



RESEARCH PAPER

Changing Paradigms: Criminal Responsibility in Mental Health Laws of Pakistan and UN Conventions on the Rights of Persons with Disabilities

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ABSTRACT

An individual is liable for his/her wrong doings against fellow members of the society. However, in certain situations he/she can be exempted from his/her actions, especially in a situation whereby he/she cannot differentiate in right and wrong due to his/her mental incapability. In the modern era, ample development has been gained in the field of mental health and an effective mechanism has been provided as to observe and implement the principles of responsibility between crime and mental illness. Schizophrenia has been commonly referred as severe cognitive and affective deficits that heavily influence empathy, understanding, reason and decision making, but also control of compulsiveness. Although there is relation between mental illness and lacks or decrease of legal accountability, their relationship is also bound by social, cultural, demographic, developmental, and clinical factors. For criminal liability both *mens rea* and *actus reus* are important ingredients. However, in case of Schizophrenia the element of *mens rea* is missing, which exempt the mentally ill person from the consequences of crime. A qualitative method of research is conducted to evaluate the criminal responsibility of a mentally ill patient. Upon observation, it has been discovered that laws related to mental health in Pakistan lacks compatibility with international conventions and Islamic law, so there is a dire need to revamp the existing legislation and a phenomenon of non-responsibility of a mentally ill patient should be followed as a paradigm shift.

KEYWORDS Criminal Responsibility, CRPD, Islamic Law and Pakistan, Mental Health, Schizophrenia

Introduction

Schizophrenia is mental illness in which a person hears hilarious voices and feels that his thoughts, sensations are in control of another body. For that reason, he is usually isolated from the society. The situation of schizophrenia patient varies according to his condition. The issue of criminal responsibility of a patient suffering from Schizophrenia became a matter of debate in Pakistan after the case of Imad Ali and Khizar Hayat, in which the court convicted them for their criminal acts. For that reason, it is important to examine whether the patient of schizophrenia is liable for his criminal acts or not. In modern time a new understanding is developed to harmonize the principles of criminal justice system with that of mental health system. In this regard, the United Nation Convention on Rights of Person with Disabilities, herein referred as "CRPD", recommend that member parties should amend their criminal legislation to declare non-responsibility of a disable person. According to Islamic law a person cannot be assassinated if there is doubt on the part of offender. Canadian law also states that a mentally ill patient should not be charged for his criminal act.

According to Pakistan Schizophrenia patients are not treated properly and the law is silent about the criminal responsibility of a mentally ill patient suffering from

Schizophrenia. This work is conducted to analyse the mental health laws regarding schizophrenia and the international conventions regarding disabled persons i.e. CRPD. In addition, the research shed light on criminal responsibility of a mentally ill patient according to Islamic law. Although Mental Health laws of Pakistan are quite updated, but the study focused on the mental health laws in advance countries (specially Canada), which could be recommended for Pakistan.

Literature Review

Premeditated conduct of people can be understood as a result of natural causes in a scientific context but also imitates reasons for action. The human conduct is emitted by the intension, wishes and beliefs and this later approach is used by the law (Morse, 1999). Criminal responsibility is a phenomenon in which an insane person would be given special privilege and would not be considered responsible for his criminal act. Mental disorder is also a fact which need to be determined by the law. According to Szasz "The notion "mental illness" is a metaphor which one have termed as a mistake for a fact. One consider people physically ill when their organ-functioning deviate from some anatomical and physiological norms; likewise, one presume people mentally ill when their behaviour hit certain ethical, political and social norms. It explains that why various historical personalities, from Jesus to Castro and Job to Hitler, had been diagnosed as having this or that psychiatric malady" (Szasz, 1970). Leff commented on the opinion of Szasz that "his argument are not only wrongheaded, they are also inhumane, since they deny the possibility for a condition [schizophrenia] which claims the life of one in ten sufferers" (Leff, 1993). By analysing the quotations of Szasz and Leff, mental illness is a reality which should be addressed by the law makers. The observance of mental illness in law is also necessary as it will prove as a border line between the acknowledgment that people are accountable for their decision or authority to take decision and apprehended interference infringing the people of fundamental rights of citizenship.

