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**GENDER-BASED VIOLENCE:
THE IMPACT OF *QISAS* & *DIYAT* IN CRIMINAL LAW
& RECOMMENDATIONS FOR ENHANCING JUSTICE**

POSITION PAPER



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Introduction

Qisas and *diyat*¹ law pertains to Chapter XVI “*Offences Affecting the Human Body*” of the Pakistan Penal Code (PPC) 1860. The *qisas* and *diyat* law came on the statute books in a compulsory manner rather than through routine legislative procedures.

The Supreme Court (Shari’at appellate bench), in 1989, declared² several provisions of the then existing substantive and procedural law repugnant to the injunctions of Islam and therefore ruled that modifications were required³. The effect of these legal amendments was to privatize the criminal justice system, essentially transforming the specified serious offences from being offences against the State to becoming private matters, or offences against an individual. This transformation has allowed for an enabling environment in the contest between parties with unequal bargaining power, financial and social, by creating a blatantly discriminatory legal system encouraging impunity. The revised laws have particular implications for gender-based violence, in particular, so-called ‘honour killings’.

The relevant provisions declared repugnant to the Injunctions of Islam, expounded in the *Gul Hassan Case*⁴, were those relating to murder and different forms of hurt in the PPC. The reasons for this declaration were that the law did not provide for Islamic punishments for murder and hurt, as expounded in the *Quran* and *sunnah*, and lacked provisions for compromise and pardoning of the offender by heirs of the victim (See Annex 1 for matters covered in *qisas* and *diyat* law).

The Supreme Court ordered the law to be amended. Accordingly, Section 302 of the PPC describing punishment for murder was amended to include⁵:

- Punishment for murder as mentioned in the *Quran*;
- Provision for the heirs of the deceased to effect compromise on receiving compensation, or pardon without receiving any compensation;
- In case of compromise or pardon by the heirs of the deceased the court was to have jurisdiction to punish the offender under *tazir*;
- Law to include the four necessary *Ahkamat* (orders), of *qisas*, compromise, pardon and *tazir*.

This Position Paper reviews the negative impact the introduction of the *qisas* and *diyat* law has had on the prosecution of crimes against women, in particular, those committed with reference to the so-called notion of ‘honour’ in Section 1. Section 2 summarises why the Criminal law (Amendment) Act 2004, Act 1 of 2005, intended to overcome legal lacunae with respect to so-called ‘honour’ crimes, failed to have the desired impact. Section 3 briefly outlines the key issues arising in the application of the *qisas* and *diyat* law in court cases; Section 4 looks at the possible ways forward as indicated by superior courts. **The paper concludes with a set of recommendations** relating to High Court rules and specific changes required in the relevant sections of the Pakistan Penal Code and the Criminal Procedure Code.

To facilitate the reader, a series of Annexes provide key information:

- Annex 1 gives a list of definitions of key words;
- Annex 2 lists the matters covered by *qisas* and *diyat* law;
- Annex 3 enumerates key aspects of the Criminal law (Amendment) Act 2004, Act 1 of 2005;
- Annex 4 is the text of the Anti-Honour Killings Bill 2014, recently passed by the Senate.

1. See Annex 1 for definitions of the terms relied on in this paper

2. *Federation of Pakistan v Gul Hassan* (PLD 1989 SC 633).

3. Under Article 203D(3) of the Constitution of Pakistan, it is binding on the President to take steps to amend the law.

4. *Supra*

5. *Supra*, p.667 of Gul Hassan case.

1. The impact on so-called 'honour' crimes including murder

The prosecution of so-called 'honour crimes', especially murder committed in the name of 'honour', was most negatively affected by the introduction of the *qisas* and *diyat* law. Previously, such murders escaped stricter sentences on account of the defense of 'grave and sudden provocation', which was one of the exceptions to culpable homicide amounting to murder before the law was amended. While the sentences were lenient, the offenders could not go scot-free.

The label 'honour crimes' refers to acts of violence, usually murder, committed by male family members against female family members, whom the male relatives claim have brought dishonour upon the family. In Pakistan, while such crimes are often said to be related to rural customs, in reality, the practice cuts across the rural-urban divide and is present throughout the country. In the first half of 2014, there were at least 5,401 cases of violence against women reported; of which 267 were supposedly 'honour crimes'⁶. These figures are likely to be gross under-estimates as the non-reporting of such incidents continues to be a major concern.

Usually, one or more family members are the offenders in such crimes. Under the *qisas* and *diyat* law, this gives rise to the peculiar situation whereby the legal heirs of the victim are most often the offenders, while other legal heirs are empowered to forgive one or more of the other heirs.

The prosecution of so-called honour killings cases has suffered due to the following:

i. The defense of "grave and sudden provocation" continued to be applied despite having been deleted from law:

In the *Gul Hasan Case*, the court held, "according to the injunctions of Islam, provocation, no matter how grave and sudden it is, does not lessen the intensity of crime of murder."⁷ It therefore ruled that this clause be struck from the books as a defense.

Unfortunately, while the 'grave and sudden provocation' defense was removed from the text of the law, it was reintroduced through court judgments. It was not until the year 2000, that the judicial trend on the plea of grave and sudden provocation started to reverse, following a Supreme Court judgment⁸, which held:

*"by and large all cases of grave and sudden provocation would not ipso facto fall under section 302 (c) PPC particularly those of wife, sister and other female relatives on the allegation of siyakari [in Balochistan and Southern Punjab extramarital sex is termed siyakari]"*⁹.

ii. Pardoning the offender and compromise in cases of murder and offences of bodily harm:

Since the coming into force of the *qisas* and *diyat* law, all forms of murder and bodily harm became primarily offences against the person, and not against the State. Hence, the authority to prosecute or forgive rests primarily with the heirs of the deceased or the victim. If the victim or the victim's heirs pardon the offender, the State (read the court) has very limited authority under specific circumstances to render any punishment.

