‘Honour’ Killings in Pakistan: Judicial and Legal Treatment of the Crime: A Feminist Perspective

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Abstract

This paper discusses ‘honour’ killings of women in Pakistan by tracing the historical trajectory of laws, their origins, and legal reforms on the subject. The analysis demonstrates the complicity of Pakistani laws with honour crimes. In doing so, the paper attempts to show that the law is not a value-free or neutral concept. The law stands with the powerful (the male gender in this case). The established legal system reflects and reinforces the sexism of the society that created it. The law ensures patriarchal control over female sexuality and reflects a way of thinking in which masculinity means strength, aggressiveness, and domination; and femininity designates delicacy, resistance, and subordination. The paper also attempts to evaluate the judicial treatment of the ‘honour’ killings cases by critically analysing the case law on ‘honour’ killings before 2004, that is, before the enactment of the Criminal Law (Amendment) Act 2004, referred to as the Honour Killings Act. It also analyses the cases after the enactment of the said law to see if they had any effect in changing the judicial mindset and revolutionising the way in which honour crimes are dealt with in courts. The paper further evaluates the provisions of the new anti-honour killings law of 2016 against the backdrop of the older Honour Killings Act 2004 to analyse the changes introduced by the new law, and to see if it promises any different and positive results. The paper then examines how both the old and the new anti-honour killings laws are just another tool by which the powerful transmit this false consciousness to the already disadvantaged segment of society, women in this case, that their concerns are being addressed at the state level.

Keywords: honour killings, *hudood, qisas, diyat, tazir, qatl-e-amd, ghairat*

Introduction: Women’s Experience with Law in Pakistan

The status of women varies across different cultures and traditions in Pakistan. Still, some general statements could be made about their status, as it will not be far-fetched to say that the ultimate social realities are not much different

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for women all across Pakistan.[1] Women, be they from any social strata or culture, are assets whose worth is assessed in terms of their power of reproduction and as objects of sexual satisfaction. They are commodities which are to be transferred from their parents' homes to their husbands' homes who are the ultimate recipients of these commodities.[2] These commodities are then 'protected' by setting several parameters as to how they are to lead their lives. These patriarchal sentiments were already quite deeply entrenched in our society, but their effect was multiplied through massive and formal support during Zia's regime, owing to his Islamisation policies.[3] The said regime had the effect of legitimising such views via the state and its institutions, especially the law. Zia's regime successfully perpetuated the public versus private divide in the society by promoting a vision of modest and chaste women. Zia removed women from the public sphere and made everything about them private, as demanded by their so-called 'chastity.'[4] Discrimination against women was perpetuated by administrative and legal apparatus, which paved a way for patriarchal elements to rein freely in society and made women highly vulnerable. Moreover, women's legal status was eroded by the promulgation of discriminatory laws and resultantly, their secondary position in the society was formalised.[5] This kind of atmosphere

[1] Sanchita Bhattachariya, 'Status of Women in Pakistan' (*pu.edu.pk*) <pu.edu.pk/images/journal/history/PDF-FILES/7v51_No1_14.pdf> accessed 24 April 2018.

[2] Malin Paulusson, 'Why Honor is Worth More Than a Life' (*Diva-portal*) <http://www.diva-portal.se/smash/get/diva2:830956/FULLTEXT01.pdf;jsessionid=wra6K3PeHmV8l7KkAHZjNfqfBKEwgiOiSlv5DzdH.diva2-search7-vm> accessed 24 April 2018.

[3] Michelle Maskiell, 'The Impact of Islamisation Policies on Pakistani Women's Lives' (*usaid.gov*) <pdf.usaid.gov/pdf_docs/PNAAY031.pdf> accessed 26 April 2018.

[4] Anita M. Wiess, 'Interpreting Islam and Women's rights: Implementing CEDAW in Pakistan' [2003] 18(3) *International Sociology* 581-601. See also, Jamal Shah, Zia-Ul-Haque and the Proliferation of Religion in Pakistan [2012] 3(21) *International Journal of Business and Social Science* 310-323.

[5] See the Offence of Zina (Enforcement of Hudood) Ordinance 1979 and Qanoon-e-Shahadat Order 1984 (Law of Evidence). Under the Zina Ordinance, if a woman accuses a man of zina-bil-jabr, she must produce four pious male witnesses who must witness the act of penetration, to prove the offense of rape liable to *hadd*. Since under the Law of Evidence, a woman's testimony is not weighed equally to that of a man, hence if a woman does not have requisite number of male witnesses but she does have female witnesses, their testimony would not fulfil the evidentiary requirement. As a result, the woman who is the victim of rape is likely to face adultery charges while the perpetrator may go scot free. For further information, see also, Zafar Iabal Kalanauri, 'A Review of Zina Laws in Pakistan' (*zklawassociates*) <www.zklawassociates.com/wp-content/.../A-Review-of-Zina-Laws-in-Pakistan.pdf> accessed 24 April 2018.

allowed men to become judges of women's modesty, and protectors of their sexuality. Women, on the other hand, became victims of all kinds of violence, along with other setbacks that they had to suffer in terms of their social and economic positions.[6]

The kind of violence that this paper will attempt to address is 'honour' killings. The initial laws dealing with 'honour' killings in Pakistan had their roots in the British colonial rule. In 1835, the British established a law commission to examine the issue of 'honour' killings. The commission exhibited significant leniency towards men whose honour was thought to be tarnished by the females of the family. It concluded that if it could be proved that a man had killed under such provocation, such killing should not be considered murder, but the lesser offence of manslaughter.[7] The judges in Pakistan still justify 'honour' killings by applying the plea of "grave and sudden provocation" as suffered by the perpetrator – the exact language of the British law. The further impetus for such leniency came from the decision of a Shariat Bench of the Peshawar High Court in the case of *Gul Hassan Khan v the Government of Pakistan.*[8] These Shariat benches were established during Zia's era as a part of his radical Islamisation process. This was the first case wherein the court held that the penalties prescribed in chapter XVI of the Pakistan Penal Code (the 'PPC') with respect to offences against the human body are un-Islamic inasmuch as such offences were not made forgivable by pardon or on the payment of *diyat*. Owing to the decision in *Gul Hassan case,* the process of incorporating *qisas* and *diyat* provisions in the PPC commenced in 1990.

This paper will further examine 'honour' killings as a form of social control. It will be discussed that nothing much has changed for women since Zia's era, and our criminal justice system continually contributes to leniency towards male perpetrators of 'honour' killings. The discussion will use a feminist lens to examine the issue at hand which will inform arguments made in the paper throughout. The article will then briefly discuss the concept of 'honour' killings and explore the rationale behind the same. The *qisas* and *diyat* laws will be discussed next to see how the law itself plays its part in facilitating 'honour' killings. The laws made specifically to target 'honour'

[6] (n 2).

[7] Paul Henley, 'Girls in the River: Pakistan's Struggle to End Honour Killing' (intpolicydigest) <https://intpolicydigest.org/2018/09/19/girls-in-the-river-pakistan-s-struggle-to-end-honour-killings/> accessed 25 September 2018.

[8] *Gul Hassan Khan v the Government of Pakistan* PLD 1989 SC 633.

killings, that is, anti-honour killings laws of 2004 and 2016, will also be evaluated to see what effect, if any, they had, not only on the legal and judicial treatment of honour crimes but also on the practice of this barbarity in general. Further, the judicial treatment of honour crimes will be discussed with the help of case law or jurisprudence established before and after the enactment of the 'honour' killings specific law of 2004. The discussion will then be summed up by framing this phenomenon of 'honour' killings within broader sociological framework.

'Honour' Killing - Understanding the Rationale Behind it

"[W]hen a man takes the life of a woman and claims that he did it because she was guilty of immoral sexual conduct, it is called an honour killing, not murder."[9] 'Honour' killings are acts of barbarism committed by men of a family, predominantly against women, who are considered to have brought dishonour upon the family's name. The justification given for such acts is based upon a socially constructed role of men as protectors of women's sexuality to maintain family values and social order.[10]

The underlying philosophy of 'honour' killings is based upon the fascination of patriarchal systems with the notion of patrilineage.[11] Honour is basically social esteem. It is given by society and hence can be lost and must be regained. Women are considered as the property of men in the family.[12] This commodification of women is directly connected to the patriarchal obsession with patrilineage. Women, as mentioned earlier in the paper, are objects whose worth is calculated in terms of their reproductive capability, and as sex objects. Men are owners and protectors of the women's womb and they are supposed to control the sexuality of women. A man's honour in a patriarchal society is defined in terms of his ability to control the sexual behaviour of women of his family.[13] Deviance from any of the social norms or social controls, as set by men in society, is understood as women misbehaving and undermining the authority of men and social order, and hence needs to be punished.

