The Eighteenth Amendment: Rights of the Mentally Challenged in Post-Conviction Proceedings

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Abstract

The case of Imdad Ali is a landmark decision of the Supreme Court of Pakistan. The court, in deciding Imdad Ali's case made observations regarding mental health problems. Schizophrenia in particular was observed not to be an illness qualifying for the defence of insanity. Unsurprisingly, many saw this as a blatant violation of the rules of due process, whereby which no fair trial could ever be conducted for those suffering from Schizophrenia. This article discusses the needs of due process which are imperative for a fair trial, in context of this decision of the apex court of the country.

> *"Whatever disagreement there may be as to the scope of the phrase 'due process of law' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard."*
>
> — Oliver Wendell Holmes Jr.*

Introduction

It is an often reiterated misconception that Constitution of Pakistan did not have a due process or fair trial clause until the 18th amendment to the 1972 Constitution which was passed by the National Assembly of Pakistan on April 8, 2010. In fact, the very first constitution, i.e. The Constitution of 1962 clearly included this right in no uncertain terms. Article 4 of the 1962 Constitution provided*: "To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan"* and *"In particular—no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."*[1] However, the protection of this particular right, whether in article 4 of the 1962 Constitution or the 18th amendment to the 1972 constitution, is practically non-existent. So, to talk about, or demand, fair trial or due process for mentally insane defendants seems like reaching for the stars when it is not even provided to a common-sane-man.

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* *Frank v Magnum*, 237 U.S. 309, 347 (1915).

[1] Constitution of Pakistan 1962, art 4(1) and (2)(a).

The impetus for the present article is derived from the case of *Imdad Ali*[2] where the Supreme Court ruled on the validity of the defence of insanity for patients of Schizophrenia.

Nonetheless, one finds oneself in a moral dilemma when one has to contemplate as to what is more reprehensible, or more aptly put *'pathetic'*; denying it to the sane or denying it to the insane? Surely, there are certain provisions of Pakistan's laws which do provide, at least, some kind of protections to mentally insane persons[3] but the kind of questions which were raised after the current case have, to the best of my knowledge, never been raised before. Namely, how does mental illness affect the fairness of post-trial/post-conviction proceedings if it is alleged that the convict has become mentally insane after his conviction. And this very question lies at the very heart of this article's discussion.

A. Background

In January 2001, Imdad Ali was convicted of murder under section 302(b) of Pakistan Penal Code[4] and was sentenced to death by the trial court.[5] His subsequent appeals to both High Court and Supreme Court were dismissed in 2008 and 2015 (respectively) as well as his mercy petition to the President of Pakistan.[6] In August 2016 his lawyer filed a writ in Lahore High Court (Multan Bench)

[2] *Mst. Safia Bano v Home Department, Govt of Punjab and Ors* C.P no 2990 of 2016.
[3] Mental Health Ordinance 2001.
[4] Hereinafter 'PPC'.
[5] *Safia Bano* (n 2) 2.
[6] Ibid.

under Article 199 of the Constitution pursuant to the Prison Rules 1978.[7] The crux of his submission was a request for the stay of the execution until Imdad regained sanity so that he could make his will—which was provided under the Prison Rules. The writ, as well as the subsequent appeal to the Supreme Court was dismissed. However, the Supreme Court went a step further and held that "*Paranoid Schizophrenia is not a mental disorder*",[8] as articulated under Mental Health Ordinance 2001 and therefore the relief provided in Prison Rules to mentally insane defendants did not apply.

Two points must be noted here; first that in these proceedings there was no argument as to the fairness of trial or due process. Probably because Imdad Ali did take the defence of insanity at his trial which was rejected in trial along with his subsequent appeals against conviction all the way up to the Supreme Court.[9]

Second, even if it is alleged that he was faking his illness or the defence failed for some other reasons or that he became mentally insane after his conviction—despite the fact that even the state appointed doctors certified him as a patient of Paranoid Schizophrenia—but the fact that Supreme Court excluded Paranoid Schizophrenia altogether from the province of mental disorders would mean that in any later case even if a defendant is accepted to be a patient of Paranoid Schizophrenia, he would still not be able to rely on the defence of insanity.

