act (1912), was passed in the Indo-Pak subcontinent.[322] Pakistan applied this inherited Act of 1912 and later replaced it with the MHO 2001. [323]The English laws that impacted Pakistani mental health jurisprudence even after independence were as follows;

3.5.1.1 LUNACY ACT 1912

Until 2001, the Lunacy Act of 1912 was the primary source of regulations governing the treatment of mentally ill people in Pakistan. This act was declared to those persons having mental illness called “Lunatics” or "idiots of unsound mind.324 The main focus of this act was to remove the mentally ill personnel from society and keep them in Asylums.[325]

The lunacy act was divided into four primary components, each of which included key definitions and terms, as well as paperwork relating to the reaction, precaution, and care of individuals suffering from mental illness, as well as practical standards for determining whether an individual is mentally ill. Based on a need assessment, the law was judged to be severely insufficient and outdated to battle the growing need of mentally ill people and society, making a revision to the lunacy act mandatory.[326]

Despite Pakistan's acceptance of British India's Lunacy Act 1912 upon independence in 1947, it was subsequently replaced by The Mental Health Ordinance 2001 (MHO 2001). The principal goals of the MHO 2001 were to change the legal framework for the treatment and care

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[321] Yasir Abbasi, “Mental health ordinance 2001 is it really being used,” The Journal of the Pakistan Medical Association 58, no. 10 (2008):578-580.T https://jpma.org.pk/PdfDownload/1520.pdf

[322] Gilani, “Psychiatric health laws in Pakistan: from lunacy to mental health,” 317.

[323] Safdar. A. Sohail, Akhtar A. Syed, and Atif Rahman. "Mental health in Pakistan: yesterday, today and tomorrow." Mental health in Asia and the Pacific: Historical and cultural perspectives (2017), 19-22.

[324] Gilani, “Psychiatric health laws in Pakistan: from lunacy to mental health,”317.

[325] Abbasi, “MentalTHealthTOrdinanceT2001TIsTitTreallyTbeingTused,”578-579.

[326] Shafquat Inayat, "Mental health issues and relevant Legislation in a Developing Country." *Pakistan Journal of Public Health* 7:2 (2017), 123.

of people with mental illnesses. This included improving arrangements for their care, treatment, property management, and financial administration, as well as supporting community-based care. Furthermore, the regulation is intended to promote mental health and avoid mental diseases.[327]

3.5.1.2 MENTAL HEALTH ACT, 1959

The origin of the Mental Health Act 1959 can be attributed to the discussions conducted by the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency, which took place from 1954 to 1957. The Commission primarily examined the Lunacy and Mental Treatment Acts from 1890 to 1930, as well as the Mental Deficiency Acts from 1913 to 1938. However, as indicated by the Commission's suggested amendments, these laws are no longer in line with modern principles.

The following were the fundamental principles that supported the 1959 Act:

i. The provision of treatment, both within hospitals and beyond, in a voluntary and informal manner, whenever possible.
ii. The development of proper systems to treat circumstances when compulsion was required, either for the patient's or society's benefit.
iii. Evaluating the Act considering the increased need of shifting the emphasis on mental health issues from institutional to community-based care.[328]

Effective from November 1, 1960, the Mental Health Act 1959 brought about a thorough transformation by removing prior statutes and implementing a more inclusive term,

[327] Sangeeta Dey et al., "Comparing legislation for involuntary admission and treatment of mental illness in four South Asian countries," International Journal of Mental Health Systems 13, no. 67 (2019): 7-9, https://doi.org/10.1186/s13033-019-0322-7.

[328] JEH Williams, TCN Gibbens, R Jennings, Williams, JE Hall, T. C. N. Gibbens, and Raymond Jennings. "The Mental Health Act, 1959." *The Modern Law Review* 23:4 (1960), 411-413.

"mental disorder." This shift dissolved the divisions among patient classifications and offered a balanced framework for protecting and regulating a smaller segment of individuals. Notably, voluntary hospitalization became a norm, and the Act ensured that mental health care was consistent with general health services, removing the common misconception that mentally disordered people were different from other sick people.[329]

The Mental Health Act of 1959 laid the foundation for translating the recommendations of the Percy Commission into actionable legislation. By removing the division between psychiatric and other medical facilities, the Act ensured that individuals labeled as 'mentally ill' could access broader health and social services. Section 6 of the Act mandated local authorities to provide aftercare, which included establishing residential homes, training centers, and supplementary support services.[330]

The act dissolved the Board of Control, and Mental Health Review Tribunals (MHRTs) were established because of the Act. The Lord Chancellor established guidelines for tribunal hearings in the Mental Health Review Tribunal Rules 1960. The Special Hospitals [Broadmoor, Rampton, Moss Side] Working Party was formed in early 1959 by the Minister of Health to evaluate the role of special hospitals and the care of specific patient groups within them. This assessment considered the new mental health legislation as well as the larger hospital service provisions. [331]

Similarly, the Royal Commission advocated a review mechanism covering both medical and non-medical opinions to prevent unjustified detention in hospitals or under guardianship. These tribunals were designed to incorporate medical and non-medical perspectives and adopt

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[329] Ibid.

[330] The Mental Health Act 1959, can be reached at https://navigator.health.org.uk/theme/mental-health-act-1959

[331] Ibid, 415.

local, independent decision-making regarding patient discharge. A tribunal comprised of members picked from a panel of suitable individuals for each health region was the preferred structure.[332]

The Mental Health Act of 1959's impact was further increased by The Mental Health Act of 1983, which reinforced informal patient status and extended certain rights to detained individuals. Notably, this Act introduced provisions for appeals and information propagation about rights. The succeeding 2007 amendments introduced the advanced concept of compulsory treatment outside hospital settings, known as community treatment orders.[333]

By continuing the previous discussions, the succeeding paragraphs explore a detailed exploration of The Mental Health Act of 1983 to provide a thorough understanding of its implications and significance.

3.5.1.3 MENTAL HEALTH ACT, 1983

The Mental Health Act of 1983 was signed on 9 May 1983 and went into effect on 30 December 1983 after receiving royal assent. It repealed a significant portion of the Mental Health Act of 1959 and replaced the Mental Health (Amendment) Act of 1982. Only the most experienced psychiatrists in England and Wales have operated their practices under laws other than the 1983 Act.[334]

The Mental Health Act of 1983 was an iconic piece of legislation that played and plays a critical role in the treatment and care of people suffering from mental illnesses in the United Kingdom. This revolutionary statute, which combines the principles of the 1959 and 1982 Acts,

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[332] Ibid.

[333] National Institute for Health and Care Excellence. "Service user experience in adult mental health: improving the experience of care for people using adult NHS mental health services." *NICE Guidelines [CG136]* (2011).

[334] Branton and Brookes, "Definitions and Criteria,"

provides a comprehensive framework for the assessment, treatment, and rights of those who require mental health treatment.[335]

Under the Mental Health Act of 1983, all laws relating to people with mental illnesses were combined. On September 30, 1983, the majority of the newly enacted regulations came into force (S. 149(2)). In contrast, as required by S.149(3), the rules relating to hospitalization for assessment (S.35), treatment (S.36), and interim hospital orders (ss. 38, 40(3)) were put into effect on October 1, 1984. On October 28, 1984, the sections (Ss. 114, 145(1)) concerning authorized social workers entered effect.[336]

The act also removed the lacunas in the 1959 act. For instance, The Mental Health Act of 1959 implied that people who were in custody could receive treatment without their consent because it made no mention of consent for treatment. However, the consent provision was a substantial new addition made by the 1983 Act.[337]

The act specifies the particular circumstances and grounds for keeping someone in a medical facility against their will. This power may be used independently of whether the subject has the mental capacity to authorize their hospitalization, a condition known as "being sectioned." Only when a person has a "mental disorder" that qualifies for invoking the Act is detention permitted. In addition, the detention has to be necessary for their safety or the safety of others.[338]

The statute places a strong emphasis on the need to look into less restrictive forms of medical care and treatment before using incarceration. The act also specifies the duties of

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[335] Claire Hilton "Changes between the 1959 and 1983 Mental Health Acts (England & Wales), with particular reference to consent to treatment for electroconvulsive therapy." *History of Psychiatry* 18: 2 (2007), 225-226.

[336] https://www.mentalhealthlaw.co.uk/media/Gostin_chapter_1.pdf

[337]Claire Hilton “Changes between the 1959 and 1983 Mental Health Acts (England & Wales), with particular reference to consent to treatment for electroconvulsive therapy." *History of Psychiatry* 18:2 (2007), 217

[338] https://www.alzheimers.org.uk/get-support/legal-and-financial/mental-health-act-1983

healthcare and social service providers for people in detention, including safeguards for their safety. The act further clarifies guardianship and post-custody care rules as well as the processes for challenging an individual's detention. The Act might cause stress for both the person with dementia and their careers, though, if it were to be applied to them.[339]

The 1983 Mental Health Act underwent revision in 2007. The 2007 amendments received Royal Assent on 19 July 2007 and were substantially implemented on 3 November 2008.[340]

The main goal was to clarify the rights afforded to those who are dealing with mental health issues in a variety of important areas. These include the evaluation and medical care received in a hospital setting, the accessibility of medical care while residing in the community, and the various pathways that may result in hospitalization, including both civil and criminal ones.[341]

The 2007 amendments to the Mental Health Act of 1983 resulted in new definitions for "mental disorder" and "medical treatment," as well as the removal of the classifications required for protracted detention. This includes doing away with the outdated "treatability test" and replacing it with a brand-new "appropriate-treatment test." In addition, the term "learning disability" was added to the diagnosis of a mental disease if it was related to extremely violent or dangerously irresponsible behavior.[342]

Since many Pakistani psychiatrists were trained in the UK, many British Pakistani psychiatrists were working there who were closely connected to the psychiatric community in Pakistan. That is why the mental health laws of Pakistan are closely related to the UK’s mental

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[339] Ibid

[340] Tim Branton, and Guy Brookes. "Definitions and criteria: the 2007 amendments to the Mental Health Act 1983." *Advances in psychiatric treatment* 16:3 (2010), 162.

[341] Mental Health Act 1983, page 2

[342] Ibid.

health laws and the Mental Health Ordinance 2001 in Pakistan has a lot in common with the UK's Mental Health Act 1983 as a result of these long-standing and ongoing connections.[343]

3.6 CURRENT MENTAL HEALTH LEGISLATIONS IN PAKISTAN

All over the world, states have National Mental Health Legislation to deal with mental health-related problems. Mental diseases are significant contributors to the global health burden, with depression and anxiety ranking among the leading causes of disease burden worldwide.

According to the World Health Organization, a billion people are dealing with mental health concerns, 3 million people are killed by alcohol each year, and one person dies by suicide every 40 seconds, especially among those aged 15 to 29.[344] In developing countries, like Pakistan, where mental health is given less emphasis, limited facilities obstruct mental health care. Mental health issues are more prevalent in Pakistan, with women suffering with a higher frequency, which may be related to lower female literacy rates.[345]

Pakistan's development in the area of mental health legislation has gone through many stages. Health Ordinance 2001 was the first step in this regard. The 18th Amendment, however, changed everything and caused the central ordinance to be repealed. After that, the responsibility for creating local mental health laws fell to the provinces, indicating a crucial change in the nation's approach to mental health policy.

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[343] Tareen and Tareen, "Mental Health Law,"

[344] World Health Organization, "Mental Health and Substance Use," accessed August 9, 2024, https://www.emro.who.int/mnh/statistics/world-mental-health-day-2020.html.

[345] S. Mudasser Shah, Taipeng Sun, Wei Xu, Wenhao Jiang, and Yonggui Yuan. "The mental health of China and Pakistan, mental health laws and COVID-19 mental health policies: a comparative review." General Psychiatry 35:5 (2022).

3.6.1 MENTAL HEALTH ORDINANCE 2001

A joint effort involving the Institute of Psychiatry, a WHO Collaborating Centre located in Rawalpindi, as well as the international and local mental health communities resulted in the Mental Health Ordinance 2001. The Mental Health Act of the United Kingdom was used as the model for many measures of the Mental Health Ordinance of 2001.[346]

A paradigm change from collective rights to an individual right-based approach is brought about by the new legislation. A movement may be observed from the previous Lunacy Act of 1912, which was more concerned with protecting society from people with mental illness by isolating and segregating them from the public, to the Mental Health Ordinance of 2001, which was more concerned with the treatment of people with mental disease. It has now advanced by adopting a right-based strategy.

The Mental Health Ordinance (MHO) of 2001 addressed concerns relating to access to mental health services, including voluntary and involuntary treatment, issues with competency, capacity, and guardianship. The concept of informed consent and human rights issues like the right to confidentiality, the right to have their property protected, and the right to have disciplinary action against abusive treatment were also covered by the ordinance.[347]The Ordinance also addressed a variety of issues, including access to mental health services, voluntary and involuntary treatment, and issues of competency, capacity, and guardianship. Moreover, the ordinance made it illegal for someone to accuse another of being mentally ill in

[346] Muhammad Tahir Khalily, Aziz ur Rehman, Mujeeb Masud Bhatti, Brian Hallahan, Irshad Ahmad, Muhammad Ifzal Mehmood, Shamsher Hayat Khan, and Bilal Ahmed Khan. "Stakeholders' perspective on mental health laws in Pakistan: A mixed method study." *International Journal of Law and Psychiatry* 74 (2021).

[347] Abbasi, "MentalTHealthTOrdinanceT2001TIsTitTreallyTbeingTused,"578-579.

order to slander, impugn, or defame them. Additionally, it condemned maltreatment, and microcephaly, and placed an unusual limit on psychosurgery and electric shock therapy.[348]

The Federal Mental Health Authority (FMHA) was founded in 2001 as a part of this ordinance to develop national care standards to ensure standardized care across the country. The term "mental disorder" under the ordinance has the same meaning as other terms in this ordinance, including mental disease, severe personality disorders, and severe mental disability.[349]

According to the ordinance, “There are four types of patient detention:

a) Admission for assessment, which spans 28 days.

b) Admission for treatment, with a duration of 6 months.

c) Urgent admission, allowing detention for 72 hours.

d) Emergency holding, which permits detention for 24 hours.”[350]

According to the MHO 2001, a patient's relatives or family members have a period of fourteen days in which to appeal against the detention order to a court of protection. The ordinance necessitates an evaluation by a psychiatrist (or a medical professional skilled in psychiatry) as well as a general medical practitioner in circumstances of involuntary admission and treatment. The idea of "emergency powers" enables medical professionals to provide care without involving formal legal processes.[351]

According to the ordinance, a government-appointed board must be established and given the responsibility of regularly inspecting every part of psychiatric hospitals and evaluating patients, including those with mental illnesses. The board has the power to advise psychiatric facilities, provincial mental health agencies, or the federal government on conditions there. This

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[348] ibid.
[349] Dey et al., "Comparing legislation for involuntary admission," 11.
[350] Ibid.
[351] Ibid.

group is known as the Board of Visitors and is made up of a chair (a High Court judge), two psychiatrists (one with at least 10 years of experience, and one well-respected citizen), two physicians (with at least 12 years of experience), and the Director of General Health Services (or their nominee).[352]

Following Pakistan's 18th Amendment to the Constitution in 2010, the provinces acquired control over matters relating to disabilities and related issues. The Ministry of Human Rights is responsible for enforcing the Convention on the Rights of Persons with Disabilities in collaboration with relevant federal and provincial organizations to guarantee improved coherence and compliance with international obligations on a national scale. All provinces were required to update and adopt relevant laws following the passage of the 18th Amendment.[353] Accordingly, different provinces have formulated their provincial acts on mental health.

3.6.2 SINDH MENTAL HEALTH ACT 2013

In April 2010, 18th amendment to the constitution was enacted, transferring to the individual provinces the responsibility of providing psychiatric treatment from the federal government. Consequently, the jurisdiction over mental health law was also transferred to the provincial level. Notably, the province of Sindh took the lead in adopting and putting into practice the Mental Health Ordinance of 2001, eventually renaming it the Sindh Mental Health Act 2013).[354]

The foundation of the Sindh Mental Health Act 2013 lies in the MHO 2001. This law defines "mental disorder" as a person who has a mental ailment that requires treatment owing to

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[352] Ibid, 11.

[353] Government of Pakistan ministry of human rights.

[354] Tariq Hassan, Asad Tamizuddin Nizami, and Sarah Hirji. "Forensic psychiatry in Pakistan." *International journal of law and psychiatry 41* (2015), 95.

any condition involving the mind, except severe personality disorder and mental impairment. The confinement classifications are similar to those listed in the MHO 2001.[355]

Section 54 (2) of the Sindh Mental Health Act, 2013, states that a mentally disturbed prisoner held in a correctional facility must be assessed by the Inspector General of Prisons to determine their mental condition. If the individual is found to be mentally unstable, appropriate measures should be taken to convert the person from the criminal justice system to the mental health system.[356] In cases when a person is being held for "offenses endangering public health, safety, convenience, or morals," Section 53(3) requires an evaluation by the Board or two of its members to ascertain the person's mental state.[357]

To oversee matters, the Sindh Mental Health Authority is composed of a chairperson and a maximum of fourteen members designated by the government. Its duties include advising the government on all issues relating to mental health, including creating a code of conduct to achieve the Act's goals. By MHO 2001, the Board of Visitors is established by the Sindh Mental Health Authority in partnership with the government to carry out the purposes of the Act. This Act deals with the assessment and care of an accused person who has been labeled "mentally disabled while they are imprisoned.[358]

Nevertheless, this legal structure lacks protective measures for mentally ill defendants, specifically individuals detained under blasphemy laws, who lack any corresponding legal rights. Human rights organizations have raised apprehensions that a noteworthy portion of individuals

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[355] Dey et al., "Comparing legislation for involuntary admission," 8.

[356] Hira Zulfiqar, “Mental Illness in the Pakistani Legal System." Editor’s Note 5 (2018): 142. Can be visited at https://humanrightsreviewpakistan.wordpress.com/mental-illness-in-the-pakistani-legal-system/ (Last retrieved: 20/7/2023).

[357] Section 53, Sindh Mental Health Act.

[358] Dey et al., "Comparing legislation for involuntary admission," 8.

with mental illnesses are subjected to prosecution under blasphemy laws due to this circumstance.[359]

3.6.3 PUNJAB MENTAL HEALTH ACT 2014

The Punjab Mental Health Act 2014 serves as an amendment to the Mental Health Ordinance 2001. The Act was introduced by the government with little consultation from mental health specialists or advocacy organizations. This legislation modifies the 2001 ordinance, principally by replacing the word 'Federal Government' with 'Government.' In essence, this legislation is the MHO 2001, with sections altered by the Punjab Mental Health (Amendment) Act 2014, and this amended version is now only applicable to the Punjab region.[360] The FMHA was also superseded by the Punjab Mental Health Authority. The authority is made up of a chairperson and up to ten members chosen by the Punjab Government. The assessment and treatment processes are identical to those described in the MHO 2001.[361]

3.6.4 KHYBER PAKHTUNKHWA MENTAL HEALTH ACT

In its foundation, the Khyber Pakhtunkhwa Mental Health Act of 2017 has also similarities to the MHO 2001. While the Mental Health Acts of Sindh, Punjab, and Khyber Pakhtunkhwa do not include community modifications they do mention the 'providing of counselling, education, rehabilitation, aftercare, and preventive measures in the community.'

Khyber Pakhtunkhwa has also introduced a health policy for the period 2018-2025 to address mental health issues. Due to decades of geopolitical instability, violence, and economic uncertainty, non-communicable diseases such as mental disorders, cancer, cardiovascular

[359]Zulfiqar, "Mental Illness in the Pakistani Legal System," 1423.
[360]Shaikh, "Mental health legislation in Pakistan," 2.
[361] Dey et al., "Comparing legislation for involuntary admission," 10.

diseases, diabetes, and injuries have accounted for significant mortality and morbidity in the region. The policy focused on various mental health aspects, such as improving health services and facility packages, prioritizing mental health, raising healthcare delivery standards, training for healthcare workers, improving doctors' skills and supervision, providing psychosocial and physical rehabilitation for those affected by long-term injuries and violence, establishing rescue and psycho-social support services, and expanding mental health services.[362]

3.6.5 BALUCHISTAN MENTAL HEALTH ACT

Baluchistan Mental Bill No. 04 of 2019 was passed by the Provincial Assembly on October 12, 2019, and signed by the Governor on October 24, 2019, thus formulating the Baluchistan Mental Health Act, 2019.[363] Despite the fact, that the Mental Health Ordinance 2001 was repealed after the 18th amendment in 2010, it took 9 years for the provincial assembly to come up with its legislation. This shows the seriousness of the mental health issues in the province.

Baluchistan is a region with inadequate infrastructure, health care, and economic well-being. Due to a lack of mental health treatments in hospitals, many seek out traditional therapeutic approaches such as homeopathy, Chinese herbal medicine, and acupuncturists. Although the Balochistan Institute of Psychiatry and Behavioral Sciences was recently founded in the province, it is still not functioning and is situated in Quetta, leaving other important cities like Turbat, Gwadar, and Khuzdar without adequate mental health facilities. In a developing

[362] Ibid.

[363] The Balochistan Mental Health Act, 2019 Act No. IX of 2019, Last accessed July 7, 2023, available at https://pabalochistan.gov.pk/pab/pab/tables/alldocuments/actdocx/2019-10-30_16:45:35_5c0a1.pdf

society characterized by insecurity, unemployment, and economic difficulties, mental health should be prioritized alongside physical ailments.

3.6.6 CRIMINAL LAWS OF PAKISTAN DEALING WITH MENTALLY DISORDERED PEOPLES

The right to a fair trial is a basic human right and a fundamental right guaranteed under various UN Conventions and the Constitution of Pakistan 1973. This right is available to every citizen without any discrimination. Accordingly, Sections 295, 464, 465 & 466 of the Pakistan Penal Code 1860, and Chapter 34 of Criminal Procedure Code deal with insanity and the rights of people suffering from insanity. Insanity is defined in Pakistani law under Section 84 of the Pakistan Penal Code, 1860. "Nothing is an offense which is done by a person who at the time of doing because of unsoundness of mind, is incapable of knowing the nature of the act or that he doing what is either wrong or contrary to law".[364]

Sections 295 of the Pakistan Penal Code deal with blasphemy, which sometimes poses significant challenges for those suffering from mental health disorders. This situation emerges as a result of the lack of provisions for people suffering from psychotic and/or neurotic disorders. As a result, persons suffering from these conditions may be subjected to legal action under these statutes, which lack the requisite safeguards.[365]

This is particularly concerning because of certain mental diseases, like schizophrenia, in which people mistakenly believe they are conforming to acceptable social norms. Similarly, Individuals suffering from neurotic disorders such as obsessive-compulsive disorder (OCD) may also feel compelled to engage in behaviors that could be interpreted as blasphemous.

[364] Section 84, PPC.
[365] Zulfiqar, "Mental Illness in the Pakistani Legal System," 143.