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[9] Rabia Ali, 'The Dark Side of 'Honour'' (*Atria*, 2001) <ww.atria.nl/ezines/IAV_606755/IAV_606755_2001.pdf> accessed 27 April 2018.

[10] Lynn Welchman and Sara Hossain (ed.), *"Honour": Crimes, Paradigms, and Violence Against Women* (Zed Books 2005).

[11] (n 2).

[12] Ibid.

[13] (n 10).

Legal Treatment of 'Honour' Killings

This section will trace the history of laws and legal reforms in the area of 'honour' killings in Pakistan. It will further evaluate the strong and weak aspects of these laws as a means to deter 'honour' killings in the country. The discussion will start with *qisas* and *diyat* laws, and it will be seen how these provisions made their way into the law and what their incorporation meant for perpetrators and victims of 'honour' killings. The Criminal (Amendment) Acts of 2004 and 2016 made specifically to deal with 'honour' killings will be discussed next to assess their effectiveness in preventing the 'honour' killings in Pakistan.

How *Qisas* and *Diyat* Laws Facilitated 'Honour' Killings

Qisas and *diyat* laws have become a powerful means for the offenders to commit 'honour' killings and then go scot-free. These laws allow the victim or his/her family to retain control over the treatment of the trial of murder. The process of incorporating *qisas* and *diyat* provisions in the PPC commenced in 1990, owing to the decision of the court in *Federation of Pakistan v Gul Hassan and others*,[14] in which sections 299 to 338 of the Pakistan Penal Code 1860 ('PPC') which relate to offenses against the human body, and section 345 of Code of Criminal Procedure 1898 ('Cr.P.C') were held to be repugnant to Islamic injunctions for various reasons. Some of the reasons which are pertinent for the purposes of this paper included that these provisions do not provide for *qisas* and *diyat* in cases of bodily hurt and murder. Moreover, they also do not provide for a compromise between the parties on an agreed compensation, and pardon of the offender by the victim in case of hurt, or heirs of victim in case of murder. This incorporation of the said provisions deeply affected the judiciary's treatment of 'honour' killings because the victim's heirs are often also the perpetrators.

Now some of the provisions relating to *qisas* and *diyat* as incorporated by the *Gul Hassan case*, and which are most relevant for the purposes of this paper will be discussed. The same will be critically analysed to evaluate their relationship with 'honour' killings and the way in which these have the effect of facilitating the 'honour' killings. The discussion will first expound upon the concept of *wali* as laid down in the PPC, as it plays a very important role in all

[14] *Federation of Pakistan v Gul Hassan and others* PLD 1989 SC 633.

matters relating to *qisas* and *diyat*. Section 299(m) of the PPC defines *wali* as "a person entitled to claim qisas." Section 305 of the PPC lays down:

> *Wali*: In case of a *qatl*, the *wali* shall be
>
> a) the heirs of the victim, according to his personal law;
>
> b) the government, if there is no heir.

It can be clearly seen from these provisions that *wali* has a right to claim *qisas* and to compound offenses, as will be discussed shortly. Moreover, heirs of the victim are declared as *wali*; the government can only serve as *wali* in cases where there is no heir. It will be established shortly how this understanding of *wali* is problematic in the context of 'honour' killings. Section 309 of the PPC reads as follows:

> (1) In the case of *Qatl-e-amd*, an adult sane *wali* may, at any time and without any compensation, waive his right of *Qisas*.
>
> Provided that the right of *Qisas* shall not be waived:
>
> a) Where the Government is the *Wali*.
>
> b) Where the right of *Qisas* vests in a minor or insane.
>
> (2) where a victim has more than one *wali*, any one of them may waive his right of *qisas*."

Moreover, section 310 of the PPC lays down:

> "(1) In the case of *Qatl-e-amd*, an adult sane *wali* may, at any time on accepting *badl-i-sulh*, compound his right of *Qisas*:
>
> Provided that a female shall not be given in marriage or otherwise in *badl-i-sulh*.

These provisions make it clear that *wali* has a right to either waive the right to *qisas* altogether in case of murder, or to compound the offense on accepting *badl-i-sulh*. According to section 338 E of the PPC, all offenses under Chapter XVI of the PPC, which relate to bodily offenses, may be waived or compounded, and provisions of sections 309 and 310 shall *mutatis mutandis* apply to the waiver or compounding of such offenses.

This concept of *wali* is problematic because by making the heir a *wali*, the law has made it easy for perpetrators of 'honour' killings to escape

punishment. The reason being that the aforementioned provisions allow heirs of a victim to compound the offense of murder under all circumstances, even when they have vested interest with the perpetrator, like in cases of 'honour' killings. For example, in *Samia Sarwar case*,[15] her brother being the *wali* compounded her murder at hands of her own parents who went scot-free. 'Honour' killings are committed by the family members of a victim; hence the compounding of the offense by the other family members is inevitable. Hence, the law is assisting and encouraging potential offenders, rather than deterring them from committing 'honour' killings.

Also, section 313 of the PPC lays down that 'if the victim has no *wali* other than a minor or an insane, the father, or if he is not alive, the paternal grandfather of such *wali* shall have the right of *qisas* on his behalf.' This section clearly disentitles women from being the *wali* on behalf of the insane or minor *wali* of the victim. Again, the same male members who commit the crime or support the same are given the right to compound it. It clearly shows how the law is informed by the male standpoint, otherwise these lacunas are too apparent for anyone to ignore, unless they are deliberately incorporated into law, which is the case here. Mackinnon is right in saying that underlying these laws is a man-made structured hierarchy based on sex. These laws are made to maintain male dominance over women's sexuality. Moreover, section 338F of the PPC says that:

> In the interpretation and application of the provisions of this Chapter, and in respect of matters ancillary or akin thereto, the court shall be guided by the injunction of Islam as laid down in the Holy Qur'an and Sunnah.

Again, this section is highly problematic as it confers wide-ranged discretion upon the judiciary to decide all matters pertaining to offenses against the human body, and the right to *qisas* and *diyat* in respect of the same. No parameters have been laid down in the law itself for interpreting Islamic Injunctions. This poses a big problem in the context of 'honour' killings owing to the already gender-biased nature of our judiciary (which will be discussed shortly). Such a provision is tantamount to giving a legal cover to all the biases of the judiciary against women under the disguise of Islam when judges are not even well-trained in *Shariah* law. *Ghulam Yasin v The State*[16] is

[15] Quoted in a study research report conducted on Qisas and Diyat laws by the National Commission on the Status of Women <http://www.ncsw.gov.pk/previewpublication/2>.
[16] *Ghulam Yasin v The State* PLD 1994 Lah. 392.

the case which highlights the problematic nature of the aforementioned provision of law. In this case, the court said that section 338 F of the PPC gives authority to courts to take notice of Islamic injunctions with regards to murder on account of *ghairat* (honour) and to take benefit from the same. The court then quoted some ahadith which clearly prohibited 'honour' killings. However, the judges interpreted the same in such a way that it was held that "... it is obvious that a *Qatl* committed on account of *Ghairat* is not the same thing as *Qatl-e-amd* pure and simple and the persons found guilty of *Qatl* committed on account of *Ghairat* do deserve concession which must be given to them."[17]

Enactment of 'Honour' Killings Act 2004: Strengths and Weaknesses

In 2004, the Parliament passed an act making honour crimes and especially killings unlawful. The Criminal Law (Amendment) Act 2004 made numerous changes to the Criminal Procedure Code and the PPC and included killings on the pretext of honour under the category of *qatl-i-amd*. However, even this Act, which was passed after years of advocacy from civil society, failed to incorporate some critical changes. Some of the crucial changes made by this Act will now be briefly discussed.