The law provides the right to the *walis* (heirs) to waive or compound their right of *qisas*. Any adult sane *wali* of the deceased may at any time waive his/her right of *qisas* without any compensation or compound *qisas* on accepting *badl-i-sulh* (mutually agreed upon compensation)¹⁰. Once any

6. *Statistics on Violence Against Women*, Aurat Foundation, 2014.

7. *Supra*, p.674 of *Gul Hasan Case*.

8. *Abdul Zaheer v The State* 2000 SCMR 406

9. *Id.*

10. Sections 309 & 310 PPC. This right can be exercised till the execution of sentence (section 381 CrPC).

wali waives or compounds his/her right of *qisas*, the *qisas* punishment is suspended and cannot be enforced.¹¹ The court, however, retains the discretion to punish the offender under *tazir* when either: (1) all the *walis* have not waived or compounded their right of *qisas*, or (2) if the principle of *fasad fil arz*¹² (causing chaos on earth) is attracted¹³.

Note:

*Waiver or compounding of the right of qisas does not mean that the offence is compounded. All the offences of murder and bodily hurt can be compounded under section 338-E (1) with the prior permission of the court*¹⁴.

iii. Frequently, the perpetrators of such crimes are relatives of the victim and being relatives, obtain virtual 'impunity' under the new law:¹⁵

Under the law, intentional murder is not liable to *qisas* punishment, as per s.306 PPC, when:

- The offender is a minor¹⁶ or insane,
- The offender causes death of his/her child, grandchild, how low so ever¹⁷,
- Any *wali* (legal heir) of the victim is a direct descendent of the offender, no matter how low so ever.

Qisas also cannot be enforced, according to s. 307 PPC, when:

- The offender dies before the enforcement of *qisas*;
- Any *wali* voluntarily and without duress, to the satisfaction of the court, waives the right of *qisas*¹⁸ or compounds *qisas*¹⁹;
- The right of *qisas* devolves on the offender as a result of the death of the *wali* of the victim, or on the person who has no right of *qisas* against the offender.

The net result is virtual impunity for offenders who are immediate relatives of the victim. In the case of so-called 'honour crimes' it is usually male relatives who murder their female relatives. In the case of a husband who kills his wife, or father who kills his daughter, they are likely to be 'forgiven' by the other heirs. Where the offender is the father of a murdered woman's children, he benefits from the exemption of *qisas* under the above-mentioned provision of "any *wali* (legal heir) of the victim is a direct descendent of the offender, no matter how low so ever".

iv. Court rulings on the basis of notions with no legal basis:

The courts have accepted new defenses for killing on the grounds of 'morality control' and the plea of men being *qawam* (managers in charge). The notion of *qawam* extended a very different kind of right of self-defense, which included 'killing' especially of a female relative because of her alleged sexual promiscuity.²⁰

Similarly, under the influence of the previous *Zina* Ordinance, the accusation of immorality and sexual promiscuity has been used excessively to provide justification for such killings. A mere statement on the part of the accused was enough to justify his brutal act of murder.²¹

11. See, Section 307(b) PPC.

12. Essentially this section applies to the Court's discretion in punishing offenders in matters of public interest.

13. See, Section 311 PPC.

14. Permission under section 345(2) CrPC.

15. Section 306 (b) and (c) PPC cases are not liable to *qisas* and the only mandatory punishment is *diyat*.

16. Minor is defined as a person who has attained the age of 18 years.

17. Many jurists have objected to this position, as being against the injunctions of the *Quran*. See *Khan Muhammad v The State* (2005 SCMR 509).

18. Under section 309 PPC.

19. Under section 310 PPC.

20. In the case of *Muhammad Ibrahim v Soofi Abdul Razaq* (1997 PCrLJ 63) issue before the court was if a husband had on absolute right under Islamic law to kill his wife, though answered in the negative only 5 years imprisonment sentence was given.

21. *Muhammad Ismail v The State* (1999 PCrLJ 459).

v. Courts exercised wide discretion to sentence the accused when the case was not liable to *qisas*:

The availability of section 302 (c) PPC, under which an overwhelming majority of cases were sentenced, did not provide for any minimum punitive sanction for an intentional murder in which *qisas* was not applicable. This gave courts wide discretion to sentence an accused with up to twenty-five years imprisonment (which amounts to a life sentence).

As an offence committed in the name or pretext of honour could be waived or compounded subject to such conditions as the Court deemed fit to impose with the consent of the parties and having regard to the facts and circumstances of the case²², instances of honor crimes were subjected to waiver or compromise without any factual inquiry by the Court.

2. Why the Criminal law (Amendment) Act 2004, Act 1 of 2005 was ineffective:²³

The amendments introduced under the Criminal Law (Amendment) Act 2004, Act 1 of 2005 were primarily aimed at dealing with honour crimes effectively. The impression given was that, thanks to this amendment, perpetrators of honour killings would no longer escape punishment. In fact, the amendments failed to combat this phenomenon, as the fundamental lacunas in the law were not rectified.

Only two of the eight amendments were significant (See Annex 2 for the full list of amendments). The two significant amendments were as follows:

- i. Application of section 302 (c) PPC was barred for honour killing cases;²⁴
- ii. In section 311 PPC, honour killing was included in the ambit of *fasad fil arz* and the sentence in application of *fasad fil arz* was enhanced to include the death sentence, life imprisonment (up to 14 years), but for a case of honour killing, the minimum sentence was to be at least 10 years of imprisonment.

The barring of section 302 (c) PPC from application to honour killing cases prevented lesser sentences. Lesser sentences became applicable only in cases falling in the exceptions of section 306 & 307 (c) PPC.

The amendments did not change section 308 PPC, which provides for the sentencing of cases not liable to *qisas*, in which some relatives who often perpetuate such crimes benefit from virtual 'impunity'.

