

9-1-2008

Judicial Patronage of 'Honor Killings' in Pakistan: The Supreme Court's Persistent Adherence to the Doctrine of Grave and Sudden Provocation

Moeen H. Cheema
Lahore University of Management Sciences

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/bhrlr>



Part of the [Comparative and Foreign Law Commons](#), and the [Criminal Law Commons](#)

Recommended Citation

Moeen H. Cheema, *Judicial Patronage of 'Honor Killings' in Pakistan: The Supreme Court's Persistent Adherence to the Doctrine of Grave and Sudden Provocation*, 14 Buff. Hum. Rts. L. Rev. 51 (2008).
Available at: <https://digitalcommons.law.buffalo.edu/bhrlr/vol14/iss1/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Human Rights Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

JUDICIAL PATRONAGE OF ‘HONOR KILLINGS’ IN PAKISTAN: THE SUPREME COURT’S PERSISTENT ADHERENCE TO THE DOCTRINE OF GRAVE AND SUDDEN PROVOCATION

Moeen H. Cheema†

I. INTRODUCTION

Pakistan has earned considerable notoriety on the international stage because of its failure to curb violent crimes against women committed in the name of honor.¹ Academic analyses of the state’s failure to deter honor killings focus primarily on lacunae in statutory law (especially the Islamized provisions introduced by legislation), while assigning secondary blame to gaps in the criminal justice system, failings of the policing system, and the inherent defects in the workings of the informal tribal or community-based adjudicatory mechanisms.² However, most of these studies fail to dissect the perplexing array of Pakistan’s laws, especially the different punishment regimes and rules concerning pardon that apply to various cate-

† Assistant Professor of Law & Policy at the Lahore University of Management Sciences (LUMS), Pakistan; LL.M. Harvard Law School, 1999; LL.B. University of London, 1998. I am grateful to first year law students at the Department of Law & Policy for their valuable research assistance and comments.

¹ The term ‘honor killing’ is generally used to refer to murder by male family members of their female relatives on account of perceived dishonor caused to the family in a number of circumstances, most often when the female relative chooses to marry or divorce of her own accord, is accused of having illicit sexual relations with someone, or even when she has been raped. For cultural, sociological and economic analysis of the conception of honor underlying such violence and the causes of such crimes see Mazna Hussain, “Take My Riches, Give Me Justice”: A Contextual Analysis Of Pakistan’s Honour Crimes Legislation, 29 HARV. J.L. & GENDER 223, 226-31 (2006); Rachel A. Ruane, *Murder In The Name Of Honour: Violence Against Women In Jordan And Pakistan*, 14 EMORY INT’L L. REV. 1523, 1530-35 (2000); and AMNESTY INTERNATIONAL, PAKISTAN: HONOUR KILLINGS OF GIRLS AND WOMEN (1999), available at [http://web.amnesty.org/library/pdf/ASA330181999ENGLISH/\\$File/ASA3301899.pdf](http://web.amnesty.org/library/pdf/ASA330181999ENGLISH/$File/ASA3301899.pdf). For recent statistics on honor killings in Pakistan, see Bruce Loudon, *Pakistan police fail as ‘honour killings’ soar*, The Australian, Feb. 10, 2007, available at <http://www.theaustralian.news.com.au/story/0,20867,21201328-2703,00.html>.

² See, e.g., Hussain, *supra* note 1; Ruane, *supra* note 1; Christina A. Madek, *Killing Dishonour: Effective Eradication Of Honour Killing*, 29 SUFFOLK TRANS-NAT’L L. REV. 53 (2005).

gories of murder.³ As such, these studies miss the mark since the main culprit is neither the substantive legal provisions nor the frequently demonized Islamic law provisions, but rather, the superior judiciary of Pakistan which has historically patronized honor killing by consistently exercising all available discretion in sentencing to the benefit of those accused of such crimes.

Although Pakistan's Parliament has now passed an act with the stated aim of deterring murder in the 'name or on the pretext of honor,'⁴ the author anticipates that the historical approach of the judiciary towards honor killings will be adhered to, resulting in the continued, relatively lenient treatment of honor killings. Certain ambiguities rooted in the text of the Act appear to encourage the courts to disregard the Act in many cases of honor killings.⁵ In order to understand the basis of this prediction, it is important to appreciate the history of the judicial approach towards sentencing and the allegiance to the exculpatory doctrine of grave and sudden provocation in Pakistan, lately in the face of statutory intervention as well as Islamic law doctrines. Part II of this Note shall, therefore, review the historical (pre-1990) approach of Pakistan's courts towards punishment of the accused under Pakistan's Penal Code provisions dating back to British colonial times. Part III shall outline the Islamized provisions that the Qisas and Diyat legislation introduced in 1990 and the approach adopted by Pakistan's courts towards implementing and applying these laws from 1990 until 1995. Part IV shall analyze two important Supreme Court judgments delivered in late 1995 and reported in early 1996, which opened the floodgates for judicial patronage of honor killings. Part V shall analyze the attempt by the legislature in 2004 to withdraw judicial discretion in sentencing for cases of murder in the name of honor, and Part VI shall

³ See Ruane, *supra* note 1 (presenting a comparatively more informative analysis of Pakistan's Qisas and Diyat laws). However, even this work includes several simplistic or inaccurate statements and fails to identify exactly how honor killings slip through the various cracks in the system, which shall be identified in this article.