Schizophrenia is also a mental disorder which need to be determined. Schizophrenia is a type of mental illness, which is more serious than other kind of mental disorder (1995 MLJ 268). Linda Hart described her situation of schizophrenia as, "The top half of my head feels quite light but the thread that runs down from my head to my stomach is soaked in a deep despair. Maggots in my belly multiply. Rotting flesh. Want to drink bleach to cleanse them or a sharp knife to cut them out. They told me I need a psychiatrist and not a medical surgeon back in September. They said Graham [the psychiatrist] would get rid of the maggots but he hasn't" (Bartlett & Sandland, 2007). With respect to the relation between criminal responsibility and schizophrenia, it is analysed after a research that a schizophrenia patient is mostly involved in criminal act and they are arrested more frequently than the other offenders in society (Schanda & Stompe, 2009).

Material and Methods

In this research paper Qualitative Research Methodology was used. The laws of developed countries, especially Canada were comparatively studied and analysed with the law of Pakistan, with respect to criminal liability of mentally ill person. The principles of Islamic law were also analysed. Precedents of the superior courts of Pakistan and Canada were thoroughly studied. The work of different researchers was assessed. Different international conventions were analysed. Relevant theories of the prominent scholars were highlighted. Data of relevant cases was collected and analysed and conclusion was adduced.

Criminal Responsibility of Mentally Ill Patient

A concept exists in society relating to mentally disturbed person is that he/she will not be held responsible for any criminal act. Because the mentally ill patients are not in their full sense and their act is not according to their thinking (Campbell & Heginbotham, 1991). This is the legal concept of insanity as unsound mind person is also not booked for a criminal

act according to the law. However, the legal concept of insanity could not be equalized with mental illness. In contrast to mental illness, the insanity has primarily to do with legal competence of a person. Moreover, insanity is an abnormality of mind and according to criminal law an insane person is not liable for a criminal act (Hoggett, 1990).

Mental illness is a scientific concept in so far as it embodies a classification of conditions which are used both to describe and where possible, explain the origins and natural progress of the conditions, and to facilitate the discovery and application of treatment and cures. Some mental illness has proven physically, while other have no established physical causes (Kendell, 1975). Schizophrenia is also a mental disorder and categorized in mental illness (Tsimpoulis, Niveau & Eytan, 2018). Schizophrenia is a brain disorder in which a person is incapable to know understand his action. According to Talreja, "the core characteristics of this disorder include the presence of persistent cognitive defects mostly affecting executive functions and altered activation in limbic and prefrontal areas that can be associated with the decrease in the sense of the self-being in control and thus with decreased violation" (Talreja, Shah & Kataria, 2013).

The first case of insanity was noted in English legal treaty of 1581, in which it was decided that an insane person cannot be held accountable for his wrong doing. However, recent phenomena of insanity plea is dominated in the result of a case in 1873. According to the case a person named Daniel M'Naughten have assassinated Sir Robert Peel (British Prime Minister) (Kelly, 2009), the offender was not convicted on the plea that he was victim of mental illness and for conviction it requires that the person should be mentally fit (UK House of Lords Decision, 1943). Another rule which benefit the mental health patient is Durham Rule. According to this rule a person will not be held liable for crime as a result of his mental disorder. This rule is still followed in the state of New Hampshire (The Durham Rule, 1954).

The legislation of different countries varies according to their cultural differences. Different countries follow different legal system i.e. some follow common law system while others emphasise on civil law (Grossi & Green, 2017). According to Canadian law, a person is not convicted if it is proved that he is mental health patient (Miladinovic & Lukassen, 2014). The Criminal Law of Canada states that "no person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong" (Criminal Code of Canada, Section 16). While in other countries like Sweden, Pakistan and many African countries a psychological mental ill patient is considered criminally responsible for his action. However, compulsory treatment would be provided to the mental ill patient in a mental hospital (Ogunlesi, Ogunwale, Roos & Kaliski, 2012).