The insertion of honour killing in the ambit of *fasad fil arz* in section 311-PPC failed to achieve any purpose because of the controversy around the non-applicability of section 311-PPC in *tazir* cases. (See below discussion of *qisas* vs. *tazir* cases) Irrespective of the on-going debate of whether section 311-PPC is applicable in *tazir* cases or not, it is unconscionable that on the one hand the 2005 Amendment Act included honour killing in *fasad fil arz* and provided for a minimum 10 year sentence, but simultaneously added a second proviso in section 338-E (1) and added a new section 2(a) in 345 CrPC, which made all cases of intentional murder compoundable offences. These changes were not harmonious.

22. This was added by insertion of second proviso in section 338-E (1), PPC and addition of sub-section 2-A in section 345 CrPC through Act, 1 of 2005. Before this amendment there was no separate provision for compounding of an honour crime. It was compounded like other offences in this chapter.

23. The changes to the law made by the Amendment can be found in Annex 3.

24. Overwhelming majority of honour killings cases used to be decided under this section.

3. Key problems arising from the application of *qisas* and *diyat*

i. Complications arising from the quantum of sentence being the same (death) under *qisas* and *tazir*:

The law provides for the death sentence regardless of whether the murder is proved with evidence required for *qisas* or without such evidence (Sections 302 (a) and (b), PPC). In practice, the sentence of death is hardly ever given as *qisas*²⁵. The definitions of *qisas* and *tazir* given in the law make it clear that these are two different sentencing regimes. However, a death sentence, regardless of whether it is given as *qisas* or *tazir*, remains the same in terms of quantum, nature of punishment and mode of execution of sentence. The offender meets the same end irrespective of being sentenced to death as *qisas* or *tazir*. It is unconscionable that, according to the evidentiary requirements in the existing law, a sentence of death obtained through a higher level of proof (for *qisas*) can be done away with by any single heir of the deceased, while the same sentence if given via a lower standard of proof (for *tazir*) can only be removed if all the heirs of the deceased compound the offence with the permission of the court.

ii. The lack of determination of *tazkia al shahud*

It is of concern that, as a matter of routine, trial courts do not adopt the procedure to determine *tazkia al shahud* while recording evidence of the prosecution witnesses. Hence, if no mitigating circumstances exist, the court will punish the accused with a sentence of death under section 302 (b) as *tazir*. The courts give no reason for not applying the test of *tazkia al shahud* for witnesses. If *tazkia al shahud* is a mandatory requirement for conviction under *qisas* the question arises of why the trial courts do not put the witnesses to this test. Should the witnesses not stand up to the requirements of the test, the court should record this. The Supreme Court, in a recent judgment, *Zahid Rehman v State*²⁶, declared that in cases of intentional murder it is the obligation of the Court to first apply the test for *qisas* i.e. whether there has been a confession by the accused or if *tazkia al shahud* are present, and then assess which sentencing regime would apply: *qisas* or *tazir*.

iii. Is compromise or compounding of an offence an absolute right of the heirs of the deceased?

The provision regulating the compounding of offences does not provide any clear guidelines for the courts in accepting or rejecting a compromise²⁷ and consequently either acquitting an offender or exercising discretion to punish him under *tazir* as per the nature of the offence.

4. The Way Forward

i. Supreme Court Guidelines on compromise and compounding of offence:

The higher courts have issued guidelines and directions regarding compromise applications and factors to be considered by the courts from time to time²⁸. In *Azmat and another v The State*²⁹, the

25. *The State v Abdul Waheed & another* (1992 PCrLJ 1596) was an exceptional case in which sentence of death as *qisas* was given. It was based on the confession of the accused. However, later cases overruled the interpretation adopted in this case.

26. *Criminal Appeal No. 126 of 2012*.

27. If the court accepts a compromise it amounts to acquittal under section 345(6) and if the court rejects a compromise the sentence given stands, unless the court considers compromise as a mitigating factor and alters the sentence.

28. In *Nazak Hussain v The State* (PLD 1996 SC 178), court issued guidelines regarding the relevant court for entertaining applications for compromise as per the stage of the case. In *Ghulam Qadir v The State* (PLD 2012 Sindh 277), the Sindh High Court issued guidelines for subordinate courts, regarding the relevant court for adjudication of such applications.

29. *Azmat and another v The State* (PLD 2009 SC 768).

Supreme Court upheld an order rejecting compromise and elaborated on the combined effect of the provisions related to waiver or compounding of *qisas*, punishment under *fasad fil arz* and compounding of offence. It held that when a court is informed of a compromise, it is required to assess:

- Whether all the heirs had joined in the compromise;
- Whether any *wali* was a minor and if so, did the minor reach a compromise in accordance with section 313(2) PPC³⁰, if not then such minor is to be treated as a non-compromising *wali*;
- To find out whether the case was one of *fasad fil arz* and thus, not a case of acquittal despite a compromise and in fact a case of punishment under section 311, PPC;
- To find out whether any facts of circumstances existed which could persuade the court not to allow the compromise in light of section 345(2) CrPC.

Despite these directions, however, the court added, “it is neither possible nor desirable to categorize cases where such a permission be granted or withheld. Such a decision shall have to be taken by the concerned court after applying its judicial mind and of course whether the act in question amounted to *fasad fil arz*”.

The above guidelines could apply in cases where the compromise application is moved after conviction, or at a stage when the evidence has been recorded and the court is in a position to decide on the basis of facts and circumstances of the case.

The difficulty arises in cases where the compromise is reached *before* the recording of evidence. For these cases, the Supreme Court (SC) held, “it is advisable for the concerned court to postpone its decision about the acquittal or otherwise of the accused person, to discover all the facts and circumstances....”