⁴ CRIMINAL LAW (AMENDMENT) ACT, 2004 (Act I of 2005, Gazette of Pakistan, Extraordinary, Part II, 11th January, 2005).

⁵ Many critics of the Act anticipated that the legislation will fail to deliver. See, e.g., Hussain, *supra* note 1 at 239-41; ASIAN CENTRE FOR HUMAN RIGHTS, CONFRONTING HONOUR KILLINGS (2004), available at <http://www.countercurrents.org/hr-achr291004.htm>. However, once again the focus was on the failure to rectify the perceived defects in the Qisas and Diyat laws rather than the weakness of the law in terms of curbing the abuse of judicial discretion in sentencing and thwarting the availability of grave and sudden provocation as a defense.

identify the increasingly visible signs that the Supreme Court is ready to sidestep this legislation, once again, in order to offer patronage to honor killings.

II. PRE-1990 JUDICIAL APPROACH TO SENTENCING IN CASES OF 'GRAVE AND SUDDEN PROVOCATION'

Prior to 1990, Section 302 of the Pakistan Penal Code, 1860 (P.P.C.) laid down the law governing murder, whereby murder was punishable by death or imprisonment for life at a minimum. However, Section 302 incorporated a number of specific exceptions, the first of which provided that it "is not murder if the offender, while deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation." A case which fell within this exception was thus reduced to 'culpable homicide not amounting to murder' which was punishable under Section 304, Part I, by transportation for life or imprisonment up to ten years, thereby providing substantial discretion to judges in sentencing.

In *Kamal v. State*, the Supreme Court decided unanimously that both the trial court and the High Court had erred in awarding capital punishment to the accused for murder under Section 302 of the P.P.C.⁶ The Supreme Court found that the accused had committed culpable homicide not amounting to murder *under grave and sudden provocation* when he killed his wife, and, thus, was punishable under Section 304, Part I. Whereas, Salahuddin Ahmed, J. recommended the maximum sentence of imprisonment for life, the other two judges favored a lesser sentence. Muhammad Afzal Cheema, J. noted the defense counsel's observation that the usual "award of sentences in such cases . . . ranged from six months to five years," and sentenced the accused to time already served which was more than five years and "good enough to meet the ends of justice."⁷ Dorab Patel, J. referred to several past judgments in which offenders had been given sentences ranging between one and three years, and agreed that the sentence undergone was thus adequate in these circumstances.⁸

⁶ *Kamal v. State*, P.L.D.1977 S.C. 153.

⁷ *Id.* at 159.

⁸ *Id.* at 162-63. Dorab Patel, J. referred to the following cases, amongst others:

- a. *State v. Akbar*, P.L.D. 1961 Lah. 24, where the respondent had been sentenced to undergo imprisonment for one year when it was proven that he had caught his sister in the act of intercourse with her paramour and had killed only the paramour.

The above case was followed by *Munir Ahmad v. State*, where the appellant had killed the suspected paramour of his wife: the deceased had abused him by calling him a pimp and man without honor.⁹ The Supreme Court converted his conviction to a crime punishable under Section 304, Part I and sentenced him to imprisonment for the period already undergone by him, that being six years and three months. Likewise, in *Shamoon v. State* the Supreme Court sentenced the appellant to time already served, having altered his conviction from murder under Section 302 to culpable homicide under Section 304, Part I.¹⁰ Earlier, the Federal Shariat Court had sentenced him to life imprisonment, having relied on his confessional statement that he had killed the deceased, but having disregarded his plea that he had done so upon seeing him in a compromising situation with his wife. The Shariat Court doubted the defense of provocation on the grounds that if he had in fact seen his wife in this condition, she would not have escaped unhurt.¹¹ The Supreme Court held that if the conviction of an accused is based solely or primarily on his confessional statement, then it must be taken in its entirety. *Niamat Ali v. Muhammad Yaqub* offers yet another example of the judicial approach under the pre-1990 penal laws of Pakistan concerning grave and sudden provocation.¹² The Supreme Court refused to enhance a sentence of two years given to the appellant for the murder of his wife on the grounds that “the respondent had lost his control on seeing the deceased indulging in immoral activity.”¹³

In these and other similar cases, provocation was invariably considered grave when suspicions of sexual impropriety by a man's wife, sister,

-
- b. *Muhammad Sadiq v. State*, P.L.D. 1966 Lah. 104, where the facts were similar, a Division Bench of the West Pakistan High Court awarded a sentence of two years' R. I.
 - c. In *Abdul Khanan Watamir v. Emperor*, A.I.R. 1939 Lah. 436, the sentence awarded was three years. The appellant had proven that on returning home late at night he had seen a man going out of the house, and when he asked his wife for an explanation as she abused him, he killed her.
 - d. *Mewa v. State*, P.L.D. 1958 Lah. 468, with facts very similar to *Kamal v. State*, in which a Division Bench of the West Pakistan High Court had awarded only three years' imprisonment.

