

Roundtable Discussion on ‘Qisas’ and ‘Diyat’ Law within the Criminal Justice System

September 21, 2013

Introduction

In wake of the Shahzaib Khan Murder Case and the compromise that his family has entered into with that of the accused, the issue of ‘diyat’ or blood money in cases of murder has come to the fore once again and has raised pertinent questions concerning the criminal justice system in Pakistan. Some for instance, ask whether Islam is a religion for the rich only. The west views it as ‘privatization of justice’ which absolves the State from protecting its citizens and the American media has gone on to the extent of describing ‘diyat’ as being effectively a bribe!

It is against this backdrop that the School of Law convened a roundtable discussion on ‘qisas’ and ‘diyat’ law within the criminal justice system in Pakistan on 21st September 2013. The discussion included prominent criminal law practitioners of Pakistan such as Barrister Salman Safdar, who is one of the few experts on prosecution development in the country and regularly conducts lectures and workshops on criminal procedure, evidence and advocacy skills. He completed his LL.B (Hons) from London School of Economics and as a B.A in Political Science from Government College University Lahore; Barrister Haider Rasul Mirza who is practicing at Mirza and Mirza advocates and legal consultants in Lahore. He holds a BSC. (Hons) from Lums, LL.B (Hons) from University of London and a PG. Diploma in Professional Legal Skills from ICSL. He has a keen interest in constitutional, criminal and international laws; and Mr. Asad Jamal who is a senior lawyer specializing in human rights law. He teaches criminal law at Lums and is currently coordinating the ABA’s Rule of Law initiative in Pakistan.

Ms. Nida Mahmood (Director-International Programmes at School of Law) was the moderator and Ms. Anoshay Fazal (Academic Coordinator and Skills Facilitator at School of Law) took the minutes of the discussion.

Background

Mr. Asad Jamal shed light on the background to the Qisas & Diyat Ordinance 1990. He highlighted that the debate started in the year 1977 with Zia’-ul-Haq’s ‘Islamization’ of the laws of the State of Pakistan. He explained that it was in the case of *Gul Hasan Khan v. Government*

of Pakistan (1979)¹ that the need to Islamize Chapter 16 of the Pakistan Penal Code (PPC) was reiterated.

The Federal Shariat Court declared that various sections of the Pakistan Penal Code² and the Code of Criminal Procedure³ were repugnant to the injunctions of Islam. The court also held that Sections 302⁴, 304⁵ and 304-A⁶ were repugnant as the former did not provide for any exemption from a death sentence for an offender who has killed his or her son; or an offender who was insane at the time of the commission of the offence. Furthermore, sections 324⁷, 325⁸, 326⁹, 329¹⁰, 331¹¹ and 333¹² were also considered repugnant to the injunctions of Islam as they did not have provisions for Qisas . Sections 335 and 338 were considered repugnant as they did not have provisions for the payment of Diyat.¹³ .

The Qisas and Diyat Ordinance of 1990 provided for the victim (or his heirs) to have the right to inflict injuries equal to those sustained by the victim (Qisas). The law also allows the offender to provide compensation or blood money for the crime committed (Diyat).

Qisas is defined as,

*“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 as if he has committed Qatl-i-amd in exercise of the right of the victim of a Wali”.*¹⁴

Diyat is defined as,

*“compensation specified in section 323 payable to the heirs of the victims.”*¹⁵

Mr. Jamal stated that the law was ambiguous as the standard of proof required by section 304 of PPC cannot be met.¹⁶ In that, either the confession of the accused or the alibi of four reliable,

¹ PLD 1980 Peshawar 1.

² PAK PENAL CODE,

³ PAK. CODE CRIM. PROC.

⁴ See *supra* note 2, § 302.

⁵ *Id.* at § 304.

⁶ *Id.* at § 304-A.

⁷ *Id.* at § 324.

⁸ *Id.* at § 325.

⁹ *Id.* at § 326.