This paper will focus on this point and evaluate how mental illness affects the post-conviction proceedings of defendants.

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[7] *Safia Bano* (n 2) 3.
[8] *Safia Bano* (n 2) 10.
[9] *Safia Bano* (n 2) 2.

B. Mental Insanity, Fair Trial & Common Law

There can be no doubt, *whatsoever*, that it is the most universally accepted component of due process, amongst the legal systems which cherish and purport to uphold the celebrated values of due process, that a defendant must have a fair trial and an opportunity to be heard. This opportunity to be heard is by no means curtailed if the person in question has already been indicted and convicted thereafter even by, through subsequent appeals, the highest court in the land. The reasons for this have both, constitutional and logical grounds. In constitutional terms, the most basic but fundamental rule is that, a prisoner, whether convicted or during his/her trial, simply does not, and can never, become some inhumane rights-barren entity, devoid of any entitlement to fundamental rights and freedoms. (S)He simply does not and cannot, ever, lose the right to have rights.

These rights include, *inter alia* and for the current purposes, a right of reopening one's case in light of new substantial evidence which may render the conviction unsafe or even exonerate the convict altogether. How can a legal system bar the right to be heard again and present one's case, even after the accused has been convicted, if the case can help him with regards to the conviction itself or the appropriate punishment given thereunder—post-conviction proceedings to be exact—and still claim to deliver justice. No sentence is irrevocable, provided that the sentence hasn't been carried out already, in which case, there could be no compensation worthy enough for the wrongly convicted which would bring back the time of his suffering, and indeed no compensation at all, if the sentence was death. As Justice Brennan noted:

"Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a

denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose "the right to have rights."[10]

Needless to say, that a right to be heard, and to appeal one's conviction on later adduced evidence or under any other valid reason which might help the defendant's case is a fundamental right. This Court, being the guardian of people's constitutional rights and freedoms therefore must protect that right, to borrow words from Justice Sathasivam, *"even if the noose is being tied on the condemned prisoner's neck."*[11]

The effective exercise, however, and vindication of this fundamental right comes into question when the convict in any particular case is, or even after his trial and subsequent conviction, becomes mentally ill. He cannot understand the case against him anymore, he cannot give directions to his lawyer(s)—he simply becomes defenceless unable to fight on for his life and liberty—he is

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[10] *Furman v Georgia*, 408 U.S. 238, 291 (1972):
"...A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted.... yet the finality of death precludes relief. An executed person has indeed "lost the right to have rights." As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'"

[11] *Shatrughan Chauhan & Anr. v Union of India & Ors*. [2014] INSC 44, [22].

like a brave warrior but, in a defeated army. In this regard the legal wisdom of Sir William Blackstone is enlightening:

"[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."[12]

The position of mental illness, widely and generally brushed as 'insanity', and the result of any such finding on a defendant's case either at pre-conviction or post-conviction stages, was resolutely constituted in English Common Law.[13] But suffice it would be to say, that although the rule of law regarding insanity as a bar to execution of a convict was uniformly accepted by some of the most illustrious scholars and jurists in common law tradition, but the reasons supplied in support of this rule for the prohibition were not limited to procedural or substantive laws. In fact, they varied, other than legal factors, from consideration of religious to compassionate factors. For the purposes of due process, as Sir William Blackstone articulated, one of the principal justifications forwarded for insanity as a bar to the execution was to provide offenders, especially in

[12] 4 Bl Comm 24-25.