⁹ *Munir Ahmad v. State*, 1994 S.C.M.R. 80.

¹⁰ *Shamoon v. State*, 1995 S.C.M.R. 1377.

¹¹ *Id.* at 1379.

¹² *Niamat Ali v. Muhammad Yaqub*, 1988 S.C.M.R. 62.

¹³ *Id.* at 64.

cousin or mother were raised. However, the defense of provocation was only available if the provocation was sudden and caused the accused to lose self-control. If there had been a cooling-off period and the accused had committed the offence with pre-meditation, then the accused would be liable for murder.¹⁴ However, even in these cases, "killing for honor" was held to deserve mitigated punishment.¹⁵

III. *GUL HASAN KHAN*: INTRODUCTION OF THE ISLAMIC LAWS OF QISAS AND DIYAT

In 1989, the Shariat Appellate Bench of the Supreme Court finally decided a number of petitions in *Federation of Pakistan v. Gul Hasan Khan*, some of which had been pending since 1980. These petitions challenged the existing provisions relating to murder, culpable homicide, and hurt under the P.P.C.¹⁶ Exercising its unprecedented constitutional powers, the Shariat Bench of the apex court unanimously declared that the relevant

¹⁴ See, e.g., *Allah Wasaya v. State*, 1977 S.C.M.R. 44, where the sentence of death was maintained. The court pointed out that:

The main ingredient of Exception I is the deprivation of power of self-control as a result of grave and sudden provocation. Loss of self-control and premeditation are not compatible phenomena . . . They suspected that the deceased had formed an illicit liaison with [wife of the accused] and was on an amorous visit. If they had killed [the deceased] there and then it could be at best argued that his very presence at night gave sudden and grave provocation. As seen they caught the deceased and tied his hands with a rope and took him away to a distance of nearly 600 yards and killed him in a field. Thereafter they severed the head from the trunk and carried the two parts of dead body further away and buried them at two different places. Having disposed of the dead body they concealed their weapons of offence . . . The conduct of the appellants thus showed full meditation rather than deprivation of self-control.

¹⁵ See, e.g., *Ahmad v. State*, 1982 S.C.M.R. 1049, where a sentence of death was substituted for life imprisonment.

¹⁶ See *Federation of Pakistan v. Gul Hasan Khan*, P.L.D. 1989 S.C. 633. The Shariat Appellate Bench disposed of 11 petitions, the earliest of which had been decided by the Federal Shariat Court in 1980 and the latest in 1986. It is interesting to note that in an era where the state policy was to Islamize laws, especially criminal laws, and several contentious pieces of legislation had been brought about by the military regime of General Zia-ul-Haq such as the *Hudood* laws, the Shariat Appellate Bench had delayed taking such a major step down the path of Islamization.

provisions of the P.P.C. were null and void for lack of conformity with the injunctions of Islam and ordered the government to replace these with suitable provisions as per the directions of the bench. To comply with the Shariat Court's dictates, the President promulgated the Criminal Law (Second Amendment) Ordinance of 1990, frequently referred to as the Qisas and Diyat Ordinance, which introduced provisions deemed to conform with the injunctions of Islam as elaborated in the judgment. The Qisas and Diyat Ordinance brought forth a new categorization of homicides and hurt, and created provisions allowing for private settlement of these offenses.¹⁷

On the issue of grave and sudden provocation, Justice Taqi Usmani declared in his opinion in *Gul Hasan Khan* that the Exception I of Section 300 diverged from Islamic precepts:

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

¹⁷ The drafters of the Code of Criminal Procedure (Cr.P.C.) had created two types of distinctions between crimes which were alien to the British Common Law. First, the Cr.P.C. distinguished between compoundable and non-compoundable offences. Compoundable offences may be settled by the parties (offender and victim or his/her heirs), subject to the approval of the trial court, as if it were a private or civil dispute. Prior to 1990, murder and grievous hurt were non-compoundable. The second distinction was between cognizable (those that are investigated and prosecuted by the state) and non-cognizable offences (which may only be prosecuted by the complainant). Murder was and continues to be a cognizable offence. However, due to the weaknesses of the investigation and public prosecution functions of the state, most prosecutions, even of very serious crimes including murder, are in practice brought by and pursued by the victims or their families.

state and may be given any punishment by the state (as *tazir*).¹⁸

The above-quoted dictum seems to have dramatically raised the bar for claiming a defense in honor killing situations. Presumptively, the accused could only claim an exemption if he brought forth four eyewitnesses of adultery, a near-impossible standard of proof. Further, killing a person caught in the act of fornication, which is sexual intercourse by one who is not presently married or has never previously been married, would never be justified even if four eyewitnesses were forthcoming since only adultery is punishable by death under Islamic law.¹⁹ This enabled Justice Nasim Hasan Shah, member of the bench in *Gul Hasan Khan*, to conclude in *State v. Abdul Waheed* that after the Islamization of the concerned laws, the defense of grave and sudden provocation was not available to the accused when he killed the deceased upon seeing him in a compromising situation with his sister while in the presence of two eyewitnesses:

The observations made in Gul Hasan’s case clearly show that grave and sudden provocation is not an exemption *per se* and the punishment of Qisas [death as retribution] where Qatl-i-Amd [intentional murder] is committed under grave and sudden provocation, can be mitigated only if proof of Zina [adultery] is produced, which confirms to the required standard of evidence prescribed under Islamic injunctions.²⁰

Hence, the Qisas and Diyat Ordinance excluded all exceptions including grave and sudden provocation, sudden fight, and exceeding the right of private defense from Section 300. However, it would be incorrect to state that these Islamized criminal provisions excluded the possibility of leniency for honor killing on account of the exclusion of the defense of grave and sudden provocation. In the aftermath of *Gul Hasan Khan*, murder was re-classified into four separate sub-categories:

- a. Qatl-i-Amd liable to Qisas, punishable under Section 302(a) of P.P.C.:²¹ This offense requires a heightened standard of proof which may be in the form of a voluntary confession before the trial court or two eyewit-

¹⁸ *Gul Hasan Khan*, P.L.D. 1989 S.C. at 674. This passage as well as the entire opinion was written in Urdu. The translation and the emphasis are by the author of this Note.

¹⁹ See, e.g., *State v. Muhammad Hanif*, 1992 S.C.M.R. 2047 at 2053-54.

²⁰ *State v. Abdul Waheed*, 1992 P.Cr.L.J. 1596 at 1601.

²¹ PAK. PEN. CODE ch. 16, § 302(a) (1860).

nesses who meet the requirement of *tazkiyah-ul-shuhood* inquiry of credibility.²² In such a case, the legal heirs of the victim have the choice of exercising *qisas*, that is capital punishment as retribution, or pardoning the offender either in *lieu* of compensation or even without any compensation.²³ If the heirs choose to exercise their right of *qisas*, the state has no authority to pardon the offender or remit the sentence. However, if *any one of the heirs* pardons the offender and waives his or her right of *qisas*, *qisas* can not be enforced. The judge may, nonetheless, give a sentence of imprisonment of up to fourteen years as *tazir* (discretionary punishment under Islamic law) keeping in view the principle of *fasad-fil-arz*, *i.e.* if the offender is a previous convict, professional criminal or if the murder was committed in a brutal manner.²⁴

- b. *Qatl-i-Amd* liable to *Tazir*, punishable under Section 302(b) of P.P.C.: If proof of *Qatl-i-Amd* liable to *qisas* is not available, but murder is proven beyond reasonable doubt based upon other evidence — such as one eyewitness and circumstantial evidence; or two or more eyewitnesses who do not meet the credibility test of *tazkiyah-ul-shuhood* — then the accused is convicted of *Qatl-i-Amd* liable to *tazir*. The punishment for this offence is death or imprisonment for life at a minimum.²⁵ Even this offence is now ‘compoundable’ under the Code of Criminal Procedure (Cr.P.C.) but only if *all* of the victim’s heirs voluntarily agree to pardon the offender subject to a compromise or settlement. The judge has the discretion to either accept that compromise and compound the offence with the result

²² PAK. PEN. CODE ch. 16, § 304 (1860). See *Gulbar v. State*, P.L.D. 2002 Pesh. 65, for a detailed discussion of these evidentiary requirements.

²³ PAK. PEN. CODE ch. 16, §§ 309-10 (1860). The right to exercise *qisas* or to waive it belongs to the *walis* (legal heirs according to Islamic laws of inheritance). See *Muhammad Jabbar v. State*, 2000 P.Cr.L.J. 1688.

²⁴ PAK. PEN. CODE ch. 16, § 311 (1860).

²⁵ PAK. PEN. CODE ch. 16, § 302(b) (1860).

that the accused is acquitted, or to reject the compromise and award a sentence under Section 302(b).²⁶

- c. Qatl-i-Amd where Qisas is not applicable, punishable under Section 302(c): Section 302(c) states that the offender shall be punished with imprisonment of up to twenty-five years where "according to Injunctions of Islam the punishment of *qisas* is not applicable."²⁷ From 1990 until 1995, several eminent judges of the superior courts of Pakistan, including justices of the Supreme Court, erroneously thought that Section 302(c) applied to the fourth category of *Qatl-i-Amd* described below.²⁸ This raised a very important question: what category or categories of murder was this provision really designed to cover?
- d. Qatl-i-Amd not liable to Qisas, punishable under Section 308: As per Section 306, *Qatl-i-Amd* shall not liable to *qisas* if (a) the offender is a minor or is insane, (b) the offender has caused the death of a direct descendant, and (c) any heir of the victim is a direct descendant of the offender.²⁹ As per Section 307(c), *qisas* shall not be enforced if as a result of the death of an heir of the victim "the right of *qisas* devolves on the offender" or on any person "who has no right of *qisas* against the offender" in accordance with Section 306.³⁰ Section 308 explicitly provides the punishment for this category of *qatl* and not Section 302(c), which is *diyat* (monetary compensation for unlawfully causing death) and up to fourteen years as *tazir* if the judge chooses to sentence the accused to imprisonment.³¹

