

THE ROLE OF QISAS AND DIYAT IN FACILITATING HONOUR KILLINGS

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ABSTRACT

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This dissertation considers whether the provision of the Islamic law of *qisas* and *diyat* in Pakistan is justifiable in light of how it is employed to evade punishment for honor killings, thereby producing an environment in which the freedom of women, and men, is severely limited. This research paper first examines the law itself, and its historical and religious context, to demonstrate why it has persisted. Second, it evaluates the inadequate attempts to curtail honour killings, the considerable shortcomings of these reforms, and the contemporary relevance of *qisas* and *diyat*—if any—in the modern criminal justice system. Finally, this dissertation identifies the issues central to honour killings, such as the institutional biases at the heart of law enforcement and the judiciary, the inferior position of women in Pakistani society, and the tribal structures that perpetuate honour killings—all in the context of human rights and by studying the significant body of case law on the subject. In light of the findings, the issues detailed, and the areas that have been highlighted for reform, this dissertation concludes that the current model of *qisas* and *diyat* is unjustifiable and in immediate need of change.

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Introduction

This dissertation concerns the elements of Pakistani penal law known as *qisas* and *diya*. *Qisas* and *diya* refer to the right of a murder victim's family under Sharia law to punish the wrongdoer or to choose not to punish them (in exchange for financial compensation). This dissertation will explore how the law allows defendants to evade punishment for murder, particularly in the context of honor killings, or to escape with disproportionately short sentences despite the nature of their crimes. Under *qisas* and *diya* laws, homicide is regarded as a private dispute, one that the state is not absolutely required to prosecute. This has resulted in the violation of both domestic law and international human rights obligations, especially where women are concerned.

The critical analysis of *qisas* and *diya* will be supplemented by a view of the law in light of the human rights of women as well as Pakistan's obligations to its citizens. The dissertation will also consider the historical, religious and cultural context of *qisas* and *diya* and how the private nature of this law is markedly distinct from a Western legal framework based on the obligation and discretion of the state.

A discussion of the status of honour killing and its relationship to the law is important due to the drastic impact it has on women's lives and community behaviour. Despite gradual improvements in gender equality, this remains a relevant topic. The year 2016 saw a number of highly publicised honour killings, which prompted a law reform that many have criticised as falling short of its intended purpose of halting honour killings. Instead, it has served the function of merely appeasing the public. In detailing the reasons for the new law, Senator Farhatullah Babar stated:

Honour killings are common throughout Pakistan, claiming the lives of hundreds of victims every year. According to Aurat Foundation's statistics 432 women were reportedly killed in the name of honour in 2012, 705 in 2011, 557 in 2010, 604 in 2009 and 475 in 2008. These figures do not include unreported cases or, indeed, the number of men who are often killed alongside women in the name of honour. Addressing the loopholes and lacunae in the existing law is essential in order to prevent these crimes from being repeatedly committed.¹

This dissertation will therefore discuss the shortcomings of the legal provisions intended to prevent the exploitation of *qisas* and *diya* laws and how these defects render the continued provision of *qisas* and *diya* unjustifiable.

¹ Criminal Law (Amendment) (Offences in the name or pretext of Honour) Act 2016

Chapter 1

The Law of Qisas and Diyat

This chapter will examine the law relating to *qisas* and *diya* in Pakistan. The particulars of the law will be illustrated through a discussion of a recent instance of honour killing in the city of Lahore. Furthermore, this chapter will provide a perspective of *qisas* and *diya* within the historical context of Islamic law, and it will explore the process of Islamisation that overtook Pakistan soon after its inception. In order to assess why the law was promulgated, and why it has persisted, it is important to study the circumstances in which it replaced the remnants of British penal codes from colonial times.

1.1 The Origin of Qisas and Diya

The practice of ‘an eye for an eye’ (*lex talionis*) was an essential part of tribal justice in pre-Islamic Arabia. Due to the lack of a centralised authority that could seek justice on behalf of victims, retribution was the default response to harm suffered. Not only was the culprit a potential target of this retribution, but so were members of his tribe. As a result, the tribes of the Arabian Peninsula often found themselves occupied in extended blood feuds capable of lasting generations and causing great harm to those involved.² *Hamasa*, the ‘quality of fierce readiness to defend person and ‘house’ that every real man should have’,³ was vital to the Arabian man’s identity, and it included the ‘steadfastness in seeking revenge’.⁴

However, the practice of ‘blood revenge’ was costly to the families involved and disruptive to their lives, with arbitration being the final option available after an extended conflict.⁵ Arabian tribes therefore developed a method to mitigate the impact of blood feuds and to encourage peace through mechanisms of compensation and institutionalised retaliation for the harm suffered by the victim.⁶ This early form of criminal justice had a tremendous impact on reducing the instances of inter-tribal violence.

The advent of Islam saw this practice—amongst many other early Arabian customs—formalised within Islamic jurisprudence as *qisas* and *diya* (or plural *diyat*). This formed one of three categories of crime, the others being *hudood*, which are offences against God prescribing mandatory punishment, and *ta'zir*, which are offences relating to public order for which punishment lies at the discretion of the judge or ruler.⁷

The Qur’an provides for *qisas* and *diya* in Surah Al-Ma'idah (5:45):

² Daniel Pascoe, ‘Is Diya a Form of Clemency?’ (2016) 34 B.U. Int'l L.J. 149, 153

³ Michael Gilson, *Lords of the Lebanese Marches: Violence and Narrative in an Arab Society* (UC Press 1996) 160

⁴ Michael Mumisa, ‘Sharia Law And The Death Penalty’ (2015) Penal Reform International <<https://cdn.penalreform.org/wp-content/uploads/2015/07/Sharia-law-and-the-death-penalty.pdf>> accessed 3 October 2016, 10

⁵ Matthew Lippman, 'Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law' (1989) 12 B.C. Int'l & Comp. L. Rev. 29, 30

⁶ Evan Gottesman, 'The Reemergence of Qisas and Diyat in Pakistan' (1991-1992) 23 Colum. Hum. Rts. L. Rev. 433, 444

⁷ Gottesman 444-445

And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed – then it is those who are the wrongdoers.

It is clear from this passage that *qisas* encompasses offences of physical assault and murder, which are subject to retaliation on the choice of the victim or surviving heirs. The word ‘*qisas*’ means ‘quality’ or ‘equivalence’⁸; therefore, the punishment that would balance the scales for murder could only be death under the traditional practice. *Qisas* also includes ‘the right of the victim or his heirs to choose between retribution, pardon, or negotiated settlement’⁹ (*diya*, or as it is more popularly known, blood money). The resolution of tribal violence through pardon or *diya* was intended to act as an offer of peace, thereby preventing an escalation of the violence into a circle of revenge, and as evidenced by Surah Al-Ma'idah, the practice of *diya* was in fact encouraged as the most desirable solution in the event of harm.