[13] For a comprehensive study, see, J.D. Feltham, 'The Common Law and the Execution of Insane Criminals' (1964) 4 Melbourne University Law Review 434.

capital proceedings, with the opportunity to contest the finding of not only the 'conviction' but an opportunity to contest the capital sentence itself, being imposed after the conviction. Sir John Hawles—*while rejecting the argument of utilitarian purposes for punishment and its un-attainability with the execution of an insane convict*—recognised the above reasoning of this rule, as to the ability and capacity of a convict to contest the findings of his case in post-conviction proceedings and held it to be the *"true reason"*.[14]

Hence, one can clearly see the wisdom of common law for its varied rations provided in support for insanity as a bar to execution. This wisdom can be realised if one can discern the logical roots underneath the tree of this rule with various branches. In providing various reasons the common law ensured that even if a capital offender could not receive an effective and meaningful opportunity to seek 'executive clemency', whether the convict himself could not have exercised this right or the executive was prejudiced while deciding the matter in dismissing his appeal, in terms of the commutation of his sentence, he could still have the opportunity to effectively vindicate this right in front of judicial branch. This is the very logic which the Indian Supreme Court in

[14] John Hawles, Remarks on the Trial of Mr. Charles Bateman, A Complete Collection of State Trials (Vol XI 473, 476, Howell ed., 1816):
"[T]he true reason of the law I think to be this, a person of 'non sana memoria,' and a lunatick during his lunacy, is by an act of God (for so it is called, though, the means may be human, be it violent, as hard imprisonment, terror or death, or natural, or sickness) disabled to make his just defence. There may be circumstances lying in his private knowledge, which would prove his innocence, of which he can have no advantage, because not known to the persons who shall take upon them his defence; and that is the reason many civil actions die with the person against whom they lay in their life-times; and that is the reason why in criminal matters, persons by ordinary course of law cannot be convicted after their deaths."

Amrit Bhushan[15] failed to see or simply turned a blind eye towards, while exercising deference pertaining to its duties as 'judicial branch', and emphatically reiterated that: *"Interesting as the statements on and origins of the Common Law rules on the subject in England, against the execution of an insane person, may be, we, in this country, are governed entirely by our statute law on such a matter."*[16]

However, some concession could be given to Indian Supreme Court for this whimsical hokum, since Justice Rehnquist apparently fell victim to the same folly of misapprehension. In *Ford v. Wainwright*[17] the majority held that:

"Historically, delay of execution on account of insanity was not a matter of executive clemency (ex mandato regis) or judicial discretion (ex arbitrio judicis); Rather, it was required by law (ex necessitate legis)... Thus, history affords no better basis than does logic for placing the final determination of a fact, critical to the trigger of a constitutional limitation upon the State's power, in the hands of the State's own chief executive. In no other circumstance of which we are aware is the vindication of a constitutional right

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[15] (1977) SCR (2) 240; One of the main authorities relied upon by Pakistan Supreme Court in Imdad Ali's review petition. Somehow, the Supreme Court failed to notice that this authority has been (impliedly) overruled by Shatrughan Chauhan & Anr. V. Union of India & Ors. [2014] INSC 44.

[16] ibid.

"…The Courts have no power to prohibit the carrying out of a sentence of death legally passed upon an accused person on the ground either that there is some rule in the Common Law of England against the execution of an insane person sentenced to death or some theological, religious, or moral objection to it. Our statute law on the subject is based entirely on secular considerations which place the protection and welfare of society in the forefront. What the statute law does not prohibit or enjoin 'cannot be enforced, by means of a writ of Mandamus under Article 226 of the Constitution, so as to set at naught a duly passed sentence of a Court of justice."

[17] 477 U.S. 399 (1986).

entrusted to the unreviewable discretion of an administrative tribunal."[18]

To this Justice Rehnquist had his own understanding, albeit sadly mistaken, of the rule to echo, which silenced the issue of competency to assist counsel in post-conviction proceedings by the apparent clangour of *"Retributive Aims of Punishment"* and *"Evolving Standards of Human Decency"*:

"The Court's profession of 'faith to our common law heritage' and 'evolving standards of decency' is thus at best a half-truth. It is Florida's scheme — which combines a prohibition against execution of the insane with executive branch procedures for evaluating claims of insanity that is more faithful to both traditional and modern practice. And no matter how longstanding and universal, laws providing that the State should not execute persons the executive finds insane are not themselves sufficient to create an Eighth Amendment right that sweeps away as inadequate the procedures for determining sanity crafted by those very laws."[19]

And this attitude then became prevalent in all the subsequent capital punishment cases where the convict was mentally insane.