Firstly, the Criminal Law (Amendment) Act 2004 gave a very elaborate definition of honour crimes as "offence[s] committed in the name or on the pretext of honour means an offence committed in the name or on the pretext of karo kari, siyah kari or similar other customs or practices."[18] It laid down that the offence of *qatl-i-amd* committed on the pretext of honour will fall within the ambit of section 302(a) and (b), as the case may be, and will not *ispo facto* fall under section 302(c). The said Act also laid down that the accused or the convict will not act as the *wali* of a victim and allowed the state to act as *such,* if needed (section 305). In cases where there is more than one *wali* and where all of them do not agree to waive or compound the right of *qisas,* or on the principle of causing *fasad-fil-arz,* the court may punish a perpetrator against whom the right of *qisas* has been waived or compounded, while also giving minimum imprisonment for 10 years in case of honour crimes (section 311). In cases of hurt, where *qisas* will not be enforced, the court, along with *arsh* (compensation for hurt) may award a punishment of *tazir*, especially if it is an honour crime (section 337-N (2)). Moreover, waiver

[17] Ibid, [17].
[18] The Criminal Law (Amendment) Act 2004, s 2.

or compound-ability of honour crimes has been made subject to conditions as the court deems fit according to the facts and circumstances of the case (second proviso to section 338E).

However, despite the enactment of the Criminal Law (Amendment) Act 2004, it remained quite ineffective in remedying the situation and providing redress to the victims of 'honour' killings. The reason being, that some of the important provisions were dropped out from the final draft of the aforesaid Act, which will now be laid out. The provisions relating to waiver and compound-ability of the right of *qisas* were left intact and valid in cases of honour crimes, which make a room for compromise between parties, which, in turn, becomes inevitable as honour crimes are usually committed by the family members. Compound-ability or waiver of offenses related to murder or bodily harm were made subject to the satisfaction of the court. However, this does not help the victims at all because there is nothing in the Act to make sure that when courts permit compounding of an offense, it must satisfy itself that it is not an honour crime. This is because it is very well possible that due to the introduction of harsher punishments for honour crimes under this Act, offenders may not mention honour as a motive. Hence, it is important for judges to determine the offense before allowing its waiver or compound-ability.

While 'honour' killings have been categorized as *fasad-fil-arz* and a minimum sentence of ten years as *tazir* has been provided for the same, this barely does any good. This is because sentences in cases in which *qisas* does not apply are left to the discretion of judges, which again paves the way for perpetrators to get away with lenient punishments, given the gender-biased nature of our judiciary. The definition of honour crimes leaves out one important aspect which makes all the difference in the cases of 'honour' killings. It does not include words "whether committed due to grave and sudden provocation" in the definition of honour crimes. Thus, it leaves room for judges to grant concessions to the accused based on this plea, regardless of it being removed from the law. There is no mandatory minimum sentence for 'honour' killings irrespective of the relation of the offender to the victim. Moreover, other people who are usually involved in, or encourage such killings like *jirgas*, *panchayats*, and family members, and are thus primarily responsible for perpetuating these practices are not made liable under the law in any capacity.

This discussion reflects so many lacunas that have been deliberately left in the Criminal Law (Amendment) Act 2004 to let the gender-based,

social, and cultural biases of the judiciary play in an open field by granting lenient punishments to the offenders, and by facilitating compromises between parties to assist offenders in getting away with murder. Two main problems in the way of bringing perpetrators of 'honour' killings to justice, that is, waiver of the right to *qisas* or compoundability of these offenses by the heirs of the victim, and the plea of a grave and sudden provocation are still left intact in the law. This said Act merely attempted to create false consciousness amongst women that their problems are being properly addressed and something more than an assurance of formal equality is being done. However, the reality is totally different: this law again perpetuates patriarchal notions and the idea of men being the protectors of women's sexuality, even though, this time, it is not the gender neutrality of the law that is doing the trick, but rather the pro-women nature of the law that is masking patriarchal ideas. Deeper appreciation and critical analysis of this law further debunks the myth that law is neutral, and judges are neutral arbiters of the law.

Judicial Treatment of 'Honour' Killings

Cases pertaining to 'honour' killings have been coming to courts in Pakistan for years now. Until 2004, there was no specific legislation which had been enacted to curb the rampant crime of 'honour' killings in the country. So, a great body of jurisprudence has been developed by the cases decided pre-2004, which provides for very narrow and biased judgments by judges. It is crucial to take a quick look at these cases to evaluate as to how the jurisprudence on this point unfolded, and in order to analyse how judges dealt with cases of 'honour' killings. This analysis of pre-2004 jurisprudence is also important to assess as to whether there has been any transformation in the mindset of the judiciary in deciding such cases after the enactment of the Criminal Law (Amendment) Act 2004, also known as Honour Killings Act. Although new and stricter anti-honour killings law were put in place in October 2016 to fight against the practice of 'honour' crimes, it is important to first look at the jurisprudence before and after the old anti 'honour' killings law, so that the new law could be analysed against its backdrop and a clearer picture could be drawn as to the effectiveness of the new law. Aside from that, the change (if any) in legal, judicial and societal attitudes towards the treatment of 'honour' crimes can also be marked clearly this way.

Case Law Pre-2004

In pre-partition cases, husbands were given full advantage of the 'plea of sudden and grave provocation' in case they murdered their wives and their

alleged lovers whilst accusing them of adultery.[19] The courts were willing to interpret this plea quite broadly. Case law shows that even in the post-independence period, minimal and lenient punishments were granted to perpetrators of 'honour' killings.[20] The plea of sudden and grave provocation in a way authorised men to control every action of women of their families, and take their lives in case they defied the accepted social norms and social order. In the post-independence period, much confusion was created because of Islamisation of the provisions of the PPC relating to murder and hurt. Consequently, *qisas* and *diyat* provisions were made a part of the PPC. The effect of these provisions on the legal treatment of 'honour' crimes, as relevant for the purposes of this paper, will now be summarised.

Firstly, the concept of murder was completely changed, declaring every unnatural death of a person at the hands of another individual as murder. All previous categories of murder were abolished, and four new categories with respect to proof and punishment were introduced: 1) *Qatl-i-amd* liable to *qisas*, punishable under section 302(a) of the PPC; 2) *Qatl-i-amd* liable to *tazir*, punishable under section 302(b) of the PPC; 3) *Qatl-i-amd* where *qisas* is not applicable, punishable under section 302(c) of the PPC; and 4) *Qatl-i-amd* not liable to *qisas*, punishable under section 308 of the PPC. Secondly, sentences on account of murder and hurt were given not based on the gravity of crimes and the facts of the case, but on the basis of the proof of murder and relationship of the offender with the deceased. Specific requirements were laid down for *qisas*, including full confession on part of the offender to the satisfaction of the court or the testimony of requisite witnesses. In case, these requirements are not fulfilled, perpetrator is only liable to be punished under *tazir* and not *qisas*. However, sections 306(b) and 306(c) automatically exclude certain relatives from *qisas* or *tazir* under section 302(b), PPC, such

[19] *Mangal Ganda v Emperor* A.I.R 1925 Nagpur 37; *Potharaju v Emperor* A.I.R 1932 Madras 25(1); and *Emperor v Jate Uraon* A.I.R 1940 Patna 541 as quoted in 'Judicial Responses on the Issues of Honor Killing in India' (*Inflibnet*) <ir.inflibnet.ac.in:8080/jspui/bitstream/10603/89946/14/14_chapter%20-vi.pdf> accessed 29 April 2015. See also, *Emperor v Dinbandhu* A.I.R 1930 Calcutta 199 as quoted in Adnan Sattar, 'The Laws of Honour Killing and Rape in Pakistan: Current Status and Future Prospects' (*awaz.org.pk*) <aawaz.org.pk/cms/lib/downloadfiles/1448430520v2%20Final%20AS%20Laws.pdf> accessed 29 April 2018.