²⁶ See Hussain Bux v. State, P.L.D. 2003 Kar. 127, and Muhammad Aslam v. Shaukat Ali, 1997 S.C.M.R. 1307, for a distinction between waiver of *qisas* in a case of *Qatl-i-Amd* liable to *qisas* and compounding of offense in a case of *Qatl-i-Amd* liable to *tazir*.

²⁷ PAK. PEN. CODE ch. 16, § 302(c) (1860).

²⁸ See, e.g., Ali Muhammad v. Ali Muhammad, P.L.D. 1996 S.C. 274 at 290. See note 53 *infra*.

²⁹ PAK. PEN. CODE ch. 16, § 306 (1860).

³⁰ PAK. PEN. CODE ch. 16, § 307(c) (1860).

³¹ PAK. PEN. CODE ch. 16, § 308 (1860).

A careful analysis of the above categorization of murder reveals numerous gaps, allowing for the lenient treatment of honor killings. First, in an honor killing scenario, the offender may conveniently confess before the court, thereby making his offense one of *Qatl-i-Amd* liable to *qisas*. As such, any one of his family members may pardon him and save him from capital punishment. For example, if B (brother) commits honor killing of S (his sister), then either one of his parents, who are also heirs of the victim, may waive *qisas*. Although the court could still award imprisonment for up to fourteen years as *tazir*, in an overwhelming majority of cases, trial as well as appellate courts adhered to the pre-1990 approach by deeming such cases as falling outside the definition of *fasad-fil-arz*. Second, in cases where the offender committed murder of either his daughter or his wife, and had surviving children, the case would fall under Section 308 and was punishable by imprisonment for up to fourteen years at the discretion of the judge.³² Again, in such cases, judges have consistently imposed lenient sentences.

A majority of murder cases, however, fall under the category of *Qatl-i-Amd* liable to *tazir*. This is especially true when the offender has not only killed his family member but has also killed his or her suspected paramour. From 1990 to 1995, the offender was in a bind as far as making a strategic pick of the sub-categories of *Qatl-i-Amd*. If he confessed to the murder, he may have received a pardon from his own family, but would very likely have suffered capital punishment as *qisas* if the male victim's family 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.³³ Yet, if the offender was rich or influential within the community, as was the case in many instances, the offender could safely bet on the courts accepting a compounding of *Qatl-i-Amd* liable to *qisas* or a compromise of *Qatl-i-Amd* liable to *tazir*, without much scrutiny even if such a settlement had not been freely negotiated.

³² See, e.g., *Khalil-ul-Zaman v. Supreme Appellate Court, Lahore*, P.L.D. 1994 S.C. 885. The accused was convicted of the murder of his wife and sentenced to death for *Qatl-i-Amd* liable to *tazir*. The accused had a living child from his marriage with the deceased and the Supreme Court held that his case clearly fell under § 308 and not under § 302(b). The Supreme Court stated that the "error committed by the Courts in . . . sentencing him to death is so serious that had the petitioner eventually been hanged to death . . . it would have amounted to murder through judicial process."

³³ In fact, grave and sudden provocation was frequently used as a mitigating factor in cases of *Qatl-i-Amd* liable to *tazir*, used by the courts to avoid inflicting the 'normal' sentence of capital punishment.

IV. OPENING THE FLOODGATES OF PROVOCATION: JUDICIAL PATRONAGE OF HONOR KILLINGS

In 1995, having struggled for years with its inability to show leniency for grave and sudden provocation in the face of a contrarian statutory scheme and a weighty opinion on Islamic law, the Supreme Court of Pakistan finally yielded.³⁴ First, in *Abdul Haque v. The State*, the Supreme Court held that in a case of grave and sudden provocation, if the victim is not *maasoom-ud-dam* (completely innocent), then *qisas* is not applicable against the offender under Islamic law.³⁵ The Court distinguished the judgment of Nasim Hassan Shah, J. in *Abdul Waheed* by implying that precedent was merely that the plea of grave and sudden provocation should be

³⁴ The jurisprudence of Pakistan's courts was not consistent on this issue and signs of dissent had been emerging as early as 1992. See Muhammad Hanif, 1992 S.C.M.R. 2047; the Lahore High Court's judgment in Ali Muhammad v. Ali Muhammad, 1993 P.Cr.L.J. 557. In the Supreme Court in *Abdul Haque v. The State*, Justice Sajjad Ali Shah, incumbent Chief Justice, noted the considerations in favor of recognizing provocation as a defense:

The plea of diminished liability in respect of offences relating to human body committed under grave and sudden provocation has been well recognized in the sub-continent for more than a hundred years. There is a good reason for that: a person who commits culpable homicide out of compulsions, ethical or otherwise, not brought about by himself, cannot in the matter of punishment be placed on the same footing as a cold-blooded murderer or a hired assassin. A serious question for consideration arises whether the Criminal Law (Second Amendment) Ordinance, 1990, was intended to do away with the preferential treatment that had always been accorded to a person who took another person's life under circumstances where he had lost all self-control. The question is of a great fundamental importance not only for the reason that it will affect a large number of pending cases but also because it has a bearing on the attitude and reflexes of the people under the most testing circumstances when their natural reactions compel them to act in a certain manner.