The challenge is how the courts can proceed to discover the facts when the prosecution is in the hands of the heirs of the complainant? For this, the Supreme Court has expounded that some judicial discretion in assessing the validity of a compromise is essential, stating that the

“requirement of leave of the court cannot be construed that while considering a compromise plea, even if a compromise is lawfully entered, by free consent of the legal heirs, the Court, should act in a mechanical manner and allow the same as a matter of course and routine; should sit as a silent spectator or to conduct as a post office simplicitor and affix a judicial stamp upon it”³¹.

ii. Positive developments in courts

The Supreme Court has pointed out many problems with the *qisas* and *diyat* law and has made the following suggestions to the legislature to address these problems:

- In order to make offences of murder and bodily hurt compoundable, a new section be added in the CrPC mentioning their compounding and procedure for making an application;
- To exercise discretion to sentence an offender under *tazir* despite compounding of offence under Section 338-E PPC, the quantum of imprisonment and the circumstances have to be spelt out;
- The legislature should lay down precisely the circumstances or the cases in which, despite waiver and receipt of compensation, *tazir* punishment is to be inflicted, otherwise unlimited power with the Courts may lead to injustice and arbitrariness³².

Using court discretion: In the case of *Muhammad Siddique vs. The State*,³³ the High Court rejected a compromise by exercising its discretion under section 338-E PPC and declared a judicial response was needed in such brutal acts of violence. Elaborating the textually undefined circumstances in which courts could exercise such discretion, the Court held that such offenses require a judicial response as:

“A murder in the name of honour is not merely the physical elimination of a man or a woman. It is at a socio-political plane a blow to the concept of a free dynamic and an egalitarian

30. Description of persons who have right of *qisas* on behalf of a minor *wali*.

31. *Naseem Akhtar and another v The State* (PLD 2010 SC 938).

32. Para 18 at p. 369 of Muhammad Ashraf *supra*. No amendment has been made in the law on these points.

33. *Muhammad Siddique vs. The State* (PLD 2002 Lahore 444). The court also referred to *Faqirullah v. Khalil-uz-Zaman and others* (1999 SCMR 2203), at p. 2214.

*society. In great majority of cases, behind it at play, is a certain mental outlook, and a creed which seeks to deprive equal rights to women i.e. inter alia the right to marry or the right to divorce which are recognized not only by our religion but have been protected in law and enshrined in the Constitution.*³⁴

The High Court rejected a bail application in the case of the murder of a woman and a man on the pretext of 'siyakari' although the heirs of the deceased had forgiven the accused.³⁵ The court observed³⁶ that crimes of honor can be compounded despite the 2005 amendments but, regardless of the compounding of *tazir* and waiver of *qisas*, the court enjoys discretion to punish the accused when the offence has been committed with brutality or on pretext of 'siyakari'. A compromise affected outside of the court is of no value unless sanctioned by the court and such sanction is based on sound and reasonable discretion and not accorded as a matter of routine.

In *Zahid Rehman v The State*, the SC has attempted to clarify the issues raised by this law, stating that with regards to compromise; s.309 (waiver) and s.310 (compounding/*badl i sulh*) apply only to cases of *qisas*. In cases of *tazir*, compromise is regulated by s. 345(2) CrPC (compounding of offence) and s. 338-E, PPC (waiver or compounding of offences). Resultantly, a partial compromise can only be given weightage in cases of *qisas* and not for *tazir*. As for s.311 '*fasad fil arz*', the Court held that this provision too, only applies in *qisas* cases.

iii. Legislative Developments:

The Senate Standing Committee on Interior approved an Amendment Bill on 21st January 2015 (See Annex 4 for the full text of the Bill). The Bill suggests that sections 309, 310, 311, 338-E and 345 of the Penal Code should be amended to exclude '*qatl-i-amd*' (intentional murder) committed in the name or the pretext of honour. Furthermore, the Bill suggests an amendment to the Criminal Procedure Code, making murder committed in the name or pretext of honor a "non-compoundable" offence. The bill aims to bring honour killings outside the purview of compromise and the payment of blood money, so as to circumvent lacunas in the existing law.

The Bill, having received Senate approval, has to now pass through the National Assembly to be enacted into law. The amendments suggested are broad and could incur censure from the more conservative elements within parliament. Thus, it is an appropriate moment to suggest an alternative set of amendments.

5. Key recommendations for legal reforms

The law on murder and bodily hurt under the Pakistan Penal Code works around the *tazir* provisions. The manner in which the law is formulated and the requirements stipulated for the application of *qisas*, renders *qisas* inapplicable in the vast majority of cases. The only application of *qisas* is, in fact, a 'misapplication', in the form of waiver or compounding of *qisas* in cases that are in fact not liable to *qisas*.

Incorporating the following suggested amendments can prevent this misuse. Tactically also, there may be less resistance to amendments in provisions related to *tazir* punishments, as these are not religious in character.

The law in its current form violates fundamental rights, including:

- Right to life,
- Right to due process of law;
- Equality before law and equal protection of law.

34. *Ibid*, para 24, p. 457.

35. *Khadim Hussain v The State* (PLD 2012 Bal 179).

36. *Ibid*, para 8, p.185.

Proposed Amendments

1. Amendment in High Court Rules:

The High Court Rules should be revised to incorporate the Supreme Court's guidelines for scrutiny of compromise applications, issued in cases of *Azmat and another v The State*³⁷; instructions when a compromise cannot be accepted, provided in *Naseem Akhtar v The State*³⁸; and the relevant court to adjudicate upon compromise applications, expounded in *Nazak Hussain v The State*.³⁹

Reason and Purpose: Currently most compromises are reached out of Court, even before a trial begins, and judges do not question the validity of such compromises. Incorporating the Supreme Court's guidelines, and the recent judgment of in *Zahid Rehman v State*, will ensure that all murder cases go to Court, and a factual evidentiary assessment is made before the Court allows parties to enter said compromise.