[18] Ibid 416.
[19] *Ford* (n 16) 432-33.

C. Post-Conviction Proceedings and Mental Insanity

The repercussions of such, *aforementioned*, heedless contentions regarding the connection of due process clause in 14th amendment in the U.S Constitution—the counterpart of which in Pakistan's Constitution is art. 10A (18th amendment)—and its bearing upon post-conviction proceedings in which the convicted person was insane, were obviously far reaching. This drought of a reasoning has left both the lands, the fields of legal practitioners and meadows of academic debates, barren of yielding any fruits. For, on the hand, one almost sounds antediluvian raconteur when discussing cases where a capital counsel argued the incapacity to assist on the part of defendant as a *condicio sine qua non* of due process. On the other hand, many, if not all, academics have accepted this analysis, in dismissing the relevance of the capacity to assist counsel as a necessary element to consider in such cases. *"With respect to the first rationale"*, says Prof. Slobogin *"[that an incompetent person might be unable to provide counsel with last minute information leading to vacation of the sentence], as Powell noted in his concurrence, the view that competency is required to assist the attorney 'has slight merit today,' because defendants are entitled to effective assistance of counsel at trial and appeal, as well as to multiple post-conviction reviews of the sentence."*[20]

It is true that Justice Powell too in *Ford*[21], sort of, dismissed the concerns for capacity to assist counsel in same heedless manner and without any serious consideration. And where he did discuss it, his opinion, was way out of touch with practical reality of trial courts. Addressing the rationales of common law prohibition and

[20] Christopher Slobogin, Minding Justice: Laws That Deprive People with Mental Disability of Life and Liberty (HUP 2006) 92-3.
[21] *Ford* (n 16).

discussing, in particular the rationale as a mentally disabled person's incapacity in assisting counsel at trial and in post-conviction proceedings, he noted:

"The first of these justifications [capacity to assist counsel] has slight merit today. Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review. Throughout this process, the defendant has access to counsel, by constitutional right at trial, and by employment or appointment at other stages of the process whenever the defendant raises substantial claims. Nor does the defendant merely have the right to counsel's assistance; he also has the right to the effective assistance of counsel at trial and on appeal."[22]

How much out of touch, sadly, these contentions are, is evident from U.S Supreme Court's decision in *Panetti v. Quarterman*[23]—which is the U.S Supreme Court's first interpretation of Ford as to the substantive standard of competency to be executed, or more aptly put, when is one sane enough to die or insane enough to live—in which the court did not even care to address the issue of capacity to assist counsel or capacity to communicate a defence which may save him from the gallows. The point where insanity becomes more insane, is when one realises the fact that Panetti, despite dipping in and out of his cognitive faculties,

[22] *Ford* (n 16) 420. He continues:
"…These guarantees are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free. In addition, in cases tried at common law execution often followed fairly quickly after trial, so that incompetence at the time of execution was linked as a practical matter with incompetence at the trial itself. Our decisions already recognize, however, that a defendant must be competent to stand trial, and thus the notion that a defendant must be able to assist in his defence is largely provided for."
[23] 551 U.S 930 (2007).

was allowed to represent himself at trial. During his trial in 1995, Panetti fired his lawyers and argued "his own insanity". Appearing in a cowboy outfit, while wearing a Tom Mix hat on his head and dressed in cowboy garb, the man herded legal beasts in the ranch of law. Albeit this time he did not have, with him, rope to lasso the running case out of his hands, so he asked Jesus Christ, John F. Kennedy, and Anne Bancroft to come to his aid. When they did not answer, he subpoenaed them!—Or the poor man at least tried to!

This sorry tail illustrates the alarming extent to which the rule as to the capacity to assist counsel and communicate a defence, where the accused is mentally ill, has vanished as an integral part of criminal proceedings and as a cherished principle in the course of justice itself.