1.2 The Process of Islamisation

The initial colonisation of India saw the majority of the region’s criminal law brought under the authority of British judges, who were aided in their work by Islamic scholars known as *mawlawis*. The cases of the time were, to a minor extent, determined under the rules *shari’ah*—whether or not the parties in question were Muslim.¹⁰ However, there were a few notable exceptions. For example: ‘the right of the victim's next of kin to pardon a murderer, long established in Islamic law, was abolished in 1790...’¹¹ Towards the end of the nineteenth century, the Indian Penal Code 1860 and the Criminal Procedure Code 1898 had completely abolished Islamic criminal law.¹²

This set the stage for the provision of *shari’ah*, or lack thereof, in the post-Independence¹³ criminal law of the Pakistan. Although it is arguable that Muhammad Ali Jinnah¹⁴ subscribed to the tradition of liberal democracy, of which secularism is a fundamental aspect, his pragmatic choice of unifying the movement for an independent nation under the banner of Islam had a lasting impact on the evolution of Pakistani law—especially since he provided little clarification as to what role *shari’ah* would have following the creation of Pakistan, only that he did not envision an Islamic theocracy.¹⁵

Perhaps a secular state was never truly possible: after all, there was very little that the ethnically diverse Muslim communities of India had in common with each other besides a shared faith, and just as this

⁸ Lippman 43

⁹ Gottesman 434

¹⁰ Daniel P. Collins, 'Islamization of Pakistani Law: A Historical Perspective' (1988) 24 Stan. J. Int'l L. 511, 537-538

¹¹ *ibid*

¹² *ibid* 544

¹³ Pakistan gained independence on August 14, 1947

¹⁴ Founder of Pakistan (1876-1948)

¹⁵ Collins 547-549

faith proved foundational to Pakistan's independence, so too was it foundational to the country's subsequent fundamentalist interpretation of the injunctions of Islam. Jinnah's political expediency and ideological ambiguity came at a heavy cost. Indeed, in the decades following his death, the process of Islamisation resulted in the repeal and replacement of a substantial portion of the secular law present since before Pakistan's independence with provisions that purported to conform to the injunctions of the Qur'an and Sunna.

A significant event during this shift towards *shari'ah* occurred in 1973 with the promulgation of the current Pakistani Constitution, which included a 'repugnancy clause'¹⁶ that allowed the High Court of the time to examine and decide whether a law was repugnant to the injunctions of Islam and whether it should be changed.¹⁷ Furthermore, General Zia-ul-Haq—in his campaign of Islamisation—established the Federal Shariat Court (FSC) and replaced certain sections of the Pakistan Penal Code 1860 with *Hudood* laws, thereby restoring major elements of Islamic penal law:

Hudood punishments (singular "hadd") - i.e. those prescribed by the Qur'an and Sunnah - were reinstated for four crimes: drinking, theft, zina (any sexual act between persons not married to one another, including adultery, fornication, and rape), and qazf (false imputation of zina).¹⁸

The enactment of *Hudood* laws, accompanied by the FSC's power to void provisions repugnant to Islam, is *the* defining moment in the Islamisation of Pakistani law. The law could now be molded freely to fit the dominant Hanafi tradition. Furthermore, the FSC drew a portion of its membership from amongst fundamentalist Muslim clerics who supported Zia's rhetoric, such as Justice Taqi Usmani. Usmani, for instance, was instrumental in having the Ahmadiyya community's right to freedom of religion restricted and having them declared 'non-Muslims'.¹⁹ Zia-ul-Haq's changes were not received without opposition, however, and even the FSC attempted to curb the effect of the *Hudood* laws despite its purpose as an instrument of Islamisation. In the case of *Hazoor Baksh v Federation of Pakistan*,²⁰ the FSC declared 'invalid those sections of the *Hudood* Ordinance that authorized stoning'.

This judgment could have represented the beginning of a balanced agenda for the FSC, as well as a significant victory for a more moderate interpretation of Islamic law, had General Zia not undone it entirely. In response to the decision, he took steps to change both the rules and the membership of the Court, resulting in a reversal of the decision.²¹

The entire affair is indicative of the fact that any autonomy possessed by the Court was to be exercised in service of Zia's mission of Islamisation. In the face of a general lack of secularist opposition, he was

¹⁶ *ibid* 563

¹⁷ Section 203D, Chapter 3A of the Constitution of the Islamic Republic of Pakistan

¹⁸ Collins 569

¹⁹ Ordinance XX 1984

²⁰ [1981] PLD F.S.C. 145

²¹ Collins 574

bound to succeed. It was in the midst of this tumultuous backdrop that the law relating to unnatural deaths was redefined, drastically altering the landscape of Pakistani criminal law.

1.3 The Qisas and Diyat Ordinance

The law of *qisas* and *diya* was first promulgated in the form of an Ordinance,²² and a particular judgment of the FSC was instrumental in shaping the new law. In its 1989 decision, the Supreme Court Shariat Appellate Bench in the case of *Federation of Pakistan v. Gul Hassan Khan*²³ found that the sections of the Pakistan Penal Code (P.P.C.) 1860 and the Criminal Procedure Code (Cr.P.C.) 1898, relating to murder and deliberate hurt, were repugnant to Islam.²⁴ This marked the culmination of a number of petitions before the Federal Shariat Court²⁵ challenging the P.P.C. provisions that had applied since colonial times:

Exercising its unprecedented constitutional powers, the Shariat Bench of the apex court unanimously declared that the relevant provisions of the P.P.C. were null and void for lack of conformity with the injunctions of Islam and ordered the government to replace these with suitable provisions as per the directions of the bench.²⁶

The *Gul Hassan* judgment singled out the lack of provisions for the right of *qisas*, as well as for *diya*, and it highlighted the apparent irreconcilability of the fundamental aspects of the common law penal system inherited from the British and that of Islamic criminal law. The Court objected to the government's power to issue a pardon without consulting the aggrieved party or heirs of the deceased (referred to as *wali*) and the want of any such provision allowing the victim or her heirs to pardon the offender²⁷ (referred to as 'compounding the right of *qisas*'). Justice Taqi Usmani, a scholar of the Hanafi School, stated in his judgment, 'In Islam, the individual victim or his heirs retain from the beginning to the end entire control over the matter including the crime and the criminal.'²⁸ The inability of the victims to influence the process of justice was therefore seen as decidedly un-Islamic.