In case of schizophrenia, if a mental ill patient commits a crime, he is not capable to know the situation, even he/she does not know the legality of the act, meaning the defendant cannot control his action (Smith, 2012). Although in some condition the patient of schizophrenia understand the situation, so the liability depends on the mental condition of the patient. Moreover, we cannot draw a line of demarcation whether the mentally ill patient is liable in law or vice versa. To clarify the confusion between schizophrenia and legal capacity, it is necessary to elaborate the principle of International Conventions and local laws of Pakistan.

CRPD and Criminal Responsibility

The CRPD is an international treaty adopted by the United Nations General Assembly in 2006. In February 2013, 155 members' states have signed, and 127 states had rectified the treaty (Szmukler, & Daw, 2014). CRPD is aimed to flourish "the policies, plans, programmes and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities" (Pozon, 2016). Article 1 of CRPD states about it

main purpose. It provides the concept that it will “promote, protect and ensure the full and equal environment of all human rights and fundamental freedoms by all persons with disabilities and will promote respect for their inherent dignity”. Although most of the rights are protected by the UN treaties but CRPD deals only with those rights of person having disabilities (Bartlett, 2009). The CRPD had not defined the term disability and left the interpretation of disability to the state parties. The disabled person is categorized as having “long term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder their full and effective participation in society on equal basis with others”. Moreover, Rights of person with disabilities Committee have endorsed that mentally ill patient falls under the Convention.

The CRPD article 12 clearly determine legal obligation of a disabled person. Although, as per as the criminal responsibility of a disabled person is concerned, the general comment of article 12 is silent over it. Nevertheless, the United Nations High Commissioner for Human Rights Office in 2009 notified “article 12 requires the abolition of criminal defences based on the existence of a mental or intellectual disability and called for disability neutral doctrine on the subject element of crime” (UN, M, 2011). In 2016 the CRPD Committee in their concluding remarks recommended that state parties under article 14 should “amend their criminal legislation to eliminate declarations of non-responsibility on grounds of disability” (CRPD Committee, 2016). The right of non-responsibility in criminal trial would lead to benefit many convicted and imprisoned disabled persons. This argument is endorsed by Appelbaum (Appelbaum, 2016) and Perlin (Perlin, 2017). The most dominant view regarding abolition of criminal responsibility for disabled offender is of Minkowitz (Minkowitz, 2017) and Slobogin (Slobogin, 2000)).

According to Slobogin “*mens rea* (mental element of a crime) is increasingly response to the situation and subjective experience of alleged offender, the insanity defence has lost much of its *raison d’etre*”. However, Slobogin think that the disabled persons acquitted under the defence of criminal liability would be transferred to mental health facility if he is considered to be fatal for the people (Slobogin, 2015). Minkowitz follow the Slobogin suit but is against the psychiatric detention of alleged offender. Minkowitz stipulates that “unusual mental phenomena should be treated like any other perception, belief or world views and should not imply the absence of criminal intent”. While other analyst are not prepared to provide that much equality. Anne Plumb states “Most people have some questionable or unusual beliefs but there is something about ours that may make them more problematic” (Spandler, & Anderson, 2015).

The intension of a person to do a crime and non-responsibility in criminal cases need a comprehensive observation of alleged offender. Dawson (Dawson, 2015) highlights that “this entails an assessment of the inner workings of the human mind – an understanding criticised in the General Comment in connection with mental capacity assessments” (General Comment No.1, Para 15). It would be suggested that functional test should be conducted for the analysis of person’s understanding and belief. But this diversion will also suffer the disabled person with incredible problem. Even the phenomena of forced treatment are also against the CRPD rights. Although an alternative mechanism should be followed for determination of mental illness of alleged offender, so that the jury may decide their case in best interest of defendant and society.