Unfortunately, the current legal system does not provide these persons with any unique protections, thus subjecting them to prosecution without having the chance to mount a valid defense. This, in turn, can lead to unfair judicial processes and even convictions under the laws.[366]

In addition to the above provisions of PPC, a full chapter, Chapter 34, discusses the problem of insanity in the Criminal Procedure Code, of 1898.[367]

3.7 ANALYSIS OF THE MENTAL HEALTH LEGISLATION IN PAKISTAN

Pakistan's mental health laws constitute a complex junction of legal, cultural, and societal factors that influence the treatment and rights of people suffering from mental illnesses. The legal framework aims to address issues with mental health treatment, the rights of people suffering from mental diseases, and promoting the integration of mental health into the wider healthcare system. Accordingly, the state promulgated its laws to make them compatible with international standards. Now the question here remains; is the legislation that Pakistan has passed effective in fulfilling our nation's duties under the UN human rights regime?

After the 18th Amendment to the 1973 constitution of Pakistan, when health became a provincial subject the Mental Health Ordinance and the Mental Health Authority were repealed, and mental health became a matter for provincial legislatures to address through their respective assemblies.[368] However, these provincial Mental Health Acts had potential drawbacks such as a restrictive definition of a mental condition, possibly inappropriate authority allocation to police

[366] Ibid.
[367] Chapter 34, CrPC 1898.
[368] Zulfiqar, "Mental Illness in the Pakistani Legal System," 143.

personnel, and the absence of advocates for human rights in the Federal Mental Health Authority.[369]

Since the provincial acts are copies of the ordinance, therefore, the rights provided under the act are analyzed. The Mental Health Ordinance has some good features and drawbacks at the same time. For instance:

3.7.1 THE RIGHT TO CONFIDENTIALITY

Article 50 of Mental Health Ordinance 2001 deals with the matter of confidentiality. It states that "Not patient would be publicized, nor this identity disclosed to the public through press or media unless such person chooses to publicize his condition".[370]All healthcare providers who give care or treatment to a person suffering from a mental illness would have a duty to keep all such information confidential; however, the Ordinance also allows for the following exceptions:

"1) to communicate with the nominated representative.

2) To other mental health specialists and other healthcare workers so they can provide care and treatment to the person with a psychological illness.

3) If providing care to a person with a mental condition during an emergency is risky to them or others.

4) Data released in response to a valid concern for the safety and well-being of the public, as well as data release for legal processes."[371]

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[369] Tariq Hassan, Asad Tamizuddin Nizami, and Sarah Hirji. "Forensic psychiatry in Pakistan." *International journal of law and psychiatry* 41 (2015), 95.

[370] Muhammad Irfan ul Haq Chaudhary, *The manual of mental health laws* (Al Haq Law Book Center, 2015), 60.

[371] Article 50, Mental Health Ordinance.

It is vital to point out that, except in extraordinary situations, all information the mental health care practitioner provides must be verbal, with no written or soft copies of medical data provided. There is a substantial likelihood that the nominated representative will use the written document or copy of the medical records to his advantage. This is necessary to defend the patient's right to privacy. [372]

3.7.2 RIGHT TO THE APPOINTMENT OF GUARDIAN

According to Article 32 of the MHO, if a mentally ill person is unable to care for himself, the court may appoint any suitable person as his guardian or ask that he be taken care of in a mental health facility and ask for this maintenance. [373]

By section 33 of the MHO, the court of protection may appoint any qualified individual to serve as a guardian of an intellectually disabled person's property. No one who is legally responsible for mentally ill people may be appointed under Section 32 of the MHO as their guardian or property manager unless the court determines, for reasons that must be recorded in writing, that such an arrangement is in the best interests of the mentally ill person.[374] The phrase "Court of Protection" as defined in the ordinance refers to a District Court that has been granted jurisdiction under this mandate to determine and allocate matters related to the Government.[375]

3.7.3 RIGHT TO VOLUNTARY ADMISSION

According to the MHO 2001, the best interests of the patient must be taken into account before any decisions on this care and treatment are made when a person with a mental

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[372] ibid.
[373] Muhammad Irfan, *The manual of mental health laws*, 60.
[374] Article 32, MHO 2001.
[375] Ibid.

disease is admitted to or receives treatment in centres that have been approved (this includes psychiatric hospitals or inpatient services). To aid the patient with his rehabilitation, the patient should be involved in the talks with the care team about where their best interests lie. A person with a mental illness has the right to be treated with respect, decency, and the ability to be heard by all members of this care team. This law should grant a mentally ill individual the right to admission and treatment, as well as the right to be fully informed about their legal rights.[376]

Voluntary admission to a psychiatric hospital or unit happens in the same way as admission to a regular hospital. The patient's doctor has the option of referring a patient. Contrary to patients in ordinary hospitals, people with mental illnesses may not always be free to leave medical care. A voluntary patient who wishes to leave a mental health facility may be held for a maximum of 24 hours if the psychiatrist or physician on duty believes that he is experiencing a serious mental disease. In the unlikely event that the volunteer patient is a child and his guardians or parents need to remove him, the expert may take custody of the child and place him under the control of the health service executive (if the expert believes the child is dealing with a psychiatric illness).[377]

An application for an adult's voluntary admission may be submitted to any registered clinical professional by the applicant's spouse, civil partner, relative, duly appointed official, guardian, or any other person. The officer on duty who has been designated by the chief executive officer of the hospital to make such applications is referred to as an authorized

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[376] "Admission to a psychiatric hospital," *Citizen Information Center,* Dec 9, 2019, https://www.citizensinformation.ie/en/health/health-services/mental-health/admission-to-a-psychiatric-hospital/ last accessed 25.06.2023.

[377] Mental Health Ordinance for Pakistan (2001), accessed on Oct 6,2020 at hpp://www.emro.who.int/whd/pakistan-ordinance.pdf

officer. This does not apply to a separated spouse or a person against whom a request or application has been made under the Domestic Violence Act.[378]

3.7.4 COMPLIANCE OF NATIONAL HEALTH LEGISLATIONS WITH INTERNATIONAL STANDARDS AND UNCRPD

On a global scale, the significance of health can be inferred from Article 25 of the United Nations Universal Declaration of Human Rights (hereinafter 'UDHR') which states in subsection (1): "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." [379]

The rights under UDHR can be further divided into five distinct sub-categories:

"(a) Ensuring adequate self-care and well-being,

(b) Ensuring the health and well-being of one's family,

(c) Ensuring access to medical care,

(d) Ensuring access to social services, and

(e) Providing security in cases of disability."[380]

This framework provides a thorough solution to the problem. Points (a) and (b) are linked because the uncontrolled presence of people suffering from mental illnesses can have a severe impact on the emotional condition of family members, perhaps leading to child neglect, financial insecurity for dependents, and exposure to violence. However, the nature of mental disease

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[378] Ahmed Raza, "Admission to a psychiatric hospital."

[379] Article 25, UDHR

[380] Sana Farrukh Shaikh, Mental health legislation in Pakistan in light of national and international obligations 2, Human Rights Review.

resists easy diagnosis via (c), the right to medical care. Addressing these issues is aided further by (d) and (e), which underline the state's responsibility to recognize the hardships of persons suffering from mental illness and allocate resources to support and maintain security in cases where continuous employment is not possible.[381]

Pakistan has ratified several other human rights treaties that guarantee the rights of mentally disabled persons, including the United Nations Convention on the Rights of Persons with Disabilities in 2008. Different provisions of these conventions emphasize member states to comply with the provision of rights to people suffering from mental health issues. Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) discusses mental health, emphasizing the right of all to the best possible bodily and mental well-being. Furthermore, since 1991, the internationally recognized Principles for the Protection of Persons with Mental Illness (MI Principles) have provided guidelines. In addition, the Vienna Convention points out the protection of people with mental diseases, particularly through supporting their participation in things affecting them, such as legislative processes and voting rights. Moreover, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) reinforces these rights by ensuring equal political participation for the mentally ill alongside other people. [382]

Pakistan's mental health ordinance 2001 was somewhat not compatible with UNCRPD guidelines, including a lack of:

i. Legislation about advanced care directives,
ii. Policies regarding supported decision-making for patients,
iii. institutional licensing for treatment, and

[381] Ibid.
[382] Ibid.

iv. Provision of independent and ad hoc services."[383]

The MHO 2001 was enacted to protect the mental health and civil rights of people suffering from mental diseases. This legislation established various rights for patients, including informed consent, confidentiality, asset protection, and anti-abusive treatment measures. A key change to the MHO established the Federal Ministry of Health authority, setting stiff penalties for criminal actions against mentally ill patients ranging from fines to jail, with the severity of punishment proportional to the gravity of the offense. However, there was still a significant legal mystery regarding the criminal and civil accountability of those with mental illnesses. In British law, persons suffering from mental illnesses are entitled to the "defense of insanity and automatism," which results in diminished liability for criminal crimes. In contrast, the MHO fails to fully address this issue, leaving mentally ill people in our country's criminal justice system to face persistent issues.[384]

Introduced as a presidential order, the Mental Health Ordinance 2001 aimed to amend laws governing the care and treatment of individuals with mental disorders, improving provisions for their well-being, property management, and community care promotion, while also advocating mental health and prevention. Specific provisions of the ordinance addressed issues of mental illness competency, capacity, and guardianship. In terms of human rights protection, Chapter 7 addressed concerns such as secrecy and informed consent. Furthermore, Chapter 8 addressed offences against persons with mental problems, to reduce abusive practices by prosecuting false statements that denigrate someone's mental status and addressing poor treatment, neglect, and exploitation. However, the ordinance left a gap in its treatment of people

[383] Khalily et al., "Stakeholders' Perspective on Mental Health Laws," 74.
[384] Inayat, "Mental Health Issues," 123.

committing offenses with mental illnesses, necessitating resolution through other areas of criminal and civil law.[385]

The Federal Mental Health Authority was founded by this ordinance to create national care standards for patients and to establish a code of practice applicable to all parties participating in patient care under this regulation. A Board of Visitors was constituted to inspect the facilities regularly and ensure their proper condition. Despite these legislative advances, practical implementation has been slow. The Federal Mental Health Authority, founded in 2001, has failed to significantly advance ordinance execution. Similarly, the provincial Board of Visitors has not yet been established as of 2010. The ordinance ultimately lapsed since it didn't get parliamentary approval.[386]

Practical implementation mechanisms were prominently lacking at the provincial level, and law enforcement agencies were ineffective or non-existent, with no meaningful efforts made to enforce the law. The 18th amendment to the constitution was introduced on April 8, 2010, resulting in the decentralization of responsibilities to provinces. Provinces began rewriting with fewer limits because of the low success in enforcing the MHO 2001. In Pakistan, the MHA 2013 is currently in effect in Sindh, while the Punjab Mental Health Act (MHA) (amendments) 2014 supersedes the MHO 2001 in Punjab.[387]

Pakistan's rising mental health concerns are the result of psychological reasons (stress, anxiety, depressive disorders, and so on), socio-cultural differences (stigma, discrimination, cultural disputes, customs, and so on), economic insecurity (unemployment, poverty), persistent

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[385] Amina Tareen, and Khalida Ijaz Tareen. "Mental health law in Pakistan." *BJPsych International* 13: 3 (2016), 68.

[386] Ibid.

[387] Human Rights Commission of Pakistan, *State of Human Rights in 2023*, accessed August9, 2024, https://hrcp-web.org/hrcpweb/wp-content/uploads/2020/09/2024-State-of-human-rights-in-2023-EN.pdf.

violence, and political turmoil. According to a Human Rights Commission of Pakistan (HRCP) report, 34% of the country's population has experienced some sort of mental illness out of the different mental illnesses.[388]

There have been issues with Pakistan's mental health policy ever since it started. The mental health situation in Pakistan necessitated ongoing attention from professional organizations working in academia and the mental health field as well as policy Makers.[389] In a society like Pakistan where aggression, violence, social conservatism, and helplessness are the norm of the day, and where people get frustrated in getting their due services from government and non-government institutions, where corruption is considered a right and not an exception, life of an ordinary person become miserable and depressive.[390]

The psychological perspectives (stress, anxiety, and depressive disorders), socio-cultural disparities (stigma, discrimination, prejudice, cultural conflict, and tradition), economic instability (unemployment and poverty), and persistent violence and political unrest are all contributing to Pakistan's rapidly increasing mental health issues.[391] It creates a vast grey area either judgment about the mental health of a person or group would be dependent on relative psychosocial or sociocultural norms. [392]Similarly, in Pakistani society values like orthodoxy, submission to authority and passive behavior characterize as normal and any refusal to these norms is considered as divergent.[393]

Research by the Human Rights Commission of Pakistan (HRCP) stated that among psychiatric diseases, 34% of the country's population suffered from some type of mental

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[388] Ibid

[389]Muhammad Tahir Khalily, "Personality characteristics of addicts and non-addicts determined through Rorschach findings." Pakistan Journal of Psychology 40, no. 1 (2009). https://www.researchgate.net/publication/262564279

[390] Ibid.

[391] Ibid.

[392] Ibid.

[393]Ibid.

illness.[394] A thorough analysis of psychiatric disorders revealed risk factors that are positively related to female gender, low educational attainment, sociopolitical unrest, economic uncertainty, and regional conflict.[395] Moreover, certain psychosocial and cultural practices in our society are considered unusual and even abnormal.[396]

Individuals with schizophrenia are frequently charged with crimes in Pakistan, a practice that contradicts the United Nations international treaty, CRPD, which asks state parties to repeal legislation about the criminal culpability of disabled individuals. In contrast, legislation in several countries exempts mentally ill patients from criminal prosecution. Therefore, schizophrenia patients in Pakistan do not receive adequate treatment, and the legal system stays silent on the criminal liability of mentally ill individuals with schizophrenia.[397] In the Khizar Hayat Case,[398] the defendant, a police officer, murdered a comrade. Despite being diagnosed with schizophrenia in 2008, he was sentenced to death. His mother argued that he had a mental condition, but the court determined that schizophrenia was not a significant mental health disorder. He lived for sixteen years under the threat of execution but died before the sentence could be carried out. These instances demonstrate that people with schizophrenia are held liable for their illegal activities in Pakistan.[399]

In Pakistan, mental health providers lack proper training to manage transgender issues. Transgender people may be harmed as a result of mental health practitioners' lack of training and experience in transgender problems. There are currently no specialized courses on transgender

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[394] Noureena Kausar, Saima Dawood Khan, Bushra Akram, "March--2015-1 - Jpma.Org.Pk," Major depression in Jalal Pur Jattan, district Gujrat, Pakistan: Prevalence and gender differences, accessed July 15, 2023, https://www.jpma.org.pk/PdfDownload/7290.pdf.

[395]Ilyas Mirza, and Rachel Jenkins. "Risk factors, prevalence, and treatment of anxiety and depressive disorders in Pakistan: systematic review." *Bmj* 328, no. 7443 (2004): 794

[396] Salman Karim, Khalidv Saeed, Mowaddat Hussain Rana, Malik Hussain Mubashir, and Rachel Jenkins, "Pakistan Mental Health Country Profile," *International Review of Psychiatry* 16, no. 1 (2004): 83-92.

[397] Ibid, 190

[398] PLD 2005 Lahore 470

[399] Inayat, "Mental Health Issues," 190.

mental health available in Pakistani institutions to meet the professional needs of mental health professionals. It is critical to educate mental health practitioners in Pakistan on how to properly address transgender issues by the APA's (American Psychological Association, 2015) recommendations. Furthermore, social professionals, transgender activists, law enforcement officers, jail employees, and media personnel should all receive training.[400]

3.8 MAJOR CHALLENGES OF PROTECTION FOR PERSONS WITH MENTAL DISABILITIES IN PAKISTAN

Pakistan after signing the UNCRPD in 2010, has adopted laws keeping in view its obligations under the convention. However, even before the UNCRPD, Pakistan made occasional attempts to include disabled individuals in mainstream communal activities.[401] For instance, it issued the "National Policy on the Issue of Disability" in 2002, which defined disability as "anyone who is handicapped in undertaking any gainful profession or employment due to injury, disease, or congenital deformity, and includes persons who are visually impaired, hearing impaired, and physically and mentally disabled.[402]

The government of Pakistan passed the Special Citizen Act in 2009 to facilitate disabled persons. Authorities were required by this statute to give discounted fares for disabled people in both private and public transportation. The measure was intended to reduce fare prices for disabled individuals on Pakistan's railways and other public transportation.[403]

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[400] Ali Ajmal and Faiza Rasool, "Transgender Rights Law in Pakistan: Mental Health Perspective." *Global Social Sciences Review*, 8:2(2023), 424-425.

[401] Sana Gul, "Disability policies in Pakistan: The way forward." *Pakistan Journal of Applied Social Sciences* 11:1 (2020), 62.

[402] Shaikh, "Mental health legislation in Pakistan," 2.

[403]Gul, "Disability policies in Pakistan," 65.

In response to the UNESCAP's[404] second disability decade, the Government of Pakistan developed the National Policy for Persons with Disabilities in 2002, after lengthy discussions with many stakeholders, including NGOs and government ministries. With the cooperation of the government, civil society, and non-governmental organizations (NGOs), this approach is intended to establish a favorable environment by 2025 that empowers disabled individuals, developing their full potential through inclusive integration. The policy's key goals included empowering disabled people of all backgrounds including people suffering from mental disability, with a focus on prevention, identification, intervention measures, multi-professional teams, counseling, and genetic advice. The strategy also promoted the integration of special education into mainstream education, professional development, and the mainstreaming of impaired students through linked policies and specialized support.[405]

Despite these facts, there are several challenges to protect the rights of mentally disabled persons. Some of these issues are addressed here;

3.8.1 THE LACK OF ADEQUATE POLICY FRAMEWORK

National health policy defines the range of health, disability, mortality, and morbidity issues that it tries to address. This includes defining relevant settings such as health care, education, workplaces, social services, and the criminal justice system, as well as a comprehensive implementation structure. The policy establishes goals and a framework for local planning. Similarly, Common mental health policy goals include mental health promotion, disorder prevalence reduction, disability reduction, improved services, stigma reduction, human

[404] Used for United Nation's economic and social commission for Asia and Pacific https://www.unescap.org/

[405] Ibid, 63.

rights protection, integrating psychological aspects into healthcare, and mitigating mortality linked to mental illness, including suicide and premature physical death.[406]

The policy constitutes an intentional framework of principles that govern actions and logical outcomes inside an institution and is established and adopted by a governing body. Government policy creates an ordered stance that addresses acknowledged challenges. It outlines the government's goals, techniques, and guiding principles for addressing issues. The Policy is usually shaped by the agenda of the governing party and frequently comes before legislative and regulatory acts. Policies go through several stages of creation, with some requiring mandatory analyses of potential consequences such as implementation costs, environmental ramifications, and sectoral implications. However, the goal is to present in a clear, organized, and efficient manner.[407]

On the other hand, legislation is a sophisticated process that goes beyond a simple direct expression of policy, to confer legal validity and impact on policy by following an organized progression from creation to formal enactment.[408]

The policy and legislative framework of mental health has an inherent connection to the essential elements that make up a broad spectrum of human rights. The supply of adequate living conditions and the building of solidarity among various groups and communities are closely related to promoting mental well-being. The violation of fundamental human rights, the widespread presence of insecurity, fear, and prejudice, as well as these factors together have a major effect on instances of mental health issues within people. Therefore, the legislative

[406]To integrate mental health into national policy, "critical steps include identifying and engaging key stakeholders to ensure shared ownership and vision, comprehending the current context and needs, developing a mission statement with goals, engaging agencies for strategic plans, considering local constraints, and conducting regular outcome assessments to adjust strategies." See; Rachel Jenkins, "Supporting governments to adopt mental health policies." *World Psychiatry* 2: 1 (2003), 14.

[407] Policy, law & regulation - CLEARLAWSA, accessed August 27, 2023, https://clearlawsa.org.za/wp-content/uploads/2020/04/Lewis-Policy-Law-Regulation.pdf, 1.

[408] Ibid, 3.

framework must ensure the international human rights law norms to address mental health must be applied in their entirety.

Article 25 of the UDHR demands states to ensure basic protections including health for its citizens. The article provides that "Everyone has the right to a standard of living for the health and well-being of himself and his family, including food, clothing, housing, and medical care and necessary social services, as well as the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control".[409]

Strong guidelines for addressing population mental health are found in international human rights frameworks. Pakistan is required to fulfill its obligations in protecting the people's right to mental health due to its commitment to these treaties. For instance, the right to good physical and mental health is specifically stated as a fundamental human right in ICESCR 1966, [410] the article acknowledges gaps in access to mental health care and emphasizes the need for sufficient resources to support comprehensive health interventions that include mental health.[411]

Because of several compelling reasons, guaranteeing universal access is especially important in the context of mental health. To start, there are still several inefficiencies in the way resources are distributed within healthcare systems for mental health. The number of years a person lived with a disability (YLDs) is also considerably affected by mental health issues, yet social security programs in many nations do not adequately address the long-term requirements of patients with mental illnesses. Furthermore, widespread stigmatization of concerns relating to

[409] Article 25, Universal Declaration of Human Rights, 1948

[410] Article 12 ICESCR

[411] Nauman Ali Chaudary, "*Prevalence and determinants of mental health issues among the university students and its impact on their academic performance and well-being in Punjab, Pakistan*." (2017), 70.

mental health in many communities leads to almost constant discrimination against those who are dealing with such problems, both inside and outside of the healthcare system.[412]

For national governments attempting to address the mental health of their populations, this convergence of circumstances poses a significant problem. In this context, legally enforceable frameworks like the International Covenant on Economic, Social, and Cultural Rights (ICESCR) emerge as authoritative principles to support countries in developing policies to address mental health issues. It is important to recognize that the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) both explore the fundamental factors that determine mental health.[413]

In Pakistan, there is a lack of proper national mental health policy and gaps in mental health laws. In the healthcare system, mental health should come first. Any comprehensive strategy for public health should include psychosocial support for mental health.

3.8.2 STIGMA AND DISCRIMINATION AGAINST MENTALLY DISORDERED PERSONS IN PAKISTAN

Stigma is a social process that occurs at the organizational, public, and individual levels and involves the isolation, rejection, and discrediting of individuals or groups. Individual stigma conveys the assumption that people with mental illnesses endure ordinary stigmatization. Mental illness, which includes common mental diseases, neurological difficulties, substance use disorders, and suicide, is the leading global cause of disability, affecting approximately 450 million people. According to recent research, common mental disorders (CMD) account for 14% of the overall disease burden and are expected to become the leading cause by 2030. CMDs,

[412] Ibid.71
[413] Ibid.

which include depression, anxiety, and somatoform disorders, are common mental illnesses that cause major cognitive, emotional, or behavioral disruptions, which are frequently accompanied by distress or functional impairment.[414]

In Pakistan, the stigma surrounding mental illness goes beyond that of physical illnesses, affecting healthcare workers, students, and the general population.[415] Corrigan distinguishes between two sorts of stigma: public and self-stigma.[416] While public stigma refers to society's negative perceptions of persons as socially undesirable, self-stigma occurs when individuals label themselves as socially unacceptable. These types of stigma apply to both mental diseases and physical illnesses like AIDS and HIV.[417]

In Pakistan, a country with a population of 175 million, imagine, there are just 800 Mental Health Practitioners and four Mental Hospitals. Those living in remote areas have limited access to psychological services. Furthermore, within Pakistan, getting psychological therapy becomes difficult due to the social stigma associated with consulting a psychologist or Psychiatrist, causing individuals to refrain from seeking help.[418]

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[414] Kabtamu Nigussie, Dejene Tesfaye, Tilahun Bete, and Henock Asfaw. "Perceived stigma, common mental disorders and associated factors among primary caregivers of adult patients with mental illness attending at public hospitals, Harari regional state, Eastern Ethiopia: A multicenter cross-sectional study." *Frontiers in Public Health* 11 (2023): 1024228.