This decision, carried as it was by the tide of Islamisation, resulted in the promulgation of the Criminal Law (Second Amendment) Ordinance of 1990, which amended the relevant sections of the P.P.C., specifically ss. 299-308. It is worth noting that Justice Pir Karam Shah, who drafted the judgment in

²² A Presidential order that has the same force as an Act of Parliament but is meant to expire after 120 days (Article 89 of The Constitution of Pakistan (1973)). The Qisas and Diyat Ordinance was re-promulgated over twenty times. In 1997, the amendments to the P.P.C. and Cr.P.C. were brought onto a statutory footing under the government of Nawaz Sharif.

²³ [1989] PLD S.C. 633

²⁴ Sohail Akbar Warraich, "'Honour Killings' and the Law in Pakistan' in Lynn Welchman and Sara Hossain (eds), *'Honour': Crimes, Paradigms and Violence Against Women* (Zed Books 2005) 84

²⁵ Under section 203D, Chapter 3A of The Constitution of the Islamic Republic of Pakistan, 1973 (amended in 1980), the FSC may examine and decide whether or not a law is repugnant to the injunctions of Islam.

²⁶ Moeen H. Cheema, 'Judicial Patronage of "Honor Killings" in Pakistan: The Supreme Court's Persistent Adherence to the Doctrine of Grave and Sudden Provocation' (2008) 14 *Buff. Hum. Rts. L. Rev.* 51, 55-56

²⁷ Warriach 84

²⁸ *Federation of Pakistan v Gul Hassan Khan*

Gul Hassan, and Justice Taqi Usmani, who was instrumental to Islamisation during the Zia era, were both involved in drafting the Qisas and Diyat Ordinance.²⁹

The most drastic effect of this change was to render intentional killing under s. 302 (*qatl-i-amd*) and offences against the body (*jurooh-al-amd*) as crimes against the victims or their heirs. This can be opposed to a state-centric construction of a crime where an offence is considered to have been committed against the state, thereby making it the government's duty to pursue prosecution irrespective of the aggrieved party's wishes.

The current justice system in Pakistan is both secular and religious, with particular areas of the penal code based on Western tradition. For example, in the last decade certain aspects of the Islamic law relating to rape have been replaced by criminal law. This parallel legal system rests at the heart of the issues concerning this dissertation. For instance, while murder remains a cognisable offence under the Cr.P.C, requiring investigation and prosecution by the government,³⁰ in reality it is treated as a matter to be pursued by the victim's *wali* in accordance with Islamic law.

As we shall see later, the practical effect of this law has been in many instances to reduce the court's role to that of a mere spectator, despite it possessing considerable powers to interfere in the process of compromise between the victim's legal heirs and the culprit.

1.4 Qisas and Diyat in the Context of Honour Killing

The Qisas and Diyat Ordinance reshaped the landscape of murder, but as much as it replaced provisions that were employed in the past by killers to escape serious punishment for honour killings,³¹ it introduced a new set of laws that allowed murderers to accomplish the same end—merely by other means.

A recent case, concluded in October 2016,³² involving the killing of Kiran Bibi and Ghulam Abbas, is an archetypal example of how the *qisas* and *diya* laws operate in practice. In 2014, Faqeer Muhammad, father to Kiran Bibi, killed his daughter and her alleged lover, Ghulam, for carrying on a relationship outside of wedlock. It is not an uncommon occurrence among all but the most progressive segments of Pakistani society—especially in rural areas—for severe punishment or even death to flow from a perceived or actual infringement of the gendered moral rules prescribed to women. Any act of a woman that is believed to be 'unchaste' requires swift punishment in order to restore the honour of male

²⁹ Tahir H. Wasti, 'The Law on Honour Killing: A British Innovation in the Criminal Law of the Indian Subcontinent and its Subsequent Metamorphosis under Pakistan Penal Code' (2010) 25(2) Res. J. South Asian Studies 361, 378

³⁰ Cheema 56

³¹ The P.P.C., before it was amended by the Qisas and Diyat Ordinance in 1990, provided that those who killed while deprived of self-control due to 'grave and sudden provocation' were not guilty of murder but of the lesser offence of culpable homicide, which carried a minimal sentence—usually between one and three years (Cheema, p. 53).

³² Gabriel Samuels, 'Man Accused of Murdering Daughter Spared Jail After 'Pardoning Himself in Court' *Independent* (18 October 2016) <www.independent.co.uk/news/world/asia/pakistan-honour-killing-man-accused-of-murdering-daughter-spared-jail-after-pardoning-himself-a7367206.html> accessed 1 January 2017

members of the family. Often, but not as frequently, men too are subjected to the harsh consequences of violating these rules.

Mr. Muhammad subsequently relied on the law relating to *qisas* and *diya* in order to escape punishment under s. 302 of the P.P.C. for killing his daughter and Ghulam. The mistake should not be made of equating this with the defence of grave and sudden provocation under British law; the injunctions of Islam do not allow for the reduction of a sentence or exemption from *qisas* on the basis of provocation, no matter how serious the provoking event may be. Under Islamic law, according to Justice Taqi Usmani,³³ a person may only be exempted from *qisas* (equal retribution, amounting to a death sentence in the case of murder) where: (i) the killing is done in self-defence; and (ii) ‘where the deceased was committing an act for which the sentence under Islam was death’.³⁴

With regard to this, Justice Taqi Usmani stated³⁵ that under Islamic *Hudood* laws the commission of *zina* (sexual relations out of marriage) is punishable by death, and therefore (as is the case with Mr. Muhammad), an individual who murders his wife/daughter for committing *zina* may be exempted from a death sentence under *qisas*. He may still be liable to *ta'zir* ‘for taking the law into his own hands’, but as we shall see later, that approach has many problems of its own.

Mr. Muhammad likely based his defense on his daughter’s conduct. S.309 allows a sane *wali* (legal heir) of the victim to waive his/her right of *qisas* (which in the case of *qatl-i-amd* amounts to a death penalty; s.302(a)) – without any necessary compensation. Furthermore, s. 310 allows the right of *qisas* to be compounded in exchange for compensation (*badal-i-sulh*), except where a female person offered in marriage is the compensation in question. These sections must be read in conjunction with s. 345 of the Cr.P.C., which provides that *qatl-i-amd* may only be compounded by ‘the heirs of the victims [other than the accused or the convict if the offence has been committed by him in the name or on the pretext of *karo kari*, *siyah kari*³⁶ or similar other customs or practices]’.

Kiran Bibi was unmarried at the time of her death; therefore, Mr. Muhammad (the killer), his wife (Bushra), and their son (Waqas), were her *wali*. S. 309(2) of the P.P.C. allows the right of *qisas* to be waived by any one of multiple *wali*; a consensus of all the heirs is not necessary. Furthermore, an individual is not liable to *qisas* according to s. 306(b) if he/she is the parent or grandparent of the victim, but they may be punished with a term extending until twenty-five years (s. 302(c)). As such, while Waqas may have been his sister’s heir, he was legally barred from demanding retribution on her behalf against his father. Furthermore, s. 306(c) prevents a child from enforcing their right of *qisas* against a parent for *qatl-i-amd*, so Waqas would also have been barred on that front had he wished to demand retribution. In any event—he did not.