2. Amendments in Section 308 PPC

Text of 308-PPC:	Recommended amendments
<p>308. Punishment in <i>qatl-i-amd</i> not liable to <i>qisas</i>, etc.:</p> <p>(1) Where an offender guilty of <i>qatl-i-amd</i> is not liable to <i>qisas</i> under Section 306 or the <i>qisas</i> is not enforceable under clause (c) of Section 307, he shall be liable to <i>diyat</i>:</p> <p>Provided that, where the offender is minor or insane, <i>diyat</i> shall be payable either from his property or, by such person as may be determined by the Court:</p> <p>Provided further that where at the time of committing <i>qatl-i-amd</i> the offender being a minor, had attained sufficient maturity of being insane, had a lucid interval, so as to be able to realize the consequences of his act, he may also be punished with imprisonment of either description for a term which may extend to [twenty-five years] as <i>ta'zir</i>.</p> <p>Provided further that, where the <i>qisas</i> is not enforceable under clause (c) of Section 307, the offender shall be liable to <i>diyat</i> only if there is any <i>wali</i> other than offender and if there is no <i>wali</i> other than the offender, he shall be punished with imprisonment of either description for a term which may extend to [twenty-five years] years as <i>ta'zir</i>.</p> <p>(2) Notwithstanding anything contained in sub-section (i), the Court, having regard to the facts and circumstances of the case in addition to the punishment of <i>diyat</i>, may punish the offender with imprisonment of either description for a term, which may extend to [twenty-five years] years, as <i>ta'zir</i>.</p>	<p>A sub-section 3 be added within the text as follows:</p> <p><i>“Notwithstanding anything contained in sub sections 1 and 2 in a case of intentional murder in the name or pretext of honour, the court shall, in addition to the payment of diyat, punish the offender with a sentence of imprisonment which may extend up to 25 years but shall not be less than 14 years.”</i></p> <p>Reasons and purpose:</p> <p>For cases of intentional murder, which are not liable to <i>qisas</i> (under section 306-PPC), some relatives, who are the perpetrators of the crime, benefit, as the only mandatory sentence if no compromise takes place is the payment of <i>diyat</i>.</p>

37. *Azmat and another v The State* (PLD 2009 SC 768)

38. *Naseem Akhtar v The State* (PLD 2010 SC 938)

39. *Nazak Hussain v The State* (PLD 1996 SC 178)

3. Amendments in section 309-PPC:

Text of s.309-PPC:	Recommended amendments
<p>Waiver (Afw) of qisas in qatl-i-amd:</p> <p>(1) In the case of <i>qatl-i-amd</i>, an adult sane <i>wali</i> may, at any time and without any compensation, waive his right of <i>qisas</i>: Provided that the right of <i>qisas</i> shall not be waived; (a) where the Government is the <i>wali</i>, or (b) where the right of <i>qisas</i> vests in a minor or insane.</p> <p>(2) Where a victim has more than one <i>wali</i> any one of them may waive his right of <i>qisas</i>: Provided that the <i>wali</i> who does not waive the right of <i>qisas</i> shall be entitled to his share of <i>diyat</i>.</p> <p>(3) Where there are more than one victim, the waiver of the right of <i>qisas</i> by the <i>wali</i> of one victim shall not affect the right of <i>qisas</i> of the <i>wali</i> of the other victim.</p> <p>(4) Where there are more than one offenders, the waiver of the right of <i>qisas</i> against one offender shall not affect the right of <i>qisas</i> against the other offender.</p>	<p>In sub-section (1), the words “<i>at any time</i>” be substituted by the words, “<i>murder being established by the court of competent jurisdiction punishable with qisas punishment</i>”.</p> <p>Reasons and purpose:</p> <ol style="list-style-type: none"> 1. To prevent the abuse of the provisions for waiver and compounding of <i>qisas</i> at the very outset of a case, by ensuring that it is first determined whether the case is punishable with <i>qisas</i> or <i>tazir</i> sentence. 2. To enable courts to gather the required evidence to punish the offender under section 311-PPC in case all the <i>walis</i> have not waived or compounded their right of <i>qisas</i> or under application of <i>fasad fil arz</i>. 3. In practice, the punishment of <i>qisas</i> is rarely given or retained at the appeal level in murder cases. Practically, all sentences including the death sentence are handed out as <i>tazir</i> sentences in which neither waiver or the compounding of <i>qisas</i> apply; the offence can only be compounded under section 345 CrPC and 338-E PPC.

4. Amendments in section 310-PPC:

Text of s.310-PPC:	Recommended amendments
<p>Compounding of <i>qisas (Sulh) in qatl-i-amd:</i></p> <p>(1) In the case of <i>qatl-i-amd</i>, an adult sane <i>wali</i> may, at any time on accepting <i>badl-i-sulh</i>, compound his right of <i>qisas</i>: Provided that a female shall not be given in marriage or otherwise in <i>badl-i-sulh</i>.</p> <p>(2) Where a <i>wali</i> is a minor or insane, the <i>wali</i> of such minor or insane <i>wali</i> may compound the right of <i>qisas</i> on behalf of such minor or insane <i>wali</i>: Provided that the value of <i>badl-i-sulh</i> shall not be less than the value of <i>diyat</i>.</p> <p>(3) Where the Government is the <i>wali</i>, it may compound the right of <i>qisas</i>: Provided that the value of <i>badl-i-sulh</i> shall not be less than the value of <i>diyat</i>.</p> <p>(4) Where the <i>badl-i-sulh</i> is not determined or is a property or a right the value of which cannot be determined in terms of money under <i>Shari'ah</i>, the right of <i>qisas</i> shall be deemed to have been compounded and the offender shall be liable to <i>diyat</i>.</p> <p>(5) <i>Badl-i-sulh</i> may be paid or given on demand or on a deferred date as may be agreed upon between the offender and the <i>wali</i>.</p>	<p>In sub-section (1) the words, “<i>at any time</i>” be substituted by the words, “<i>murder being established by the court of competent jurisdiction punishable with qisas punishment</i>”.</p> <p>Reasons and purpose: For the same reasons as outlined for section 309 PPC above.</p>