[415] Muhammad Omair Husain et al., "Stigma toward mental and physical illness: attitudes of healthcare professionals, healthcare students and the general public in Pakistan," BJPsych Open 6: 5 (2020),3.

[416] Corrigan, Patrick. "How stigma interferes with mental health care." *American psychologist* 59: 7 (2004), 614.

[417] Husain et al., "Stigma toward mental and physical illness," 3.

[418] Nashi Khan, Kausar Rukhsana, Khalid Adeela, and Farooq Anum. "Gender differences among discrimination and stigma experienced by depressive patients in Pakistan." *Pakistan journal of medical sciences* 31: 6 (2015), 1432.

3.8.3 THE LACK OF COORDINATION AND ISSUE OF RESOURCE DISTRIBUTION

Pakistan has not done much to address the severe shortage and unequal distribution of mental health resources, as well as the lack of psychosocial support in the provinces, even though the country signed the Mental Health Action Plan 2013–2030 of the WHO.[419] This lack of coordination between federal and federating units is thus very problematic in terms of the provision and facilitation of rights for people suffering from mental health problems.

Because of Pakistan's decentralized federal structure, health is a provincial matter. Even if the federal Ministry of Health is competent to coordinate a national response, the provinces are not included in its mandate. Because of this, every province has up to now experienced issues pertaining to a shortage of mental health resources and expertise. The new plan, which is under the Ministry of Planning, aims to address this. In addition to its comparative advantages in strategic planning and budgeting at the federal level, the ministry's status as a federal ministry facilitates the model's adoption by its provincial counterparts.[420]

3.8.4 ACCESS TO MENTAL HEALTH REHABILITATION SERVICES IN PAKISTAN

Access to mental health services in Pakistan is very problematic, as the mental health field is unregulated and a much-neglected field in the country. Most psychiatrists in Pakistan are graduates of the College of Physicians and Surgeons, except a small number of psychiatrists with training from abroad. Once qualified, individuals are allowed to work in both the public and

[419] Asma Hamayun, Menta Health Goals, DAWN, September 24, 2023, can be accessed at: https://www.dawn.com/news/1635182/mental-health-goals

[420] Ibid.

commercial sectors. These services are provided by the private sector, and quality control is unregulated. In numerous tertiary care clinics, hundreds of patients are evaluated and treated by postgraduate mental health students with minimal supervision.[421] Similarly, undergraduate psychiatric training is further weakened by outdated curricula that hardly address public mental health demands. Students' knowledge of common mental diseases is hardly tested. Most private medical colleges do not meet the 12-bed mental patient criterion and have only one psychiatrist and no nursing care. Again, malpractices are observed as some of the recognized experts, for example, falsely claim to be members of a 'Federal Mental Health body,' when no such body exists.[422]

Few Pakistani universities provide clinical psychology courses, despite offering several psychology degrees. The four-year bachelor's or master's degree in psychology allows these specializations. After qualification, there is no legal structure to control the development or quality of these services. For instance, about 150 independent clinical psychologists in Islamabad operate uncontrolled and unsupervised.[423]

3.8.5 NATURAL DISASTERS AND HUMANITARIAN ISSUES

Over the last few decades, mental healthcare has emerged as a crucial component of the public health concerns posed by humanitarian disasters. The majority of countries are working to create mental health action plans based on scientific evidence that can address the mental health consequences of complex events. These countries have learned from prior crises and are creating

[421] Asma Hamayun, Unregulated Mental Healthcare, DAWN, Published July 29, 2021 available at https://www.dawn.com/news/1637523/unregulated-mental-healthcare

[422] Ibid.

[423] Ibid.

structures to provide targeted Mental Health and Psychosocial Support (MHPSS) services when they are required.[424]

According to WHO estimates, one in every five people (including children) may require mental health care during a humanitarian crisis. According to preliminary research in Pakistan, among the 80 districts most impacted by the disaster, 26 (out of 31) are in Baluchistan, 13 (out of 23) are in Sindh, 12 (out of 17) are in KP, two (out of three) are in Punjab, and two (out of six) are in Gilgit-Baltistan. So, given the magnitude of the disaster and the scarcity of resources, how can MHPSS services be provided?[425] Simply, one in every seven Pakistanis is confronting a complicated humanitarian disaster as a result of the urgent climate crisis and the havoc it has caused on our political, economic, and healthcare systems.[426]

Though there is no proper planning for such disasters, however, the Ministry of Planning, Development, and Special Initiatives developed an MHPSS strategy during COVID-19. The ministry's exclusive mandate to identify an overlooked area and launch it as a special initiative was a vital opportunity to address the potentially growing national burden of mental health conditions, lack of specialist resources, and multifaceted challenges of providing mental healthcare. Protection of mental disorder patients' rights, overcoming a ruining data gap, addressing a lack of locally adapted scientific interventions, solid multi-sectorial collaboration (e.g., with PDMAs, ministries, NGOs, and community organizations), and linking existing mental health services to develop meaningful avenues to care were among the key challenges.[427]

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[424] Asma Hamayun, "Floods and Mental Health," DAWN, October 2022, https://www.dawn.com/news/1714070. Last accessed July 10, 2023

[425] Ibid.

[426] Ibid.

[427] Ibid.

This program created an innovative digital paradigm for rights-based, multilayered, evidence-based mental healthcare that is scalable and tailored to local needs and resources by the ministry. A strong web portal that serves as the primary interface for service users (and can be easily integrated with a telecom solution to provide a helpline); a Learning Management System to train specialists, non-specialists, healthcare workers, teachers, and community workers; and three iOS and Android mobile apps for community workers, rescue workers, and primary care staff are part of this model. These evidence-based, customized resources have been translated into Urdu and can be translated into regional languages. A trained team of 40 mental health specialists can assist in areas without specialists. This digital plan will collect important data, pool mental health resources, provide training and supervision, supply and regulate key services, and establish a referral system to increase mental healthcare response capacity.[428]

3.8.6 ACCESS TO JUSTICE AND DISCRIMINATION IN MENTAL HEALTH RIGHTS

Access to justice is the most significant human right and must be ensured for persons suffering from mental issues. The protection of human rights, particularly with a focus on the mental health and general welfare of persons, is a crucial duty of the legal system. The field of mental health and legal issues has grown dramatically in recent decades, departing greatly from the traditional, constrained understanding of forensic psychology.[429]

The traditional view of criminal psychology centered on dealing with problems only related to the criminal aspects of mental health, mainly concentrating on issues like the insanity

[428] Ibid

[429] Glueck, Bernard C. "Changing Concepts in Forensic Psychiatry." Journal of Criminal Law and Criminology 45 (1954): 123–32.

plea to maximize trial effectiveness. Four significant changes in forensic psychology have resulted from modern advancements:

1) A development in our understanding of how mental illness and criminal behavior interact;

2) A legal analysis aimed at defining the concepts of insanity or lunacy;

3) The guarantee of mental impairment treatment within custodial care contexts; and

4) A change in the way mental health is perceived, along with a change in societal attitudes towards overall well-being.[430]

3.8.7 LACK OF SOCIAL INCLUSION OR PARTICIPATION

According to the World Health Organization's conceptual framework, a community-based plan can be developed in which community workers, teachers, youth, healthcare and emergency responders, and community leaders can be trained to provide basic support and identify individuals in need of mental healthcare. The next step is to train non-specialists, such as counselors and primary care personnel, to treat common mental health issues and to identify those who require specialist care. The ultimate level comprises therapy for serious mental problems provided by district-level specialists or directed to tertiary care centers if needed.[431] Unfortunately, there is no such inclusion and participatory approach adopted at the community level.

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[430] Arboleda-Flórez, J. "Forensic psychiatry: Contemporary scope, challenges and controversies." World Psychiatry 5 (2006): 87–91. PMC1525122.

[431] Asma Hamayun, “Floods and Mental Health,”2.

Article 14 of the UNCRPD prohibits all unlawful or arbitrary deprivation of liberty of people with disabilities, emphasizing that the presence of impairment does not justify a deprivation of liberty. States are required to substitute alternative service models that respect the person's will and preferences for coercive psychiatry and support in making decisions about health-related issues, and they should be considered as dangerous to the community and should be treated like other physically disabled persons.[432]

3.8.8 PROTECTION OF MENTALLY ILL PRISONERS

International law requires that the use of the death penalty should be limited to the most severe offenses and should adhere to just and lawful procedures that safeguard the fundamental rights of the accused and allow opportunities for legal remedies after a conviction. Similarly, the execution of minors is explicitly forbidden under international law, and established international customary law prevents the capital punishment of individuals with mental illnesses.[433]

Unfortunately, Pakistan persists in executing people with mental illnesses, developmental disorders, and intellectual disabilities. The Human Rights Committee concluded that the prisoner on death row's mental state was worsened by both his treatment and the conditions of his confinement, resulting in well-documented, long-term psychological harm.[434]

As an illustration, Schizophrenia constitutes a mental ailment wherein an individual perceives amusing voices and experiences a belief that their thoughts and sensations are being controlled by another entity. Consequently, they are often convicted. The situation of a person

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[432] A/HRC/34/58, paragraph 85 and A/HRC/35/21, paragraph 29.

[433] Ibid, 40.

[434] Allard K. Lowenstein, "A Most serious crime: Pakistan's unlawful use of the death penalty." A report by Justice Project Pakistan, Yale Law School's Allard K. Lowenstein *International Human Rights Clinic* (2016),37.

with schizophrenia fluctuates based on their particular condition. The debate surrounding the legal guilt of a schizophrenia patient has arisen in Pakistan following the cases of Imad Ali and Khizar Hayat, both of whom were convicted by the court for their criminal actions. Hence, it is imperative to scrutinize whether individuals with schizophrenia can be held accountable for their criminal deeds.

In contemporary times, a novel understanding has developed to reconcile the principles of the criminal justice system with those of the mental health system. In this context, the UNCRPD suggests that member nations should amend their criminal laws to assert the non-responsibility of a disabled individual. Again, as per Islamic law, a person cannot be subjected to capital punishment if there exists uncertainty on the part of the perpetrator. As per Pakistani law, schizophrenia patients do not receive adequate treatment, and there is a lack of legal clarity concerning the criminal liability of a mentally ill patient afflicted with schizophrenia.[435]

3.9 CONCLUSION

The chapter "Mental Health Legislations in Pakistan and the Rights of Individuals with Mental Disorders" provided a brief overview of the legislation on mental health in Pakistan. The effect of common law and the English mental health legislation is deeply rooted in Pakistan's legal system.

This analysis showed the lack of a comprehensive national mental health policy, inequalities in resource distribution, difficulties in coordinating between the federal government and federating units, political tensions, and instances of discrimination. The need for more comprehensive and coherent legislative frameworks that prioritize the rights and well-being of

[47] Muhammad Ifzal Mehmood, and Hamaish Khan, “Changing Paradigms: Criminal Responsibility in Mental Health Laws of Pakistan and UN Conventions on the Rights of Persons with Disabilities”. *Journal of Development and Social Sciences* 3:4 (2022), 190.

people who are dealing with mental diseases was pointed out in the discussion. It further examined a variety of Pakistani laws and statutory measures and identified the gaps and legal complexities that need adherence to international norms, particularly those outlined in the UNCRPD ("United Nations Convention on the Rights of Persons with Disabilities"). A strong national-level legal framework regulating mental health laws by international standards should be there to support the rights of people with mental disorders.

CHAPTER 4

PROTECTION OF RIGHTS OF MENTALLY DISORDERED PERSONS UNDER ISLAMIC LAW

4.1 INTRODUCTION

With Islamic law prevailing in the nation, Pakistan's legal system is a special fusion of English and Islamic law. Islamic law is crucial in this context for guaranteeing that people with mental illnesses have their rights protected. However, it is debatable whether Islamic law is a valid legal framework and why Muslims are required to follow it. Islamic law's universal applicability cannot be contested, although Western law does not accept it as a comprehensive legal system. Over time, it becomes obvious that Islamic law is no longer a local law; it is an international force with the ability to impact global events.[436]

National legislation must consider religious and cultural significance for it to be accepted as a component of international conventions. To balance its religious and cultural impact with its

[436] Imran Ahsan Nyazee, "Islamic Law and Human Rights," Islamabad Law Review VOL.1:1 & 2, Spring/Summer (2003), 15.

obligations under international law, Pakistan has joined several agreements with reservations in light of this. This chapter therefore seeks to investigate the extent to which Islamic law is used in Pakistan to defend the rights of those who suffer from mental illness. It is important to discuss whether Islamic law is compatible with global human rights norms by a thorough examination of the legal system in place in Pakistan for the protection of the rights of people with mental illnesses.

The chapter will further analyze that Sharia is consistent with the UNCRPD's guiding principles and standards to protect people with mental illnesses. Therefore, the object is to provide a thorough understanding of how Islamic law safeguards the rights of those with mental illnesses, especially in Pakistan, which will help with ongoing efforts to strengthen the legal framework and processes linked to mental health.

4.2 ISLAMIC LAW AND THE CONCEPT OF HUMAN RIGHTS

It is very important to explore the interconnections and differences between the two frameworks, and how they may complement or challenge each other. Muslims must understand the essence of human rights as they are applied by the UN and will be implemented by Muslim states in conformity with Islamic law, and non-Muslims must reject anti-Islamic law propaganda and be willing to recognize and accommodate the principles of systems other than the Western.[437]

In the West, there are two approaches Universalists and cultural relativists. The former believes in the universal nature of the truth adopted by international Law, whereas, the cultural relativists believe that international principles are relative to culture including religion. However, it is quite natural to say that Islamic law unlike other religious laws is universal law and adopts a

[437] Ibid, 15.

universal character of human rights and is not relative to its norms.[438] Thus it is vital to say that Islam is not a religion of private affair in the Western sense; it is a system, ideology, and way of life that considers every act of the state and the individual.[439]

It is therefore necessary to understand how different the principles and practices of Islamic law (Sharia) can interact and shape our understanding of the internationally recognized concept of contemporary human rights. This includes examining how Islamic legal traditions address issues such as the protection of individual freedoms, equality, and justice, as well as how these principles may bring into line or conflict with contemporary human rights norms and standards. It is therefore necessary to explore how Islamic legal scholars and practitioners interpret and apply these principles in contemporary contexts, and how they may be adapted to promote human rights in diverse societies.

The Organization of Islamic Cooperation (OIC) adopted the Cairo Declaration on Human Rights (CDHR) in the pattern of UDHR to develop their own human rights framework, with roots in the Qur'an, Hadith, Islamic teaching, and the narrative of the Islamic Uma, on August 5, 1990.[440] Pakistan is among the 45 states that have signed the declaration. The Declaration establishes essential human rights based on Islamic law. The Cairo Declaration in its preamble, states that human rights are inalienable and inherent in Islam.[441]

The convention consists of 25 articles. This Declaration stresses the significance of equality and non-discrimination, and prevents member states "from discrimination based on race, color, language, belief, sex, religion, political affiliation, social rank, or other factors".[442]The declaration from articles 2 to 23 stresses all basic human rights of people including civil and

[438]Ibid, 21.
[439] Ibid, 24.
[440] Cairo Declaration on Human Rights in Islam, Cairo, 14 Muharram, 1411A.H./5 August, 1990 A.D.)
[441] Preamble, Ibid.
[442] Article 1, Ibid.

political rights including the provision of economic, cultural, and social rights without any discrimination. Though this declaration does not explicitly mention the rights of mentally disabled persons, however, the word 'without discrimination' asserts that all rights under the declaration can be provided to persons suffering from mental health as well.

Unfortunately, the Cairo Declaration on Human Rights in Islam remained solely on paper. There appeared to be no movement within the Islamic world to translate the document's intentions and objectives into specific work, suggestions, or binding norms. Later declarations of producing binding conventions or codifying the content of Islamic rules have not come to fruition.[443]

Similarly, the Arab states decided to create their charter, which was adopted on September 15, 1994, by the Council of the League of Arab States.[444] This League of Arab States provided that;

> Reaffirming the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, as well as the provisions of the United Nations International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Cairo Declaration on Human Rights in Islam.[445]

This is a bitter fact, that none of these Muslim declarations or leagues could be materialized in the form of a universal Muslim Convention, preserving Islamic values and standards into a universally recognized Islamic instrument on human rights.

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[443] Nyazee, "Islamic Law and Human Rights," 62.

[444] Council of the League of Arab States, Arab Charter on Human Rights, Sep. 15, 1994, reprinted in 18 Human Rights. L.J. 151 (1997).

[445] Preamble, Ibid.

4.3 IMPORTANCE OF ISLAMIC LAWS

The human mind alone is not sufficient or qualified enough to provide sufficient rulings for human beings. That is why, Allah Almighty sent so many Prophets with divine books to guide the people to do the right and abstain the wrong. Thus, the goodness and badness of a thing are directly linked with divine guidance in the form of revelations through Prophets. Human Intellect can determine objects in the light of these revelations or divine guidance only. The positive and negative aspects of things cannot be perceived based on human reasoning only. Human reasoning can identify and accept the wisdom of the creator (set parameters or standards set by Allah Almighty) by observing and analyzing only. This feature of Islamic law is enshrined in Western jurisprudence as well. For instance, naturalists believe that the law of nature can be discovered by human reason. To check the rationality of state law, they consider the laws which are compatible with natural law.[446] The positivists, on the other hand, differentiate law from morality. The goodness or badness of things, according to them is irrelevant. They suppose man-made law is a valid law, without resorting to any external standardization.[447]

Unlike positivists, some standards in the form of revelation are used as a standard to check the soundness of state laws. The Muslims believe that human reason based on the basic sources of Islamic Law (the Holy Quran and the Traditions of the prophet) is necessary to develop state laws.[448] The Muslims have entered into a covenant with their Creator (Allah Almighty). The Holy Quran says; “We offered the trust to the heavens and the earth and the

[446] Raymond Wacks, Philosophy of Law: A Very Short Introduction (Oxford: Oxford University Press, 2006), 1-5.

[447] Ibid.

[448] Nyazee, "*Islamic Jurisprudence*," 87.

mountains, but they refused to carry it and were afraid of doing so; but man carried it. Surely, he is wrong-doing, ignorant"[449]

Thus, human beings have accepted this responsibility to obey God through this covenant. This covenant has made the Muslims accountable by offering certain rights and obligations. Therefore, Islamic laws are formulated and guaranteed by state laws in Pakistan to protect the rights of individuals.

4.4 SIGNIFICANCE OF ISLAMIC LAW IN PAKISTANI LEGAL SYSTEM

Pakistan, with a population of 207.68 million as per the final results of Census-2017[450], is the second largest country in the world with a Muslim majority of 96%, after Indonesia.[451] The country's name is officially declared as the Islamic Republic of Pakistan,[452] with Islam being the state's official religion.[453] The fundamentals of Islamic Law[454] are enshrined in the Objectives Resolution,[455] which forms a significant part of the 1973 Pakistani Constitution. The Courts have employed Article 2A as a means to examine the constitutionality of laws. If a law is found to be incompatible with Islamic principles, it is considered to be ultra vires the Constitution. As a

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[449] Al-Quran; 33:72

[450] Pakistan Bureau of Statistics, accessed April 25, 2023, see; [Pakistan Bureau of Statistics, "Brief Census 2017," https://www.pbs.gov.pk/content/brief-census-2017].

[451] Muslim Population by Country 2023, World Population Review, See; https://worldpopulationreview.com/country-rankings/muslim-population-by-country. Last accessed April 26, 2023

[452] Article 1, the Constitution of the Islamic Republic of Pakistan.

[453] Article 2, Ibid.

[454] As for example; "sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust. Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed; Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah" See; https://na.gov.pk/uploads/documents/1434604126_750.pdf last accessed 01.05.2023

[455] The objectives resolution was passed by "the first Constituent Assembly of Pakistan on March 12, 1949. It is so important that in *Asma Jilani v The Government of Punjab (PLD 1972 SC 139)* it was held that if there be any *Grund-norm*, it would be the Objectives Resolution."

result, both High Courts and the Supreme Court possess the authority to scrutinize the legitimacy of a law, including a constitutional amendment, in light of Islamic teachings.[456]

In addition to Article 2A, Article 227 stipulates that the laws must be under the principles of Islam. The article states that;

"All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions."[457]

According to statistics available on the Federal Shariat Court's website, it has examined a total of 512 federal laws, out of which 55 were found to be contrary to Islamic principles. Additionally, the Court has scrutinized 999 instruments of provincial legislation and found 212 of them to conflict with Islamic teachings.[458] For example, The Federal Shariat Court, while examining the 'validity' of the Child Marriage Restraint Act, of 1929 observed that the state can ban a Mubah (permissible) act for the interest of the society under the Islamic doctrine of Sad u Zarai (a rule where a lawful act may be banned for its ultimate negative effects).[459]

The superior courts have thus, consistently acknowledged the teachings of Islam as significant factors in legal discourse, employing them as both supporting and opposing arguments for various propositions. These courts frequently resort to the teachings of Islam as a source for interpreting different provisions. For instance, J Asif Saeed Khosa in Pakistan Lawyers' Forum Case[460] observed:

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[456] PLD 1987 Karachi 404.
[457] Article 227, the Constitution of the Islamic Republic of Pakistan.
[458] https://www.federalshariatcourt.gov.pk/en/jurisdictions/ (last accessed: 15.05.2023).
[459] Farooq Omar Bhoja v. The Federation of Pakistan, PLD 2022 FSC 1.
[460] Pakistan Lawyers Forum vs. Federation of Pakistan, PLD 2015 SC 401

Islam is not just a fundamental principle or a salient feature of the Constitution of Pakistan but it is the very life and soul of the Pakistani society and is a matter of faith transcending any constitutional dispensation. It is but obvious that in this country which was created in the name of Islam and which is predominantly inhabited by Muslims the Parliament is most unlikely to, notwithstanding any express or implied constitutional limitation to that effect or not, amend the Constitution to achieve something which may offend against any express Divine command.[461]

Secondly, even in the Indian subcontinent, "the most remarkable feature of Indian legal history in the eighteenth century was the Shariah, which was applied by British judges seated in Shariah courts. The Holy Qur'an and Shaster were previously exclusive to Muslims and Hindus. The law about Muslims and Hindus was modified by the Regulations of 1793. The regulations that governed both groups were known as "Hindu Law" for Hindus and "Mohammadan Law" for Muslims in 1793. The Company's Courts have always employed pundits (academics who specialize in Hindu law) and mavlavis (experts in Islamic law) to assist in the administration of Muslim and Hindu law."[462]

Thirdly, in Pakistan, public views are shaped mostly by social and religious factors. Most mental health patients initially seek care from faith healers and religious leaders, then from mental health specialists if such therapies fail. Most people attribute mental illness to supernatural causes or supernatural forces. They also found that traditional healers and psychiatric treatments provided the most mental health care.[463] In Pakistan, faith healers are an important source of care for persons suffering from mental illnesses, particularly women and

[461] Ibid

[462] Muhammad Munir, Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan, Islamic Studies, Islamic Research Institute Winter 2008, Vol. 47, No. 4 (Winter 2008), pp. 445-482

[463] Khadeeja Munawaar, Jamila Hanum, "A systematic review of mental health literacy in Pakistan, 17 August2020https://onlinelibrary.wiley.com/doi/full/10.1111/appy.12408?casa_token=Ld_8ztCJDg0AAAAA%3A36ReKF3O4ZBcEz7M7K8vCaL4_TdUSbDsuiZdTB1hzy9Epn70GAre61DcGHPje1uoW3VGtWmLwuTLLoHR" last accessed June 20, 2023.

those with limited education. Repetition of Quranic passages, "dum," and the usage of "taweez" or ropes on the body are common faith-healing treatments. Apart from those, numerous fake faith healers use a variety of different procedures, some of which can be harmful.[464]

If a law could be challenged or altered on the touchstone of repugnance to Islamic Law, why should the teachings of Islamic law not have been considered during the formulation of state legislation? For this chapter, therefore, it was deemed appropriate to discuss Islamic Law in comparison with Western jurisprudence followed by its application to deal with the rights of mentally disordered persons.