See *Abdul Haque v. The State*, P.L.D. 1996 S.C. 1 at 7.

³⁵ *Abdul Haque v. The State*, P.L.D. 1996 S.C. 1. Earlier, a majority of the judges in the High Court of Balochistan, including Justice Iftikhar Muhammad Chaudhry (present Chief Justice of the Supreme Court of Pakistan) who authored the leading opinion, had awarded the sentence of death on the basis that the Islamized statutory scheme "does not provide any exception in respect of the offence of *Qatl-i-Amd*, if committed due to grave and sudden provocation." See *Abdul Haque v. The State*, P.L.D. 1995 Quetta 83 at 90.

based upon some credible evidence, and not totally fabricated.³⁶ Citing *Muhammad Hanif v. State* and Verse 4:34 of the *Qur'an*,³⁷ the Court suggested an alternative ground for exempting cases of honor killing from the operation of Section 302(a) by comparing such cases to those in which defense of another person is raised as an explanation for causing death in order to prevent rape.³⁸ In other words, even if the woman is a consenting party to unlawful sexual intercourse, her husband or other male family members, who are her protectors and guardians, have the right to kill her paramour and, thereby claim the defense of that person.³⁹

³⁶ *Abdul Haque*, P.L.D. 1996 S.C. 1 at 28. Citing with approval from a pre-1990 case – *Mohib Ali v. State*, 1985 S.C.M.R. 2055 – the Court continued in its efforts of creating the illusion that the exclusion of Exception I from § 300 were of no consequence: “A mere allegation of moral laxity without any unimpeachable evidence to substantiate would not constitute grave and sudden provocation. If such pleas without any evidence are accepted, it would give a licence to people to kill innocent people.”

³⁷ Verse 34 of Surah *Al-Nisa* reads: “Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means.” (Translation by Yusuf Ali)

³⁸ The court quote the following extract from *Muhammad Hanif*, 1992 S.C.M.R. 2047:

A person like the deceased who suffered from a prohibition under Qura'nic Injunctions not to touch or deal with a lady who was not Mehram to him could not so disgrace and insult as to evoke the corresponding duty of the husband to protect and guard the wife. Such a man under the Injunctions of Islam cannot be said to be Maasoom-ud?Dam when he is indulging in such an activity. Be it a person disgracing a lady or committing Zina?bil?Jabr with her being unmarried, it is not provocation but an exercise of the right conferred on the husband under the express words of the Qur'an itself. Qisas will not be liable in such a situation.

Abdul Haque, P.L.D. 1996 S.C. 1 at 31. It must be noted that this case was not one of grave and sudden provocation in the true sense, but rather one of defense of wife from an assault, which right was presumptively exceeded.

³⁹ If this analysis were correct, the accused in an honor killing case ought to be acquitted rather than convicted for a different category of *Qatl-i-Amd*. This is because §§96, 97 and 100 read together state that “nothing is an offence which is done in the exercise of the right of private defence” of one’s “own body and the body of any other person,” and this right extends to the voluntary causing of death . . . to the assailant if the offence which occasions the exercise of the right be . . . an assault with the intent of committing rape.” It could, however, be argued that reasonable force short of causing death may be employed in order to prevent the com-

It must, however, be noted that this was not a case of honor killing and the *ratio* of this case was rather limited.⁴⁰ The Court converted the petitioner’s case from *qatli-i-amd* liable to *qisas* under Section 302(a) to *qatli-i-amd* liable to *tazir* under Section 302(b) and sentenced him to life imprisonment. The Court reiterated the rule that if the conviction is based upon a confessional statement, then it must be taken in its entirety. As such, the Court held that if an accused makes a statement admitting the fact of intentional killing but maintains that he did so under grave and sudden provocation, this statement would not qualify as a ‘confession’ that would render the case one of *Qatl-i-Amd* liable to *qisas*.⁴¹

On January 28, 2006, the Supreme Court of Pakistan decided *Ali Muhammad v. Ali Muhammad*.⁴² The accused claimed that he had killed the deceased under grave and sudden provocation upon seeing him and his wife “lying on the same bed in an objectionable position.”⁴³ The trial court had convicted the accused under the old Section 304, Part I, without realizing that this provision was no longer on the statute books, and sentenced him to undergo imprisonment for seven years. On appeal, Ausaf Ali Khan, J. of the Lahore High Court pointed out this error and noted that the Islamized provisions did not provide an exception in cases of provocation, but held, nonetheless, that the accused had raised a valid defense. He based this judgment on the Islamic law doctrine of the sanctity of home:

mission of *zina* (consensual sexual intercourse) with a woman under one’s protection (in the above sense) since that is a serious crime under Islamic law. Honor killing situations then become comparable to those situations where the right of private defense of person is exceeded. Note that the old Exception 2 of §300 which stated:

Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation. . .