5. Amendments in s. 311-PPC:

Text of s.311-PPC:	Recommended amendments
<p>Ta'zir after waiver or compounding of right of <i>qisas</i> in <i>qatl-i-amd</i>:</p> <p>Notwithstanding anything contained in Section 309 or Section 310, where all the <i>wali</i> do not waive or compound the right of <i>qisas</i>, or [if] the principle of <i>fasad-fil-arz</i> the Court may, having regard to the facts and circumstances of the case, punish an offender against whom the right of <i>qisas</i> has been waived or compounded with [death or imprisonment for life or] imprisonment of either description for a term of which may extend to fourteen years as <i>ta'zir</i>.</p> <p>Provided that if the offence has been committed in the name or on the pretext of honour, the imprisonment shall not be less than ten years.</p>	<p>Replace the word “may” with “shall” to ensure the court does sentence the offender;</p> <ol style="list-style-type: none"> i. The sentence of death and life imprisonment should be deleted. ii. The sentences should be amended: <ol style="list-style-type: none"> a. In a case in which all the <i>walis</i> have not waived or compounded their right of <i>qisas</i>, the offender should receive a sentence, which may extend to 14 years imprisonment but is not less than 7 years. b. If punishment is under the principle of <i>fasad fil arz</i>, the sentence shall be up to 25 years but not less than 14 years; proviso mentioning minimum sentence for honour killings be deleted as minimum sentence of 14 years in case of <i>fasad fil arz</i> will cover honour killing. <p>Reasons and purpose:</p> <ol style="list-style-type: none"> 1. The waiver or compounding of <i>qisas</i> and the compounding of the offence are two different matters. Waiver or compounding of <i>qisas</i> stops the application of <i>qisas</i> but the offence is not compounded. 2. The law will come into accordance with the directions in <i>Gul Hasan Case</i>, which asked for the law on intentional murder to include provisions for <i>qisas</i> or <i>badl i sulh</i> for the heirs of the deceased and provide the authority to the state to punish offender under <i>tazir</i> in public interest.

6. Amendment in s.338-E (1)– PPC:

POSITION PAPER

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Text of s.338-E (1) – PPC:	Recommended amendments
<p>Waiver or compounding of offences:</p> <p>(1) Subject to the provisions of this Chapter and Section 345 of the Code of Criminal Procedure, 1898 (V of 1898), all offences under this Chapter may be waived or compounded and the provisions of Sections 309 and 310 shall, mutatis mutandis, apply to the waiver or compounding of such offences:</p> <p>Provided that, where an offence has been waived or compounded, the Court may, in its discretion having regard to the facts and circumstances of the case, acquit or award <i>ta'zir</i> to the offender according to the nature of the offence.</p> <p>Provided further that where an offence under this Chapter has been committed in the name or on the pretext of honour, such offence may be waived or compounded subject to such conditions as the Court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case.</p>	<ol style="list-style-type: none"> i. The first proviso be amended to read as follows: “Provided if the principle of <i>fasad fil arz</i> is attracted the court shall, having regard to the facts and circumstances of the case, punish the offender against whom the offence has been waived or compounded under <i>tazir</i> according to the nature of the offence.” ii. In case of intentional murder, the sentence shall be imprisonment, which may extend up to 25 years but shall not be less than 10 years. Provided if the murder is committed in the name of or under the pretext of ‘honour’ the sentence of imprisonment shall not be less than 14 years and the offender shall also be liable to payment of half of the <i>diyat</i>. iii. In case of intentional murder punishable under section 308 (3) PPC [proposed above] the sentence of imprisonment shall not be less than 10 years and the offender shall also be liable to the payment of half of the amount of <i>diyat</i>. iv. In case of grievous hurt causing loss of an organ or dismemberment of an organ with sentence of imprisonment equal to one third of the maximum sentence for that offence and payment of <i>arsh</i> or <i>daman</i>, as the case may be. If the offence is committed in the name or pretext of honour, the sentence of imprisonment shall be half of the maximum sentence for that offence and payment of <i>arsh</i> or <i>daman</i> as the case may be. <p>Explanation: For the purpose of this section the expression <i>fasad fil arz</i> shall include the past conduct of the offender including whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the</p>

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public conscience, or if the offender is considered a potential danger to the community or if the offence has been committed in the name of, or pretext of, honour.

- v. The second proviso added through Act 1 of 2005 shall be deleted.

Reasons and purpose:

1. The existing section gives courts the discretion to punish an offender under *tazir*, but fails to mention the facts and circumstances in which this discretion is to be used; it also does not give clear guidelines about the quantum of sentence;
2. The existing provision gives courts unfettered discretion, which may lead to arbitrariness and injustice, as pointed out by a full bench of the Lahore High Court in the case of *Muhammad Ashraf v The State*;
3. The proposed amendment shall help to punish the perpetrators of crimes justified in the name or pretext of 'honour' in case of compromise between the parties;
4. The recent *Zahid Rehman v The State*, s.311 PPC ruling has restricted *fasad fil arz* (i.e. the Court's discretion to punish offenders in matters of public interest) to *qisas* cases only. This is redundant as most such cases are dealt with under *tazir*. This makes a strong case for amendments in section 338–E, PPC instead of leaving an open ended, generalized discretion with the court to sentence an offender under *tazir* against whom the offence has been compounded. All the situations included in the expression *fasad fil arz* in section 311 can be inserted in section 338-E to make it effective.
5. The second proviso added by Act 1 of 2005 is ambiguous and has never been applied. In isolated cases the courts have referred to it but in no case has its meanings and nature of application been elaborated.