The issue of criminal trial for the disable defendant is also discussed in CRPD. According to article 12 the trial procedure is relevant but CRPD Committee in its final remarks have discussed this issue under article 13 and 14 (CRPD Committee, 2017). The question of concern is whether a mentally ill patient can plead his/her case? Whether he is able to understand and take part in trail? An idea of unfit to prosecute will lead other alternative means, which will be intended to provide justice to the plaintiff and defendant unable to take part in their defence i.e. a person appointed on behalf mentally disabled person will plead the case but practically the nominate will present the fact of the case and

would not be able to describe the *intention* (Series, Nilsson, 2018). Similar to the “insanity defence”, the process of offender supposed “unfit to plead” mostly resulted into “diversion into mental health detention, procedures for defendants, or community supervision, which have been criticized by disability rights advocates” (Gooding, 2016).

According to a proposal presented by the Law Commission of England and Wales, a fundamental test for assessment of disability should be adopted in Criminal Proceeding. Gooding and O’Mahony objected on this proposal and stated “this would be likely to violate article 12(2) of CRPD and ironically render the reforms less complaint than the previous they replaced” (Gooding, 2016). After proper deliberation from academicians in area of phycology, Commission rejected the idea of “dialogistic threshold”. It is believed that “diagnostic threshold” would lead to decrease the possibility of doubt and it is helpful in assessment of defendant (Law Commission No. 364).

Criminal Responsibility of Mentally Ill Patient in Islamic Law

In Islamic the technical word used for insanity is *junun* (hidden, invisible). The *junun* is defined by Islamic Scholars to be “the impairment of the mind, where it prevents action and speech from operating on reason, except rarely” (Majmu’ah min al-Ulama, 1989). Beside insanity, some Islamic scholars have recognized two other mental illness under the rule of insanity in criminal responsibility i.e. sudden perplexity and mental retardation (Chaleby, 1996). The term used for the first category is *dahish*, which means “perplexed, startled, stunned”. In this condition a person suddenly become confused or perplexed. According to Hanafi school of thought the *dahish* is same as insane person (Chaleby, 1996). The second category is termed as *’atah*, which is described as diminished ability of the mind to reason and is different from sudden perplexity. The term also covers dementia as well as mental retardation. Most of the Islamic jurists are having the consent that a person suffering from the disease of *’Atah* will be treated as *majnun* (Chaleby, 1996).

Islamic jurisprudence classifies mental illness into three forms (i) absolute, (ii) intermittent and (iii) partial. According to sharia criminal responsibility depends on the situation of a mentally disorder patient. If a person is absolutely unable to understand anything and continuously unable to use his reason properly, he/she will not be responsible for any criminal act. So, the concept of *mens rea*, itotaly cognized in the Islamic law (Tzeferakos, 2017). In the situation of intermittent a person sometime is able to communicate at a reasonable level of conception, perception and cognition but at others time could not understand anything and losses his mental abilities. The person will be dealt as *majnun* when he is in situation of mental illness and would not be responsible for his criminal action but will be responsible at normal state of mind. While in the last situation of partial insanity, the person will be not be criminally not responsible for his action at the situation of mental disorder but will be dealt according to law in normal situation of his health (Awdah p. 584)).

If we analysed the mental illness according to Islamic Law, some of Islamic scholars has declared perplexed or startled person criminally not responsible for their action. In addition, some have recognized *dahish* as insane and ruled that he will be treated by law like a *majnun* (Majmu’ah min al-Ulama, 1989). This approach shows that according to Islamic law a person having a mental illness shall not be criminally responsible for his action.