³³ Wasti, 377

³⁴ Warraich 87

³⁵ Wasti 377

³⁶ Alternative terms for honour killing.

Mr. Muhammad was of course similarly barred from compounding the right of *qisas* with respect to himself under s. 345 of the Cr.P.C and s. 305 of P.P.C., but Bushra possessed the right to pardon him as a legal heir of the victim. Furthermore, Ghulam's mother waived her right of *qisas*, leaving none whom wished to see Mr. Muhammad punished for the double murder. In the absence of any heir of the deceased parties willing to seek justice, Mr. Muhammad was allowed to walk free considering time already served.

It would appear from the example of this case, and many others, that it lies on the victim's *wali* in the case of *qatl-i-amd*—where the evidential requirements of *qisas* have been met³⁷—to make the final determination of what punishment the accused is to receive. This case is by no means an outlier; however, the law in this area is not nearly as straightforward as illustrated.

The impression thus far has been that the court is meant to play the role of a mere referee in these events, present only to insure that the rules are followed, but that is far from true. Where an offence has been waived or compounded or where the evidential requirements of *qisas* have not been met, the court may nevertheless acquit or award *ta'zir*—a punishment that is given at the discretion of the judge—to the offender 'having regard to the facts and circumstances of the case'.³⁸ *Ta'zir* also arises as the result of a technical requirement under s. 304(1): an offense is only liable to *qisas* if the accused makes a voluntary and true confession to the court, or the requirement of witnesses is met under Article 17 of the Qanun-e-Shahadat 1984³⁹; otherwise, 'the murderer is liable to *ta'zir* – a sentence of life imprisonment or death under 302(b)'.⁴⁰

Ironically, this means that a person accused of murder who is certain *qisas* will be waived or compounded is better off confessing to the crime than allowing the court to deliberate on his guilt or innocence. For this reason, there is normally no doubt as to the culpability of any individual whose punishment is waived. A confession is likely to have already been made.

According to Warraich, while this section grants the court considerable discretion, it has proved ineffective due to 'technicalities' or a 'lack of judicial application'.⁴¹ He does not elaborate as to why there is a lack of judicial application of *ta'zir*, but it suggests that the court is unwilling to exercise such discretion because it would interfere with the regular course of proceedings, whereby the culprit and the victim's *wali* are allowed to negotiate a settlement.

Finally, it is unclear why the court did not award a *ta'zir* punishment to Faqeer Muhammad under the principle of *fasad-fil-arz*, which provides for the punishment of an individual even in the event of waiver or compounding of *qisas*. The expression *fasad-fil-arz* (mischief on earth) is comparable to the presence of 'aggravated circumstances'. According to s. 311 of the P.P.C., it includes the offender's

³⁷ See below.

³⁸ S. 338-E of the P.P.C. 1860

³⁹ Law of evidence.

⁴⁰ Warriach 85

⁴¹ Warriach 87

past conduct, whether he has previous convictions, the brutal or shocking manner of the offence, which is outrageous to public conscience, if the offender is considered a danger to the community, or if the offence has been committed in the name or on the pretext of honour. *Fasad-fil-arz* is meant to prevent an individual from committing heinous crimes and escaping punishment through the payment of *diya*. A terrorist or spree killer could hardly be allowed for policy reasons to rely on *diya*. Similarly, if an offence has been committed in the name or pretext of honour, the court has the discretion to hand out a sentence of no less than ten years and up to fourteen years.⁴²

It is undoubtedly true that Mr. Muhammad killed his daughter and her alleged lover, but proving that he was motivated by honour is a separate matter entirely—one that the police in Pakistan are not always inclined to investigate. It is possible that the accused argued that the murder was committed for a reason other than honour, which would prevent the principle of *fasad-fil-arz* under s. 311 of the P.P.C. from applying. Furthermore, in a far more likely scenario, there was no heir willing to exercise his/her right to retribution. A major flaw in the principle of *fasad-fil-arz* is that it applies only where there is an absence of a consensus of *wali*—that is if one of several heirs disagrees with compounding of *qisas*. However, in this situation, both Bushra and Ghulam’s mother waived their right to *qisas*, and Waqas was barred from demanding retribution because the culprit was his own father. Therefore, there was no party remaining who was willing to exercise the right of *qisas*.

It will be obvious to the reader at this point that to a considerable extent, Pakistani penal law regards deliberate harm, even to the extent of killing, as a private matter between the perpetrator and the injured. In the absence of anyone willing to exercise their right of *qisas*, killers are often allowed to walk free. However, depending on the evidence available in the case, a *ta'zir* sentence may still be imposed on the killer at the discretion of the judge. Furthermore, killing in the ‘name or on pretext of honour’ will attract the principle of *fasad-fil-arz*, thereby mandating a minimum sentence for the accused by the court, so long as at least one of the victim’s *wali* wishes to exercise their right to *qisas*. And yet, despite these apparent safeguards, the issue of waiver and compoundability in reference to honour crimes is still relevant in Pakistan today.

This may be because an analysis of the letter of the law does little to reveal how this law operates in practice. Institutionalised police bias, misogynistic and traditional attitudes towards the place of women, and the practical application of the law leave unpunished the real harm suffered by real people—a matter which does not lend itself well to abstraction and the extensive discussion of technicalities. While on the surface it seems apparent that honour killings are condemned and are legally punishable, the reality of the law in this area paints a bleak picture. The next chapter of this dissertation will detail many of the issues plaguing the current law and it will expand upon the issues mentioned above.

⁴² A change introduced to s. 311 of P.P.C. by the Criminal Law (Amendment) Act, 2004 (I of 2005), s. 8(iv). The more recent Criminal Law (Amendment) (Offences in the name or pretext of Honour) Act 2016 has extended the sentence to one of life.

Chapter 2

A Law Fraught with Problems

This chapter will explore the reasons why the provision of *qisas* and *diya* laws is not justifiable. This will be done by identifying the key shortcomings of the law, especially as regards the uncertainty and contradiction apparent in many conflicting decisions of the Supreme Court. Furthermore, this chapter will demonstrate how the court's approach to honour killings has failed to adequately distinguish the *qisas* and *diya* laws from the 'un-Islamic' defense of grave and sudden provocation under Pakistan's pre-1990 penal codes.

This chapter will also discuss whether *qisas* and *diya* laws have relevance in a modern criminal justice system, and whether reliance upon them in cases of honour killing runs contrary to the principles of Islam. In other words, does Islam recognise the right of an individual (or his tribe) to kill in the name of honour?