[20] *The State v Akbar* 1961 PLD (W.P.) 24, Lahore; *Muhammad Saleh v The State* PLD 1965 SC 446; *Chiragh v The State* 1970 PCr.LJ 1199; *Khadim Hussain and another v The State* 1973 PCr.LJ 284; *Jafir v The State* 1975 PCr.LJ 582; *Ali Sher v The State* 1999 PCr.LJ 682.

as parents and grandparents who murder their child or grandchild, or where a person murders his spouse and is survived by children from the marriage. Such perpetrators could only be sentenced to *diyat*, although the courts have the discretion to impose a maximum sentence of 14 years depending upon the facts and circumstances of a particular case. Moreover, law of *qisas* is not to be applied in cases where 'Islamic Injunctions do not allow for such application' (section 302 (c), PPC). The aforesaid provision did not contain any elucidation as to the construction of 'Islamic Injunctions,' and it was left solely to the discretion of the court. Lastly and most importantly, law (section 309 & 310, PPC read in conjunction with section 345, Cr.PC) allowed heirs of the victim to either waive the right to *qisas* by pardoning the victim or to compound the offense by taking some compensation from the perpetrator. If the case is being heard under *qisas*, any one of the heirs may waive their right of *qisas* and enter a compromise, which waiver or comprise the court is bound to accept. In such a case, the accused will be acquitted unless the court exercises its discretion under section 311 (dealing with the discretion of a court, irrespective of waiver or compromise, to impose a sentence of maximum 14 years under the concept of *fasad-fil-arz*), PPC. However, if the case is being heard under *tazir*, for a compromise to be effective, all heirs must be included and the permission of the court is a must. Such compromise amounts to the acquittal of the accused. It remained difficult to determine as to which case falls under section 309 and which one falls under section 310. Judgments conflicted over whether a single heir alone can compound or waive a case liable to *tazir*, and which provision of law governed when all heirs did not forgive the offender.

These changes in law resulted in many confusions and incongruities over various issues. The new categorisation of murder provided a leeway for the lenient treatment of 'honour' killings. For instance, in the case of 'honour' killing, the offender may plead guilty before the court, thereby making his offense fall under *qatl-i-amd* liable to *qisas*. In such a case, any one of his family members may forgive him and save him from capital punishment (because in the case of 'honour' killings, usually both the perpetrator and the victim belong to the same family). Although the court could still award imprisonment for up to fourteen years as *tazir* but in majority of cases, the courts held on to its lenient approach by declaring such cases as falling outside the ambit of *fasad-fil-arz*. Moreover, in cases where the offender committed the murder of either his daughter or his wife, and had surviving children, the case attracted the application of section 308, PPC, and was punishable by imprisonment for up to fourteen years at the discretion of the

judge. Again, in such cases, judges have time and again awarded lenient sentences. A majority of murder cases, however, fall under the category of *qatl-i-amd* liable to *tazir*. This is especially the case when the offender has not only killed his family member but has also killed the woman's suspected paramour. In this case, if he confessed to the murder, his family may have forgiven him, but he would quite likely have been awarded capital punishment as *qisas* if the family of the male victim insisted on it. On the other hand, if the accused did not confess and was instead convicted under section 302(b), he would receive a minimum punishment of life imprisonment. Yet, if the offender happened to be affluent or powerful within the community, he could safely rely on the courts accepting a compounding of *qatl-i-amd* liable to *qisas* or a compromise of *qatl-i-amd* liable to *tazir*, without examining whether or not such a settlement had been voluntarily negotiated. The confusion was further created over issues like whether sections 309 and 310, PPC, relate to punishments under *qisas* or *diyat*. The case of *Gul Hassan*, as also mentioned earlier, added further to this confusion. Judgment in the said case laid down that murder can only be exempt from *qisas* in two situations: (1) where the deceased committed an act for which the punishment under Islam is also death; and (2) where murder was committed in self-defence. It was also held that murder of a person who is not *masoom-ud-dam* (one whose blood is protected by law) cannot be punished under *qisas*. However, it was not clarified as to who qualifies as *masoom-ud-dam* and who does not. It was left for subsequent decisions to conjecture on this point. Moreover, making self-defence an exemption from *qisas,* and the court's treatment of this exemption created further hindrance in the way of prosecuting perpetrators of 'honour' killings. However, there was one positive aspect of the judgment which was the cancelation of the plea of sudden and grave provocation to be used as a defence. On the issue of grave and sudden provocation, Taqi Usmani J., in his opinion in *Gul Hasan*, noted that the Exception I of section 300, PPC, did not conform to Islamic principles:

> As per Islamic rulings, provocation, no matter how grave or sudden, cannot by itself reduce the gravity of the offence of murder. Instead, the relevant issue from an Islamic perspective would be that whether the deceased was indulging in such acts which would amount to an offence punishable by death under Islamic law? For example, if a man sees his wife committing adultery, an offence punishable by death under Islamic law, and kills his wife and her paramour in such circumstances, and brings evidence of adultery as per the requisite standard of

> proof under Islamic law, then he shall indeed be exempt from Qisas (capital punishment in retribution). However, since he should have approached the authorities in such circumstances rather than taking the law in his own hands, he has committed a crime against the state and may be given any punishment by the state (as tazir).[21]

Despite this positive aspect of the judgment, its lack of clarity was evident in many cases to follow. Further, although the exception of 'sudden and grave provocation' was expunged from the Penal Code by the *Gul Hassan* case, it was still argued and accepted in mitigation, in several cases following the *Gul Hassan* case, which shall now be discussed.

In *Abdul Waheed* case,[22] the Supreme Court evaluated the plea of sudden and grave provocation against the backdrop of *Gul Hassan* case. In this case, the accused was sentenced to hard labour for seven years under section 302(c), PPC (where *qisas* is not applicable), based on the accused's confession that he intended to shoot his sister on finding her in a compromising position with the victim, but the victim intervened and was shot. The prosecution case fell apart owing to the non-credibility of the witnesses, leaving the confession as the only basis of the conviction. The trial court referred to the *Gul Hassan* case and accepted the accused's account thus declaring the victim as not *masoom-ud-dam*. An appeal was filed by the prosecution asking to sentence the accused to death for *qisas* under section 302(a), PPC. Naseem Hassan Shah J. referred to section 141 of the *Qanoon-e-Shahadat* and noted that the onus of proof is on the accused when trying to benefit from exceptions. He further noted that the requisite evidence in the instant case same as that for *zina* under *hadd*, is, four adult male Muslim eyewitnesses. In the present case, there was no other evidence on record other than the accused's own account. The court relied upon *Mohib Ali v The State*,[23] where the Supreme Court observed that "a mere allegation of moral laxity without any unimpeachable evidence to substantiate would not constitute sudden and grave provocation. If such pleas, without any evidence,

[21] (n 14) 674.
[22] *Abdul Waheed case* 1992 PCr.LJ 1596.
[23] *Mohib Ali v The State* 1985 SCMR 2055.

are accepted, it would give a license to people to kill innocent people,"[24] and enhanced the sentence to death under section 302(1), PPC.

However, in several other cases of similar nature which followed *Abdul Waheed*, the positive precedent set by this judgment was not followed. In fact, judgments after this case continued to be conservative and granted lenient punishments to offenders in cases of 'honour' killings. Cases were mostly decided based on the conduct of the victim, which was considered as the motive of the murder and was also used as an excuse for not granting compensation to the heirs, as the victim was often declared not to be a *masoom-ud-dam.* The statement of the accused was not even scrutinized. Self-defence was made an exception to the application of *qisas*. Many cases involved the said exception of self-defence, so it is important to discuss the same in order to determine the court's treatment of the same.

In *State v Muhammad Hanif and 5 others*,[25] Muhammad Hanif and his two brothers were charged for the murder of Muhammad Ashraf. While the other two accused denied all the charges, Muhammad Hanif took refuge under the plea of grave and sudden provocation. He admitted killing Muhammad Ashraf when the deceased disgraced his wife. The trial court, despite admitting that the plea of grave and sudden provocation is not available under the law anymore, nevertheless considered the plea of grave and sudden provocation as an extenuating circumstance in the case. The trial court sentenced Muhammad Hanif to ten years' hard labour under section 302(c), PPC (murder not liable to *qisas*), and a fine to be payable to the deceased's heirs. The state appealed, asking the court to convict the accused under *qisas*. On appeal, Shafi ur Rehamn J. noted that according to the injunctions of Islam, *qatl-i-amd* liable to *qisas* applies only when the person murdered is not someone whose acts invoke a death sentence under Islam or is *masoom-ud-dam*, thereby paving a way for the accused to declare their victims not *masoom-ud-dam* and receive lenient punishments. Further, the court brought 'honour' killings within the context of self-defence as an exception to *qisas* and invoked the Quranic description of men as *qawwam* or protectors of their women; and hence the murder of another man who disgraced the wife of the accused was considered deserving of leniency under the law. From plethora of ahadith on the subject, the court only quoted three, without ascertaining their authenticity, and somehow concluded that the right of self-defence as

[24] Ibid [15].
[25] *State v Muhammad Hanif and 5 others* 1992 SCMR 2047.

available under Islam is far wider than the one available under the PPC. This decision gave another leeway for subsequent courts to bend the law in favour of perpetrators of 'honour' killings by describing their offense a result of self-defence.