This is because of the mistake as to misapprehending the logic behind common law's various rationales for a bar on the execution of insane offenders. Underneath this follows a common reservation on common law prohibition on execution of mentally disabled persons that, there are, though, many rationales but the standard needed to establish such a claim as is, if not at all present there, then at least is imprecise. The inevitable corollary of such contentions, however much honest and well-wishing they may be, is the confusion which would entail with it, the label of imprecision and vagueness over the desirable 'generality' of these various rationales. The wisdom of common law lies in the fact that the various rationales dealt with various situations in criminal justice system, in which an offender, who is mentally disabled, could find himself.

No one can deny the fact, that in cases where a convict has become mentally disabled after his conviction and before the execution of sentence, the only rationale—*in that particular situation*—common law provided was of one's incapacity as to assist his counsel or to use old common law terminology, he could

have "alleged somewhat in stay of judgment or execution." This is what Sir Matthew Hale SL noted:

"If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment .... And if such person after his plea, and before his trial, become of non sane memory, he shall not be tried; or, if after his trial he become of non sane memory, he shall not receive judgment; or, if after judgment he become of non sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution."[24]

Brief for Legal Historians provided as *Amici Curiae* Supporting Petitioner in *Panetti* presented views, and consensus on this point, of professors at Princeton University, University of Oxford, University of Michigan, Columbia University Law School, University of Michigan Law School, and Arizona State Law School.[25]

Therefore, the only sensible conclusion which can be drawn from this is that despite having multiple rationales for prohibiting the execution of a mentally disabled person, the main reason was a convict's capacity to assist his counsel, referred as a convict's capacity to reason sufficiently to communicate a defence. Even if one considers the element of time from when these common law rules were articulated to present day operation of criminal justice system, one still cannot comprehend Justice Powell's apparent wisdom in dismissing grave concerns which the execution of insane offenders poses over the due process clause, just because common

[24] *See* M. Hale, *Historia Placitorum Coronæ* (1736) Vol I, 35.
[25] Brief for Legal Historians as Amici Curiae Supporting Petitioner at 22, *Panetti v Quarterman*, 551 U.S. _, 127 S. Ct. 2842 (2007) (No. 06-6407).

law rationales are not precise enough. Since, in my view, the only reason behind common law's broad formulation of this rule was either the lack of scientific advancement, of which the present day law is blessed with—albeit it has chosen to preposterously ignore it—or an attempt to safeguard the rights of mentally insane at any cost or by any mean or rational. By doing this common law tried to step in and safeguard the rights of those who it considered as having lost the ability to protect and effectively vindicate their rights themselves.

Today our understanding of law, in areas of mental health, is greatly enhanced by advancement in medical science, sophisticated and intricate diagnostic tools and indeed the progressed contemporary scholarship of modern psychiatry. Back in 18th century, common law had neither. So, the broad formulation of this rule was based on—and hence absolutely justified thereof—the idea of a convict's "generalised understanding*"* of legal proceedings, pertaining to the commonly recognised and obvious manifestations of mental disability/insanity at that time. If anything at all, the consideration of time element goes in favour of the argument that infliction of punishment in such circumstances would breach due process clause and common law's broad range of rationales for the prohibition of an insane offender's execution, which did expressly include, the capacity of a convict to assist his counsel or a convict's capacity to reason sufficiently to communicate a defence.

True it is, that in *Atkins v. Virginia*[26] U.S Supreme Court did categorically exclude mentally disabled persons from state sanctioned execution under 8th amendment of U.S Constitution—the counterpart of which in Pakistan's Constitution is art. 14[27]—but Justice Powell's opinion which became the *Stare Decisis* of *Ford*, as

[26] 536 U.S. 304 (2002).
[27] *See* Nasim Hasan Shah CJ in Constitutional Petition No.9 of 1991(Suo Motu), heard on 6th February 1994. [1994] SCMR 1028.

subsequently accepted in *Panetti*, somewhat perpetually silenced the calls of Due Process arguments in such cases. Nonetheless there lies, one of the most comprehensive articulation of due process and its connection with cases like these, in *Solesbee v. Balcom*[28], in the dissenting opinion of Justice Frankfurter:

"However quaint some of these ancient authorities of our law may sound to our ears, the Twentieth Century has not so far progressed as to outmode their reasoning. We should not be less humane than were Englishmen in the centuries that preceded this Republic. And the practical considerations are not less relevant today than they were when urged by Sir John Hawles and Hale and Hawkins and Blackstone in writings which nurtured so many founders of the Republic. If a man has gone insane, is he still himself? Is he still the man who was convicted? In any event, "were he of sound memory, he might allege somewhat" to save himself from doom. It is not an idle fancy that one under sentence of death ought not, by becoming non compos, be denied the means to "allege somewhat" that might free him. Such an opportunity may save life, as the last minute applications to this Court from time to time, and not always without success, amply attest."[29]

The authenticity of Justice Frankfurter's wisdom in *Solesbee*, can be seen, echoing through U.S supreme Court's verdicts in trials dealing with issues of competency to stand trial. In the context of the latter, the test of competency still to date contains the core values—'*including the capacity to understand charges against oneself and understanding one's situation thereunder, to one's capacity to convey 'pertinent information' to counsel regarding the case*—which common law enunciated in this area.[30] If this is true, then one

[28] 339 U.S. 9 (1950).
[29] Ibid at 20.
[30] *See Drope v Missouri*, 420 U.S. 162, 172 (1975); *Dusky v United States*, 362 U.S. 402, 402 (1960).

simply does not understand the wisdom of U.S Supreme Court in blatantly discarding the concerns of due process. Since In my view, however much these varying forms of *"competency test"* may be, they signify the same purposes of social justice in a criminal justice system, as common law aimed to serve in 18th century. For the simple premise of common law in the application of these rules was to forward the course of not only social but *'sensible social justice'*, since the lack of such rules in criminal procedures would gravely undermine not only the reliability of a judgment but would flagitiously sever the delivery of justice if the accused lacked the capacity to sufficiently reason in appreciating the relevant facts and issues in a case against him and assist counsel with respect to effectively communicating a defence.

In 1988/89, American Bar Association in its standards regarding mental health in criminal justice system echoed exactly the same rationales i.e. if a convict's incapacity to assist counsel substantiate as to suspending the collateral proceedings, it must also affirm and support the suspension of his/her execution. ABA Standards duly acknowledge that prisoners should not be executed if they cannot understand the nature of the pending proceedings or if they *"lack sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lack the ability to convey such information to counsel or the court."*[31] One can clearly see that there is a strong argument that the rule against the stay of execution is not, although it may be one of the reasons, based on the notions of humanity, or more aptly put sympathy, for a vulnerable convict but rather it has its primary foundation on the grounds of integrity of the criminal justice system.

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[31] American Bar Association, Criminal Justice Mental Health Standards 7-5.6 [1988] <http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html#7-5.6> accessed 8 August 2018.

Perhaps this is the important factor which Justice Powell's reasoning in *Ford* missed. As pointed out before, the whole case revolved around the definition of competency for the execution. And by focusing exclusively on this argument it missed the actual and rather more important, point. The question which should have been focused on was how a convict's incompetence or impaired cognitive faculties impacts upon the overall post-conviction proceedings. It appears, as Prof Bonnie quite exquisitely pointed out, that *"from this standpoint, Justice Powell must have been assuming that prisoners on the threshold of execution have already taken advantage of these post-conviction opportunities, leaving little risk that some critically important fact has been obscured throughout these proceedings or that a previously unknown defect in the conviction or sentence could yet emerge."*[32]

Here one may give some concession to Justice Powell as the aforementioned assumptions could have been warranted if, and only if, a convict's impaired capacity to assist would have been identified in those post-conviction proceedings and courts would have accordingly taken adequate measures. But as Prof Bonnie pointed out the defect in the current habeas practice of USA, that *"the prisoner's incompetence is not ordinarily recognised as a basis for suspending collateral litigation"*; the same is equally true of Pakistan's legal system and can be seen from the facts of Imdad Ali's case or if one is looking for another ridiculous example, in *Noor Uddin v. The State*[33]. In this case the medical board convened by the trial court certified that the accused was suffering from paranoid schizophrenia. And that he is now on medication and is fit to stand trial. This would mean—*the trial court reasoned and the High Court agreed*—that the accused must have been sane and in total control of