4.5 ISLAMIC LEGAL THEORY AND THE LAW

To understand the concept of mental health and the protection of persons facing mental health issues, a brief analysis of Western concepts in light of Islamic legal theory is necessary. For instance, Austin defines law as, a "Command of Sovereign backed by sanction."[465] Likewise, the definition of HLA Harts about law as "the combination of primary and secondary rules"[466] denotes right-conferring rules and obligation-creating rules. Is there such a concept of command or rules in Islamic law? Islamic legal theory defines law as,

"خطاب تعالي الا تعلق بأفاال المكلاين بلاقاضاء أو لتخير أو اوضع""[467]

Which means, "Address of Allah Almighty the exalted related to the acts of subjects (human beings) through a demand or option or declaration".[468]

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[464] Farouqui, Traditional healing practices sought by Muslim Psychiatric Patients in Lahore, Pakistan Int. J Disability Devel, Edu.2006,401-415

[465] Stumpf Morrison, Andrew. "Law Is the Command of the Sovereign: HLA Hart Reconsidered." *Ratio Juris* 29, no. 3 (2016): 364-384.

[466] Lee, K-K. "Hart's primary and secondary rules." *Mind* (1968): 561-564.

[467] Imran Ahsan Khan Nyazee, "Islamic Jurisprudence: Uṣūl al-Fiqh," (International Institute of Islamic Thought and Islamic Research Institute, 2010), 47.

[468] Ibid.

The definition shows the concept of command, addressed by the Lawgiver (Allah Almighty. Now who is sovereign, and what are the commands of the sovereign? Muslims believe in the sovereignty of Allah Almighty alone.[469] The commands of Allah Almighty are in the form of certain obligations. It is pertinent here to discuss the obligation of creating rules by the creator. These obligations are either positive (to do) or negative (not to do) and may be binding or non-binding. Obligations that are binding need to be followed by Muslims, and in case of default, there might be sanctions or consequences. Sometimes, the command is there, an obligation is created but no sanction is there for violation, because the obligation is not binding. Thus, it is better to do it, and, for non-compliance, there is no sanction. Similarly, it is better to avoid, if not avoided there is no sanction. Some things must be done, if not done, there are sanctions. Some things must be avoided, if not avoided, there are sanctions. Thus, four categories are included in this demand, which is termed obligation or fard or Ijab,[470] Recommendation, or nadb[471] (positive aspects). While, prohibition or Tahreem[472] and disapproval or Karahat[473] from (negative aspects).

Islamic law is mainly criticized as the name of rituals and means of obligations by Western scholars.[474] But, Muslims believe that by respecting obligations, the rights of the people are already satisfied. Thus law is not only a command, not only obligations but also provides certain rights to the people. There are many other verses and teachings of the Holy Quran and Sunnah where freedom of choice is given to the individual to do or not to do certain things,

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[469] "Sovereignty over the entire universe belongs to Allah Almighty alone" See; Objective Resolution under article 2(a) of the 1973 Constitution of Pakistan.

[470] "Farad or Obligatory is the command that arise from evidence or source that is definitive with regard to the authenticity of its transmission. Wajib is also obligatory, but is slightly weaker in in its demand for commission" See Ibid., 52

[471] Mandub or recommended is the command which is non-binding though the source is probable. See Ibid. 51.

[472] Duty imposed on Muslims not to do an ac. The prohibition of such an act is also from definitive evidence. See Ibid. 53.

[473] "It is an act whose omission is demanded by Allah Almighty through probable evidence, it has further been divided into makrooh Al-tanzih and makruh karahat al –tahrim." See Ibid.,53

[474] Heiner Bielefeldt, "Western versus Islamic human rights conceptions? A critique of cultural essentialism in the discussion on human rights," Political Theory 28, no. 1 (2000): 90-121.

called Ibahat (Permissible).[475] Thus obligation, recommendation, prohibition, disapproval, and permissible are certain primary rules of Shariah.

For all such primary rules, certain secondary rules in the form of conditions and causes are there. Allah Almighty has attached such conditions with obligations like prayer and Zakat. For example, Zakat is an obligation subject to certain conditions, on the properties of Muslims for the deserving segment of the society. Then there are certain obstacles, in the presence of which the obligatory rule won't be there. Likewise, certain prohibitions become permissible under certain situations. For example, eating a corpse in the first place is prohibited,[476] but if nothing is available then it becomes permissible to use it to save one's life, as an exception. Jurists talk about Azima (Obligation imposed initially as a general rule) or the general rules of general behaviors, and, Rukhsa exemption from the rule, based on certain specific conditions or situations.[477] So in Shariah, there are obligation-creating rules (both negative and positive), binding and non-binding rules, rules of permissions, options, conditions or exceptions, and the rules of validity or invalidity of different acts.

Where do we find these rules of Shariah, or, what are the sources of Islamic Law? These are available in the Holy Quran, Traditions of the Holy Prophet (explaining the verses of the Quran through his conduct), Ijma, Analogy, Maslahat, etc.[478] The leading Jurists have, however, developed certain "General Principles of Law", derived from the Holy Quran and the tradition of the Prophet, and for every act, one does not need specific rules from original sources. As far as the Holy Quran is concerned there are more than 6200 verses, out of which hardly 500 verses or

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[475] Ibid, 53.

[476] Al Quran 2:173

[477] An important tenet of Islamic law is the prohibition of drinking wine for Muslims. "This is a general rule that must be observed. However, in situations where a Muslim is suffering from extreme thirst and their life is in danger, there is an exemption from this rule. In such cases, one is permitted to consume to the extent necessary to save their life. This exemption from the general rule is known as Azima and Rukhsa, and it serves as a crucial aspect of Islamic law, ensuring analytical consistency." See; Nyazee, "Islamic Jurisprudence," 77.

[478] Nyazee, "Islamic Jurisprudence," 162-200

less than 10 percent of Ayat directly deal with legal issues, or relate to law and jurisprudence, though indirect reference is there, while, the majority of the remaining verses discuss morality, the five pillars of the faith, and a range of other topics.[479]

The verses of the Holy Quran that directly deal with legal rules or issues are termed "Ayat ul Ahkam or "legal verses".[480] Similarly, the traditions of the Holy Prophet which deal with the legal issues or rules are called "Ahadeeth ul Ahkam"[481]. Muslim jurists have worked constantly on these rulings of Quran and Sunnah, and have compiled them in the shape of books and commentaries for the sake of understanding.[482]

These rulings of shariah must be made part of legislation while ensuring the rights of mentally disabled people. A common belief in Muslim psychological literature holds that revelation should control reason, and emotions should be subordinated to it. This is the reason Muslim psychologists also pay far less attention to prior experiences in a patient's life, for example his early years, on the ground that they think thoughts have an impact on emotions and moods. They frequently refer to the present moment, helping the patient realize his spiritual affiliation with God, by outlining the constraints on his personal agency.[483]

4.6 MENTAL HEALTH PROTECTION AND THE RULINGS OF SHARIAH

The legal rules available in the Holy Quran, Sunnah, and compilations of well-known jurists explicitly discuss the subject of mental health or the use of human intellect. There are

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[479] Muhammad Hashim Kamali, Principles of Islamic Jurisprudence (Cambridge, UK: The Islamic Texts Society, 2003), 27.

[480]Ayat ul Ahkam or verses of the rules' is a phrase used to describe the verses of the Quran from which legal rulings are drawn.

[481] Ahadeet Ahkam or Rules of traditions is a phrase used to describe the verses of the Quran from which legal rulings are drawn.

[482] As for instance, well-known work on these rules are Ahkam ul Quran written by Abu Bakar Jassas and Fiqh-us-Sunnah written by Sayyid Saabiq.

[483] Minas, Harry, and Milton Lewis, eds. *mental health in Asia and the Pacific: Historical and cultural perspectives*. New York: Springer, 2017.

verses of the Holy Quran that directly or indirectly emphasize thinking, reasoning, observations, or the use of mind. Time and again Allah Almighty has addressed Muslims by sayings, to ponder or think, like [afala tatafakkaroon (don't you think), afala taqiloon, (Don't you ponder) afalaa yashuroon (why don't they understand)]. The Lawgiver emphasizes the use of reason or human intellect by analyzing and observing different phenomena. Islamic law thus compels its followers to protect the rights of people suffering from mental disability using obligation-creating rules, rights-conferring rules, and secondary rules in the form of general rules or exemptions. The jurists have discussed the cause, conditions, validity, and invalidity of such rules in the light of the teachings of the Quran and Sunnah.

There are some particular verses of the Holy Quran (legal rules), which talk about certain dealings and put the condition of mental maturity for them. As The Holy Quran says;

> And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgment, release their property to them. And do not consume it excessively and quickly, [anticipating] that they will grow up. And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor - let him take according to what is acceptable. Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as Accountant. [484]

When you feel they have attained mental maturity, then hand over the property to them. Allah Almighty has put the condition of "mental maturity" before handing over the property to them. The Muslim guardian is responsible for examining his mental fitness as it affects their legal rights. What are the signs and indications of mental maturity, and what factors need to be

[484] Al-Quran; 4:6 Translation for this thesis has been taken from Allama Maudoodi

considered in such situations? Muslim Jurists have discussed such questions to avoid the possible exploitation of their property by the guardians.

Similarly, some verses discuss the issue of "defective mental capacity". Almighty Allah says in another verse of the Holy Quran;

"And do not give the weak-minded your property, which Allah has made a means of sustenance for you, but provide for them with it and clothe them and speak to them words of appropriate kindness."[485] The creator has forbidden handing over the property to idiots or weak-minded people and has ordered them to give once they attain mental maturity.

Then, some verses talk about certain legal responsibilities based on mental disability or mental capacity. Such disability may be because of intoxication or drunkenness. The Holy Quran says;

> Believers! Do not draw near to the Prayer while you are intoxicated until you know what you are saying nor while you are defiled - save when you are traveling - until you have washed yourselves. If you are either ill or traveling or have satisfied a want of nature or have had contact with women and can find no water, then betake yourselves to pure earth, passing with it lightly over your face and your hands. Surely Allah is All-Relenting, All-Forgiving.[486]

Likewise, the Muslim jurists have elaborated the traditions of the Prophet (Peace be Upon Him), regarding mentally disordered persons in detail. For instance, the Holy Prophet says; "The pen does not record the evil actions against the sleeper until he wakes up or against the boy until he reaches the puberty, or against the madman until he recovers his wits."[487]

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[485] Al-Quran; 4:5
[486] Al Quran; 4:43
[487] Sunan al-Tirmidhi 1423

It is obvious from the above tradition, that in Islamic law there are general rules of Islamic law that deal with the issue of mental disability. Other than general rules, there are also rules in the form of exemptions for the madman (person suffering from mental illness). Thus, mental illness is recognized as a valid defense under the Shariah. The persons suffering from mental disability are not punished for the crimes they have committed in the state of illness. Not only this, but Islamic law has exonerated such persons from other liabilities and religious obligations in the form of prayer, zakat, or other contracts.

4.7 LEGAL CAPACITY IN ISLAMIC LAW

Being a Muslim, a person has certain rights and is bound by certain obligations. Now, who is bound to obey and carry out these rights and obligations under Islamic law? In Islamic Law, Legal capacity (Ahliyyah) is of two kinds; the capacity for acquiring rights and obligations[488] and the capacity for execution or performance.[489]

4.7.1 CAPACITY FOR ATTAINING RIGHTS AND OBLIGATIONS

Being a human being, people are subject to certain rights and obligations. They acquire certain rights and duties. The criteria for having such rights are 'being human only'. Thus, every human being; a child, an insane, or an orphan has the capacity for acquiring certain rights and duties. Rights belong to them but somebody else is made bound to perform for them.[490] Thus jurists discuss this as another kind of capacity.

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[488] Termed as "Ahliyat al Wajub" in Islamic law, which is the capacity to follow obligations. See; Nyazee, "Islamic Jurisprudence," 111.

[489] Termed as "Ahliat al Adaa" in Islamic law, which is the capability of human being to perform acts which Allah Almighty has assigned certain legal affects. Ibid.

[490] Ibid, 114.

4.7.2 CAPACITY FOR THE PERFORMANCE OF RIGHTS AND OBLIGATIONS

People own some rights but cannot exercise them. Somebody else exercises such rights for them. Jurists call it 'capacity for execution or performance'. As, for instance; Guardian is appointed for mentally disordered persons to look after their health and property. They have the right but cannot look after such property themselves.

The criteria for the capacity of execution or performance is 'Intellect or reason'. Without having mental Maturity or capacity obligations cannot be performed. Therefore, mental capacity is required for the performance of certain actions. Actions cannot be executed by a person lacking such capacity or having defective capacity.[491]

4.8 CATEGORIES OF DEFECTIVE LEGAL CAPACITY

In Shariah, there are different categories and causes of 'Defective Legal Capacity'. These defective issues may be natural or acquired.[492] A person may be suffering from mental issues by birth or become insane later. Sometimes, a sane person by physical activities like consuming wine lacks mental capacity, which is prohibited in Islamic law. He or she at this stage may do something unknowingly and will be held liable for the consequences of the wrong done. But here we are concerned with the natural causes of defective mental capacity. Jurists have divided such mental defects into different categories to determine the rights and liabilities of people. However, this research is confined to people suffering from mental health-related issues only.

[491] Ibid, 115
[492] Ibid, 126

4.8.1 INSANITY OR JUNOON

Among the natural causes of defective legal capacity is Junoon or Insanity. This is the worst form of mental disorder. The person suffering from insanity is called Majnoon. This person has a legal capacity like that of a child under the age of 7 years. Rights and obligations are established for such a person however, such an individual is not accountable for worship or punishment based on humanity principle, and all of his dealings are deemed void.[493] majnūn is commonly used for describing persons with unusual behavior and thus it can be used to designate those we now consider to be "mentally ill".[494] Other terms used are mental illness, mental disorders, psychosis, schizophrenia, and mania.

4.8.2 LUNATICS OR MATOO

This mental disability is lesser than that of insanity. Such persons are known as Matoo in Shariah. There are different stages of lunatics. This is temporary. At one phase he acts like a sane person and on another occasion, he behaves like an insane. His position is like a child above the age of 7 years and below puberty. In normal condition, he has normal capacity. ʿAtah was defined by some jurists as diminished rationality (nuqṣān al-ʿaql) without actually amounting to total insanity or madness.

Three categories are discussed by jurists regarding matuh. The only beneficial actions fall under the first category. The guardian does not need to approve for the maʃtūh to carry out these tasks. The acts that are only harmful fall into the second category. Even though the guardian gave their approval, the maʃtūh's actions will be deemed invalid. Activities that lie halfway

[493] Ibid, 127
[494] Michael W Dols, and Diana E. Immisch. "Majnūn: The madman in medieval Islamic society." (1992).

between exclusively beneficial and exclusively harmful activities are included in the third category. Only if the guardian has given their approval will this kind of action be accepted.[495]

Muslim jurists provided a range of instances of behaviors that fit into each of these three classifications. Accepting donations such as endowments, gifts, and charitable contributions that allow the maʃtūh to increase their wealth include instances of the first category that don't require payment. Conversely, instances of the second group comprise bestowing gifts or charity and analogous deeds, which cause the maʿtūh to forfeit a portion of their wealth without obtaining anything in return. Divorce is typically categorized by Muslim jurists as one of the acts that fall under this second group. Lastly, the majority of financial transactions as well as other behaviors like marriage, purchasing, selling, and leasing belong to the third category.[496]

4.8.3 IDIOTS OR SUFAAA

A person who fails to observe due care in his transactions is called an idiot. He cannot take care of his interests and does not behave like a prudent person. Such a person does some irresponsible things. This person is weak in understanding questions put to them. The Holy Quran says, “But if the one who has the obligation is of limited understanding (safīh) or weak or unable to dictate himself, then let his guardian dictate in justice”[497]

4.8.4 INTOXICATED OR SUKRAAN

In this condition, a person becomes intoxicated. A person may become intoxicated by free will or involuntarily. When a person is forcefully compelled to drink, then he is just like a

[495] Mohammed Ghaly (2019) The Convention on the Rights of Persons with Disabilities and the Islamic Tradition: The question of legal capacity in focus, Journal of Disability & Religion, 23:3, 251-278, DOI: 10.1080/23312521.2019.1613943

[496] Ibid.

[497] Al Quran, 02:282

person who is asleep. If a person drinks a fluid drink it is a juice but it is a wine. Then his position is again like an asleep person. However, if a person is drinking wine voluntarily, he gets intoxicated and commits a wrongful act. He would be liable for the consequences of the act. For example, if he disposed of the property, or killed someone while intoxicated. There are two opinions in Islamic jurisprudence. First, the lawgiver has prescribed that he will not be punished for the wrong done. But Hanafi jurists as per the principle of English law, "Nobody should benefit from his wrong", added that such a person cannot exonerate himself from liability.

Now the question is how to determine a person's mental health condition, whether he is insane, lunatic, or victim of another category? Jurists have maintained that it would be based on medical evidence to test the mental capacity of a person keeping in view the opinions of psychologists and other medical experts.

4.9 THE BASIC OBJECTIVES OF ISLAMIC LAW AND MENTAL HEALTH

The shar'ah continues to have an impact on choices through its objectives (maq'as'id), and the underlying general principles (qaw'a'id). The truth is that these goals serve as a guide for all types of rights and fundamental human rights in particular. These goals resemble higher ideals predominant in Western societies, which place a higher weight on human aims and logic, but God Almighty has predetermined the goals of the Shariah in the form of maqasid us Shariaa.[498]

For an instance, Maslow's theory essentially addresses the fundamental needs of human existence (al-dharuriyyat), but in Islam, it takes into account the needs of al-hajiyyat. The five Hifz (preservation) that scholars identified for al-Daruriyyat were "Hifz al-Din" (religious), "Hifz al-Nafs" (self), "Hifz alAql" (intellectualism), "Hifz al-Nasl" (progeny/family), and "Hifz al-Mal" (wealth). Muslim jurists have analyzed various rules of Islamic Law and have derived

[498] Nyazee, Islamic Law and Human Rights, 26.

"General Principles" behind these rules.[499] They talk about these five primary purposes of Islamic Law, known as Maqasid u Shariah (the purpose of Shariah), which are termed in English as;

i. Preservation/protection of Religion
ii. Protection of Life
iii. Protection of Projency
iv. Protection of Intellect
v. Protection of Property

There are rules for establishing these rights both from positive and negative aspects (i.e., for the preservation and protection of these basic purposes). As, to protect the human mind, from a positive aspect 'right to education' is given to children, and, from a negative aspect, wine is prohibited by Muslims to preserve and protect human intellect.[500]

These purposes are then prioritized by the jurists in terms of their value and validity. Muslims first prefer religion, then life, then progeny, then intellect, and lastly property. For example; in terms of Blasphemy and the freedom of expression which one to prefer? In case of conflict between the right to freedom of expression and not harming the religious feelings of others, it is always the protection of the religious aspect that is preferred. Similarly, if one person is killed and seeks punishment of the offender, and the offender claims not to be punished based on insanity how to create a balance? The jurists have talked about Ahliatul uqoobat. The capacity for punishment requires the age of majority and sanity. An insane person cannot be punished.

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[499] Maslow's Hierarchy of needs theory and the principles of Maqasid Sharī'ah." Journal of Islamic Thought and Civilization 12, no. 2 (2022): 136−150. https://doi.org/10.32350/jitc.122.10

[500] "O you who have believed, indeed, intoxicants (khamr), gambling, [sacrificing on] stone altars [to other than God], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful." Al Quran 4: 43

What about the criminal liability of an insane person? The status of that of a child above 7 and before puberty. In crime, there are two things, men's rea and actus reus, the criminal act done and the guilty mind, and then the causal link between the crime and the act. A person for example was killed because of a guilty mind. However, this aspect is missing in the case of an insane person. Therefore, his acts are not enumerated as a crime.[501]

Sometimes there are cases of strict liability, where we forget about the guilty mind. Once the act is committed, a person becomes liable. No visas would be there, however, if the insane person has destroyed the property of someone, then civil liability would be there. Who would pay for him is the question that is on his family or community or the state.

4.10 THE RIGHTS UNDER THE UNCRPD AND THE SCOPE OF SHARIAH

The UNCRPD and Islamic Law both offer a comprehensive legal framework for the rights of mentally disordered persons, especially in the Pakistani context. Islam In fact, was the first religion to acknowledge fundamental human rights, about 14 centuries ago. It gave the message of equality among human beings without any discrimination. The Holy Prophet said;

> No non-Arab is superior to any Arab, and no Arab is superior to any non-Arab. Similarly, no man is superior to either a black man or a white man; neither is superior to either a black man or a white man. Since Adam was made of clay, you are all his offspring.[502]

Islamic Law ensures the protection of the rights of everyone including mentally disordered persons. For example, Islamic Law commands that mentally disabled individuals

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[501] Mohammed Ghaly, "The Convention on the Rights of Persons with Disabilities and the Islamic Tradition"

[502] Prophet Muhammad (PBUH) Last Sermon delivered: 632 A.C., 9th day of Dhul al Hijjah, 10 A.H. in the 'Uranah valley of Mount Arafat.

should be treated with utmost dignity and respect, and their privacy should be protected. The teachings also recognize the concept of "hifz al-nafs," or the protection of life, is central to the preservation of human rights, including mentally disordered persons. Similarly, the concept of mental illness (Hifz ul Aqzl) is acknowledged in Islamic Law, and several teachings of the Holy Quran and Sunnah ensure the protection of the rights of those suffering from mental disorders.