Later, in *Ghulam Yasin v The State,*[26] which involved the murder of a man and injury of a woman at the hands of her brother and paternal uncles on allegedly finding her in a compromising position with the deceased, the court noted that "it is true that provisions of this chapter relating to *Qatl* do not make any allowance for *Qatl* committed under *Ghairat* but in view of section 338 F of PPC, courts are bound to apply the provisions of law in accordance with the injunctions of Islam."[27] The Lahore High Court looked at various ahadith and held that it was "obvious that a murder committed on account of *ghairat* is not the same as *qatl-e-amd* pure and simple, and the persons found guilty of *Qatl* committed on account of *ghairat* do deserve concession which must be given to them."[28] The court concluded that murder in such circumstances did not fall under section 302(a) of the Penal Code and reduced the sentence to five years. This judgment was used in many subsequent cases to grant lenient punishments to the offenders, especially in the Lahore High Court.

The issues of *masoom-ud-dam*, sudden provocation, and *qawwam* (Islamic concept of men as being in-charge of women) were also discussed in *Ali Mohammad v Ali Muhammad.*[29] In this case, the accused killed a man whom he allegedly saw in a compromising position with his wife. The trial court heard the case under the old PPC provisions and sentenced the accused to seven years. The High Court, on appeal, acquitted the accused and deemed the murder as legally justified. When the case reached the Supreme Court, it used the Islamic concept of men as being in-charge of women and responsible for their protection and safeguard. On this basis, it was maintained that the right to self-defence includes the right to defend the honour of one's women. As a result, Ali Muhammad was sentenced to imprisonment for two years (already undergone) as he went beyond his right of self-defence and used excessive force. These decisions had the effect of bringing back the plea of

[26] *Ghulam Yasin v The State* PLD 1994 Lah. 392.
[27] Ibid [13].
[28] Ibid [17].
[29] *Ali Mohammad v Ali Muhammad* PLD 1996 SC 274.

grave and sudden provocation in the equation, which ceased to be the law in 1990.

Similarly, in many subsequent cases decided by courts, sentences of the accused were reduced if the murder was believed to be committed to save the family honours, or based on sudden and grave provocation.[30]

In *Muhammad Arshad v The State*,[31] a person committed murder of his sister, mother, and two brothers. As per the prosecution's story, the accused had been living separately from his family and killed the aforesaid family members for allegedly dumping mud in his land. The motive behind these murders was told to be a family dispute. However, the accused admitted to having committed the said murders on the basis of the alleged illicit relationship of his sister with some person and his brothers' and mother's acquiesce to the same. In the court, he resorted to the plea of sudden and grave provocation as his sister's alleged immorality and other family members' acceptance of the same brought bad name and dishonour to him. However, he was not extended the benefit of the aforesaid plea of sudden and grave provocation because there was nothing on the record to suggest that "any unpleasant incident prompting the petitioner happened before the occurrence which created abnormal situation leading to the fateful occurrence."[32] It was noted that the alleged illicit relationship of the accused's sister with some person may be a cause of annoyance for him but the same cannot be considered as an element of sudden and grave provocation justifying the murder of four innocent individuals. The court set quite a positive precedent by saying that "[i]t is correct that in our society, the illicit liaison of a female of the family is not tolerated but mere suspicion of such relations cannot be used an excuse to commit murder and claim mitigating circumstance for lesser punishment."[33] The same principle was followed in *Abdul Jabbar v The State*.[34] However, in some of the later murder cases, the Supreme Court has now set a standard that if the accused is able to prove that "he was deprived of the capability of self-control or was swayed away by circumstances

[30] *Shabir Hussain v The State* 2002 YLR 1177; *Nisar Ahmad v The State* 2002 YLR 740; *Muhammad Ibrahim v The State*, 2002 YLR 562; *Haji Muhammad v The State*, 2002 YLR 59; *Wazir v The State* 2000 YLR 2823; *Ali Sher v The State* 1999 PCr.LJ 682; *Muhammad Ishaque v The State* 1998 PCr.LJ 1110.
[31] *Muhammad Arshad v The State* 2006 SCMR 89.
[32] Ibid [5].
[33] Ibid.
[34] *Abdul Jabbar v The State* 2007 SCMR 1496.

immediately preceding the act of murder or there was an immediate cause leading to grave provocation . . . the sentence of life imprisonment or lesser punishment may be imposed..."[35] This standard again leaves a room for the plea of sudden and grave provocation to be used as a defence strategy. The evaluation of the Supreme Court cases demonstrates how judiciary's proclivity to interpret the law within the context of widely accepted parochial social and cultural norms is still intact. Mitigating circumstances like the plea of sudden and grave provocation is still taken into account for male perpetrators as they are considered to be the 'guardians' of family honours.

The Lahore High Court has given a lot of conflicting judgments in the cases of 'honour' killings that tend to both support and condemn this practice. For example, in one of the judgments, the Lahore High Court gave a quite progressive and positive decision in the case of honour crime.

In *Ashiq Hussain v Abdul Hameed*,[36] the court enhanced the sentence of the accused who committed murders of Abid Hussain and Hafizan Bibi on the account of honour. The court went into detail as to how "some of the pre-Islamic prejudices still persist in one form or the other. The murders in the name of honour is one manifestation of this prejudice which has taken the lives of many innocent souls." The court went on to state that "no Court can and no civilised human being can sanctify murders in the name of tradition, family honour or religion."

Similarly, in *Bashir v The State*,[37] the court strongly opposed the practice and observed that "neither law of the land nor religion permitted so-called honour killing which amounted to murder (Qatl-i-Amd) simpliciter and that honour-killing was violative of fundamental rights enshrined in Articles 8(I) & 9 of the Constitution."[38] Further, in *Kamal Shah v The State*,[39] the court condemned 'honour' killing and said that "murder based on *"Ghairat"* is not a mitigating circumstance for awarding a lesser sentence."[40]

However, despite these positive decisions on part of courts, there are still many other decisions in this regard which paint a very bleak picture and

[35] *Muhammad Zaman v The State* PLD 2009 SC 49, [11].
[36] *Ashiq Hussain v Abdul Hameed* 2002 PCr.LJ 859.
[37] *Bashir v The State* 2006 PCr.LJ 1945.
[38] Ibid [21].
[39] *Kamal Shah v The State* 2009 PCr.LJ 547.
[40] Ibid [11].

still allow the plea of grave and sudden provocation to be used as a mitigating circumstance.

In *Nasir Abbas v The State*,[41] the court held that the award of capital punishment to the accused was not justified, as it was a case of family honour. In *Muhammad Imran v The State*,[42] the accused murdered two daughters of the complainant. As per the complainant's story, one of her deceased daughters was married to the father of the accused who considered this marriage as her deceased stepmother's plan to grab his father's property. Therefore, he along with his real mother, hatched a conspiracy to kill her stepmother. However, the accused confessed to have committed the murder when he lost his senses on seeing her stepmother in a compromising position with someone. The other daughter of the complainant was also murdered on account of her involvement in the aforesaid suspicious circumstances. The accused did not produce any witness in his favour, but his story was still believed by the court as plausible and he was granted a favourable judgment. The court, in this case, explicitly laid down that "killing over question of family honour on provocation had been accepted as an extenuating ground for grant of lesser punishment . . . *Qatl* committed on account of *ghairat* being not equivalent to *Qatl-e-Amd*, the appellant is entitled to some concession."[43] Similarly, in *Sarfraz v The State*,[44] the man who murdered his wife and her alleged paramour on seeing them together was granted a lenient punishment on the grounds of sudden provocation. The court declared that the deceased were not *masoom-ud-dam* without even delving into a standard on the basis of which it is decided as to who qualifies as a *masoom-ud-dam* and who does not. It was held:

> We would detest killing on this ground [on the ground of family honour and grave provocation]. But we are conscious of the fact that a situation as is apparent in this case and which had led to the occurrence was the cause of a grave provocation. If someone is provoked then his act is not one of pre-meditation falling under the definition of cold-blooded murder. It is a case where human frailty governs consciousness and impulse dominates . . . although this was

[41] *Nasir Abbas v The State* 2006 PCr.LJ 497.
[42] *Muhammad Imran v The State* 2008 YLR 1290.
[43] Ibid [13].
[44] *Sarfraz v The State* 2008 YLR 969.