Simply, this is another way of reintroducing provocation and other old specific exceptions to murder through the back door.

⁴⁰ The petitioner had killed the deceased in a courtroom during the trial of the deceased for the murder of the petitioner’s father. The deceased had abused the petitioner by saying that he would rape his wife and all the women of his tribe if he were acquitted. The Court found that such abuse “was traditionally beyond toleration of a Pathan.”

⁴¹ *Abdul Haque*, P.L.D. 1996 S.C. 1 at 34.

⁴² *Ali Muhammad*, P.L.D. 1996 S.C. 274.

⁴³ *Id.* at 278.

And to enter a house without permission at night and commit Zina with wife/daughter/sister of owner of a house was obviously a vice which could be stopped with force. . In fact Islam does extend the right to the aggressed to take life of the aggressor in such a situation.⁴⁴

Again relying upon verse 4:34 of the *Qur'an*,⁴⁵ the Lahore High Court further held that this right of defense of person was available not only to the woman's husband, but also to any other person "in whose lawful custody she is residing."⁴⁶ The court held that "the appellant as custodian of honor of his wife had the right to kill the deceased while he was engaged in sex act with his wife and he had not earned liability of Qisas or Tazir or even Diyat."⁴⁷ Thus, the accused was acquitted.

The Supreme Court explained to the 'uninitiated' that no anomaly exists in the High Court's decision to equate provocation with self-defense. Citing numerous English precedents about provocation, the Supreme Court suggested that there lies a universal belief that the natural response for a man is to lose self-control upon seeing his wife in an adulterous situation, just as much as it is natural for a man to use force in self-defense.⁴⁸ The Court then pointed out that the issue surrounding the conformity of exceptions to murder with the injunctions of Islam had been taken up by the Federal Shariat Court in the case of *Muhammad Riaz v. Federal Government*, prior to its decision in *Gul Hassan Khan*.⁴⁹ In that case, Aftab Hussain, Member, averred in his leading opinion that the exceptions to Section 300 did "not present any difficulty in respect of reconciliation with Quran and Sunnah."⁵⁰ When the Shariat Appellate Bench of the Supreme Court later addressed this same issue in *Gul Hasan Khan*, Pir Muhammad Karam Shah, J. agreed with the view of Aftab Hussain, Member in *Muhammad Riaz*, on this particular point.⁵¹ On the other hand, Maulana Muhammad Taqi Usmani, J. recorded a separate opinion in which he expressed a different view on grave and sudden provocation. The Supreme Court argued that the majority of the judges in *Gul Hasan Khan* had agreed with Pir Muham-

⁴⁴ *Ali Muhammad v. Ali Muhammad*, 1993 P.Cr.L.J. 557 at 563.

⁴⁵ *See supra* note 37 for translation.

⁴⁶ *Ali Muhammad*, 1993 P. Cr. L.J. at 564.

⁴⁷ *Id.* at 565.

⁴⁸ *Ali Muhammad*, P.L.D. 1996 S.C. at 280-82.

⁴⁹ *Muhammad Riaz v. Federal Government*, P.L.D. 1980 F.S.C. 1.

⁵⁰ *Ali Muhammad*, P.L.D. 1996 S.C. at 284.

⁵¹ *Id.*

mad Karam Shah, J., including Nasim Hassan Shah, J.,⁵² and Maulana Muhammad Taqi Usmani’s opinion was a minority view. The Supreme Court thereby suggested that the exclusion of the exceptions to Section 300 from the Criminal Law (Second Amendment) Ordinance of 1990, was an oversight and held that “there should be no doubt that the cases covered by the exceptions to the old section 300, P.P.C. read with the old section 304 thereof, are cases which were intended to be dealt with under clause (c) of the new section 302 of the P.P.C.”⁵³

Hence, the court finally clarified and distinguished the sub-clauses for this seemingly redundant provision. Cases of honor killing which meet the test of grave and sudden provocation no longer fall under Section 302(a) or (b) but, instead, are now converted into cases covered by Section 302(c). Since Section 302(c) does not specify a minimum punishment, the courts were granted the freedom to revert to their pre-1990 approach. Even in the instant case, the Supreme Court reawakened the specter of *Kamal v. State* and held that the length of imprisonment already served by the accused, approximately three years, would suffice.