7. Amendment in s.345 - CrPC:

POSITION PAPER

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Text of s.345 - CrPC:	Recommended amendments
<p>Compounding of offences: Amendment of section 345, Act V of 1898.---In the Code, in section 345, -- (a) in subsection (2), in the table, -- (i) against the entry relating to <i>Qatl-i-Amd</i> in the first column, in the third column, after the word “victim” at the end, the comma and words “other than the accused or the convict if the offence has been committed by him in the name or on the pretext of <i>karo kari, siyah kari</i> or similar other customs or practices” shall be added. (6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.</p>	<p>i. Sub-section (2)(a) added by Act 1 of 2005 shall be deleted. ii. In sub-section (6) after the words, “<i>has been compounded</i>” the full stop shall be substituted by a comma and the words, “<i>unless the court has sentenced the offender in application of the principle of fasad fil arz</i>” shall be added.</p>

References:

- The Constitution of the Islamic Republic of Pakistan, 1973.*
Pakistan Penal Code (Act XLV of 1860).
The Code of Criminal Procedure, 1898.
Statistics on Violence against Women, Aurat Foundation, 2014.

Cases Cited:

- Abdul Zaheer v The State* (2000 SCMR 406).
Azmat and another v The State (PLD 2009 SC 768).
Faqirullah v. Khalil-uz-Zaman and others (1999 SCMR 2203).
Federation of Pakistan v Gul Hasan (PLD 1989 SC 633).
Ghulam Qadir v The State (PLD 2012 Sindh 277).
Khadim Hussain v The State (PLD 2012 Balochistan 179).
Khan Muhammad v The State (2005 SCMR 509).
Muhammad Ibrahim v Soofi Abdul Razaq (1997 PCrLJ 63).
Muhammad Ismail v The State (1999 PCrLJ 459).
Muhammad Siddique vs. The State (PLD 2002 Lahore 444).
Naseem Akhtar and another v The State (PLD 2010 SC 938).
Nazak Hussain v The State PLD (1996 SC 178).
State v Abdul Waheed & another (1992 PCrLJ 1596).
Zahid Hussain v State (Criminal Appeal No. 126 of 2012).

Annex 1

Definitions:

Qisas has been defined to mean punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed *qatl-i-amd* in exercise of the right of the victim or a *wali*⁴⁰. As per section 305 PPC '*wali*' refers to heirs of the victim but, in case of *qatl-i-amd* committed in the name of honor, does not include the accused or convicted. The basic theoretical principle of *qisas* is equality or similarity.

Diyat is compensation payable to the relatives/dependents of the murdered victim to compound the offence of murder. In the case of death, the amount of *diyat* is specified in Section 323 PPC and should not be less than value of thirty thousand six hundred and thirty grams of silver. *Diyat* is payable in cases of *qatl* (murder) and not in cases of hurt. *Diyat* can be awarded where the offence committed is proved to be not liable to *qisas* or where *qisas* is not enforceable. The consideration in such cases is *badl-i-sulh* as laid down in section 310 PPC. The amount of *diyat* is to be disbursed amongst the heirs of victim according to *shariah*. In case where an heir foregoes his share it shall not be recovered. It can be ordered to be paid in lump sum or in installments by the court. *Diyat* although compensatory in nature, nonetheless remains a substantive punishment⁴¹. *Diyat* is not merely a sort of compensation but is a prescribed punishment as defined in section 53 PPC, hence serving sentence of imprisonment would not absolve an accused from his/her responsibility to pay the amount of compensation as required under section 544-A Criminal Procedure Code (CrPC).⁴²

Arsh is compensation specified in chapter XVI of PPC, for offences relating to various kinds of hurt. The amount of *arsh* is assessed as a certain percentage of the value of *diyat*. It is to be paid in lump sum or in installments; in case of default, the convict is liable to simple imprisonment.

Daman is compensation fixed by the Court payable by the offender to the victim for causing hurt not liable to *arsh*. The amount of *daman* is determined keeping in view expenses incurred on the treatment of the victim, loss or disability caused in functioning of any organ and the anguish suffered by the victim.

"Tazir" is derived from the word "*azar*" which means 'to prevent; to respect, to reform'. "In its primitive sense, it meant prohibition, and also instruction⁴³." As per section 2(e) of the *Zina* Ordinance it means "any punishment other than *hadd*⁴⁴." The difference between *hadd* and *tazir* is essentially that *hadd* is considered a divine right and the punishment is specified in *tazir* punishment, in contrast, is left to the discretion of the judge.

40. Mahmood.M, *The Major Acts 2014*, Pakistan Law Times Publications.

41. Abid Hussain's Case (PLD 2002 Lah 482)

42. PLD Publishers, Pakistan Criminal Law Journal, 2005, P. 1316.

43. *Hedaya*, English translated by Charles Hamilton, Premier Book House, Lahore.

44. Section 2(e), Offence of *Zina* (Enforcement of Hudood) Ordinance, (VII of 1979).

Annex 2

Key features of the *qisas* and *diyat* law and subject matters covered in it:

The change in provisions was not merely a change in the name of the offence but of substance, content, meaning and the consequences flowing thereof.⁴⁵

Punishment for intentional murder:

Section 302 PPC provides the following punishments:

- 302(a): death as *qisas*, if proof required under law is available,
- 302(b): death or imprisonment for life as *tazir*, having regard to the facts and the circumstances of the case if the proof required for *qisas* is not available,
- 302(c): imprisonment for a term, which may extend to twenty-five years where according to the Injunctions of Islam punishment of *qisas* is not applicable. Section 302(c) was made inapplicable to intentional murder committed in the name or pretext of honour and was to fall in the ambit of either of the first two sub-sections as the case may be.⁴⁶

All intentional murders are not applicable to *qisas*. Murders by the following are not liable to *qisas* punishment, as per s.306 PPC:

- When the offender is a minor⁴⁷ or insane,
- When the offender causes death of his/her child, grandchild, how low so ever⁴⁸,
- When any *wali* (legal heir) of the victim is a direct descendent of the offender, no matter how low so ever.