Criminal Responsibility of Mental Ill Patient and Laws of Pakistan

The mental illness in Pakistan is increasing day by day due to different sociological problems (Zafar, Syed, & Tehseen, 2008) and have affected mostly the educated masses (Javed, Naeem, & Irfan, 2006). One of the prevailing issues for the Mental Ill Patient is their criminal responsibility for his/her criminal act. In British law, if a person is declared mentally ill, their criminal liability is decreased (Blackstone, 1769). Similarly, it is mentioned in Pakistani civil law that a person cannot enter into a valid contract, if he is mentally

disorder and “would not be liable for breach of contract” (Mental Health Law, 2001). However, the mental health law has not defined the criminal responsibility of mentally ill individual (Gilani, Kasi, 2005). The ordinance has left a question mark on the legislative part that how it will be determined that a person is incapable to be executed or not?

In Pakistan most of the mental health patient is liable for his/her criminal act. This statement is endorsed by the decisions of Supreme Court of Pakistan. In case of Imdad Ali (Mst. Safia Bano vs Home Department, 2017), his wife claimed that her husband is suffering from schizophrenia (a mental illness), and he killed a person while he was not in senses. But the court convicted her husband and he was awarded death penalty by the trial court. Her wife preferred an appeal to the High Court, but his punishment was upheld by the appellate court. Then his wife filed an appeal to Supreme Court and produced medical certificate issued by the Medical Board of Nishtar Hospital Multan in which the doctors have diagnosed as a case of paranoid schizophrenia. It was prayed by the appellant that at the time issuance of warrant, the petitioner was reported to be a patient of “Paranoid Schizophrenia”, therefore his medical treatment should be provided under the Prison Rule 1978 (Rule 104).

Supreme court of Pakistan referred to the decision of Indian Supreme Court on schizophrenia i.e. Narain Gupta case (Ram Narain Gupta v, Smt, Rameshwari Gupta, 1988). According to the fact of the case, the wife was diagnosed of paranoid Schizophrenia. Her husband came to the court for the dissolution of marriage and prayed that she is unable to perform her marital duties, so his marriage should be dissolved. The court rejected his plea and commented that paranoid schizophrenia is not severe mental illness. In another judgement of Amrit Bhushan Gupta (Amrit Busham Gupta v. Union of India, 1977) from Indian jurisdiction was also reported. The plaintiff was awarded death penalty for having committed culpable homicide amounting to murder. The court did not consider paranoid schizophrenia and rejected his appeal of his acquittal. For that reason, in case of Imdad Ali the court was of the opinion that paranoid Schizophrenia is not a severe disorder (MHLO, 2001) and he was awarded death penalty.

Subsequently, in case of Khizar Hayat (Khizar Hayat Case, PLD 2005 Lahore 470), the accused was a police officer and he had killed his colleague. He was sentenced to death in 2003 but he was diagnosed with Schizophrenia in 2008. His mother pleaded that her son was mentally ill but the court did not consider schizophrenia as a severe mental health order. He had spent sixteen years for the execution of his death punishment, but was expired before his execution. It is evident from the above precedents that in Pakistan the mental health patient suffering from Schizophrenia is liable for his criminal action. There is need to refer the legislation in Islamic law, international conventions and other jurisdiction where they have explained the mental health laws in detail.

Conclusion

It is noted that mental health professional has diagnosed different kinds of mental illness. And the people are suffering from one disease, but the severity of the illness varies according to the situation of patient. In case of schizophrenia, the patient condition depends on the severity of this disease. Medical practitioner has proven that criminal acts of a person is linked with psychotic illness. In this regard, criminal responsibility of a mentally ill patient is a complex phenomenon, as it could not be determined easily and its dependency on the patient condition. Advancement of research in the field of psychology will help the medical practitioner and legal experts to evaluate the criminal responsibility and schizophrenia.

In Pakistan the patient of schizophrenia is charged for his criminal acts while the United Nation international convention i.e. CRPD recommend that state parties should abolish the laws regarding criminal responsibility of a disabled person. It is also found in the legislation of different countries where the mental health patient is not responsible for his criminal acts. The laws are changed according to the condition of society and person as

paradigm shift. So, the mental health laws should also be amended in Pakistan according to the international conventions and best practices in specific jurisdictions.

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