> a double murder case, it was certainly not a case falling under Section 302(b), PPC, rather it is a case coming within the ambit of 302(c) PPC.[45]

In *Muhammad Farooq v The State*, the court stated that "as the murder has been committed out of suspicion of immorality, so award of lesser sentence to the appellant was proper and highly justified."[46] Again in *Sabir Hussain alias Pehlwan v The State*,[47] a brother murdered his sister and her alleged paramour as that "was the expected reaction of a young man with boiling blood, seeing his real sister with her paramour at midnight time in his house."[48] Social customs, as dictated by men in a patriarchal society like Pakistan, were preferred over the life of women; and the role of men as protectors of women's sexuality was highlighted by saying:

> Human life was very sacred. At the same time prevalent social set up, traditions and customs prevailing in the society could not be ignored where men would sacrifice their lives to safeguard the honour of their womenfolk... and that no religion allowed widespread immorality to destroy the fabric of a family life. Such acts of immorality are not approved by most of the civilizations of the world.[49]

The list of such cases goes on and on. As a result, these precedents have been followed in the future cases even though logic dictated otherwise. For example, in *Qaisar Ayub v The State*,[50] the judge said that license to kill cannot be given to anyone on the pretext of honour but still felt compelled to allow mitigation in the sentence, as murder in the name of honour is accepted by the Lahore High Court as a mitigating circumstance in several precedents.[51] The Lahore High Court's trend of passing conflicting judgments

[45] Ibid [13].
[46] *Muhammad Farooq v The State* 2008 YLR 2319 [15].
[47] *Sabir Hussain alias Pehlwan v The State* 2007 PCr.LJ 1159.
[48] Ibid [7].
[49] Ibid [9].
[50] *Qaisar Ayub v The State* 2009 PCr.LJ 1148.
[51] *Muhammad Waryam v The State* 2005 YLR 1017; *Muhammad Akhtar and another v The State*, 2009 YLR 1092.

in the cases of 'honour' killings continues, and can be seen even in a more recent series of judgments.[52]

The Balochistan High Court, on the other hand, in *Sher Ahmed v Khuda-e-Rahim*,[53] ruled that 'honour' killing amounted to murder and was not permitted by either law or religion. Such act was rather found to be violative of Article 9 of the Constitution which is a quite a positive ruling on part of the court.

This discussion shows how self-defence has been made an exception to the application of *qisas* without specifically laying out that what constitutes self-defence, or who can exercise it and under what circumstances. Therefore, it will not be incorrect to say that this exception has the potential to be bent in every way possible to benefit the perpetrators of honour crimes against women. Also, the merger of the concepts of self-defence and *masoom-ud-dam* reintroduced the exception of the plea of sudden and grave provocation. The courts also took advantage of the confusions created by the incorporation of *qisas* and *diyat* provisions in the PPC and some of the judicial pronouncements, especially in the *Gul Hassan* case, to construe the law as widely as possible in the favour of men. The analysis of the case law also reveals that it is not just the black letter law that victimizes women but also the regressive mind-set of the judges, as is clearly reflected in some of their decisions in cases of 'honour' killings. As a result, perpetrators of 'honour' killings were seldom brought to justice. Cases of 'honour' killings rarely led to convictions and imprisonments,[54] which could be one of the major reasons

[52] *Sajjad Hussain alias Shahzad v The State* 2016 YLR 1517 (conviction of accused from s. 302(b), PPC to s. 302(c), PPC and his sentence of death on five counts was commuted to sentence of imprisonment for twenty-five years on five counts, as the Accused had seen his wife and her paramour in objectionable position, when other deceased and injured were also present in the house. Ambient circumstances compelled accused to get rid of his wife, her alleged paramour and his own children in order to absolve himself from opprobrium life and odium living); 2012 YLR1948 (nobody could be given a license to kill an innocent person on the ground of so-called *ghairat*. Case of accused was found to not be covered under s.302(c), PPC).

[53] *Sher Ahmed v Khuda-e-Rahim* 2012 MLD 158.

[54] See 'IRB - Immigration and Refugee Board of Canada: Pakistan: Honour killings targeting men and women [PAK104257.E]', (*ecoi.net*) <http://www.ecoi.net/local_link/237371/346401_en.html> accessed 30 April 2018. See also, 'Navi Pillay Urges Government Action After "Honour" Killing of Pregnant Woman in Pakistan' (*ohchr.org*) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14650&> accessed 30 April 2018. See also, 'Pakistan: Women fearing gender-based harm/violence'

for the subsequent increase in cases of 'honour' killings after the enactment of Qisas and Diyat Ordinance 1990.

Case Law Post-2004

After having discussed the courts' treatment of the cases of 'honour' killings pre-2004, it is now pertinent to look at some of the cases post-2004, that is, after the enactment of the Criminal Law (Amendment) Act 2004 to see what effect, if any, this new law had on the judicial mindset in deciding the 'honour' killings cases. A few cases from different high courts since 2005 will now be discussed to discern a pattern of judicial treatment of honour crimes.

In a recently reported Supreme Court case, the court drew a distinction between honour crimes and crimes committed under grave and sudden provocation. In *Muhammad Qasim v the State*,[55] the appellant was convicted under section 302(b) of the PPC, for the murder of Meer Muhammad and Qaim Khatoon (appellant's sister-in-law) on the suspicion of illicit relations between the two. The High Court reduced the sentence to life imprisonment. In appeal, his sentence was further reduced by the instant court. Again, in this case, the court distinguished between the crimes committed based on honour and those committed on the account of grave and sudden provocation. The court referred to the proviso to section 302, PPC, as added by Criminal Law (Amendment) Act, 2004 (I of 2005), S.3, which stated 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. The court said that the words 'in the name or pretext of honour', referred to a premeditated crime and should not be confused with grave and sudden provocation which refers to crimes committed under loss of self-control.

The High Court in Khyber Pakhtunkhwa demonstrated a regressive approach towards honour crimes in *Umar Zahid vs. The State*.[56] In this case, there was a *jirga* between the complainant and Umar Zahid on the day of

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(*gov.uk*)
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/500817/PAK_Women_Gender_based_harm_and_violence_feb_16.pdf> accessed 30 April 2018.

[55] *Muhammad Qasim v the State* PLD 2018 SC 840.

[56] *Umar Zahid v The State* 2009 MLD 4.

occurrence. Umar Zahid allegedly took the victim from her house in the dark hours. The victim was buried, and her sudden and unnatural death was not reported, and it was subsequently found in an investigation that hanging was the cause of the death of the deceased. It was supposed in the judgment that this could be a case of forced honour suicide, where the deceased could have committed suicide for the honour of the family. In any case, the offender was released based on some legal mechanics. Even in the case as recent as *Aurangzeb v The State*,[57] that was reported in 2015, it was held that, "offence committed on the pretext of *ghairat* or family honour was different from the one committed on the ground of grave and sudden provocation which would be determined by looking into the circumstances of each case."[58] In this case, the accused was acquitted for lack of evidence of premeditated murder.

However, in *Sanobar Khan v The State*,[59] the Peshawar high Court set quite a positive precedent. In this case, the accused had killed two people named Sharafat Bibi and Ashraf Khan only because Sharafat Bibi came to the room to prepare her baby's cot when Ashraf Khan was sitting there and talked to him. The accused now sought criminal revision based on the compromise between him and the heirs of the two deceased. The court referred to Criminal Amendment Act 2016 and stated that the said Act has made the crime committed in the name of honour non-compoundable, and also noted an authority establishing that compromise *ipso facto* does not dilute the effect of conviction especially when people have been murdered on account of honour. This is a positive step taken by the court in enforcing the new anti-honour killings law in a way which will deter killings in the name of honour. However, it is yet to be seen if such positive precedents are also set in all such cases by all the courts.

As for the Balochistan High Court, it has seemed to have given some positive decisions in the cases of honour crimes. In *Khadim Hussain v The State*,[60] the court supported the view that:

> Nobody had any right nor could anybody be allowed to take law in his own hands to take the life of anybody in the name of "*Ghairat*". Neither the law nor the religion permitted the so-called honour killing which amounted to *"Qatl-e-amd"*

[57] *Aurangzeb v The State* 2015 YLR 912.
[58] Ibid [16].
[59] *Sanobar Khan v The State* 2018 PCr.LJ Note 181.
[60] *Khadim Hussain v The State* 2012 PLD 179.