Similarly, The UNCRPD recognizes the human rights of persons with disabilities, including those with mental disorders. They have the right to access to justice, education, employment, full participation in society, and healthcare services without discrimination.[503]. For instance, the convention specifically addresses the right to legal capacity for persons with disabilities, stating that they have the right to make their own decisions and that their autonomy should be respected.[504] The phrase 'legal capacity' for rights in the CRPD is equivalent to the term capacity of obligation (ahliyyat al-wujūb) in the Islamic tradition, which means the capacity to acquire both rights and duties.[505] Additionally, the convention guarantees the right to live independently and be included in the community.[506] Similarly, the convention guarantees the right to access healthcare for people suffering from mental health

However, in Pakistan, the issue lies with ratification. Before ratification, all international conventions must be presented to the people's elected representatives, even if a shortcut is devised to avoid delay. Legislative approval should not imply that the convention ratified in this manner automatically becomes law. If the legislature does not exist for some reason during a certain period, there must be some mechanism for soliciting public opinion to determine whether or not the new norms are likely to conflict with the Shari'ah. For example, each convention

[503] Article 25, Ibid.
[504] Article 12, CRPD
[505] ; Nyazee, "Islamic Jurisprudence," 111.
[506] Article 19, ibid.

should be sent to the Council of Islamic Ideology in Pakistan. The Council should make its report public to solicit public input, particularly from the Pakistan Bar Council. A final report must be sent to the government for approval.[507]

The Islamic character of the Constitution of Pakistan 1973 guarantees the rights of citizens, including those with disabilities, and the government is obligated to provide appropriate resources and support for individuals with mental disorders. However, still there are significant challenges for mentally disordered persons in Pakistan, including social stigma, lack of access to healthcare, and discrimination. Since the population belongs to Muslims, and Muslims consider the teachings of Islam as part of their faith, therefore, the Islamic legal framework can ensure their protection and enjoy their human rights.

4.12 CONCLUSION

This chapter examined how Islamic law and the protection of people with mental illnesses interact, taking into account Pakistan's distinctive legal system, which combines common law and Shariah. To understand this dynamic important constitutional and legislative components, such as the Pakistani Constitution and the 1949 Objective Resolution, were examined. The discussion included the origins of Islamic law, a Shariah-based understanding of mental illness, a classification of mental illnesses, and the core values of Shariah. Additionally, a thorough analysis of the rights and obligations of people with mental disabilities followed, taking into account questions of criminal responsibility and the scope of the insanity defense.

The research ultimately led to an examination of Islamic law's contribution to mental health, especially the Cairo Declaration of Human Rights to Pakistan's protection of the rights of

[507] Nyazee, Islamic law and human rights, 59.

those with mental illnesses. The analysis revealed a similarity between CRPD's principles and Islamic legal precepts, emphasizing the protection of vulnerable people, including individuals with mental illnesses. Unfortunately, the application of Islamic law was not considered while formulating mental health legislation. The chapter highlighted the potential of Islamic law to considerably advance the rights of those who are mentally ill in Pakistan while highlighting the need for significant efforts for thorough implementation.

CHAPTER 5

JUDICIAL INTERPRETATION OF MENTAL HEALTH LEGISLATION THROUGH CASE LAW IN PAKISTAN

5.1 INTRODUCTION

This chapter analyses Pakistani case law of Supreme Court and High Court to understand the judicial interpretation of mental health legislation. To give readers a thorough grasp of the numerous strategies employed to address mental health issues within the justice system, it begins by examining the fundamental goal of interpretation. It further examines court dynamics about people with mental disorders as well as the legal interpretation and execution of Pakistani mental health legislation.

It looks at Pakistan's legal system, especially the Mental Health Ordinance of 2001 and recent changes to the Pakistan Penal Code 1860, which protects the rights of people with mental illnesses. It again focuses on mental health legislation as seen and upheld in Pakistani courts. The identification of problems with mental health laws and court procedures will ensure that the rights are adequately protected by the UNCRPD's principles and standards.

5.2 HIERARCHY OF COURTS IN PAKISTAN

The hierarchy of the courts in Pakistan can be divided into the superior Judiciary and the lower judiciary.[508] The superior courts include the Supreme Court, High Courts, and the Federal

[508] Faqir Hussain. The judicial system of Pakistan. (Pakistan: Supreme Court of Pakistan, 2011.)

Shariat Court, and the lower judiciary comprises the district courts and several other specialized courts.[509]

5.2.1 SUPREME COURT

The Supreme Court of Pakistan is the highest court in the country. It enjoys original, appellate, and advisory jurisdiction.[510] The Supreme Court has the power to hear appeals from all lower courts, and its decisions are binding on all subordinate courts in the country.[511] It has original jurisdiction over certain matters, such as disputes between the federal and provincial governments, and has the power to hear cases of public importance,[512] or related to the Fundamental Rights as provided in the Constitution.[513] As the decisions made by the Supreme Court of Pakistan carry binding authority over the High Courts, the latter consistently adhere to these decisions. Furthermore, the Supreme Court also upholds previous decisions, particularly those rendered by benches comprising a greater number of judges than the current bench.[514]

5.2.2 HIGH COURTS

There are five High Courts in Pakistan, one for each province and one for the federal capital territory of Islamabad.[515] The High Courts have appellate jurisdiction over the Subordinate Courts in both civil and criminal cases within their respective jurisdictions and have

[509] Ibid
[510] Articles 184 to 186, Ibid.
[511] Article 189, Constitution of Pakistan 1973.
[512] Article 184, Ibid
[513] Article 8 to Article 28, Ibid.
[514]Muhammad Munir, "Precedent Law in Pakistan", (Pakistan: Oxford University Press: 2014).
[515]Article 193, Ibid.

original jurisdiction over certain matters, concerning the enforcement of fundamental rights or writ petitions.[516]

5.2.3 FEDERAL SHARIAH COURT

The Federal Shariat Court deals with cases related to Islamic law. It has the power to decide whether a particular provision of law contradicts the principles of Islam either by its initiative or by a petition from a citizen or a government (federal or provincial).[517] The decisions of the court are authoritative and are binding on all high courts and other lower courts.[518] The Court consists of 8 Muslim judges including the Chief Justice.[519]

5.2.4 LOWER JUDICIARY

The lower judiciary in Pakistan consists of civil and criminal courts at the district level. Civil courts deal with civil disputes, while criminal courts deal with criminal offenses. These courts have original jurisdiction over civil and criminal cases and hear appeals from lower courts within their respective jurisdictions.[520]

It is noteworthy that cases concerning safeguarding the rights of individuals with mental disorders are typically initiated in the lower courts, and an appeal against the decision of these courts can be made to the High Courts or the Supreme Court of Pakistan. Furthermore, matters about Islamic law are referred to the Federal Shariat Court.

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[516]Article 199, Ibid.
[517]Article 203-D, Ibid.
[518]Article 203- G, Ibid.
[519] Article 203-C, Ibid.
[520] Faqir Hussain, the Judicial System of Pakistan (Pakistan: Supreme Court of Pakistan, 2011).

5.3 CHALLENGES IN PROTECTING MENTALLY DISORDERED PERSONS IN PAKISTANI COURTS

The Pakistani courts face several significant challenges when dealing with the issues of mentally disordered persons and providing them with justice. These challenges range from inadequate legal frameworks for protecting the rights of such individuals, the lack of awareness or lack of specialized training and resources for judges and lawyers to understand the needs and concerns of mentally disordered persons, and a shortage of mental health professionals to provide proper assessment and treatment of mental health conditions.[521]

There is also a lack of access to legal representation, and a limited understanding of their legal rights and the legal process due to their condition.[522] Additionally, the stigma and discrimination associated with mental health issues in society badly affect the treatment of mentally disordered persons in the court system. Most court cases in Pakistan demonstrate that individuals are not receiving sufficient legal protection in terms of their human rights and the provision of criminal justice rights.

5.3.1 CRIMINAL JUSTICE RIGHTS OF INDIVIDUALS WITH MENTAL DISORDERS

The right to a fair trial is a right available to a citizen guaranteed by the constitution[523] and International human rights documents. In Pakistan, the right to fair trial or defense plea of insanity for mentally disordered persons is rooted in the English laws on insanity, and their provision remains crucial to ensure just and ethical legal proceedings. The defense of

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[521] Khalily et al., "Stakeholders' perspective on mental health laws in Pakistan," 101647.

[522] Ibid

[523] "A person is entitled to a fair trial and due process for the determination of his civil rights and obligations or in any criminal charge against him." See; Article 10, 1973 Constitution.

insanity has a long history dating back to Hebrew law. Originally, criminal responsibility was based on the "guilty mind" or mens rea, and the "guilty act" or actus reus. However, in insanity defense cases, the focus is on the defendant's knowledge of their actions rather than the act itself.

The first formal insanity defense was named the "wild beast" test by Judge Tracy in 1724, which defined insanity as a deprivation of memory and power of understanding, similar to a wild animal or infant. These standards remained the same in England for approximately 100 years until the M' Naghten case.[524] The guidelines provided by the M' Naghten rule or case are being followed uniformly in different countries, including Pakistan. Section 84 of the Pakistan Penal Code[525] seems to follow this M' Naghten rule for insanity practiced in England. If a person does not know the nature of the act with certainty because of defective reasoning or a malfunctioning mind. He cannot be held responsible for the consequences of the act.

The Durham Rule is the second standard for the insanity defense, developed after the 1953 case of Monte Durham. It states that an accused person with a mental disorder at the time of the crime is not criminally liable if they did not understand the nature of the crime or could not distinguish between right and wrong.[526] However, this defense is often rejected to discourage its misuse by lawbreakers. In 1962, the American Law Institute (ALI) presented Model Penal Code standards. According to this code of conduct, any person who commits a crime will not be responsible for such criminal conduct until he or she has a mental illness. He also faces the absence of substantial capacity to conform or appreciate his criminal act according to

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[524]Stephen, Allnutt, Anthony Samuels, and Colman O'driscoll. "The insanity defence: from wild beasts to M'Naghten." Australasian Psychiatry 15, no. 4 (2007): 292-298.

[525] "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law." See section 84, Pakistan Penal Code 1860.

[526] Wechsler, Herbert. "The Criteria of Criminal Responsibility." U. Chi. L. Rev. 22 (1954): 367

law.[527] Thus, capital punishment cannot be imposed on persons suffering from intellectual disability.[528]

In Pakistan, however, the British colonial influence is evident in the early laws regarding the insanity defense, with the first recorded case in 1924. In 1959, Pakistan introduced the Pakistan Penal Code, which included provisions for the defense of insanity. The Code defined insanity as a person's inability to understand the nature and consequences of their actions.[529] Unfortunately, the judgments in Pakistani courts do not address the issue thoroughly. It is important to determine and understand the nature of mental health issues, whether it is due to some internal caused factors or external factors. Insanity is an internal issue that is not associated with the condition of the brain but with the condition of the mind. It is, in fact, the malfunctioning of the mind that results in legal insanity.[530] Legal insanity refers to a mental state in which an individual engages in criminal behavior. It signifies the commission of a crime while experiencing mental illness, devoid of the capacity for reasoning and comprehension. In this

[527] The statement calls for the U.S. Supreme Court to define "a specific range of mental illness severity that would disqualify a person from being subjected to the death penalty. The current insanity test is deemed insufficient, and there is confusion among lower courts on where to draw the line for mental illness among death row inmates. The Hall v. Florida standard for intellectual disability may serve as guidance for mental illness cases. The article suggests that there are various tests that the United Nations, regional human rights bodies, and national courts have articulated, providing a range of options to consider."

[528] Cooke, Brian K., Dominque Delalot, and Tonia L. Werner. "Hall v. Florida: Capital punishment, IQ, and persons with intellectual disabilities." Journal of the American Academy of Psychiatry and the Law Online 43, no. 2 (2015): 230-234.

[529] See section 84 PPC which states; "nothing is an offense done by the individual experiencing unsoundness of the mental health and was unable to understand the nature of act at the time of committing offense or actions performing against the law."

[530] Insanity can be categorized as either medical or legal. Medical insanity pertains to any psychiatric or mental illness afflicting an individual, whereas legal insanity refers to the mental state of the person at the time the crime is committed. As for example; from a medical standpoint, it can be argued that every individual committing a criminal act is inherently insane and thus deserving of exemption from criminal liability. However, from a legal perspective, an individual must be considered sane as long as they possess the capacity to discern right from wrong and are aware that their actions contradict the law. Se; Janhavi Arakeri et al., "Insanity as a Defence under the Indian Penal Code," iPleaders, October 27, 2020, https://blog.ipleaders.in/insanity-defence-indian-penal-code/.

mental state, the person cannot comprehend the nature of their actions, distinguish right from wrong, or conform to the requirements of the law.[531]

However, the implementation of the provision of the Penal Code has been inconsistent, with little guidance for judges and lawyers on how to assess a defendant's mental state. Therefore, these rules have been criticized by lawyers and doctors in Pakistan as being inefficient.[532] Muslim scholars should analyze such tests in-depth and should come up with new tests or follow the tests adopted in other countries.[533]

Secondly, individuals suffering from mental disorders have not only the right to a fair trial but also avail other fundamental rights during criminal trials under different human rights documents, such as the right to legal representation, the right to due process, the right to be free from cruel and unusual punishment, and the right to receive mental health treatment while imprisoned.

Thirdly, in accordance with Pakistan's obligations under international human rights treaties during criminal trials, individuals found not guilty by reason of insanity are entitled to specific rights.[534] These rights include the right to receive mental health treatment, the right to be released from custody when they are no longer a danger to themselves or others, the right to appeal against continued detention and for treatment, the right to petition for release or transfer to a less restrictive setting, the right to have access to legal counsel, and the right to challenge ongoing commitment or treatment.

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[531] 1. Daphne Rozenblatt, “Legal Insanity: Towards an Understanding of Free Will through Feeling in Modern Europe,” Rechtsgeschichte - Legal History 2017, no. 25 (2017): 263–7.

[532] Nyazee, "Islamic Jurisprudence," 127.

[533] Ibid.

[534] Pakistan has been a signatory to several Human rights instruments including UNCRPD, ICCPR, ICESCR, UNCAT, and CRC that directly or indirectly talk for the protection of individual’s rights during criminal trials.

Finally, individuals with mental disorders under trial also possess certain healthcare rights, which include the right to receive suitable medical and mental health care, the right to refuse treatment under specific circumstances, the right to participate in treatment decisions, the right to privacy and confidentiality of health information, and the right to be free from discrimination based on their mental health status.[535]

5.3.2 HUMAN RIGHTS OF INDIVIDUALS WITH MENTAL DISORDERS

As a signatory to the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and other human rights instruments, Pakistan is responsible for ensuring that mentally ill people have access to the fundamental human rights enshrined in UN documents, just like any other civilized citizen. For example, it is essential to assess whether Pakistan is following its commitment to uphold the following rights: the right to dignity and respect, the right to privacy and confidentiality, the right to healthcare and treatment, the right to education and employment opportunities, the right to participate in social activities, and the right to advocacy and support services.[536]

Pakistan may demonstrate its steadfast commitment to the well-being and participation of mentally ill individuals by respecting and defending these rights and establishing an equal and caring society for everyone. Furthermore, these rights must be particularly addressed when providing justice for mentally ill individuals in Pakistani courts. Pakistan must uphold its

[535] For instance, See under the MI Principles.

[536] As a state, the country has to respect, protect and fulfill its commitment under the UN human rights regime.

commitments and adhere to these human rights principles to ensure all its citizens' fair and just treatment, including those mentally ill.[537]

5.4 TECHNIQUES OF INTERPRETATION IN SUPERIOR COURTS

Pakistan has failed to adhere to International Standards when interpreting various psychological disorders within the context of an unsound mind. Furthermore, the country has not effectively addressed the issue of interpretation in a manner that supports and protects mentally ill individuals who are mostly vulnerable and face psychological disorders. In notable instances such as the Safia Bano case,[538] the Supreme Court of Pakistan demonstrated a failure to acknowledge schizophrenia as a mental illness and termed it as an imbalance in the level of stress which does not fall within the definition of "mental disorder", thereby rejecting the plea of insanity presented by the accused.

While Pakistani courts adopt various interpretation theories, they avoid explicitly using the term' theories of interpretation' in their judgments. Instead, they adopt specific approaches such as the 'literal meaning rule' instead of using the term' textualism.' Similarly, the courts have consistently tried to ascertain the 'intention of framers' without explicitly relying on the Mischief rule or 'intentionalism'. Through a study of relevant cases, it becomes evident that the Pakistani courts have utilized different approaches when interpreting the law.[539]

The judiciary, especially the higher judiciary, follows various methodologies to interpret legal texts. These include the literal meaning rule or fair reading approach; the mischief rule, which focuses on the intention or purpose of the law; the liberal approach that emphasizes the

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[537] Human Rights watch, beyond reason, "The death penalty and offenders with mental retardation" 2 (2001),

[538] 2017 PLD 18

[539] Fatima, Sheikh. "The suffering of schizophrenia: stigma, enigma and the search for a cure." (2019)

court's construction, particularly regarding matters of fundamental rights; the Common law approach, which relies on precedents[540], and the Islamic approach based on the Holy Quran and traditions of the Holy Prophet.

5.5 PAKISTANI COURTS AND MENTAL HEALTH LAWS

Before the establishment of the Mental Health Ordinance (MHO) of 2001, the Lunacy Act of 1912 provided a useful legal foundation. The Criminal Procedure Code's sections 464 and 465 established special procedures that apply when the accused is determined to be mentally ill. These procedures were created by the Act. The concept of "mental illness" was incorporated within this framework under the classification of "idiots," with a focus on "criminal lunatics."[541]

5.6 PRE-MENTAL HEALTH ORDINANCE 2001, CASE LAWS

In this case, *Jamshid versus The State*[542] the accused-appellant filed an appeal after the trial judge issued the verdict against him. He was the subject of an FIR for having committed the crime covered by section 302 PPC. Following the formulation of the accusation, the accused's statement was recorded, and in front of the Additional Session Judge Peshawar, a confession regarding the murder's commission was made. As a result, the defendant was found guilty and given the death penalty.

According to the learned counsel for the appellant, the accused was referred to a medical board by the Trial Judge on the counsel's request in the interest of justice, and the medical board determined that he was mentally fit. The attorney questioned the medical board's qualifications, claiming that only psychiatrists could determine the claimed lunatic's mental state. The trial court

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[540] By virtue of Articles 189, 201, and 203(GG), the Constitution of 1973 establishes that the rulings of the superior judiciary hold authoritative power within their respective domains.

[541] Lunacy Act 1912. After independence, Pakistan adopted the same act to deal with mentally disabled persons, who were termed as 'lunatics.'

[542] PCr.LJ 1997 (Peshawar), 1328.

rejected the plea and, relying on the Medical Board's report, convicted and sentenced the accused to death.

The appellate court found that the trial judge acted hastily and that the case should be transferred to qualified psychiatrists so that a determination could be made regarding the accused's mental state. Thus, the appellant-accused's conviction and death sentence were overturned, and the case was remitted to the Session Judge. The above-mentioned appeal was approved under the condition that a medical board comprised of certified and competent psychiatrists be established for the sake of justice.

However, the judgment was reversed. However, the question remains, how an additional session judge can pass an order for the execution of the death penalty without recourse to a proper psychiatrist to diagnose a mental health patient? This is due to the lack of awareness on the part of judges such type of pronouncements are made.

Similarly, In this case *Raja Aurangzeb vs. the State*[543] the petitioner made an application before the trial magistrate under sections 466(I) and 497 Cr. P.C for being of unsound mind and incapable of making a defense, after being charged with the crime under section 307 PPC for the murder of Brigadier M. Abbas Abbasi on June 15, 1968, at noon or 2:30 p.m., while driving back to the Flashman Hotel Rawalpindi from the National Assembly.

On behalf of the accused, it was requested that an investigation be conducted because it appeared that he was receiving treatment for a mental disorder. This argument was rejected because the concerned doctor had examined the defendant decades prior, on October 24, 1965,

[543] PLD 2006 Pesh 116

and had determined that the nature of his mental disorder was uncertain. His mental disorder was not fully established. Hence no such treatment was recommended.

Ultimately, it was decided that the accused is of sound mind and is competent to comprehend the proceedings. There was no such evidence of his inadequacy. A revision petition had been filed under section 435 of the CrPC, but the Additional Session Judge had dismissed it. This modification complies with section 439 of the CrPC. The Court must think that the accused is of unsound mind and thus unable to present his defense before Section 464 of CrPC is applicable. The Court is under no obligation to look into the accused's mental stability.

The inquiry required by section 464 CrPC may not be solely based on the accused's assertions of mental illness and lack of capacity for self-defense. It was decided that the inquiry should be based on the concerned doctor's opinions and comments. It is not sufficient to just see or consult a psychiatrist to demonstrate his unsoundness. The fundamental issue is his current insanity and his inability to provide a defense. According to the Court's final ruling, the petitioner was found to be neither mentally incompetent nor capable of presenting his defense. Revision fails and is rejected.

In another case titled; *Abdul Ghaffar versus Public in General and others*[544] the brother of the petitioner, who was residing with the respondents (the brother and nephews of the alleged lunatic and the petitioner), was declared to be insane under section 62 of the Lunacy Act of 1912. The replies denied the charges and asserted that the alleged lunatic was a fully stable and healthy guy capable of handling his affairs. A medical board questioned the lunatic accused and

[544] CLC 1997(Lahore), 657.

determined that he was normal. The petitioner, however, was not pleased with the results of the aforementioned medical board and sought that a specialist examine the lunatic in a mental hospital in Lahore. In the aforementioned appeal, the petitioner contested the trial court's rejection of his argument.

The appellate court cited section 62 of the Lunacy Act of 1912, which provided guidelines for the inquisition and mandated that the court render an independent decision in addition to considering the medical board's findings. The court had jurisdiction over the issue of mental health, not the doctor. The appellate court concluded that the court must investigate and examine the lunatic based on earlier rulings. In this instance, the court neglected to examine the supposed lunatic and failed to construct its inquisition. The lower court was instructed to interview the alleged lunatic and, if necessary, to refer him to a mental hospital. The parties were left to cover their fees after the appeal was partially upheld

In one of the case titled; *Amiruddin Khan versus Atta Mohyud Din Khan*[545] An appeal against the order made by Additional District Judge Sialkot was submitted under section 83 of the Lunacy Act of 1912. Instead of property owned by his mentally impaired brother in India before partition, the petitioner/appellant brought an application for his appointment as manager of the property of his mentally disabled brother, who migrated to Pakistan. The alleged lunatic spent seven years in an asylum before being released.

When the mentally challenged person went to Kenya, the respondent (brother of the alleged lunatic and petitioner) was given power of attorney.

[545] MLD 1994(Lahore), 377

The petitioner applied for the appointment to administer the property; he claimed that the respondent was squandering and wasting the property of his mentally ill brother, which the respondent disputed. After being questioned by the court, the alleged lunatic was found to be sane and of sound mind. As an outcome, the petition was dismissed.

According to Section 62 of the Lunacy Act of 1912, the Court must convince itself through personal inquisition from the alleged lunatic. The court may dismiss the proceedings if it deems them superfluous. After interrogating the parties, the court referenced many judgments defining the court's authority to dismiss the application or drop the proceedings without inquisition. If the court finds and is satisfied that the charges are without merit, it may be justified to dismiss the petition. After finding the putative lunatic to be of sound mind, the appellant court dismissed the appeal with costs and upheld the lower court's decision

5.7 PRE-18TH AMENDMENT CASE LAWS

Even after the formulation mental health ordinance in 2001 thee courts didn't adhere to the provisions of the ordinance strictly. Several issues for faced by the persons suffering from mental disabilities. In the case of *Muhammad Mansha and 5 others vs Muqadas Sultan and 6 others*,[546] the Attorney General executed a sale document on behalf of the appellants, and the respondents bought the property in question. The respondents contested the Attorney General's authority and deemed the sale to be unlawful. The court dismissed the FIR that the appellants had filed against the respondents. The respondent also submitted a request for a declaration of insanity, which was approved, and a guardian was appointed on his behalf.