[32] Richard J. Bonnie, 'Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures', 54 Cath. U. L. Rev. 1169 (2004-2005) at 1178.
[33] 2014 Cr. LJ 113.

his cognitive faculties *'at the time of the alleged crime'* and therefore he is guilty.[34]

Thus, Prof Bonnie rightly and justifiably argued that:

"A prisoner's inability to assist in post-conviction litigation must be addressed in a comprehensive manner and not only as a possible element of the Eighth Amendment bar against execution of a presently incompetent person.....the rules governing collateral proceedings should be modified to protect the integrity of these proceedings long before an issue arises concerning whether an execution should go forward....."

It is a fundamental operation of any legal system that any accused or convict is given proper resources, time and due consideration of law, to prepare for his defence. Hence in this regard, if an accused is insane or has become insane after conviction, a just fair and reasonable legal system has to ask itself some basic questions of constitutional morality. Namely, does the defendant or convict have such a control over his mental and cognitive faculties as to understand the nature of accusations against him and adequately prepare for his defence?

And it is here that another important question arises that if, it is alleged that he is no longer able to understand what it is that he is charged with and convicted of and he cannot challenge his conviction, the court needs to ask itself as to what should be the minimum standard of ascertaining whether his claim is justified and he must be given relief, until he regains his senses. The answer is that of course he needs not to understand all the legal formalities and questions, constitutional perplexities and abstruse jurisprudential conundrums as a lawyer or judge would understand.

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[34] Whereas, there was nothing in the medical report to suggest anything to that extent.

But at the very minimum the defendant or the convict, as Smith J[35] pointed out:

"needs to understand generally the nature of the proceedings, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in Court in a general sense, though he need not, of course, understand all the formalities. He needs to be able to understand the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this by letting his counsel know what his version of the facts is and, if necessary, telling the Court what it is. He need not have the mental capacity to make an able defence: but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any."

Pakistani courts are based on an adversarial system that enshrines equality of arms in legal disputes and ensures that knowledgeable parties on both sides of the controversy focus, develop and present all relevant facts and legal arguments to the court. Consequently, the adversarial system may work unfairly for those who are unable either to assert effectively, legal rights on their own behalf or to hire a lawyer for that purpose. In case of a mentally ill defendant, he may have a legal representation, but this would avail him no benefits, and he therefore would not be able to enjoy this fundamental right, if he is in a condition which renders him unable to exercise it.

The risk of miscarriage of justice becomes profoundly grave when the punishment given to the convict is death. For death is such

[35] Smith J (Supreme Court of Victoria), in *R v Presser* [1958] VR 45 at 48.

a lover, and so unique are its trysts, that once rendezvoused with; there's no turning back. Unique in its finality—unique in its enormity—unique in its irrevocability; for a convict, capital punishment and its extreme severity are profoundly unique and unparalleled to any other punishment today. As Justice Brennan noted in Furman:

"No other existing punishment is comparable to death in terms of physical and mental suffering.... [T]he unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself. Expatriation, for example, is a punishment that 'destroys for the individual the political existence that was centuries in the development,' that 'strips the citizen of his status in the national and international political community,' and that puts 'his very existence' in jeopardy. Expatriation thus inherently entails 'the total destruction of the individual's status in organized society.' 'In short, the expatriate has lost the right to have rights.' Yet, demonstrably, expatriation is not 'a fate worse than death.' Although death, like expatriation, destroys the individual's 'political existence' and his 'status in organized society,' it does more, for, unlike expatriation, death also destroys 'his very existence.' There is, too, at least the possibility that the expatriate will in the future regain 'the right to have rights.' Death forecloses even that possibility."