> simpliciter. Such iniquitous and vile act was violative of the Fundamental Rights as enshrined in Art.9 of the Constitution which provided that no person would be deprived of life or liberty except in accordance with law and any custom or usage in that respect was void under Art.8(1) of the Constitution.[61]

Similarly, in another case,[62] it was said that murder based on "*ghairat*" did not furnish a valid mitigating circumstance for awarding a lesser sentence, and "killing of innocent people, especially the women on to pretext of '*Siyahkari'* was un-Islamic, illegal, and unconstitutional."[63]

However, Sindh High Court seems to have developed a much harsher attitude towards the offender in honour crimes post 2004, though not many cases have appeared before the court. For instance, in *Daimuddin v The State*,[64] the court rejected the bail of applicants who conspired to kill a female member of their family for marrying of her own choice. Shahid Anwar Bajwa J. stated that "*Karo Kari* is crime which is a blot not only on the fair name of Sindh … It has in the comity of nations, always sullied Pakistan and Muslim Society as a whole."[65]

In another case reported as *Amir Bux Machi vs. The State*,[66] bail was refused to the accused on the grounds that murder on the pretext of honour did not provide any valid ground for the grant of bail. The Lahore High Court continues to pass conflicting judgments in the cases of 'honour' killings as also evident from its pre-2004 jurisprudence. In *Muhammad Tahir v The State*,[67] the accused had committed the murder of his wife on account of '*ghairat'*. The Lahore High Court while passing the judgment stated that no lenient view can be taken in the present case on account of '*ghairat'* (honour) which is quite a positive stance taken by the court.

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[61] Ibid [6].
[62] *Gul Muhammad v The State* 2012 PLD 22.
[63] Ibid [14].
[64] *Daimuddin v The State* 2010 MLD 1089.
[65] Ibid [10].
[66] *Amir Bux Machi v The State* 2013 YLR 2190.
[67] *Muhammad Tahir v The State* 2014 YLR15

However, later in *Muhammad Sadiq v The State*,[68] the court did not hold onto this positive ruling. In this case, the appellant Muhammad Sadiq was convicted under section 302(b), PPC, by way of *tazir* for committing the murder of Ghulam Hussain and was sentenced to death. The court noted that the motive of the murder as disclosed by the prosecution and the accused in his first statement before the police after his arrest, was based on the suspicion of the deceased's illicit relations with his wife. His wife had been missing from home for quite some time and the appellant was looking both for his wife and the deceased. One day, when he saw the deceased, he killed him. The court noted that the "infliction of multiple firearm injuries on the chest and abdomen of the deceased Ghulam Hussain reflects that the appellant Muhammad Sadiq had nurtured grave provocation in his mind based on suspicion of illicit relations of his wife with the deceased. It therefore furnishes considerable mitigating circumstance to reconsider the quantum of punishment of death awarded to Muhammad Sadiq appellant. In the attending circumstances awarding of sentence of death to Muhammad Sadiq appellant would be harsh and instead imprisonment for life would be sufficient to meet the ends of justice."

In *Muhammad Shah Nawaz v The State*,[69] the appellant challenged his conviction under section 302(b), PPC on account of murders of Muhammad Younas and Tahira Bibi (appellant's cousin who was residing in the appellant's compound in a separate room). Learned counsel for the appellant argued that the murder was committed on the spur of a moment when the appellant lost control on seeing the two deceased in an objectionable position. This plea was not taken by the appellant himself at any point and hence was declared an afterthought without any ground to stand on. The forensic evidence revealed that the swabs of the deceased were stained with semen making it a case of murder on the pretext of honour rather than the one committed on the spur of a moment. The Lahore High Court referred to the Act XLIII of 2016 (Anti-Honour Killings Law 2016) and observed that the incidents of honour killings are only covered under sections 302(a) and 302(b) of the PPC, and not under section 302(c). The court was convinced as to the guilt of the accused beyond reasonable doubt. However, as for the quantum of sentence to be awarded, the court stated that "we have observed mitigating factors i.e. the recovery of the crime weapon remained inconsequential and the occurrence had taken place inside the bounds of the appellant's compound

[68] *Muhammad Sadiq v The State* 2012 MLD 53.
[69] *Muhammad Shah Nawaz v The State* 2019 MLD 455.

in the adjacent room of his house and on seeing both the deceased in the objectionable condition, he being first paternal cousin of deceased Mst Tahira Bibi, had reacted blindly without considering its consequences."[70] Hence, the court decided that it is a settled principle of law that if at any stage. both the sentences of life imprisonment or death could be awarded, the preference should be given to the lesser punishment as a matter of caution. Consequently, the death sentence of the appellant was reduced to life imprisonment.

This case shows that even after the enactment of the stricter new law, grave and sudden provocation is still being used as a mitigating factor in cases of honour crimes (although there was also one other mitigating factor in the case, the defence of grave and sudden provocation remains intact). The court distinguished between murder committed in the name of honour and the one committed on the spur of a moment to arguably leave a room for the latter to be still used as a mitigating circumstance, and as a way for perpetrators to change their defence from honour to grave and sudden provocation to escape stricter punishments. This is because acting impulsively on seeing a female from one's family in an objectionable position with a stranger is not different from acting on account of honour, so there was no need to distinguish the two as the court did in this case.

The overall analysis of case law post-2004 suggests that the benefit that could have come about in terms of harsher punishments for 'honour' killings, as provided in the Criminal Law (Amendment) Act 2004, is being cancelled out by the usage of the plea of sudden and grave provocation as a defence, and the court's willingness to broadly interpret the same in favour of male perpetrators. Even though this plea is no more a part of law, the judges continue to interpret the law in light of societal norms, and their biases as members of a patriarchal society, thus resulting in a grave miscarriage of justice. Assertion of masculinity through violence, with much of it against women, a distinct feature of a patriarchal society, is being given full formal backing under the pretext of guarding family honour. Mere suspicion of any form of behaviour on part of women that seems to transgress societal norms is considered adequate to taint one's honour. The perceived or actual immoral behaviour that may lead to 'honour' killings of women may take various forms including marital infidelity, pre-marital sexual relations, demanding a divorce, being a victim of rape, or refusing to submit to an arranged marriage.

[70] Ibid [20].

Defiance of any form of social controls is taken as women misbehaving and thus needing to be punished to restore men's honour. The judicial treatment of 'honour' killings, instead of serving as a deterrent for male perpetrators, has the opposite effect of encouraging them. This is because, once the perpetrators bring the element of honour in a case, they are usually granted lenient punishments by the courts without paying much heed to the actual motive behind the murder. These discussions reveal that judges are not always the neutral arbiters of law, rather they are social and political actors, who tend to use legal doctrines as mere verbal camouflage to lend unwarranted plausibility and legitimacy to judicial caprice.

Criminal Law (Amendment) (Offences in the Name or Pretext of Honour) Act 2016 - Future Prospects?

In October 2016, public protests after a Pakistani model Qandeel Baloch was murdered by her brother on the pretext of honour pushed the Parliament to pass a stricter anti-'honour' killings law. The Parliament claims to have plugged the loophole in the older 'honour' killings law which allowed the legal heirs of the victim to pardon the perpetrators, who are usually their family members. Under the new law, the murderer would face a mandatory minimum lifetime jail sentence, if convicted of the killing (proviso to section 311). But still there are some loopholes in the new law which can easily tilt the balance in favour of the perpetrators. It is now upon the prosecution to prove that the murder was an honour crime. This is problematic as women's lives and conduct will be up for assessment in the courts paving a way for misogynistic rulings on the victims' morality rather than the act of perpetrators. Further, the judge can commute a death penalty into a life sentence. Moreover, section 302 of the PPC lays down that a convict in a simple murder case may get the life imprisonment of fourteen years or a maximum of the death penalty. Perpetrators can easily alter the motive of their crimes by denying that their crimes were on the pretext of honour, and thus escape the mandatory term and hence be charged under section 302, PPC and pardoned under section 309, PPC, by the family members. So essentially, the crime has still not been made non-compoundable – a major loophole paving a way for perpetrators to go scot free. Also, whether a murder can be defined as a crime of 'honour' is left to the judge's discretion, which again is a problem given the patriarchal mindset of some members of the judiciary, especially at a lower level. Furthermore, the new law does not provide the survivors of 'honour' crimes with any redress/recourse, as it only talks about murder and death. Lastly, 'honour' crimes have still not been made crimes against the state under the new law leaving an ample space for the offenders to either

walk free or get lenient punishments. It can be said that the new anti-honour killings act is essentially an old law in a new disguise enacted just to appease women and create false consciousness among them, that stricter punishments will translate into justice for them, which is not necessarily the case as will be discussed now.