[546] 2010 CLC 712 (LHC).

The appellants, however, filed an appeal with the court challenging the order. The High Court referred the case back to the lower court so that it could review the terms of the Mental Health Ordinance 2001 and determine if the guardian was fulfilling its obligations.

Similarly in *Muhammad Ashraf Versus Sher Muhammad and others,*[547] the petition was filed to determine who owns the disputed property. The appellant was alleged to be of unsound mind and incapable of caring for his property, so his brother acted as guardian over his property. The trial court requested that the property documents and the alleged lunatic person be presented before the court, but the appellant failed to do so, as well as the lunatic person. As a result, the petition was denied. This appeal was filed in response to the previous decision. The learned counsel argued that dismissing the appellant's petition was contrary to the intent of the Lunacy Act of 1912. The opposing counsel argued in favor of the trial court's decision, claiming that the appellant failed to produce evidence despite being given several chances and that the medical certificate submitted by the appellant was forged.

After examination of the case, the appellate court ruled that the court must assess the claimed lunatic's mental state and should act as the child's father to safeguard the child and his belongings if he is determined to be insane. The additional district court's decision was overturned because it was made in error, and when the decision was overturned, the appeal was permitted, and the case was remanded.

Similarly, in *Arshad Ehsan through legal guardian vs Sheikh Ehsan Ghani and 2 others*,[548] the petitioner filed a civil revision in protest of the trial court's ruling and the appeal's denial. In this instance, the petitioner filed a lawsuit against his father after learning that he had given his

[547] PLD 2006 Lah 189
[548] PLD 2006 Lah 654

brother the inheritance from his father's property. As a result, the petitioner lost the inheritance. According to the petitioner, his father was mentally ill. The first respondent, the petitioner's father, filed a lawsuit to have the plaint dismissed and refuted his claim of mental instability. After investigation and conclusion, the verdict was rendered against the petitioner, and the claim was found to be true.

The petitioner appealed for his right, which was likewise dismissed, and contested the Trial Court's decision. The petitioner filed an appeal to set the verdict aside, which was denied, leading to the civil revision. The opposing counsel argued that the petitioner's suit should have been properly dismissed based on merit, but the learned petitioner's attorney supported the petitioner's position.

The court determined that the lawsuit was legally barred. Only after the respondent's mental state has been established can the legality of the gift be judged. The revision was therefore disposed of.

In another case, *Aurangzeb vs Public at large* District Judge's decision to hold the appellant's brother mentally and physically paralyzed was challenged, and a revision petition involving some of the property under dispute was also submitted. The appellant also submitted a guardianship application on the patient's behalf, but it was denied.

The appellant claimed that his brother was mentally ill and physically disabled. The court mandated the formation of the medical board and the submission of the patient report. After assessing the patient, reports of disability were provided to the Court. However, those reports were later refuted by the doctors' contradicting testimony. The court noted that the

inference was drawn because of juxtaposition. As a result of the District Judge's decision, an appeal was filed, which was successful, and the matter was remanded.

Similarly, in *Sultan Versus the State,*[549] the appellant was found guilty of murder. Following an investigation and trial by the session judge, the death sentence was handed down, along with a fine. This appeal was filed to have the judgment reversed. The appellant's learned counsel objected to the mode of trial, and a point of lunacy, and the judgment was demanded to be overturned. A psychiatrist issued a certificate of lunacy, but the State's Advocate General objected and found the appellant to be of sound mind after being examined by the Court-appointed medical board. The trial court issued its verdict despite failing to determine the convict's mental health.

The appellant Court accepted the appellant's appeal. It remanded the case based on the impugned trial Court's decision that it should first determine the convict's insanity through proper procedure after the commission of an offense.

In another case titled; *Dilshad Hussain Versus the State*,[550] an appeal was filed to contest the Additional Session Judge II's conviction of the appellant in his ruling. The accused was found guilty of smuggling a copy of the Holy Quran into the nullah in the case that had been brought against him. The trial magistrate accepted the accused's bail based on the medical superintendent's certificate, although it was noted that he had not followed the correct procedure. No one made any mention of the law's provisions. Neither the defendant nor his counsel entered a statement during the trial admitting to the accused's insanity. The court had cross-examined the accused; to which he gave a faultless response. There was no substantial evidence against the

[549] PCr.LJ 2006 1693
[550] PCr.LJ 2003 206

accused then; the only available evidence was weak extrajudicial evidence. It was thought that a sincere Muslim could not act in such a disrespectful manner unless they had a mental illness. Due to a lack of evidence, the appeal in this case was granted, and the accused was acquitted.

5.8 POST-18TH AMENDMENT CASE LAWS

5.8.1 DECISIONS OF THE SUPREME COURTS OF PAKISTAN

The Supreme Court of Pakistan has rendered numerous important judgments that have shaped the country's legal background. However, among these notable rulings, the one that truly stands out is the Safia Bano Case[551]. This particular judgment holds immense significance and has gathered widespread attention.

The case involved three prisoners sentenced to death for murder but claimed to be of unsound mind at the time of the offence. The Court held that if a prisoner is unable to comprehend the rationale and reason behind his punishment, then carrying out the death sentence will not meet the ends of justice. The Court also directed the Government to establish a Medical Board and Mental Health Facilities for assessing, treating and rehabilitating prisoners and convicts. The case is considered a promising start towards reforming the Mental Health Laws in Pakistan.

A. FACTS OF THE CASE

The case involved three accused namely Imdad Ali, Kaneezan Bibi and Ghulam Abbas.

Imdad Ali was indicted for murdering Hafiz Muhammad Abdullah and pleaded not guilty. The trial court appointed an advocate at state expense to represent him. The defence counsel later

[551] PLD 2021 SC 488.

submitted an application to determine the accused's competence to face trial, which the trial court dismissed. The Lahore High Court also dismissed a revision of this order. Later an application to summon Medical Officer was accepted. During the trial, Imdad Ali was examined under section 342 Cr.P.C, and his wife appeared as a defence witness and testified that he had exhibited abnormal behaviour before the incident. He was convicted and sentenced to death by the trial court, later upheld by the Lahore High Court and the Supreme Court. The President of Pakistan dismissed a mercy petition. When black warrants were issued for his execution, his wife (Safia Bano) filed a petition to stay his execution and constitute a medical board to examine his mental health condition, which Additional Sessions Judge, Vehari, dismissed. She then filed a constitution petition before the Lahore High Court, Multan, which was also dismissed. After, which Safia Bano filed a Constitution Petition before the Supreme Court, assailing the order of the High Court. Supreme Court also dismissed her petition. She then filed a review petition against the order of the Supreme Court, dismissing her petition (impugned order).

Kaneezan Bibi was tried, along with her co-accused (Khan Muhammad), for the murder of six individuals in the Pir Mahal area of Toba Tek Singh in July 1989. She was convicted under section 302(b) PPC and sentenced to death on six counts in January 1991. Her criminal jail appeal and subsequent appeals were dismissed, and her sentence was confirmed. She did not file any review petition against the judgment. Her mercy petition was also dismissed, and the Supreme Court dismissed her subsequent appeal to convert her sentence to life imprisonment on the grounds of mental illness. However, in 2018, it was found that Kaneezan Bibi was suffering from schizophrenia, and her execution was stayed for three weeks by the President of Pakistan. After perusing a report submitted by the Superintendent Central Jail, Lahore, the then Hon'ble Chief Justice took suo motu notice and ordered her case to be clubbed with Imdad Ali's case.

Ghulam Abbas was indicted for the murder of Wajid Ali and for assaulting his wife in 2004. After the trial, he was convicted under section 302(b) PPC and sentenced to death and imprisonment for other offenses. The Lahore High Court and the Supreme Court dismissed his appeals against the conviction and sentence. His review petition and mercy petition were also rejected. Black warrants were issued for his execution on 18.06.2019. However, his mother (Noor Jehan) filed a Constitutional petition before the Supreme Court to stay the execution of black warrants on the grounds that Ghulam Abbas suffered from intellectual disability, mental illness, and learning disability since childhood and has a documented history of mental illness during his confinement in jail. The then Hon'ble Chief Justice of Pakistan stayed his execution and directed the office to club the petition with Imdad Ali's case.

The cases and petitions of these three individuals were consolidated and heard together, and the resulting judgment is referenced as PLD 2021 SC 488.[552]

B. ARGUMENTS BY COUNSELS AND AMICI CURIAE

The counsel for three condemned Prisoners (Imdad Ali, Kaneezan Bibi, and Ghulam Abbas) argued that the prisoners have been suffering from acute mental illnesses for a long time and, therefore, executing their death sentences would be inhumane. A medical board established by the court has diagnosed prisoners with severe lifelong mental illnesses. The counsel argued that the prisoners' mental illnesses prevented them from understanding and following the mandatory procedures required before execution and requested that their sentences be commuted to life imprisonment.

[552] Mst. safia bano vs Home Department Government of Punjab “Pld 2021 SC 488”

The complainant's counsel opposed this, arguing that at the time of committing the crime, the prisoner (Imdad Ali) was mentally fit and aware of the consequences of his actions. He further argued that when he has virtually exhausted all the remedies available to him under the law, he is not entitled to any indulgence at this belated stage.

The amicus curiae, Brigadier (Retd.) Professor Dr Mowadat Hussain Rana elaborated on the nature of mental illnesses, saying that they are misunderstood and inadequately understood, often raising suspicion and doubt in legal circles. He argued that assessing mental illnesses is a technical and professional pursuit that psychiatrists can only do, using rigorous clinical, psychometric, and scientific tests. He also argued that certain prerequisites (being able to understand the nature of proceedings against him, etc.) must be met for an accused person to participate in a criminal trial meaningfully.

Barrister Haider Rasul Mirza, who also acted as amicus curiae, argued that courts require a serious approach when such issues are raised. He referred to various provisions of domestic and foreign laws, as well as prison rules, jail manuals, judgments, and other material from different jurisdictions. He contended that executing the death sentence of a condemned prisoner who is unable to make rational decisions and understand the rationale behind their punishment due to a medically recognized mental illness would serve no purpose.

The learned Additional Attorney General for Pakistan and learned Law Officers of all the Provinces adopted the submissions and contentions of Barrister Mirza and Brigadier (Retd.) Professor Dr Mowadat Hussain Rana, in particular, agreed that the death sentence should not be executed in such cases.

C. OPINION OF THE COURT

The court ruling stated that certain terms used in Pakistan's legal system regarding mental health, such as "lunatic," "insane," and "unsound mind," have not been explicitly defined in the relevant statutes and rules. However, the Mental Health Ordinance of 2001 defined terms like "mental disorder" and "mental impairment." The court examined definitions of mental illness in other jurisdictions (the United Kingdom and India), finding that the terms are defined by medical science and evolve with it. Therefore, the court recommended avoiding limited definitions and suggested that provincial legislatures amend mental health laws to reflect medically recognized disorders as defined by the World Health Organization's latest edition of the International Classification of Diseases. The court also directed the substitution of terms like "unsoundness of mind," "unsound mind," and "lunatic" with more appropriate terms like "mental disorder" or "mental illness."

Based on the presented facts, the court identified several significant legal questions that arose from the petitions. While addressing these important legal questions, Justice Manzoor Ahmad Malik in this judgment[553] established significant legal principles related to mental health laws:

1.How should the trial Court deal with the plea of an accused that he/she was suffering from mental illness at the time of the commission of the offense?

Addressing the question, the court held that in the case of a special plea, that the accused was suffering from mental illness at the time of the commission of the offense (under section 84 PPC), the Courts should keep in view that the onus to prove such plea is on the accused.

[553] PLD 2021 SC 488

However, the prosecution will not be absolved of its duty (to prove its case against the accused beyond reasonable doubt) if the accused is unsuccessful in proving a plea raised on his/her behalf.

The court, relied upon the case of *Khizer Hayat v. The State*[554] where the plea of insanity by the defendant was rejected, emphasizing that not every mentally disturbed or ill person is exempt from criminal liability. The court also endorsed the principle that every person is presumed to be sane and responsible for their actions unless proven otherwise. The court interpreted that the burden of proof for a plea under section 84 PPC lies with the accused, and the correctness of the plea is decided based on the available evidence. As per Article 121 of the Qanun-e-Shahadat Order, 1984, the accused must prove that they were suffering from a mental illness at the time of the alleged act, which made them incapable of knowing the nature of the act or that it was wrong or against the law. The court further relied upon "The State v. Balahari Das Sutradhar"[555], "Lal Khan v. The Crown"[556], and "Gholam Yousaf v. The Crown"[557].

2.How should the trial Court deal with the claim that an accused is incapable of making his/her defense due to mental illness?

In response, the court held that while dealing with the claim that an accused is incapable of making his/her defense due to mental illness, reference must be made to sections 464 and 465 of Crpc. The court, after forming a prima facie tentative opinion (after giving due consideration to its observations about the conduct and demeanor of an accused person) based on an objective assessment of the material and information placed before the Court, must embark upon conducting an inquiry to decide the capability of accused to make his/her defense, by getting the

[554] 2006 SCMR 1755
[555] PLD 1962 Dacca 467
[556] PLD 1952 Lah. 502
[557] PLD 1953 Lah. 213

accused examined by a Medical Board. The capability of the accused to face trial within the contemplation of sections 464 and 465 Cr.P.C. shall be then recorded by the Court.

While doing so, the court proceeded with the help of an ancillary question about the type of approach of view to be formed by the court about the incapability of the accused to make his/her defense. Reliance was made on the case of Sirajuddin v. Afzal Khan and another[558] erstwhile provision of section 465 of Cr. P.C. while addressing that instead of a subjective, an objective type of view shall be formed by the court in such matters. The two stages of the relevant section of Cr. P.C was differentiated viz the first stage is that it must appear to the Court that the accused, placed on trial before it, was of unsound mind and incapable of making his defense, and the second stage of trying the question of unsoundness of mind. Following the first stage, the court starts an inquiry into the second question, which has to be tried by the Court as a preliminary proceeding with the aid of the assessor (medical board). The court further relied on Ata Muhammad v. The State[559] and Sirajuddin versus Afzal Khan and another[560] on the point that a court shall only proceed to the inquiry stage of getting the accused examined by the medical officer once it has reason to believe based on objective reasoning that the accused would not be able to make his defense.

3.Whether a mentally ill condemned prisoner should be executed?

Responding to this question, the court held that a mentally ill condemned prisoner should not be executed. However, not every mental illness will qualify for this exemption. A Medical Board of mental health professionals must thoroughly examine and evaluate the prisoner to

[558] PLD 1997 SC 847
[559] 1960 (W.P.) Lahr. 111
[560] PLD 1997 SC 847

determine if they lack the higher mental functions to appreciate the rationale and reasons behind the death sentence.

The court discussed and interpreted the issue in the light of Domestic Law and took guidance from International Law. Domestic Law, although does not expressly restrict the execution of a convict on death row and suffering from mental illness, however, certain provisions in the Prison Rules (Rule 107 and 362) may be termed implied safeguards against the execution of mentally ill condemned prisoners. Rule 107 is a pathway to exempt a mentally ill condemned prisoner from being executed, and the rationale behind the procedure provided in Rule 362 is to convey to the condemned prisoner the reason behind his execution and to inform him that he has exhausted all the legal remedies against his/her conviction. The court also placed reliance on case laws from foreign jurisdictions (the United States and India) viz "Ford v. Wainwright[561]", "Pannetti v. Quarterman"[562], and "X v. State of Maharashtra[563]". It endorsed the set "standard for competency". The court, while taking guidance from Conventions ratified by Pakistan, such as ICCPR (International Covenant on Civil and Political Rights) and CRPD (Convention on the Rights of Persons with Disabilities) prohibited the execution of mentally ill condemned prisoners because executing someone who cannot understand their crime or punishment is inhumane and lacks retributive value.

D. JUDGMENT OF THE COURT

In the case of **Imdad Ali,** it was found that the convict had already served out a substantial part of the alternative sentence provided under section 302(b) PPC, so the court

[561] Ford v. Wainwright 477 U. S. 399 (1986)
[562] Pannetti v. Quarterman 551 U.S 930. (2007)
[563] (2019) 7 SCC 1

decided not to remand the case for a fresh/new trial. On the review petition filed by the State seeking to convert Imdad Ali's death sentence to life imprisonment due to his mental health condition, the court, although it did not touch upon the mental health condition, however, it found sufficient reasons and circumstances on record to warrant conversion of the death sentence to life imprisonment. Firstly, the prosecution's motive was disbelieved by the trial court, and secondly, Imdad Ali had already served about 20 years of his sentence. Therefore, on the principle of legitimate expectancy of life, he was entitled to the conversion of the death sentence to imprisonment for life. As a result, the Criminal Review Petition was allowed, and Imdad Ali's death sentence was converted into imprisonment for life with the benefit of section 382-B, Cr.P.C. In contrast, his conviction under section 302(b) PPC was maintained, and the compensation and sentence in its default were left intact.

In the case of **Kaneezan Bibi**, the court observed that Kaneezan Bibi has been in prison for over 32 years, more than the alternate sentence provided under section 302(b) PPC, which is life imprisonment. Therefore, the principle of legitimate expectancy of life can be invoked, and her sentence of death on six counts is converted to life imprisonment on six counts. The court also noted that Kaneezan Bibi did not file any review petition after the dismissal of her criminal appeal by the court, so using its suo motu jurisdiction to review the judgment dated 02.03.1999, the court partly allowed the appeal. Kaneezan Bibi was directed to pay compensation of Rs. 20,000/- to the legal heirs of each deceased and to undergo SI for six months on each count in default of payment of fine (as the award of RI by Trial court was against the scheme of Law). The benefit of section 382-B, Cr.P.C. is extended to her, and all the sentences of imprisonment shall run concurrently.

In the case of **Ghulam Abbas**, the court noted that Ghulam Abbas had exhausted all the remedies available to him under the law. However, his plea that he is suffering from mental illness is endorsed by the report of the Medical Board constituted by the Court. Although the President of Pakistan rejected a mercy petition, he filed, it is not clear whether the ground of mental illness was considered. Putting reliance on the judgment of the Supreme Court reported as Moinuddin and others v. The state and others[564]. The court directed the concerned Jail Superintendent to ensure that a fresh mercy petition is filed on behalf of Ghulam Abbas, mentioning his mental illness plea, and providing copies of his entire medical history/record, copies of the report of the Medical Board, and a copy of this judgment. The court expected that the mercy petition shall be disposed of after taking into consideration all the circumstances, including the observations made by the court. The Supreme Court also directed Federal and Provincial governments to make certain Law reforms in their jurisdictions related to mental health laws and directed the trial courts of the country to evaluate the accused/patient to prevent the prosecution and execution of a mentally retarded person.

While concluding this landmark judgment[565] It is astonishing to reveal that in the above said judgment involving three different cases joined together in a single judgment of a larger bench[566], the investigation officer has found the accused involved in the case and the same was proved through trial. The trial court awarded the death sentence to the accused which was confirmed by the high court. The Supreme Court dismissed the appeal and upheld the conviction. A review petition was also dismissed, and the President also declined the mercy petition. Meanwhile, black warrants were issued. In this scenario, after all the remedies were availed

[564] PLD 2019 SC 749
[565] PLD 2021 SC 488
[566] Ibid

when a constitutional petition was filed before the Supreme Court asking to examine the mental capacity of the accused. At this point, although belated, the honorable Supreme Court considers all three accused entitled to the plea of insanity through this landmark judgment.[567]

In this judgment, The Pakistani Supreme Court has heard three petitions from mentally ill death row inmates. The fact that there is no clear legal provision restricting the execution of a death row criminal suffering from mental illness has been brought up while discussing the subject of the mental illness of a convict who is on death row. Only two implicit protections, rules 107 and 362, are present in prison regulations. The Supreme Court of the United States ruling in the case of Ford v. Wainwright has also been brought up. The US Supreme Court declared that killing someone who lacks the mental capacity to understand their crime or punishment harms humanity and that there is no use in executing someone unaware of the existence or intent of sanctions.

The decision took into consideration the fact that the medical community has recognized more than 160 distinct psychiatric diseases. Like other ailments, mental problems can be identified by radiological tests, diagnostic labs, and psychiatrist assessment techniques. These problems can be broadly grouped into intellectual disabilities, personality disorders, and severe mental disorders. Disorders do not, however, affect a person's capacity for comprehension. It is acknowledged that the system misunderstands and treats mental diseases inadvertently. On a scientific level, it is frequently seen as a transient condition brought on by stress and anxiety rather than a mental or neurological disease.

Additionally, it is stated that mental disorders are just like any other disorder. To determine the mental health of convicts, the Supreme Court ordered that boards of medical

[567] Ibid

professionals be established in each province. The Supreme Court has also ordered that the words "unsound mind," "lunatic," and "insane" be changed to the more respectful term "mental disorder."

The Safia Bano case was indeed a landmark in the history of forensic psychiatry in Pakistan, laying the foundation for any future delivery of forensic mental health services. This was one of the judgments that would firmly reassert the stand taken by the Supreme Court earlier in explaining the equal status that mental and physical health enjoy in the eyes of the law. Indeed, the Mental Health Act of 2001, the provincial Mental Health Acts, ICD (International Classification of Diseases, DSM (Diagnostic and Statistical Manual of Mental Disorders), and a host of other recognized sources variously defined it and provided the court with an excess of definitions and guidelines. It required current mental health legislation to be amended to bring them in line with the latest WHO guidelines. The court further ordered that these words, which used to be outdated and even stigmatizing, such as "unsoundness of mind," be deleted from legal literature and replaced with more current terms of empathy.

Similarly, on several occasions, the trial courts have ruled out the insanity plea without giving it prime importance. For instance, while addressing this very issue in another case titled; *Jeewan Shah Versus Muhammad Shah and Others*[568], the Supreme Court prevented a miscarriage of justice by remanding the case to the lower court. Originally, a case was filed for the grant of leave to appeal against the previous judgment rendered by lower courts, including the dismissal of a revision petition by the High Court. Two lawsuits were pending in the case. The petitioner claimed in the first suit that the sale deed was obtained through undue force and was confined by the defendants. The second suit was filed in court because the petitioner was

[568] 2006 PLD 202 (SC).

insane, and thus the sale deed was illegal. The first suit was withdrawn, and the second was rejected on the defendants' application for plaint rejection. As a result, both suits were dismissed by their respective courts while they were pending. The issue of his insanity was ruled out.

The appellate court observed that the parties in both suits were distinct, and their causes of action were not similar. Many such questions that needed to be addressed were ignored. The District Judge's and High Court's decisions were overturned, and the second suit required proper hearings and recorded evidence. The Court ordered that the second suit be remanded to the Trial Court for a merits hearing.

While discussing the medical competency of civil servants, the Supreme Court has held in *Sarfaraz Ali Khan Versus the Federation of Pakistan and Others*[569] that a civil servant cannot be superseded or ignored on the ground of ailment unless he is declared unfit by the medical board as per the rules.

If we go into the details of the abovementioned case, an appeal to the Federal Service Tribunal's decision was made before the honorable Supreme Court. This case involved the advancement of a government employee whose promotion was terminated without a medical evaluation due to his mental incompetency. It was asserted that the appellant's promotion was stopped for no legitimate reason. It was also asserted that the selection committee could not assess his incapacity for holding the office or continuing with increased responsibilities without a proper medical examination.