2.1 The Meaning of 'Honour'

'Honour' is an element of the human condition that evades exact definition, particularly one that could be used in legal proceedings to consistently and accurately determine whether or not a crime was committed 'in the name or on the pretext of honour'. The P.P.C. and Cr.P.C. are silent on what the term 'honour' encompasses, despite the fact that any law that relies upon a specific criterion to limit the application of a broad rule ought to—at the very least—define the core element of the law that is employed to set the limits.

Good law is often that which strikes a desirable balance between certainty and flexibility. A law that is too precisely defined will invariably lead to absurd and unjust results, just a law that languishes in ambiguity will be subject to exploitation by those who wish to use its uncertainty to their benefit. Due to the convoluted nature of both the sections dealing with *qisas* and *diya* in the P.P.C. as well as the evidential law associated with these provisions, it is arguable that any law allowing the compounding of an offense is open to exploitation, whether or not crimes committed in the name of honour are excluded by instituting mandatory sentencing.

For instance, while the incorporation of honour crimes under the umbrella of *fasad-fil-arz* (s. 311) by the 2004 amendment to the P.P.C. is a step toward preventing the perpetrators of honour crimes from escaping punishment, the lack of clarification as to what constitutes honour killing is a source of considerable criticism. However, there is little reason why lawmakers should find it difficult to provide at least a rudimentary definition of the phrase 'in the name or pretext of honour'. A reasonable guide as to what constitutes an honour killing may begin by considering whether or not there is a causal relationship between the killing itself and an alleged instance of adultery or behaviour that may be considered unchaste, or contrary to prevalent morals (a 'but for' test of causation). After all, most honour killings are committed as a result of such an accusation against a woman.⁴³

⁴³ Stephanie Palo, 'A Charade of Change: Qisas and Diyat Ordinance Allows Honor Killings to go Unpunished in Pakistan' (2008) 15 U. C. Davis J. Int'l L. & Pol'y 93, 98

Furthermore, the ambiguity of the word ‘honour’ is problematic because it exists in conjunction with the free reign of judicial discretion. A recent law reform known as the Criminal Law (Amendment) (Offences in the name or pretext of Honour) Act 2016 was passed on October 6, 2016. The effect of this law is to impose a mandatory life sentence on anyone who commits a murder in the name or pretext of honour, but this development in the law, as much as the 2004 amendment introduced by President Pervez Musharraf, provides no guidelines as to the meaning of ‘honour’. In fact, the law merely directs the court to refer to s. 311 (*fasad-fil-arz*) where the offence has been committed in the name or pretext honour.

However, it is still up to the judge to determine whether or not a crime has been committed in the name of honour, and therefore whether the principle of *fasad-fil-arz* under s. 311 will apply in a particular instance, thereby barring the waiver of *qisas*. If the culprit is able to establish that a killing—for instance that of his daughter—was not motivated by honour, then not only will he avoid s. 311, but he will also not be liable to *qisas* (due to his familial relationship to the victim’s *wali* (s. 306). As a result, he will be held liable under s. 302(c), which leaves sentencing to the court’s discretion and requires no minimum sentence. In the case of *Abdul Haque v The State*⁴⁴, a man was sentenced to time already served (approximately two years).

It should be clear how, due to the absence of a definitive guide as to what qualifies as an ‘honour killing’, murderers are frequently able to evade mandatory sentences for such crimes. They can do so by arguing that the killing was committed for a motive other than honour, and as a result of judicial bias and the ambiguity of the law, they often succeed. Furthermore, the conflicting case law on the topic has done little to reveal how judges are likely to exercise this broad discretion available to them. As one prominent lawmaker explained, the death penalty and strict sentencing has always been available for individuals guilty of honour crimes (under *fasad-fil-arz*, for example), but ‘the problem was never just the sentence, but the absence of actual convictions.’⁴⁵

While this is not strictly a flaw in the law of *qisas* and *diya* itself, but one in the system, the amendments referred to above were intended to curb the practice of *diya* that had so far been given free reign. However, the introduction of mandatory sentencing has failed to a certain extent. It is applied primarily in cases that attract significant public notice, such as the recent murders of Qandeel Baloch and Zeenat Rafiq (concerning a mother who burned her daughter to death for eloping), but hundreds of such killings occur annually in rural areas, where there is a more lenient outlook towards honour crimes from both the police and the judiciary.

This aspect of the *qisas* and *diya* laws has been the subject of enduring criticism, and yet every amendment to date has failed to address this fundamental ambiguity in the definition of honour and the freedom of the courts to make such a determination. The coexistence of uncertainty and judicial

⁴⁴ *Abdul Haque v. The State* [1996] PLD SC 1

⁴⁵ Mazna Hussain, “‘Take My Riches, Give Me Justice’: A Contextual Analysis of Pakistan’s Honor Crimes Legislation” (2006) 29 Harv. J.L. & Gender 223, 240

discretion will always be in direct conflict to the interests of justice, because not only will the law lack certainty, but judges will be tempted to inject their personal biases into its application.

2.2 The Confused Nature of the Law

As stated in section 1.4 of the previous chapter, the opinion of the courts has been that under Islamic law a person may only be exempted from *qisas* where: (i) the killing is done in self-defence; and (ii) ‘where the deceased was committing an act for which the sentence under Islam was death’.⁴⁶ According to Justice Taqi Usmani in *Gul Hassan*, this is because ‘under the philosophy of Islam taking life of someone who is *masoom-ud-dam* (whose blood is protected by law), is a very grave offence and entails the punishment of *qisas*’⁴⁷. *Masoom-ud-dam* is therefore a ‘protected’ category of person⁴⁸, the murder of whom is not permitted in Islam.⁴⁹ A victim is clearly disqualified as *masoom ud dam* if she committed an act punishable by death prior to her murder, but what about those victims guilty of a lesser wrong, not liable to a death sentence? Does *masoom ud dam* only refer to those who are wholly innocent?

The court in *The State v Muhammad Hanif*⁵⁰ was of the opinion that *masoom ud dam* referred only to those who have not committed any sort of offense, and not those who could possibly be prosecuted as a result of their actions (such as for battery or trespass). The disproportionate effect of this judgment is apparent in the fact that it gives defendants significantly greater room to argue that an individual was not *masoom ud dam* based on their conduct prior to death, resulting in a mitigation of punishment for the accused by means of waiver.⁵¹ Once again, the court’s reluctance to provide clarity in this area is a wasted opportunity to limit the application of waiver and compounding. In essence, under the current law the sentence for *qatl* will be determined by the culpability of the victim as well as the culprit’s motives.