Hence it does not take a legal maven to comprehend the basic logic that when a punishment has such unfathomable drastic effects on the life of the convict and also on his kith and kin, the confirmation of such a sentence and its execution thereof must go through as stringent legal controls as possible. In this regard, even the fact that insanity plea was rejected at trial and subsequent appeals, it cannot form the basis of rejection of one's petition requesting stay of execution, through medical records of mental illness. Justice, fairness and reasonability in every criminal justice

system enshrine the universal principle that the process leading up to the termination of a human life must involve a strict legal scrutiny, including a prudent examination of each and every relevant factor by the decision-making body, which while doing so must ensure equal and fair representation of relevant facts from both sides. Any adjudication process which lacks this characteristic is inadequate.[36]

This line of reasoning, like every other legal issue, has its own logical conundrums and been subjected to perennial intellectual onslaughts in academic circles. The foremost of them is that why the due process, or simply put a mere hope of any substantial claim after the conviction should allow a stay on the execution of a mental patient and not everyone else, either mental or not, for the same hope could be attached to every convict.[37] It has been argued by some that the argument to stay execution of a mentally insane on the basis that he lacks the capacity to assist his counsel is deeply flawed.

"The traditional explanations of the rule are found in the writings of the old common law commentators. These sources are conveniently collected in Mr. Justice Frankfurter's dissenting opinion in Solesbee v Balkcom. No other explanations seem to have been offered by criminal law writers. Blackstone and Hale explained the rule by saying that if the defendant is sane he might urge some

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[36] *See* Justice Marshall's opinion (Justice Brennan, Justice Blackmun, and Justice Stevens join.) in *Ford v Wainwright* 477 U.S. 399 (1986):
"Rather, consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the fact finder is necessarily inadequate....[T]he minimum assurance that the life and death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected."

[37] *See* Geoffrey C. Hazard Jr. and David W. Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381 (1962).

reason why the sentence should not be carried out. Although there may be some substance to this suggestion, it does not seem weighty. The same reasoning would be sufficient to postpone—perhaps indefinitely—the execution of a sane man, for if it be assumed that intelligent reflection will disclose reasons for stay of execution, then time for reflection should be allowed the sane as well. It must be remembered that, by hypothesis, the defendant is assertedly insane at the time scheduled for execution but has been sane throughout the proceedings against him up to and including the pronouncement of sentence. Thus, the only justification for allowing a postponement of execution because insanity then supervenes is to suppose that a reason not previously considered will suddenly come to mind—a possibility which seems so small as to be more argumentative than persuasive. While it is perhaps impossible to characterize any factor as 'de minimis' when set against human life, the reality of this explanation for the rule is dubious."[38]

Quite interesting, however much, and highly praiseworthy, the profoundly acute intellectual insight of these learned authors may be, it is, overweighed by the basic fact that the learned authors simply mistook the rationale behind the stay, which is *" 'incapability' of a convict, in later raising any substantial claim against execution, arising out of a mental illness which has rendered the convict so severed with its cognitive faculties as to leave him/her completely out of touch with reality"* with *"intelligent reflection by a sane convict upon his case which might allow him/her to pick out some deep down buried point of substantive or procedural law and substantiating a stay of execution thereunder."*

To equate the *'incapability'* of a person, in comprehending his legal position in any case against him, engendered by a severe mental illness with *'obtuseness'* of a person in finding any legal point in his case which would save him from the gallows, would

[38] Ibid at 383.

have more pathological effects on the effective and meaningful administration of justice than the pathological effects on the brain of a patient, caused by paranoid schizophrenia—and such an endeavour, if undertaken, is legally speaking more ridiculous than subpoenaing of Jesus Christ and K.F Kennedy by Scott Panetti at his trial.

Conclusion

As noted above, the right to stand a fair trial is inherent in Due Process. Mental health problems, the likes of those which manifest with diseases like Schizophrenia require special considerations to be accorded to the accused/convict so that (s)he may be able to stand a fair trial, not impeded by what has already incurred mental troubles for the accused/convict. The Supreme Court's decision in the Imdad Ali case stands as a prominent reminder of the blatant disregard for this value of due process and the considerations it accords to those who need it most- the mentally insane.

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