The appeal was allowed, and the case was remanded because a simple ailment cannot determine a person's unfitness, and he cannot be declared incompetent only based on this without

[569] 2006 PLD SC 246

first undergoing a thorough medical examination. Hence his appeal was allowed based on his eligibility for promotion. It was further noted that the government servant was suspended from office based on physical fitness by the selection board and rejected for higher posts. Such type of discriminatory measures are usually taken for victimization.

Nonetheless, the Supreme Court's rejection of the case in the Appeal was encouraging. The Court ruled that a government servant cannot be bypassed or ignored because of illness unless certified officially unfit by a medical board by established norms.

The Supreme Court of Pakistan denied that schizophrenia is a mental disorder as stated in its judgment; “not a permanent disorder” does not fall in the legal definition of mental illness. Whereas the Lunacy Act not only defines criminal lunatics or idiots, ensuring their punishment after their treatment as they can write a will. In short, Pakistani Law allows the defense of mental illness or criminal lunatics with certain conditions. So, where the problem lies? It is the mental health training and awareness in the justice system. It is the understanding of mental health and training to deal with criminal lunatics.

In the proceedings of the case, the chief justice of the Supreme Court remarked; “Neither reason nor sensibility allow me to believe that we can execute a mentally ill or disabled person.” This is an example of a lack of knowledge about mental illness. Mental illness and specific symptoms are always over time and may have an onset at any phase of life. It means this is a risk factor which brought up within a person. A person may be never diagnosed as psychotic but he/she may exhibit mild symptoms in their daily life functioning. All psychotic disorders need frequent check-ups and take a lot of time to recover as well. Many undiagnosed prisoners and convicts face the death penalty and harsh punishments for crimes due to mental illness and

psychological disabilities. There is a need for a regular system for the mental health of the prisoners as well. The law in practice, around the globe believes that a criminal act is due to the free will of a person, intentionally and purposefully. A mentally ill person has no insight into his actions, even is not in a state of rationalization of their actions. A psychological misfit person cannot defend themself at any stage of trial; he/she may lie, withhold information, act insanely, and supranational behaviors.

The justice system must have this understanding, to provide mental health care to criminals within certain limitations like providing treatment within their captive places or prisons. There are many difficulties in mental health services in police departments, social welfare, and health emergency departments. If there is a system for mental health, there is no check and balance, monitoring of patients, treatments, and care at law enforcement centers. In Pakistan, a dilemma is the implementation of laws and policies.

There is an approval of the Mental Health Ordinance 2001 at the provincial level but unfortunately, it is not working at its fullest. Another area that is ignored is the proper mental health assessment and profiling in prisons regularly. There is a need for psychometric tools and forensic psychologists to work with police, courts, and part of the legal justice system in Pakistan. It is important to assess and check the mental stability and psychological fitness of legal judgments and law practices. Staff at legal departments must be trained to understand the mental health basics of all stakeholders like criminals, victims, police, lawyers, staff at legal offices and justice as well. With a defined legal obligation, practitioners should work on convicts of psychotics and neurotics disorders. [570]Many researchers have highlighted similar issues and

[570] David P. Mears, "Mental Health Needs and Services in the Criminal Justice System," Journal of Health Law and Policy 4 (2004): 255-284.

suggested moral grounds to deal with mental ill convict's use of technologies to access brain cognitive functions to underpin the psychological illness.[571]

The Pakistan Penal Code and Lunatics Act defend mental disorders, but courts mostly exclude anti-social conduct, no words for psychopaths. Maybe psychopathy personality is a determent of crime and social harm. The statement of section 84 of the Pakistan Penal Code (1860) elaborates as follows;

"Nothing is an offense which is done by a person who, at the time of doing because of unsoundness of mind, is incapable of knowing the nature of the act or that he doing what is either wrong or contrary to law".[572]

It means that the person cannot be held criminally liable and the trial cannot be done, who suffers from any mental disease, without awareness of his/her action. The same can also be found in the Indian and Malaysian penal codes. Research also concluded that People who are mentally impaired or suffering from any disease that is clinically diagnosed should be provided with mental treatment and they cannot be punished or held criminally liable for their illegal act. Because the act done by a mentally ill person is not at the level of consciousness, that person cannot evaluate the right and wrong deeds. [573]

The other side of the picture is different; the law has no relaxation or exclusion of anti-social behaviors. There may be multiple reasons to punish such case as it can create a safe corner for many convicts to escape their penalty under the bars of Psychological unfit, insane and mental illness. Evidence suggests that psychopathic criminals are aware of their deeds give

[571] Peter D. Kramer, Against Depression (New York, NY: Viking, 2009).

[572] Section 84, Pakistan Penal Code.

[573] Ali, Ashraf (2014), 'Plea of Insanity' As a Defense in Pakistan. Analysis of the celebrated Judgments of Superior Courts. International Journal of Humanities and Social Science, 2014 ISSN 2220-8488 (Print), 2221-0989 (Online). Retrieved from http://dx.doi.org/10.2139/ssrn.2261610

sufficient reasons for their acts and are responsible for their self-interest as compared to mentally ill people. [574]This opinion is not sound, if someone is aware of the act, then he/she cannot be considered as mentally impaired or “lunatic”. In the above-mentioned case, the right of judicial review was not given to the accused, this right has been discussed in detail in the following judgment of the European Commission.

In one foreign judgment titled the D.S.E. v. The Netherlands[575], the European Commission found that the government failed to comply with lawful procedures. A mentally disordered offender's period of confinement in a hospital, due to a procedural oversight, was not formally extended because "there were two months and twenty days, during which there existed no court’s decision as the basis of the applicant's detention[576].

Notably, the European Court found that, simply because an expert authority determines that the applicant is no longer suffering from a mental disorder, the law does not require his immediate and unconditional release into the community[577]. Such a rigid approach would constrain the exercise of judgment as to whether "the interests of the patient and the community into which he is to be released would be best served" by an immediate and unconditional discharge[578]. The European Court acknowledged that a responsible authority should be able to "retain some measure of supervision over the progress of the person once he is released into the

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[574] Stephen J. Morse, "Psychopathy and Criminal Responsibility," 1 Neuroethics 205 (2008)

[575]App. No. 23807/94 (July 2, 1997) (Commission report).

[576] Erkalo v. The Netherlands, App. No. 23807/94, 28 Eur. H.R. Rep. 509, 529 (1998) (Court report) (finding that the State's failure to set a hearing date to review continued detention constituted a violation of Article 5(1)(e).

[577] Johnson v. United Kingdom, App. No. 22520/93, 27 Eur. H.R. Rep. 296, 322-23 (1997) (Court report) (finding that although the applicant no longer suffered from a mental illness, a phased conditional discharge was appropriate).

[578] Ibid. at 322.

community and to make his discharge subject to conditions[579]." However, safeguards must be in place to ensure that the hospital does not unreasonably delay discharge[580]. In Johnson, a Mental Health Review Tribunal found that Johnson no longer suffered from a mental illness, but deferred his conditional discharge until arrangements could be made for suitable hostel accommodation[581]. However, the appointed social worker could not find a suitable hostel, and Johnson remained in the hospital for an additional four years. The European Court held that, although a deferral of conditional discharge was justified in principle, Article 5(1) (e) did not permit Johnson's detention because the hospital did not use the necessary safeguards to ensure that it did not unreasonably delay Johnson's release[582].

4.9 DECISION OF THE HIGH COURTS OF PAKISTAN

The High Courts of Pakistan have played a vital role in shaping the legal framework surrounding the rights and well-being of individuals with mental disorders. Through a series of significant decisions, these courts have provided essential guidance on matters relating to mental health and the protection of vulnerable individuals. It is, therefore, necessary to examine the different range of rulings issued by the High Courts, enlightening the deep impact they have had on the lives of those affected by mental disorders across the country and the advancement of mental health rights in Pakistan.

In the case *Safia Begum versus the Additional District Judge and others*[583], the petitioner filed the petition after the Additional District Judge of Lodhran dismissed two applications and

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[579] Id. at 323. In the United Kingdom, the Court of Appeal in Regina (K) v. Camden and Islington Health Authority further considered the applicability of Article 5 to a Tribunal's decision to discharge a patient subject to conditions. 2002 Q.B. 198

[580] See Johnson, 27 Eur. H.R. Rep. at 297.

[581] Ibid. at 302-03.

[582] Ibid. at 314.

[583] PLD 2022 (Lahore), 833.

issued the impugned orders. The petition was filed to invalidate the orders of the Additional District Judge of Lodhran.

The petitioner was declared the guardian of her incapacitated daughter, and the pension of the petitioner's widowed daughter's husband was sanctioned and was in the bank. The petitioner submitted two petitions, the first for authorization to withdraw the necessary funds from the bank and the second for producing financial statements.

The Learned Additional District Judge, Lodhran, turned down both applications because the petitioner was required to produce an inventory of her movable and immovable properties, as well as any outstanding claims, within three months of her appointment as a guardian. The petitioner failed to submit within the required time frame, and it was submitted after a two-year delay with no plausible explanation to the Court.

It was determined that the Learned Court did not provide such notice to the petitioner when granting the guardianship certificate. The petitioner noted the need for a bank withdrawal and a statement of property inventory, which the Learned Court denied. The court must consider the statute's intent. Even though the petitioner failed to submit the statement of expenditures on time and did not deposit inventory about the property as required by section 37 of the Mental Health Ordinance, 2001, the reasons stated by the petitioner must be considered. The cited Ordinance was enacted and is related to the welfare of people with disabilities.

As an outcome, the Learned Court granted the constitutional petition. It reversed the impugned orders of the Additional District Court by remanding the case to hear the petitioner's comments and resolve the issue anew.

In another case of *Yasmeen Jang versus Advocate General Punjab, and others*[584], the respondent filed a constitutional petition under Article 199 of the Pakistan Constitution, 1973. The order of the single bench of two intra-court appeals was sought to be set aside. The Advocate General's agreement had been secured under section 29 of the Mental Health Ordinance, 2001, to seek the Court of Protection.

The alleged lunatic's brother, who was living with his mother, claimed that his mother, an elderly and frail lady, was unable to care for the lunatic, so he hired the services of a law firm to appoint a guardian for the alleged lunatic's person and property while executing a power of attorney. The Attorney General's permission was sought before approaching the Court of Protection for the appointment of the insane. On the Attorney General's request, the medical board was asked to evaluate the alleged person and issue a medical certificate.

The patient was asked to be brought in for evaluation, which his mother resisted, citing the Attorney General's jurisdiction to issue such orders. The constitutional petition was filed in the form of a writ of mandamus to obtain consent from the Attorney General for approaching the Court, which was allowed by the single bench by observing the Attorney General's power that he could not give up his authority of giving consent on the plea of the inquiry being conducted.

The Attorney General's approval suggests some type of reasoning. In this case, it is limited to three aspects: the court's jurisdiction, the presence of a mentally disturbed person, and the applicant's relationship to the claimed lunatic. It was determined that consent may be obtained under the following processes for legal proceedings to protect the interests of the accused lunatic and ensure a fair trial.

[584] PLD 2022 (Lahore) 495.

There is a procedure that the Attorney General must follow when providing approval, which is not merely a formality but is regarded to be for a good cause. Its objective is to clean up the administration of justice, defend the sanctity of the courts, and prevent the abuse of judicial procedures.

The appellant argued that the application, which had been submitted based on wakalatnama, could not be further processed by the Advocate General without the applicant's signatures. The appellant ruled that it was unconstitutional. The court determined that the rationale for this objection was that no advocate or law firm could obtain authorization from the Attorney General solely based on the power of attorney. The applicant needed to see the Attorney General's judicial power. By hearing the petitions, the court gains the ability to appoint a guardian. Even if it performs an inquiry, the Attorney General's authority is to determine whether the court will hear the said application. The Attorney General is neither a court nor does it have any judicial power. By granting the appeal, the single bench dismissed the petition filed by the brother of an alleged insane under Article 199 of the Pakistani constitution of 1973.

In another case, *Zahid Daultana vs Begum Tehmina Daultana and five others*[585], the appellant filed an appeal under section 46 of the Mental Health Ordinance, 2001 after contesting the court's decision under section 41 of the same ordinance, and his argument that the case on the death of the mentally challenged person had been resolved had been rejected. Following a request by respondent four made according to Section 29 of the Mental Health Ordinance of 2001, the Court appointed the appellant as the mentally challenged woman's guardian and manager. Respondent 2 (the disabled woman's daughter) filed a complaint against the appellant

[585] PLD 2022 (Lahore) 46.

under sections 41 and 37 of the ordinances, 2001, alleging theft and misappropriation of the ward's assets. Respondent 2 further claimed that the appellant was not fulfilling his duties. Respondent 2 was designated as an interim manager and guardian by suspending the appellant's responsibilities. The appellant claimed that the guardianship over a mentally ill woman and her assets should be abated. This claim was rejected, so the appellant filed this appeal with the court. According to section 41(2) of the Punjab Mental Health Ordinance 2001 and section 22 of the CPC, the court confirmed that the plaintiff's right to suit still exists and that the procedures did not end or relieve him of his obligations.

The idea of modus operandi may be used by the court with jurisdiction to get information regarding the transparent use of assets. The court may also establish a commission or experts to prepare a report. As a result, the court would make the right decision. The guardian's disobedience triggered the law's punitive requirements. Hence the said appeal was dismissed.

In the case of *Shahbaz Ahmed versus the state and others*[586], a revision petition was filed against the Additional Session Judge's order. Respondent 2 filed an FIR against the petitioner in this matter, accusing him of murdering his kid. The accused were deemed proclaimed offenders after fleeing. The case was initiated following the arrest of the accused. The petitioner has filed a complaint against the police for torturing him. The Additional session judge referred him to the medical board twice, which pronounced him unfit. The petitioner filed a plea for release under Section 466 of the Criminal Procedure Code, but it was denied. The learned Counsel for the petitioner submitted that the trial court misconstrued Section 466 Cr.P.C. because the accused was mentally ill, the court should have released him on the condition that he provide the

[586] 2021 PCr.LJ (Lahore) 1100.

mandated security. As a result, the order issued by the stated court was unconstitutional. The opposing counsel described it as a discretionary power of the Court that was legally utilized.

The Court, using various international instruments and declarations as well as earlier judgments, decided that the Court was compelled to postpone the proceedings due to the accused's mental instability. The court went against the law while harming the petitioner. The order was to be overturned, and a new trial held once the proceedings were halted. According to the legislation, the petitioner's attitude should be re-determined. If an issue about the accused's legal capacity arises, whether the proceedings are before a court or a magistrate, it must be appropriately resolved, as specified by sections 464 and 465 of the Cr.P.C. By keeping the petition application filed under Section 466 Cr.PC pending, the court asked the Additional Session Judge to vacate the prior orders and order a de novo trial by quashing the proceedings. The matter of mental illness and failure to make a defense was directed to be re-determined by section 465 Cr.P.C. The choice to continue the proceedings would be made later. The petitioner's mental ability was to be determined by the Additional Session Judge in a new judgment. The petition was thus dismissed.

It is worth mentioning that Section 465 of the Criminal Procedure Code mandates the postponement of proceedings if an accused person is deemed mentally unsound during a trial before the Session Court or High Court. However, Pakistan has not recognized post-conviction insanity either at the constitutional or secondary legislative level. While there is no specific legal

provision prohibiting the execution of mentally ill convicts, executing a mentally unstable individual goes strongly against the standards set by International Human Rights Law (IHRL).[587]

In *Naseebullah Versus Special Judge, Anti-Terrorism Court II, Quetta, and others* case[588], Actus non faciti reum, nisi men sit rea was applied. This is based on the principle embodied in Section 84 of the PPC, which states that a person cannot be charged with a crime unless there is criminal intent behind the crime committed. Both appeals prayed for the case to be heard following the provisions of the Cr.PC dealing with trial procedure.

In this case, two children were murdered after committing zina and an unnatural offense. The accused was convicted and sentenced, but both cases were appealed to the Court due to the accused's unsoundness of mind. The case was referred to the Medical Board, which examined the accused and issued reports on his mental condition.

The medical board determined that the accused was suffering from schizophrenia, and release on bail was requested, along with an application for his acquittal, but the court denied it, stating that simply presenting an application for unsoundness of mind before the Court is insufficient and that the Court must have reason to believe about his unsoundness. He could be released on bail, and surety was to be provided to prevent further offenses. The trial court heard the case and decided it was under the statutory provisions of CrPC chapter xxxiv. The case was remanded to the trial court to be decided by the provisions of the Crpc.

Even the Pakistan Penal Code exonerates a person from liabilities and regards the person who cannot understand what kind of acts he is doing; his intentions are not in his conscious

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[587] 1. Michael L. Perlin, "Mental Disability and the Death Penalty: The Shame of the States (Rowman & Littlefield, 2012) (in Press) Chapter 1: An Introduction and the Dilemma of Factual Innocence," SSRN Electronic Journal, 2012, https://doi.org/10.2139/ssrn.2143178.

[588] 2017 PLD 37 (QHC).

control due to mental health illness. Such a person who suffers from mental illness with symptoms of hallucination, memory loss, absence of self-control, and dementia can be proved through documented and oral evidence, shall not be liable for the crime and to seek the resort. Every individual who is sane and normal is thought to be responsible for the acts and conducts unless the opposite is proved.

Similarly, the civil rights of the mentally ill have been denied by the courts without due process of law. For example, in *Farrukh Afzal Munif Versus Muhammad Afzal Munif and 29 others.*[589] the plaintiff alleged in his lawsuit that defendant number 1 (his father) was a lunatic who was unable to care for his possessions and assets and that defendants 3, 4, and 5 (the plaintiff's brothers) took advantage of the defendant's insanity to illegally forge his signature on several documents. In addition to the claim of confinement against defendant 1, the plaintiff also disputed the benami property of defendant 2 (his mother). The plaintiff had also asked for an injunction relief. The plaintiff prayed for the revocation of the transactions made by the defendants, the creation of a medical board to assess the mental ability of defendant 1, and the appointment of a guardian.

Under Order 7 Rule 11, the defendant filed an application for the dismissal of the complaint. When the court ordered the first defendant to appear before the court, defendant 1 did so, but owing to an event, the court's work was suspended. The claim of mental instability was refuted, and a writ of habeas corpus was denied. When it comes to the characteristics of a benami transaction, the averring party has the burden of proof. The plaintiff in this case claimed the same. The court ruled that neither the plaintiff nor he had the right to contest the benami transaction that defendant no.1 had made to the advantage of his wife.

[589] 2019 CLC (Sindh) 431.

According to section 42 of the Specific Relief Act, the plaintiff was not entitled to such a declaration, and the court has the authority to rule on eligibility. According to the Sindh Mental Health Act of 2013, the plaintiff had to go before the court of protection to request the establishment of a medical board and the appointment of a guardian for the claimed mentally ill person.

The leaned court dismissed the complaint because the cause of action was not disclosed and it was also ineligible under section 42 of the Specific Relief Act and the Sindh Mental Health Act of 2013. The plea for an injunction had also been denied.

The case of *Rehan Hameed vs Ayesha Aslam and 2 others,*[590] is related to the legality of court orders, which were challenged in a constitutional petition. The family court case in which the respondent sought maintenance and dowry recovery from the court. The Petitioner filed a petition regarding his mental illness, as well as an application for the formation of a medical board, both of which were denied by the learned Court. Before Additional District Judge, a revision petition was filed (Respondent 3). An amendment application to amend the written statement was also filed, but the Court denied it on the grounds that it was made solely to prolong the court's proceedings and change the perspective of the plea taken. A constitutional petition overturned both orders.

Similarly, in *Ahsin Arshad and others Vs. Advocate General, Punjab, and others,*[591] the petitioners, who were residents of New York, sought to assume management of their mentally ill mother's property. To proceed, they sought the consent of the advocate general. However, their

[590] 2018 YLR 731 (LHC).

[591] PLD 2018 Lahr 9

request was rejected because they did not reside within the jurisdiction of the court of protection. The case Ahsin Arshad and others v. Advocate General, Punjab, and others illustrate the substantial role of the Attorney General. Before granting consent, the Attorney General must be satisfied. In this particular case, neither the mentally disturbed individual nor the prospective manager resided within the court's jurisdiction.

The Court of Protection received a petition for the appointment of a manager to oversee the property of the petitioner's mother during her mental illness. Under Section 29 of the Ordinance, a request for consent was made to Respondent 1. However, the request was denied, citing the non-territorial jurisdiction of the patient.

The Learned Counsel for the petitioners argued that the petitioners' presence is not required for the respondent to consent. It was also argued that under Section 30 of the Ordinance, the requirement of the mentally disordered person's attendance and examination could be decided.

On behalf of the Respondent, the Additional Attorney General argued that obtaining consent is a substantive function for ensuring the Ordinance's objectives. He argued that consent cannot be given to a mentally ill person who does not reside within the Court's jurisdiction. The petition was denied because none of these points followed the Ordinance. An application must be made to the Attorney General for his consent to file an application before the court of protection in order to appoint the manager under Section 33 of the Ordinance. The mentally ill person and the manager who will be appointed must be within the jurisdiction of the Court. The petition was dismissed because the patient was not present within the Court's jurisdiction, as the Court may require, as well as the supervisor's presence at the time.

The petitioners challenged it before the high court concerned (Punjab, Lahore). HC 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 reside within the jurisdiction of the court of the protection.

5.10 OTHER MISCELLANIOUS CASES ON MENTAL DISABILITY

The court was presented with a constitutional petition in the case *Muhammad Riaz Versus Additional District and Session Judge,*[592] the petitioner applied with the Court, along with relevant certifications, for the appointment of a guardian for Respondent No. 2. The Court named the petitioner Respondent 2's guardian. After filing an appeal against the order, the respondent was medically checked by a board of psychiatrists, and the court reviewed his position by interrogating him, which he correctly answered. The court revoked the guardianship certificate by recalling the honorable Court's order.

The learned counsel for the petitioner contended that recalling the earlier ruling is without legal grounds because respondent 2 was unable to defend himself while the opposing counsel disputed it. After the following procedure and finding him mentally stable, the court concluded that it had correctly set aside the prior order of appointment of the guardian. The court upheld the order to recall the previous order. By not availing of the alternative remedy, the constitutional petition of the petitioner was not maintained and was likely to be dismissed.

Similarly in *Nasir Hussain versus The State and others*[593], a criminal revision was filed against the ruling of the court to deny the petitioner's request for the establishment of a medical

[592] PLD 2018 (Lahore) 684.
[593] 2014 PCr.LJ (Lahore), 1352.

board to assess his mental health and to summon the petitioner's file from the Punjab Institute of Mental Health in Lahore. Although the petitioner was being tried for murder, he claimed in his application that he had been receiving mental health therapy before the occurrence. It was urged that a medical board be established to assess his mental state. This instant revision petition was filed after the application was denied.

The Jail Superintendent got the psychiatrists' reports regarding the petitioner's mental health at the Trial Court's request, and they revealed that he was deemed to be in good mental health. The court must have cause to conclude that the accused is unsound based on prior rulings and relevant clauses of the Cr.P.C. If nothing has been noted, further action must be taken to bring him before a judge and an investigator. The reports described the accused as normal and mentally stable, and the court decided it was appropriate to move through with the remaining proceedings and find the accused suitable for trial. The court held that the accused's responsibility was to establish insanity by citing the Supreme Court's ruling. The trial court dismissed the application, and the current revision petition was also ruled to be dismissed after determining that the accused was a mentally healthy person.