Motive is certainly relevant in certain areas of criminal law, such as hate crimes, self-defense, and grave and sudden provocation, but the consideration of motive has the same drawbacks as considering a victim’s conduct. As one writer put it:

[The] neutrality objection operates on the premise that because ours is a society of different political opinions and moral viewpoints, governmental preference for one opinion or viewpoint over another should be minimized. Allowing motives to play a role in criminal punishment is necessarily predicated on assessing the moral worth of an actor’s decision to engage in criminal conduct based on a particular motive.⁵²

⁴⁶ Warraich 87

⁴⁷ Wasti 377

⁴⁸ One whose blood is sacred.

⁴⁹ Warraich 87

⁵⁰ [1992] SCMR 2047

⁵¹ Warraich 89

⁵² Carissa Byrne Hessick, ‘Motive’s Role In Criminal Punishment’ (2006) 80 S. Cal. L. Rev. 89, 91

This begs the question, is it appropriate for the court to deliberate as to how deserving a victim was of death? To an extent, the law relating to *qisas* and *diya* requires the court to consider such factors. Does this not, indirectly, provide legitimacy to the actions of killers when a court—for instance—determines that a man’s conduct in killing his wife after finding her in a compromising situation is grounds for allowing *diya* or a reduced sentence? It requires officials to make moral judgments and to express their preference for certain kinds of conduct over others. This inevitably feeds into the cultural and social attitudes that have so far prevented any effective reform in this area.

Furthermore, despite Justice Taqi Usmani’s insistence in *Gul Hassan* that provocation has no relevance in Islamic penal law, the decisions of the court so far indicate that while there is no *de jure* recognition of grave and sudden provocation with respect to offenses liable to *qisas*, the principle remains alive in practice as regards punishments by *ta’zir*. Provocation is considered a mitigating factor in the justification of honour killings, opening the door to compensation in the form of *diya*,⁵³ and indeed at one point the Supreme Court determined on appeal⁵⁴ that even abusive language will qualify as mitigating circumstances in awarding a sentence under *ta’zir*.⁵⁵

The consideration of grave and sudden provocation as a mitigating circumstance is a significant shortcoming of the law; after all, the vast majority of honour killings occur in circumstances where there has been a perceived violation of a man’s personal honour, which ‘provokes’ a violent response, and this response is often against a family member. Due to the close familial connection between victim and wrongdoer, these cases are technically exempted from *qisas* and fall to *ta’zir*. The consideration of mitigating circumstances inevitably leads to significantly reduced sentences where the murder of women is concerned, since most women are killed in situations where mitigating circumstances in the form of a provoking event are present.

This is relevant to *qisas* and *diya* because proponents of the law argue that *ta’zir* is an effective tool in countering injustices arising from *diya*, but it has been demonstrated that the application of *ta’zir* in this regard is highly inconsistent and, as will be discussed later, prejudiced against women. Furthermore, *ta’zir* ordinarily applies in circumstances where the culprit is not liable to a sentence under *qisas* (and therefore compounding of the offence), although the state may impose a sentence whether or not *diya* has been accepted. Even so, *ta’zir* has proved to be less than effective at mitigating the effect of *qisas* and *diya* laws.

In this respect, it is arguable that the courts are paying mere lip service to Islamic doctrine, while in fact the reasoning that they are applying in cases is hardly distinguishable from the pre-1990s law of grave and sudden provocation. Furthermore, very little effort has been made to temper the drastic effect this has had on sentencing, such that many killers are able to walk free with time served. Given that *ta’zir* holds the potential to effectively combat the ability of killers to walk free after committing a murder,

⁵³ Knudsen A, ‘License to Kill: Honour Killings in Pakistan’ (2004) CMI Working Paper No. 1 <www.cmi.no/publications/file/1737-license-to-kill-honour-killings-in-pakistan.pdf>

⁵⁴ *Abdul Haque v The State* [1996] PLD SC 1

⁵⁵ Wasti, 389

the courts ought to take a more progressive and neutral stance. Apart from a few rare cases, lower courts in Pakistan have demonstrated little intention to change the manner in which they have so far approached the problem.

2.3 What contemporary role does *diya* play?

Diya is money paid to a victim's family as compensation for a murder and it has the effect of providing relief from legal retaliation proportionate to the crime in the form of *qisas*. Islamic scripture has shown a clear preference toward victims or their heirs accepting *diya* and waving their right of *qisas* rather than demanding retribution, though it *is* their right to do so.

The Qur'an (5:45) says that 'whoever gives [up his right as] charity, it is an expiation for him'. Furthermore, the Qur'an (3:134) states those individuals are successful 'who restrain anger and who pardon the people - and Allah loves the doers of good'. Surah As-Shura (42:20) reinforces this by saying that 'the repayment of a bad action is one equivalent to it. But if someone pardons and puts things right, his reward is with Allah'.

These injunctions indicate that forgiveness is an act of charity—that while violence may legally be repaid with violence, it is preferred if one gives up their right to retribution. In fact, there is even a spiritual component to accepting *diya*, in that a person's 'reward is with Allah' and that the final punishment lies with Him. These passages reflect the pre-Islamic roots of *diya* as an attempt to mitigate the impact of blood feuds—an exercise of restraint, as it were—but what relevance does *diya* have in a modern justice system, where law enforcement and the punishment of criminals is an obligatory duty of the state and occurs in a highly organised manner?

It is undoubtedly true that *badal*, the concept of revenge that is central to Pushtun way of life, thrives within the tribes that dominate rural Pakistan, but these tribes place little stock in state-based legal methods of compensation and retaliation. Cases rarely find their way to the courts. Rather, they are usually settled by tribal *jirgas*, a council of elders who hear issues troubling the community and make decisions accordingly to settle the matter. These *jirgas* are rarely inclined to break from tradition; unfortunately, this means that individuals can often commit murders with impunity and evade punishment by paying blood money to the victim's heirs. Furthermore, *jirgas* are formed entirely of men, with no representation given to women.

The verses of the Qur'an and the origin of *diya* indicate that it was never intended to be a method whereby the guilty could escape punishment, and yet that is what it has become to a substantial degree by accommodating the tribal practice of honour killing. Furthermore, while Pakistani law does account for the culprit's wealth when calculating the value of *diya* to be paid, it is far more likely that wealthier parties will find it far easier to compromise with the victim's *wali* than someone who is poor. Under classical law, however, *diya* could be satisfied by means of a long fast and payment of alms.⁵⁶ As such,

⁵⁶ Gottesman (n 5) 448

the contemporary role of *diya* in the criminal justice system of Pakistan bears only a tenuous relationship to the part it played in classical Islamic jurisprudence.