***Qisas* cannot be enforced in the following situations, as per s.307 PPC:**

- When the offender dies before the enforcement of *qisas*;
- When any *wali* voluntarily and with out duress, to the satisfaction of the court, waives right of *qisas*⁴⁹ or compounds *qisas*⁵⁰;
- When the right of *qisas* devolves on the offender as a result of the death of the *wali* of the victim, or on the person who has no right of *qisas* against the offender.

45. Held in Muhammad Ashraf v The State (PLD 1991 Lahore 347)

46. Criminal law (Amendment) Act, 2004, Act 1 of 2005

47. Minor is defined as a person who has not attained the age of 18 years.

48. Many jurists have objected to this position, as being against the Injunctions of the Quran. See Khan Muhammad v The State (2005 SCMR 509).

49. Under section 309 PPC.

50. Under section 310 PPC.

Annex 3

Criminal law (Amendment) Act 2004, Act 1 of 2005:

- i. In section 299 PPC the definition of honour crime was added;
- ii. Application of section 302 (c) PPC was barred for honour killing cases;⁵¹
- iii. In case of intentional murder committed in name or pretext of honour, “accused or a convict” was excluded from the definition of *wali*;
- iv. In section 308 PPC upper limits of imprisonment was enhanced from 14 years to 25 years, but no lower limit fixed;
- v. Section 310 for compounding of *qisas*, giving a female in marriage or otherwise in *badl i sulh* was made an offence with punishment of rigorous imprisonment up to ten and not less than three years;⁵²
- vi. In section 311 PPC, honour killing was included in the ambit of *fasad fil arz* and the sentence in application of *fasad fil arz* was enhanced to include the death sentence, life imprisonment (up to 14 years), but for a case of honour killing, the minimum sentence was to be at least 10 years of imprisonment;
- vii. In section 338-E (1) a new proviso was added for compounding of offences committed on the pretext of honour. These could be compounded subject to the conditions the court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case.
- viii. In section 345 CrPC, sub-section 2-A was added, replicating the text as the added provision in section 338-E (1). The only difference is that local and regional terms for honour crimes were mentioned by name.

51. Overwhelming majority of honour killings cases used to be decided under this section.

52. Section 310-A was added which provided for punishment. Act 26 of 2011 amended section 310-A and extended its application to *wanni*, *swara* to settle a civil dispute or a criminal liability.

Annex 4

Anti – Honour Killings Bill 2014

[AS INTRODUCED IN THE SENATE] A BILL further to amend the Pakistan Penal Code, 1860 and the Code of Criminal Procedure, 1898 Whereas it is expedient further to amend the Pakistan Penal Code (XLV of 1860) and the Code of Criminal Procedure, 1898 (V of 1898) in order to deter and prevent honour killings in Pakistan, which claim the lives of hundreds of victims every year; It is hereby enacted as follows:-

1. *Short title and commencement.- (1) This Act may be called the Anti-Honour Killings Laws (Criminal Laws Amendment) Act, 2014. (2) It shall come into force at once.*
2. *Amendment of section 309, Act XLV of 1860.- In the Pakistan Penal Code, 1860 (XLV of 1860), hereinafter referred to as the Penal Code, in section 309, in sub-section (1), after the word “qatl-i-amd”, the words “other than the qatl-i-amd committed in the name or on the pretext of honour” shall be inserted.*
3. *Amendment of section 310, Act XLV of 1860 - In the Penal Code, in section 310, in sub-section (1), after the word “qatl-i-amd”, the words “other than the qatl-i-amd committed in the name or on the pretext of honour” shall be inserted.*
4. *Amendment of section 311, Act XLV of 1860.- In the Penal Code, in section 311,-*
 - (i) *the Proviso shall be omitted; and*
 - (ii) *in the Explanation the words “or the offence relates to honour crime” and the comma and the words “, or if the offence has been committed in the name or on the pretext of honour” shall be omitted.*
5. *Amendment of section 338E, Act XLV of 1860.- In the Penal Code, in section 338E,-*
 - (i) *in sub-section (1),-*
 - (a) *after the words “all offences”, the words “other than the qatl-i-amd committed in the name or on the pretext of honour” shall be inserted;*
 - (b) *in the second Proviso after the words “an offence” the words “other than the qatl-i-amd committed in the name or on the pretext of honour” shall be inserted; and*
 - (ii) *in sub-section (2), in the second Proviso for the words “qatl-i-amd or any other offence” the words “offence other than the qatl-i-amd committed in the name or on the pretext of honour” shall be substituted.*
6. *Amendment of section 345, Act V of 1898- In the Code of Criminal Procedure, 1898 (V of 1898), hereinafter referred to as the Code, in section 345,-*
 - (i) *in sub-section (2), in the table, against the entry relating to Qatl-i-amd,-*
 - (a) *in the first column after the words “Qatl-i-amd” the words “other than the qatl-i-amd committed in the name or on the pretext of honour” shall be added;*
 - (b) *in the third column, the commas and the words “, 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 or similar other customs or practices” shall be omitted; and (ii) in sub-section (2A) after the words “an offence” the words “other than the qatl-i-amd committed in the name or on the pretext of honour” shall be inserted.*
7. *Amendment of Schedule II, Act V of 1898.- In the Code, in schedule II, against the entry in column 1 relating to section 302, in column 6, after the word “compoundable” the words “other than the qatl-i-amd committed in the name or on the pretext of honour” shall be added.*