It is quite unfortunate that even after toughening the law against 'honour' killings, these killings are still rampant in Pakistan. At least 280 such killings were recorded by the Human Rights Commission of Pakistan from October 2016 to June 2017, and this figure is still considered to be underestimated and incomplete.[71] "In fact, the Peshawar High Court twice acquitted a man of honour crimes after this law was passed, suggesting no change in the patriarchal mindset of the judiciary."[72] In Khyber Pakhtunkhwa, ninety-four women were killed by close family members in 2017.[73] In September 2017, a man in Peshawar killed his two daughters on the suspicion that they had boyfriends, which made him felt ashamed.[74] Further, earlier this year, a mother of two minor children was allegedly killed by her husband in the Umerkot district of Sindh which is suspected to be a case of 'honour' killing by the police.[75]

The fact that incidents of honour killings continue to take place at an alarming pace, despite the passing of new and stricter anti-honour killings law, demonstrates that something more than the mere provision of harsher laws and punishments is required in the society. It is the patriarchal system that has made men the 'guardians' of women's honour and consequently left women vulnerable in face of the whimsical wishes of such men. Hence, unless this patriarchal mindset of such men, be they the perpetrators, the lawmakers, or the judges, does not change, the new laws and enactments will be ineffective in curbing the misogyny prevalent in the society. The challenge

[71] Aurat Foundation Pakistan, 'Women still victims of honour killings despite new law' (*The Express Tribune*, 31 October 2017) <https://tribune.com.pk/story/1545802/1-women-still-victims-honour-killings-despite-new-law/> accessed 01 June 2018.
[72] Ibid.
[73] Saroop Ijaz, ''Honor' Killings Continue in Pakistan Despite New Law' (Human Rights Watch, *25 September 2017*) <https://www.hrw.org/news/2017/09/25/honor-killings-continue-pakistan-despite-new-law> accessed 28 June 2018.
[74] Ali Akbar, 'Man kills two daughters for 'honour' in Peshawar'' (*Dawn*, 23 September 2017) <www.dawn.com/news/1359543> accessed 28 June 2018.
[75] Hanif Samoon, 'Mother of two allegedly killed by husband over 'honour' in Umerkot' (*Dawn*, 1 January 2018) <https://www.dawn.com/news/1380162> accessed 01 June 2018.

here is to make men with a regressive mindset realise the value of women's lives, which certainly cannot be taken to satisfy their 'masculine ego.' The inculcation of such values in the society, along with robust, quick and proper implementation of anti-honour killings law is the right approach to get rid of the barbarity presented as honour killings. Further, it needs to be ensured that the police conduct impartial and thorough investigation of honour crimes, without succumbing to any religious or political pressures. Lastly, women need to be given emergency protection if they report any threat to their lives at the hands of any of their family members.

Conclusion

The research and analysis presented in this article demonstrates that the Criminal Law (Amendment) Act 2004 did not have the desired impact of eliminating or reducing the incidents of 'honour' killings in Pakistan. This is both due to the civil society's unawareness of this law or the specifics of this law, and the faulty drafting of the same. This law still allowed for the waiver and compound-ability of the right of *qisas* in the cases of honour crimes, whereby the majority of the perpetrators are allowed to go scot free. Similarly, the law left ample space for extenuating circumstances like 'sudden and grave provocation' to be used by the perpetrators to claim lenient punishments, and by the judges to grant the same, owing to their gender-based, social and cultural biases against female victims. The new anti-honour killings law of 2016, as analysed in light of the 2004 law, suffers from the same defects as the old law did. As a result, incidents of honour crimes are still prevalent in the society at a large scale. The reported case law, post the enactment of the Criminal Law (Amendment) Acts of 2004 and 2016, shows that the plea of sudden and grave provocation is still being used as a mitigating circumstance though it is not available as an exception under the law. At the same time, some of the positive precedents set by the superior courts are not necessarily being followed by the lower courts, which not only continue to differentiate between a simple murder and a murder on the pretext of honour, but also murder under grave and sudden provocation and murder in the name of honour, to the disadvantage of victims.

Article 25 of the Constitution of Pakistan guarantees equality of all citizens regardless of their gender, race, or religion. On a deeper appreciation of this provision, it becomes clear how this formal equality only masks gender bias in favour of men. These gender-neutral principles lead women to believe in equality that looks good in theory but is repressive in practice. This formal equality is put in place by men, and that is why men are more superior

to women in reality. These gender-neutral laws benefit men by misleading women into this rhetorical labyrinth of formal equality. However, this is not only true of gender-neutral laws, but the same holds true for laws specifically made to benefit women. These laws are only made to delude women in believing that the law is unbiased, and their problems are specifically being addressed when the reality is totally opposite.

Judges are political actors who, most of the time, deliberately let their biases against women seep into their decisions to give the already patriarchal laws more patriarchal interpretation. As Allan C. Hutchinson, a critical legal scholar, wrote that "the judicial emperor, clothed and coifed in appropriately legitimate and voguish garb by the scholarly rag trade, chooses and acts to protect and preserve the propertied interest of vested white and male power."[76] Objectivity in both the law and judiciary is a myth which can be debunked by going beneath the surface of law and judicial pronouncements. Law is a political ideology which only favours the party making it, and thus perpetuates the existing unequal power relations. Norms that are integrated into the psyche of men for so long cannot be done away with new laws taking shelter under the guise of pro-women sentiments, if the male standpoint keeps informing the law.

Law brings social stability and can also serve as a means of reform, but it may also ingrain oppressive norms in the society. Therefore, feminist legal philosophy is an attempt to reformulate legal doctrines to surmount the ingrained prejudice and inequality of the past as it formulates the human notions and institutions for future. Conceding the power of law to create social realities, feminist scholars expose the existing androcentrism in the formulation and application of law, while at the same time, they suggest ways in which legal doctrines can be used to bring about social change benefitting women. But legal reforms are not all that is needed to curb the menace of honour crimes. Rather, there is a need to change the community's attitude towards such crimes by engaging in an internal discourse which would contribute towards the eradication of these crimes by addressing their fundamental causes. It would serve as an effective tool to deny such crimes any support and, in addition, to engender political will to employ further laws and policies to fight these crimes and bring the perpetrators to justice. Patriarchal sentiments leading to 'honour' killings must be destroyed to

[76] Allan C. Huchinson (ed.), *Critical Legal Studies* (Rowman & Littelfied 1989).

achieve lasting results. So, it is important to gain the community's support via an internal discourse working around cultural standards and institutions associated with such heinous crimes.

It would be helpful to change the linguistic tag of 'honour' killings, as by using the word 'honour' with killing, we tend to see this crime through the lens of those who justify the same on the ground of honourable motives.[77] It makes the offenders seem powerful and belittles the victims. This crime needs to be viewed through the eyes of victims as an attack on women's challenge to repressive patriarchy through exercising independent choices, and defying their families' wishes and social expectations. The popular narratives justifying such crimes need to be substantially changed. "Change, like always, will find resistance not so much by any kind of forces to be thoughtful, but by the darkness of ignorance which has its own comfort that it gives to the people living in them and which makes any enlightenment so hard to bring and any change so hard to occur.[78] But it is worth an effort to bring an end to this crime.

[77] Dexter Dias and Charlotte Proudman, 'Let's stop talking about 'honour killing'. There is no honour in murder' (*The Guardian*, 23 June 2014) <https://www.theguardian.com/commentisfree/2014/jun/23/stop-honour-killing-murder-women-oppresive-patriarchy> accessed 23 June 2019.

[78] Anand Kirti, Prateek Kumar and Rachana Yadav, 'The Face of Honor Based Crimes: Global Concerns and Solutions' [2011] 6(1 & 2) *International Journal of Criminal Justice Sciences* 343-357.