Alternatively, it is arguable that *diya* is a form of clemency. ‘In death penalty jurisdictions, once a defendant is sentenced to death, his or her last remaining procedural outlet is a grant of clemency or pardon from the executive.’⁵⁷ Pascoe distinguishes clemency in Western jurisdictions, which converts a sentence of death to one of imprisonment, from *diya* under Islamic law, which can result in a sentence being waived entirely (unless the state imposes a *ta’zir* sentence). Furthermore, *diya* is different from clemency in that it is up to private individuals to make the decision rather than the state. In Pakistan, through the exercise of s. 309 and s. 310 of the P.P.C., the victim’s *wali* may compromise with the killer even at the last moments prior to execution.⁵⁸ In this regard, Pascoe notes that some commentators have compared *diya* to a wrongful death settlement in tort.

Nevertheless, whether or not *diya* is meritable for its use as a preventive measure against capital punishment, which is certainly a laudable goal from a human rights perspective, the scope of its application renders it an instrument to be employed by those whose intentions are not deserving of praise.

⁵⁷ Pascoe (n 1) 162

⁵⁸ *ibid* 159

Chapter 3 The Disproportionate Effect on Women

Perhaps the greatest objection to the provision of *qisas* and *diya* laws stems from the disproportionate impact it has had on the lives and freedom of women in Pakistan. The lenient and conservative approach that has thus far been reflected in the decisions of Pakistani courts is inextricably tied to the question of women's rights. This chapter will address the cultural and social attitudes in Pakistan that view honour killings as appropriate and justified, and it will link these attitudes to the fact that as long as *diya* is available in some form or another, legislative reforms that merely go 'half way' are an insufficient cure to the problem. Furthermore, it will explore the informal tribal systems of justice present in rural areas of Pakistan that have played a crucial role in shaping the response of communities towards honour crimes and violence against women in general.

Finally, this chapter will explore the institutional bias of the courts towards a more lenient interpretation of the law with respect to honour killings by highlighting a number of cases where the courts have deliberately chosen not to limit the ambit of the law.

3.1 The Value of a Woman

In the life of most Pakistani women, there is an acknowledged and reinforced possibility of suffering bodily harm, or even death, if they violate the exacting rules of morality and honour prescribed by their culture. The preservation of honour (*ghairat*, *izzat*, or *nang*) is tantamount to man's standing in his community, and within this gendered structure, a man's reputation is balanced on the knife-edge of a woman's chastity. 'Rather than possessing honour herself, a woman is a symbolic vessel of male honor, therefore all of her actions are considered to reflect upon her male family members.'⁵⁹ The honour of a family or clan, therefore, is as much an indication of its worth as the land or wealth it possesses.

If this honour is ever brought into question, it can only be restored by punishing the transgressor. Failure to do so almost invariably results in a loss of face and social ridicule, which is central to the male identity in tribal societies. In fact, the honour of any single individual is inextricably connected to the honour of his family or clan. Therefore, as far as matters of honour are concerned, we must cease to think in terms of an individual's honour being violated. The close-knit ties of kinship that hold the tribal structures together ensure that if there is a response to a loss of honour, it is by the collective. As such, if daughter's unchaste conduct damages her father's honour, the entire clan is likely to close ranks against her, which is precisely what makes these crimes so difficult to investigate and prosecute.

A woman's existence in this patriarchal society is therefore characterised by the need to navigate the pitfalls of chastity and maintain a minimal social footprint so as not to tread on the honour of a superior, male member of her clan. Women are constantly followed by a reminder of their status by the practice of *purdah* (literally, curtain), which is embodied by concealment of the female form through the use of the *hijab* or *burqa* and physical segregation from men in order to maintain their dignity. Women in the

⁵⁹ Mazna Hussain, "'Take My Riches, Give Me Justice': A Contextual Analysis of Pakistan's Honor Crimes Legislation" (2006) 29 Harv. J.L. & Gender 223, 227

vast majority of rural areas are required to cover almost every inch of their bodies (including the eyes among the more conservative segments of Pakistani society), and it is even forbidden for a woman's name to be spoken in the presence of someone who is not part of her extended family.

In an address to an Amnesty International delegation, Hina Jilani, a Pakistani human rights activist and lawyer, highlighted some of the central issues of seeking justice for honour killings:

The law really facilitates such killings. Killings are private offences, against the individual, not the state, so who will bring and pursue the charges of murder? ... [T]he family of the girl will not pursue the case, as in their eyes no wrong has been done ... The prosecution case collapses on almost all the scenarios of an honour killing: In karo-kari cases there is no aggrieved party to pursue the case, society as a whole approves of the killing and usually there are no prosecution witnesses as nobody testifies against a family member. Since the killing takes place in a family context, forgiveness, voluntary or otherwise, is almost inevitable.⁶⁰

While this statement tackles many issues, it also indicates how *purdah* affects justice for honour killings. Due to the extreme seclusion to which women in these tribal societies are subjected, the affairs that concern them are taboo to anyone who is not part of the immediate family. As such, despite the disproportionate amount of violence against women, the 'Pakistani law enforcement and legal system often consider these human rights violations a private, family matter'.⁶¹ In its 2007 World Report, the Human Rights Watch stated:

Survivors of violence encounter unresponsiveness and hostility at each level of the criminal justice system, from police who fail to register or investigate cases of gender-based violence to judges with little training or commitment to women's equal rights.

Furthermore, 1235 of the 1339 individuals who were accused of killing the name of honour from 1998 to 2002 were the victim's family members.⁶² It is precisely because these offences occur in a family context that compromise between the killer and the *wali* is so easy to achieve, especially when the cases drag on for years in court.

Unfortunately, international demands for greater rights of women are usually stonewalled by arguments of cultural relativism. This holds that the current model of human rights is merely a reflection of Western values; by extension, the 'human rights' of women are also modeled after the concern of women in the West, with little parallel to the needs of women in other parts of the world, particularly in countries with entrenched religious and cultural preconceptions as to the status of women.

⁶⁰ Amnesty International, 'Pakistan: Honor Killing of Girls and Women' (Report) (September 1999) AI Index: ASA 33/18/99, at 50 <<http://www.amnesty.org/en/library/asset/ASA33/018/1999/en/9fe83c27-e0f1-11dd-be39-2d4003be4450/asa330181999en.pdf>>

⁶¹ Palo (n 41) 95

⁶² *ibid* 98

3.2 Police and Judicial Bias

The *State v Abdul Waheed*⁶³ is a rare instance in which the courts took a progressive stance by setting a high evidential bar on any party accused of *qatl-i-amd* ‘attempting to benefit from exceptions or special provisos’⁶⁴ (in other words, anyone relying on *diya*). The court ruled that in the case of an accused killing another based on an alleged commission of *zina*, the onus is on the individual seeking waiver to produce four male Muslim eyewitnesses to the illicit sexual act, which was also the impossibly high evidential requirement to prove *zina* under the *Hudood* laws prior to 2007.