In another case of *Ghulam Mustafa through Bashir Ahmed Versus The state and others,*[594] the petitioner requested post-arrest release based on insanity. In a murder case, the petitioner was accused. The petitioner had been an epileptic sufferer as well as a crazy person and was still receiving therapy, according to the petitioner's attorney. He was mentally ill when he committed the crime. It was required that bail be granted. The opposing counsel requested that he be referred to the Punjab Institute of Mental Health in Lahore for an examination, which resulted in the declaration that he was not fit to stand trial despite the submission of the medical

[594] 2013 PLD (Lahore), 643.

papers proving his insanity. The opposite counsel adversely rejected it based on factum probando regarding his insanity, and the petitioner was not entitled to any relief to be given. He relied on previous judgments by differentiating medical and legal insanity, which could not be taken as a plea for bail. The medical reports and section 466 of the Cr.PC were both cited by the court in writing the order. The court granted bail based on bail bonds of 5 00,000 to be provided with two sureties, each of the same amount, to satisfy the trial court after observing that there was no cause to doubt the signed reports of the medical board.

The petitioner filed the case of *Irfan ul Haq Versus The state and another,*[595] regarding his insanity and inability to appear in court for defense. He was referred to the hospital for an examination and to submit a mental health report. He was diagnosed with bipolar affective disorder, which manifests as two distinct conditions. In one situation, a person acts normally, but in another, he loses control and can endanger himself and others. The Trial Court found him to be of sound mind based on his sane statements.

Following arguments from both Counsels, the learned Court decided to dismiss the petition because if the court determines at any stage that the petitioner is incapable of defending himself, he may be referred to the medical board to be examined by a mental health hospital and decisions made accordingly. As a result, the petition was turned down. Unfortunately, sometimes, people misuse the law by pleading wrong insanity. For example, In the case of *Shehzad Ali Versus the State and others,* [596]the Petitioner filed a revision petition with the Court to have him declared insane. The case was initiated when the petitioner was charged with murdering the complainant's mother and brother. An application was submitted regarding his insanity, and he

[595] 2012 PCr.LJ 1328 (LHC).
[596] 2015 PCr.LJ 361 (LHC).

was in treatment, but there was no proof. After examining the petitioner, the constitution of the Medical Board was ordered to make a report of lunacy. After rejecting the first report, which was not duly signed by some of the board members, the report was made against his mental illness and deemed him fit for trial.

The petitioner's learned counsel confirmed his unsoundness of mind, while opposing counsel rejected it, stating that the plea of having an unsound mind was made at a late stage in the case, and there was no evidence of unsoundness during the commission of the offense. The petitioner used the mental illness defense to shield himself from double liability. After hearing both arguments that no cause of action had arisen for filing the revision petition, the court dismissed it.

Similarly, In the case of *Wali Dad Khan Versus the State and another,* [597] the trial court rejected the hypo-manic person's request to delay the case's proceedings even though he had provided documentation proving his insanity. The petitioner had submitted a revision petition in place of the judgment entered against him by the court. The learned prosecutor and the respondents' counsel had contested the revision petition because it was an attempt by the petitioner to avoid the trial. It was argued that the petitioner was not of sound mind.

The revision petition was dismissed because the petitioner's claim of mental insanity would not last forever. Additionally, it was indicated that the court could not base its decision solely on the petitioner's application but could also consider its observations and other factors as it saw fit. In any other case, it cannot support the trial and proceedings. The petitioner's solicitor had not identified any illegality or irregularity. Hence the revision was rejected.

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[597] 2011 PLD 153 (LHC).

On the question of a plea of insanity, it may be observed that 'it has never been the case of the appellant that he has committed the offense under the influence of insanity, as such, was exempted from any punishment as provided u/s 84 of P.P.C but he has taken the plea that he was incapable of making defense of unsound mind, as such the trial court should have adhered to the provisions of section 465 and other relevant provisions of Cr.P.C. before commencement of the trial Section 465, Cr.P.C. Provides that if any person before a Court of Session or a High Court appears to the Court, at his trial, to be of unsound mind and consequently incapable of making his defense, the court shall in the first instance try the fact of such unsoundness and incapability and if the court is satisfied of the fact, it shall record a finding to such effect and shall postpone further proceedings in the case. In the light of the research, it is to be analyzed that merely the fact that the accused could not take the plea at earliest stage cannot be admitted as insane is unjustified.

In *Sakina BiBi and another versus Session Judge Sargodha and another*[598], a constitutional petition was filed in response to the Session Judge's order. Previously, respondent 2 (Nephew of the alleged lunatic) petitioned for the appointment of the guardian of the alleged lunatic's property under Section 29 of the Mental Health Ordinance of 2001, claiming that the patient had no male child and that the patient's wife and daughter were misappropriating his property. As a result, after hearing the claimed lunatic's remarks, the session judge issued the order that resulted in the filing of this petition.

The learned counsel objected to respondent no. 2's locus standi status and hence requested the non-sustainability of the petition as well as the exercise of the case as unlawful. While the opposing lawyers maintained that the purported lunatic indeed required a guardian for

[598] YLR (N) 2017 (Lahore), 346.

property monitoring. Respondent 2 has the right to seek remedy from the court as the patient's close family.

Section 15 of the Mental Health Ordinance, 2001 provides for assessing mental health and treating a lunatic person by providing a psychiatric facility on the application of the lunatic's husband or wife. In contrast, Section 29 of the 2001 ordinance allows the lunatic's relative to bring an application but only with the written consent of the Advocate General of the province. In the instant matter, respondent no. 2 did not acquire consent, which the learned Session Judge did not consider. On this basis, the petition was requested to be dismissed.

Regarding the maintainability of the locus standi of the petition, the court determined there was no rationale for obtaining the medical board's opinion. Instead, the court recorded patient comments and found the petitioner somewhat imbalanced but otherwise aware of feelings and connections. After listening to the purported patient's statements, respondent 2's request to detain the supposed lunatic was denied. After noticing respondent 2's ulterior motive, the court denied the application made under section 29 because, even in that case, respondent 2 lacked the legal

The case of *Naseer Ahmed Vs Muhammad Khan*[599] is related to the sale deed of the property transferred by a plaintiff who is allegedly a lunatic. The Petitioner contested the appellate court's decision by submitting a revision petition, which the court rejected. The argument was made that the plaintiff's next friend (wife) had declared him insane. It was contested that his attorney, the plaintiff's brother, had improperly transferred property via a sale deed.

[599] 2015 CLC 566 (LHC).

The appellate court overturned the trial court's ruling, and the judgment was given in favor of the defendants. One of the defendants, who was also a tenant, asserted preemption of the subject property, and the revenue court ruled in his favor. The petitioner's attorney requested that the appellate court's judgment be overturned.

The learned counsel for the respondent argued and made assertions about the non-maintenance of the lawsuit as well as claims that the plaintiff's next friend failed to follow the correct procedure about the plaintiff's incapacity. Additionally, it was asserted that the trial court's implied acceptance was demonstrated by the fact that some vendees and attorneys were not identified.

The revision petition filed instead of the decree passed by the appellate court was thus dismissed because the trial court's decision was deemed unsustainable, and the challenge in the revision petition was dismissed.

In the case of *Mst Choto and others Versus Muhammad Ashraf and others*[600], the petitioner filed a constitutional petition to contest the decision of the sub-ordinate court. One of the respondents had filed a lawsuit for a declaration and a permanent injunction against the present petitioner and some of the respondents. The two concurrent courts rejected the application for the rejection of the defendants' plant. The petitioner used a constitutional petition to contest these two orders. The claim was rejected because no cause of action had been stated and the defendant could not be served with the lawsuit under the Mental Health Ordinance of 2001 and the CPC-established procedure since she was allegedly insane.

[600] 2011 PLD 548 (LHC).

While the counsel for respondents backed the court's rulings that they had exercised their jurisdictions, the lawyer for the writ petitioners had urged that the orders of the courts be reversed. Due to the lack of a cause of action against the petitioner and the fact that the plaintiff, who claimed to be a lunatic, cannot be sued directly, the learned Court determined that the petition was legally prohibited. After being questioned and examined, the petitioner was determined to be of sound mind. Both courts have disregarded their obligations under the law. The writ petitioners' application was approved, and the complaint was dropped.

In the case of *Mst Fatima Versus Abdul Qadir alias Suhbat and 8 others*[601], a petition was submitted to review a previously passed decree. The petitioner's challenge focused on appointing a guardian for the mentally unstable individual who had not adhered to the prescribed legal procedures. During the review process, the petitioner neither identified any errors in the original decision nor presented new evidence or significant matters. However, the petitioner raised the crucial issue of an unfit guardian, considering both the lunatic and themselves required suitable guardianship to protect their interests while preserving the integrity of the initial court ruling. The court diligently acknowledged the need for corrective measures and ensured their implementation without compromising the final decision's integrity. Despite a procedural error in the appointment of a guardian for the mentally unstable individual, it was recognized that no intentional prejudice existed, thus preserving the validity of the initial judgment. Notably, the appointed guardian shared the same mental instability as the lunatic person, prompting the need for an immediate review. In accordance with Section 32 of the Mental Health Ordinance, 2001, which prioritizes the protection of the rights of individuals with mental disorders, the court

[601] 2010 CLC (Peshawar), 1727.

ordered the appointment of a guardian in compliance with the legal provisions to safeguard the lunatic's interests.[602]

In the case of *Punjab Health Care Commission, Punjab Vs Mushtaq Ahmed Ch. and others,*[603] the petitioner filed a petition against Respondent No. 1 (a healthcare provider) and sealed the establishment. When the order sealing the service provider was challenged, the District and Session Court of Toba Tek Singh overturned it under the Punjab Health Care Act, 2010. According to the District and Session Judge, no such provision contains the sealing of establishment premises.

The petitioner's learned counsel argued, and the commission's standing orders were submitted. It was argued that a standing order under Section 9 of the Punjab Health Care Act, 2010, provides for the establishment's sealing. According to the Counsel for Respondents, the said Act contains no such provision regarding establishment sealing, and it cannot be sealed by standing orders because a non-binding instrument has a non-binding nature.

The Board's functions are also highlighted, as is the distinction between the enforceability of standing orders passed by the Board and Commission, i.e. supreme and subordinate authority to give administrative directions. The board is in charge of overseeing the commission. The Board is in charge of the commission's operations. According to the Punjab Health Care Act 2010, the Standing Order must be given effect when approved by the Board, as the source of its approval is the Board, for giving administrative directions to the commission dealing with and governing the internal workings of the commission. Obtaining registration with the commission

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[602] 2010 CLC (Peshawar), 1727.
[603] 2016 PLD 237 (LHC).

is necessary for providing health care services, which is impossible without registration through a proper procedure within a time limit.

The District and Session Court has exclusive jurisdiction over the validity of the order or action. An appeal can be filed in district court to challenge the commission's orders. The Act states that the commission should take steps to prohibit quackery and that an anti-quackery cell should be established by standing orders.

There is no provision authorizing the sealing of the establishment's premises, and the standing order has no legality, so sealing is illegal. The sealed order was overturned, and the constitutional petition was dismissed.

5.11 CONCLUSION

In this chapter, Pakistani case law has been examined to scrutinize the judicial interpretation of mental health legislation. The chapter began a thorough investigation by looking into the specifics of the techniques used to deal with mental health issues inside the legal system. It began by breaking down the main goal of interpretation, giving readers a complex comprehension of the variety of approaches at work. The important judgments made by Pakistan's Supreme Court and high courts provide a comprehensive viewpoint by looking at people with mental problems.

The case laws covered court procedures as well as how people with mental health problems are handled within the criminal justice system and how easily they may get mental health assistance. The difficulties that come with interpreting and applying mental health laws and court processes were explored, and prospective reform options were revealed.

Given the instances and terrible reality, as well as the Supreme Court's directives, there has never been a greater need for specialist medical boards staffed by professional psychiatrists and psychologists with specific training in forensic mental health. The present attempts are truly hindered by an apparent absence of capacity building. For example, forensic psychiatry is still an acknowledged specialty in Pakistan, and there is no competent forensic psychiatrist inside its borders. The chapter concludes by promoting the improvement of legal practices and systems to provide strong rights protection by the guidelines and standards established internationally to avail equal protection for people with mental illnesses in Pakistan.

CONCLUSION AND RECOMMENDATIONS

CONCLUSION AND FINDINGS OF THE RESEARCH

In Pakistan, it is crucial to protect the rights of those with mental illnesses. This work therefore sought to critically assess Pakistan's current state in light of the UNCRPD and to identify challenges and opportunities for the protection of the human rights of those with mental illnesses. Through a thorough review of the literature and an examination of Pakistan's legal and policy framework, this thesis identified several significant problems that Pakistani citizens with mental disorders face, including stigma and discrimination, a lack of access to mental healthcare services, and insufficient legal protection. The research stressed to protect the human rights of those who suffer from mental diseases. For this purpose, the UNCRPD and the United Nations Human Rights Law regime establish a framework for defending the rights of individuals with disabilities and promoting their inclusion in society by acknowledging everyone's inherent dignity and value.

Chapter one of the thesis has analyzed the existing literature on the issue of metal health in Pakistan and identified problems for the research. The chapter discussed Maslow's Hierarchy of Needs theory as the main framework that is very close to the human rights model and the rights-based approach of the UNCRPD.

Chapter two of the thesis examined the protection of mentally disordered persons within the framework of the UNCRPD and international human rights law, keeping in view Pakistan’s obligation as a state. This chapter laid down the philosophical foundation of the human rights law relate to mental health. The chapter further highlighted the role of UNCRPD in protecting

the rights of disabled persons in Pakistan maintaining mental disability as the key aspect of protection.

Chapter three analyzed Pakistani Jurisprudence in addressing mentally disabled persons. The present mental health legislation in Pakistan, including the Mental Health Ordinance 2001 and provincial legislation, were analyzed to see the compliance of the national legislation with the broader human rights framework and the UNCRPD. Several issues were highlighted with regards to the mental health policy, resource distribution, legislative matters, and coordination between federal and federating units, political tensions, and discrimination in mental health rights.

Chapter four of the thesis protects the rights of mentally disordered individuals under Islamic law. Keeping in view the mixed nature of the Pakistani legal system based on common law and Shariah, the chapter discussed the approach of Islamic law to treating the issue of mental health, and to what extent is it compatible with modern international instruments.

Chapter five of the thesis provided an in-depth analysis of case laws based on the interpretation of mental health regulations and court practices in Pakistan's legal structure. Important decisions of Pakistan's Supreme Court and high courts of mentally disabled people were discussed. The imposition of capital punishment on mentally ill persons and not providing a fair chance are grave violations of Human Rights, as seen in many judgments.

I. The findings of the thesis indicate a large gap between Pakistan's legal framework and the practical execution of policies and regulations to protect the rights of mentally ill people. Although Pakistan has ratified the UNCRPD and has adopted several laws and regulations, such as the Mental Health Ordinance 2001 and other provincial mental health acts, the practical

implementation of these laws is poor or non-existent. This lack of implementation is due to several factors, including a lack of awareness of the people dealing with people suffering from mental disorders. This is due to the lack of understanding and training among stakeholders, a lack of funding, and the stigma associated with mental illness.

II. Pakistan's institutional framework for protecting the rights of people with mental illnesses is inadequate. Mental health facilities in Pakistan, such as psychiatric hospitals and mental centers, face several challenges, including insufficient funding and staffing, inadequate infrastructure, and a lack of community-based services. Furthermore, these institutions frequently fail to preserve the dignity and autonomy of those who are mentally ill, resulting in violations of human rights. There are no mental health care services at the primary level, and services are not available at community level. No infrastructure and no professionals to deal with the patients at the community level. Therefore, Mental Health Services need proper regulations, at the community level.

III. People with mental illnesses face a wide range of human rights violations in Pakistan. Only a few instances include involuntary confinement and treatment, abuse and neglect in mental health institutions, and denial of the right to legal competence and decision-making. Such violations are common as a result of a lack of statutory safeguards and independent monitoring systems, as well as a dearth of community-based organizations capable of providing alternative support and care.

IV. Social attitudes towards mentally ill people in Pakistan are a major weakness in their rights being recognized. The stigma and discrimination that persons with mental illnesses face frequently prevent them from receiving the help and care they need to live full and independent lives. This stigma is worsened by the general public and policy maker's lack of information and

understanding of mental diseases, which has resulted in a lack of political will to confront the issue. To address this issue, various stakeholders, including mental health experts, civil society organizations, policymakers, and the general public, would need to collaborate and participate.

V. It is therefore essential to develop a human rights-based approach in state policy and practice to mental health in Pakistan that promotes the dignity and liberty of mentally disturbed persons in the country. Several measures would be required, such as strengthening the legal framework by adding Islamic law provisions for protecting mental disability, establishing independent monitoring mechanisms, expanding community-based services and support, and combating the stigma associated with mental illness.

In a nutshell, defending the rights of mentally ill persons in Pakistan demands a comprehensive strategy or legal framework that recognizes the situation's diversity and complexity and demands a multidimensional approach that includes government action, civil society advocacy, and active participation by mentally disordered persons.

RECOMMENDATIONS

The following are some of the most essential recommendations:

I. The present research presents a comprehensive evaluation of the situation in Pakistan regarding the protection of the rights of people who are mentally ill. It is strongly advised that policymakers and legislators make the required efforts to implement the UNCRPD and guarantee that national laws and policies are compliant with international human rights norms. The framework of policies is broader compared to laws. Many a time, the laws are available at the national level; however, implementation is the problem. If any policy is used to develop a law after an assessment of ground realities, then legislation helps in implementing the policies.

Therefore, it is important to analyze the key elements of mental health policy first. States are required to study the gaps that need reforms keeping in view the policies of the countries that are better in protection. Consultation shall also be made with the Ministry of Finance and other stakeholders before formulating legislation. In case the problem is faced later on, cooperation can easily be available from such stakeholders. Sadly, there are clear gaps in Pakistan's current legal framework and a conspicuous absence of a well-defined national mental health policy when it comes to the country's mental health environment.

II. Legal reforms are essential to guarantee that national laws and policies are by international human rights standards. The need for legal reforms, capacity building, lobbying, and awareness-raising is vital to ensure that mentally ill people's rights are safeguarded in Pakistan. For this purpose, General laws governing the rules and operation of the tribunal and court systems should be amended to accommodate people with mental disabilities. Similarly, rules governing legal aid, court costs, and court processes and procedures may be changed.

III. It is essential to invest in the capacity building of healthcare professionals, policymakers, and other key players in human rights, mental health, and UNCRPD implementation. Advocacy and awareness-raising activities are also essential to promote the rights of mentally ill persons and build information among the general public, politicians, and healthcare professionals.

IV. The government and related stakeholders must increase the accessibility and availability of mental health services and treatments. When creating new regulations, authorities must adhere to international norms on mental illness. In addition, to properly meet the needs of the people, there should be a stronger focus on mental health prevention, promotion, and education. Investment in the development of healthcare professionals, policymakers, and other

relevant stakeholders' capacity. This can involve mental health training programs, workshops, and seminars, as well as the application of the UNCRPD.

V. National mental health legislation rather than provincial legislation, should be there instead of provincial legislation. The reason for this is that we lack mental health knowledge. At the provincial level, we have no resources. We have only duplicated the 2001 ordinance and have done nothing so far to safeguard and provide amenities by Provincial legislation.

VI. If National Mental Health Legislation is not possible, a "Federal Mental Health Commission" similar to the "Australian Mental Health Commission" should be established as a federal agency responsible for overseeing and coordinating with all provinces, ensuring effective implementations, and ensuring health care facilities. This authority should focus on closing the mental health law implementation gap, guaranteeing accountability, and promoting effective enforcement across the country.

VII. Mental Health Services need proper regulations, as there are no mental health care services at the primary level. Doctors must be trained, and a mandatory subject on mental health must be taught so that every doctor can understand mental disorders and be able to deal with mental health patients at the community level. The treatment gap must be eliminated at the level of Specialist Services dealing with Child and Adolescent drug abusers or Forensic Psychiatric Services. This is only achievable if we have Specialist Psychiatrists in the relevant subject. Unfortunately, one in every four Pakistanis suffers from a mental disorder; these people are treatable, but the treatments are expensive, and around 80% of such patients do not receive treatment in Pakistan.

VIII. It has been observed that individuals suffering from microcephaly (also known as Shadoley in native Urdu), a hereditary disease, are exposed to coercive begging, which is visible in society. To solve this issue, a particular provision under mental health law that provides precise recommendations for the protection of these individuals is required. Furthermore, dedicated mental health facilities in each city are required to ensure the correct treatment and care of these convicts.

IX. According to statistics, the proportion of mentally ill females in Pakistan outnumbers that of males. However, there are no clear provisions in existing mental health acts that specify and differentiate the mental health services provided to each gender. Females are often more at risk of illness than males, so it is vital to identify their distinct needs, talents, abilities, and capacities. As a result, it is important to establish specialized mental health care facilities tailored to the unique needs of female mentally ill patients and prisoners.

X. Additional training is required for Pakistani police officers to appropriately diagnose detainees and those involved in criminal activities who may be suffering from a mental disease. Furthermore, police officers must be trained and equipped to refer mentally ill offenders to psychiatric clinics when appropriate.

XI. Improving Pakistan's current coordination between the legal and psychiatric sectors is crucial. This can be accomplished through improved communication, joint training programs, and multidisciplinary workshops. Establishing clear norms for information and knowledge sharing would successfully overcome the gap. Given its authoritative role in this sector, the College of Physicians and Surgeons of Pakistan should advocate for expanded training in forensic psychiatry and the extension of forensic psychiatric services in Pakistan. This could

include developing extensive training programs, collaborating with mental health institutions, and launching fundraising efforts.

POSSIBLE AREAS FOR FUTURE RESEARCH

There is a lot of study that needs to be done in this field in the context of Pakistan. One area of study could include comparing Pakistan's condition to that of other nations in the region or researching the implementation of the UNCRPD in other developing countries.

Though sufficient progress has been made to address the issues of people in the field of mental health. However, equal approach in all aspects of access to healthcare remains minimal for only a small proportion of the population in Pakistan. There are a lot of really important questions being asked about improving health in disaster- and conflict-affected populations, like how to build fair and quality health interventions, how to strengthen health systems, and how to develop long-term funding sources for such activities. This area needs proper investigation and research.

Similarly, prioritizing the needs of disadvantaged groups is important, especially those of women, children, and refugees. To provide mental health therapy, researchers should look for alternatives to the current healthcare systems, which rely on community and family resources when they are unavailable. Before mental health professionals in Pakistan can offer tangible assistance to the millions of people suffering from mental health issues, much more research and policy expertise is required. Effective research can be carried out to protect the rights of these vulnerable kinds of mental health patients.

The most important area is that of the Islamic law of protection. Islamic law which comprehends the jurisprudential thought of the interpretive schools of thought and their legal fortitudes can be discussed in detail to protect the rights of mentally disabled persons. It is because Muslims consider themselves bound by Islamic commandments and indeed a source of virtue. Therefore the issue of stigma can better be addressed by considering Islamic laws in Pakistan.

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