¹⁰ *Id.* at § 310.

¹¹ *Id.* at § 331.

¹² *Id.* at § 333.

¹³ See Report on the Committee of Pakistan Law Commission on Offences Against Human Body (Enforcement of Qisas and Diyat) Ordinance, 1984. LAW AND JUSTICE COMMISSION OF PAKISTAN.

¹⁴ Waseem Ahmed Shah, Pros and Cons of Qisas and Diyat Law, Dawn News, September 16, 2013.

¹⁵ *Id.*

¹⁶ See *supra* note 5 at §304 “Proof of qatl-i-amd liable to qisas, etc.: (1) Proof of qatl-i-amd shall be in any of the following forms, namely: - (a) the accused makes before a Court competent to try the offence a voluntary and true confession of the commission of the offence; or (b) by the evidence as provided in Article 17 of the Qanun-e-

trustworthy and unquestionable witnesses is required for conviction under Section 302 (a) of Pakistan Penal Code 1860.

The evidential requirements are such that it is impossible to prove a case as “Qatl-e-Amd” (intentional and deliberate murder).¹⁷ The courts were not provided with any criteria or standard to be followed in line with the new law. The law on Qisas and Diyat is now contained under Section 302 of Pakistan Penal Code (Act XLV of 1860) and Section 345 of Code of Criminal Procedure 1898.

Barrister Salman Safdar began by distinguishing between the global practice and local criminal justice system. In England for instance, it is the State that prosecutes, whereas in Pakistan, the State plays a very limited role in the prosecution process. Barrister Safdar further defined the terms ‘Qisas’ as ‘equal retaliation’ and related it with the ‘eye for an eye concept’, whereas as per him ‘Diyat’ is a means by which the culprit may be seen as “walking away” by providing compensation for his wrong doing. He went on to discuss “Theories of Punishment” as employed in foreign countries, including ‘rehabilitation’, ‘incapacitation’ and ‘reform’.

Mr. Jamal drew a contrast between foreign States and Pakistan where the victim and the offender are the main players, which leads to the “privatisation of justice”.

Barrister Safdar went on to discuss Section 302 of the Pakistan Penal Code 1860. Qatl-e-Amd has been defined in Section 300 of the Pakistan Penal Code 1860 as,

“Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatl-e-amd.”

Section 302 prescribes the punishment for Qatl-e-Amd:

“Whoever commits qatl-e-amd shall, subject to the provisions of this Chapter be:

- (a) punished with death as qisas;*
- (b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in Section 304 is not available; or*

Shahadat, 1984 (P.O. No. 10 of 1984). (2) The provisions of sub-section (1) shall, mutatis, mutandis, apply to a hurt liable to qisas.

¹⁷ See *supra* note 2 § 300 “Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatl-e-amd.”

(c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the injunctions of Islam the punishment of qisas is not applicable

Provided that nothing in this clause shall apply to the offence of qatl-i-amd if committed in the name or on the pretext of honour and the same shall fall within the ambit of (a) and (b), as the case may be”.

Barrister Safdar pointed out the near impossibility for the prosecution service of awarding a punishment under 302 (a), as it is extremely unlikely that the required standard of proof can be met¹⁸, in that, either confession of the accused or alibi of four reliable, trustworthy and unquestionable witnesses is needed for conviction under s302 (a) of PPC.

Barrister Mirza went on to say that the State cannot play a greater role in the prosecution process until the ‘walis’ (victim’s heirs) step aside. He went on to discuss ‘diyat’, referring to the recent Shahzaib Khan murder case as a dubious deal and raised questions regarding the compensation received in murder cases and the right exercised to receive such compensation. Mr. Mirza believes that the flaw is not within the legislation, but its application. He was also of the opinion that the case law available in relation to various pleas/defences available to victims in other jurisdictions is negligible.

Ms. Nida Mahmood raised the question of whether this law in allowing culprits to get away by paying compensation, is a ‘law for the rich’? Mr. Asad Jamal drew a comparison with the situation in India where murder is not compoundable.