This may be interpreted as an attempt by the court to limit the impact of a victim’s conduct prior to her death on the sentence given to her killer, especially when a tenuous accusation of unchaste conduct is leveled against the deceased as a justification for the killing. This could have proved an effective tool against those acting in pursuit of their honour, had it actually been enforced in later cases. Unfortunately, in *The State v Muhammad Hanif*,⁶⁵ not three months later, the Supreme Court overruled *Abdul Waheed* as regards the burden of proof on the accused, and they narrowed the definition of *masoom ud dam* to those wholly innocent of any offence.

Abdul Waheed is not an isolated case. There have been occasions when the court has attempted to curb the tide of honour killings; even when the decisions are not overruled on appeal, they are generally ignored. This lack of follow-through is one of the reasons that the status quo as regards honour killings has survived as long as it has, despite considerable opposition in many levels of Pakistani society.

Furthermore, the court has gone as far as to equate the killing of an individual who engages in illicit sexual conduct with a female family member of the murderer with an act of self-defense. The Lahore High Court stated in one case, referring to Surah Al-Nisa (4:34):⁶⁶

A husband, father and the brothers are supposed to guard the life and the honour of the females who are inmates of the house and when anyone of them finds a trespasser, committing *zina* with a woman of his family, then murder by him whilst deprived of self control will not amount to ‘*qatl-e-amd*’ liable to *qisas* because the deceased in such a case is not a *Masoom ud Dam*.⁶⁷

Unfortunately, this interpretation of Islamic injunctions is easily abused. Despite the fact that an adult woman is allowed to contract her own marriage without the permission of her guardian, accusations of *zina* are frequently employed against women who exercise such rights. Amnesty International stated in a report that ‘police continue to register complaints of abduction and *zina* against women making use of this right, though police could easily ascertain if couples were validly married and thus not guilty of either abduction or *zina*.’⁶⁸

⁶³ *The State v Abdul Waheed, alias Waheed and another* [1992] PCrLJ 1596 145

⁶⁴ Warraich 89

⁶⁵ *ibid* 47

⁶⁶ *ibid* 92

⁶⁷ *Muhammad Faisal v. The State* [1997] MLD 2527 [5], p 2528

⁶⁸ Amnesty International, ‘Pakistan: Honor Killing of Girls and Women’, at 52

Similarly, in *Ghulam Yaseen vs. The State*⁶⁹ the Lahore High Court had the opportunity to address the question of whether murders committed in the name of *ghairat* or honour ‘deserve any concession’.⁷⁰ Based on a number of *hadith* (words, actions, or habits of the Prophet), the Lahore High Court determined that while the P.P.C. 1860 does not make ‘any allowance for *Qatl* committed under *Ghairat*’, it is clear that Islamic law does not see such a killing as equal to ordinary *qatl-e-amd* (intentional/deliberate murder). The court concluded that an individual who kills because of *Ghairat* deserves concession, and a mere five-year sentence was given to the individual for murdering a man and injuring his sister. In justifying its reasoning, the court referred to its duty under s. 338-F of the P.P.C. to interpret and apply the law according to the injunctions of Islam as laid out in the Holy Qur’an and Sunnah. This judgment is not an isolated case; *Ghulam Yaseen* has been relied open in many other cases to limit sentences on appeal.⁷¹

These cases, among many others, give honour killings an aura of religious orthodoxy, while disregarding the fact that Islam instituted rights for women that had been historically deprived of them (such as the right of divorce, inheritance and legal personality). Relativist arguments notwithstanding, Pakistan is a signatory of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which requires that ‘States Parties condemn discrimination against women in all its forms’. The UN Declaration on the Elimination of Violence against Women affirms that states must exercise due diligence to prevent, investigate and punish acts of violence against women, whether those acts are perpetrated by the State or by private persons (Article 4(c)).

Official responses to the issues concerning women indicate deep-seated institutional bias and a resistance towards seeing honour killings for what they truly are—acts of murder that are as deserving of the strictest punishment as any other offence which deprives a person of life.

⁶⁹ [1994] Lahore 392

⁷⁰ Warraich, 90

⁷¹ Warraich, 91

Conclusion and Recommendations

Human rights organisations have applauded the 2016 reform of the honour killing law, despite the fact that it has ignored some of the central obstacles to justice. Furthermore, there is very little to prevent *qisas* and *diya* from finding its way back into the realm of honour killing much in the same way as it did in the case of *Federation of Pakistan v Gul Hassan Khan*. The Federal Shariat Court still has the power to declare law any repugnant to the injunctions of Islam. It is true that the political situation today is significantly different from what it was in 1980s, but statistics of honour killings have demonstrated that there has been little change in the frequency of deaths during the intervening years. On its own, the cultural attitudes towards the place of women will keep the practice alive, and it is inevitable that a test case will find its way before the FSC that will determine whether the new law can truly stand up in court.

Furthermore, the legislative reform was in response to substantial foreign and domestic criticism in a time fraught with allegations of corruption and attempts by minority parties to depose the government. As recently as May 2016, the Council of Islamic Ideology presented a number of recommendations to the government. It condemned honour killings but simultaneously argued that a man had the right to beat his wife if she refused sexual intercourse. This juxtaposition of conflicting ideas indicates the confused nature of the rights of women and the underlining attitudes towards the place of a woman within a home. It also indicates that progress made in the realm of women's rights is suspect as mere political appeasement, with no follow-through whatsoever to establish the law on a firm footing.

Therefore, given that legislative reform alone cannot cure the problem and that state officials have demonstrated a blatant unwillingness to exercise their powers in an impartial manner, the very first step, and in fact the smallest of steps required in the long road to women's equality, is the repeal of *qisas* and *diya* laws. The competency to determine a punishment must lie with the court, and the court alone, but so far even the courts have failed to properly exercise their considerable discretion.

This is due to the core elements of bias present in Pakistan's society, law enforcement and judiciary, which come together to create an environment in which such crimes go unpunished or are not given the consideration that they are due. Therefore, the state must institute educational reforms on all levels to cure the defect of institutional bias. Furthermore, there must be thorough oversight of and mandatory sensitivity training for both the police investigating honour crimes and the judges adjudicating over them so as to inform them of the specific harm to which women are subjected and how to deal with it appropriately. This is essential particularly in regions far from urban centers where media scrutiny and government oversight is all but nonexistent, and where victims are for the most part unaware of their rights.

Furthermore, the unofficial justice dispensed by *jirgas* must be sanctioned, seeing as how they base their legitimacy on draconian cultural practices that are inherently biased against women and not on any state-based legal authority. *Jirgas* are frequently responsible for condemning young women to

death, and the recognition given to them by regional authorities runs contrary to the limited rights women possess under the law.

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