In discussing reforms, the participants were of the opinion that:

The law needs to be revised and repealed in some ways. Furthermore, the society and State must assume roles as major stakeholders in similar cases, the role of the State should not be diminished. Mr. Asad Jamal further said that the State must facilitate the society in interpreting the legislative provisions. He also highlighted the need to take into account the resources currently available to the State for the prosecution process should its role be enhanced.

Barrister Mirza, raised the question as to whether reforms need to be targeted towards amending the law or developing the jurisprudence? He was of the opinion that these issues need to be addressed through jurisprudence. He stressed that the courts should play a proactive role as envisaged in s345 of the Code of Criminal Procedure (CrPC) (Act V of 1898)¹⁹. s345 (2) of CrPC states,

“The offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any

¹⁸ See supra note 19.

¹⁹ See supra note 3, § 345(2), (5)-A.

prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table:..”

Therefore, the courts must play a proactive role when giving permission for compounding of the offence, rather than allowing “razi-namas” in a mechanical manner. In addition, the courts should also seek guidance as set out in s345 (5) and s345 (7) of the CrPC referred to in the Supreme Court Judgment.²⁰ In that, the courts should consider that it is their duty and prerogative to determine the fitness of the case for the endorsement and sanction of the compromise and in appropriate cases, where the compromiser and offender is directly or indirectly beneficiary of the crime; the offence is committed or is caused thereof, for an obvious object of grabbing the property of the deceased by the compromiser, through his off spring, who may ultimately benefits himself (the offender) as well, the Court may refuse to give an effect to such a deal, especially coupled with the scenario when the offence is gruesome, brutal, cruel, appalling, odious, gross and repulsive which causes terror and sensation in the society. Certain points must be considered during the prosecution process, such as the ‘brutality of the act’ and past convictions of the accused.

Lastly, in light of the Shahzaib Khan Murder Case, Barrister Safdar shed light on the statistics of the criminal justice system where the poor are executed and the person with “deep pockets” avoids the clutches of the law. The victim’s heirs are threatened regularly and consequently coerced into filing a ‘razi-nama’. Such compromises are therefore not entered into at free will and the form that these compromises take, can be outrageous at times. He was of the opinion that a ‘soft corner for the culprit’ should only be a mitigating factor for the prosecution service. He also highlighted the need for a clear criteria or guidelines to be provided for in the law for these compromises so that they are not so arbitrary or outrageous in nature.

end

²⁰ PLD 2010 SC 938, para. 5 “Be that as it may, because of the use of word ‘No’, in both the subsections the command of law is in the negative form, thus, the composition of an offence is prohibited lacking (without) the leave of the Court. As per the Black’s Law Dictionary (Fifth Edition 801), the noted expression is defined to mean “Permission obtained from a Court to take some action which, without such permission, would not be allowable.” Thus, the object requiring leave from the Court as per the clear intention of the legislature is neither meaningless nor purposeless and it cannot be construed that while considering the compromise plea, even of a compromise which 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 or routine; should sit as a silent spectator or to conduct as a post office simpliciter and affix a judicial stamp upon it. Rather it is the duty and the prerogative of the Court to determine the fitness of the case for the endorsement and sanction of the compromise and in appropriate cases, where the compromiser and offender is directly or indirectly beneficiary of the crime; the offence is committed or is caused thereof, for an obvious object of grabbing the property of the deceased by the compromiser, through his off spring, who may ultimately benefits himself (the offender) as well, the Court may refuse to give an effect to such a deal, especially coupled with the scenario when the offence is gruesome, brutal, cruel, appalling, odious, gross and repulsive which causes terror and sensation in the society. The case in hand is the one in which the entire family has been killed while asleep, for no apparent cause but to avenge the refusal of marriage and grapple the property. And in my candid view, the instant case falls within the above category, therefore, the leave for the compromise is refused and the application is hereby dismissed.”