V. CRIMINAL LAW (AMENDMENT) ACT, 2004

After Pakistan gained considerable notoriety amongst the international media on account of its failure to curb murders in the name of honor, constant pressure from women’s rights groups and human rights “watch-dogs”, substantial public debate and political wrangling, the Parliament finally passed a legislative measure to address these issues. The measure was enacted under the Criminal Law (Amendment) Act of 2004, effective the fourth of January 2005. The Act introduced a number of potentially significant changes to the laws relating to murder. First, the Act has barred accused persons from becoming an heir (*wali*) of the victim in the case of murder committed “in the name or on the pretext of honor.”⁵⁴ This provision is ostensibly designed to ensure that the offender does not grant himself pardon for his own crime. However, in reality, it is likely to have a very limited impact since only one *wali*’s waiver of *qisas* is needed to save the accused from the death penalty, and in most cases of honor killing, there is at least one family member who is willing to forgive. Second, the Act has

⁵² *Id.* at 284-85. Contrast from Nasim Hassan Shah, J.’s opinion in Abdul Waheed, 1992 P. Cr. L.J. 1596.

⁵³ *Id.* at 290-91. The Court held that “there should be no doubt that the cases covered by the Exceptions to the old section 300, P.P.C. read with the old section 304 thereof, are cases which were intended to be dealt with under clause (c) of the new section 302.” See text accompanying note 28 *supra*.

⁵⁴ CRIMINAL LAW (AMENDMENT) ACT, §4 (2004).

increased the maximum punishment of *Qatl-i-Amd* not liable to *qisas*, punishable under Section 308 from fourteen to twenty-five years.⁵⁵ Again, this provision is unlikely to have an impact since in such cases of intra-family murders, judges do not exercise their discretion to award *tazir* punishment. If, in addition to increasing the maximum penalty a minimum sentence had also been specified for honor killings, then this provision would be more meaningful. Third, Section 311 of the P.P.C. has been amended such that the definition of *fasad-fil-arz* has been enlarged to include murder committed “in the name or on the pretext of honor.”⁵⁶ In this respect, the maximum *tazir* penalty that a court may award after the waiver of *qisas* in cases of *Qatl-i-Amd* liable to *qisas*, punishable under Section 302(a), has also been increased to death or life imprisonment, in addition to imprisonment for up to fourteen years as was previously the case.⁵⁷ This, by itself, will achieve little since our judges are unlikely to give such serious penalties after *qisas* has been waived. A more significant change, however, is that the provision mandates a minimum penalty of imprisonment of ten years as *tazir* for *Qatl-i-Amd* liable to *qisas*, after waiver of *qisas*, if the crime has been committed “in the name or on the pretext of honour.”⁵⁸ A similar approach has been adopted by setting a minimum penalty of ten years for attempted murder.⁵⁹ Finally, and of most importance, the Act has added a proviso to Section 302(c) to the effect that that clause would not apply to any murder committed “in the name or on the pretext of honor.”⁶⁰ This provision is partially intended to undo *Ali Muhammad* and, thereby, deny the defense of grave and sudden provocation in cases of honor killing.

However, certain shortcomings in the 2004 Act may potentially unravel any ameliorative impact that it may have. The critics of the Act decried its failure to deny the options of waiver of *qisas*, pardon, or compoundability to the family members of the victim and the culprit in honor killing cases.⁶¹ It was proposed that the state ought to be the heir in honor killing cases so that all prosecution decisions would be under the state’s control.⁶² But, the drafters of the Act chose a different methodology for resolving the problem – to specify mandatory minimum penalties — which was likely to be more apt to both sides of this divided issue. Unfortu-

⁵⁵ CRIMINAL LAW (AMENDMENT) ACT, §5 (2004).

⁵⁶ CRIMINAL LAW (AMENDMENT) ACT, §8 (2004).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ CRIMINAL LAW (AMENDMENT) ACT, §10 (2004).

⁶⁰ CRIMINAL LAW (AMENDMENT) ACT, §3 (2004).

⁶¹ See Hussain, *supra* note 5 at 240.

⁶² *Id.*

nately, this approach has not been consistently adopted. Whereas a minimum penalty of ten years has been mandated for *Qatl-i-Amd* liable to *qisas*, if committed in an honor killing scenario, no mandatory minimum sentence has been specified for *Qatl-i-Amd* not liable to *qisas*. *Qatl-i-Amd* liable to *tazir* already has a minimum penalty of life imprisonment, and arguably the mandatory minimum for *Qatl-i-Amd* liable to *qisas* and *Qatl-i-Amd* not liable to *qisas*, when committed in the name of honor, ought to be life imprisonment as well.

Further, as already noted, the Act seeks to deny the defense of grave and sudden provocation in honor killing cases, by banning its conversion into a Section 302(c) offense. Perhaps a more consistent approach would have been to specify a minimum penalty for this offense, comparable to those specified for other categories of *Qatl-i-Amd*. The most disturbing shortcoming of this Act is its definition of honor killing. The Act defines honor killing as an offense "committed in the name or on the pretext of honor," meaning an offense "committed in the name or on the pretext of *karo kari*, *siyah kari* or similar other customs or practices."⁶³ This may be narrowly interpreted to mean that those crimes covered by the provisions of this Act are only those that are committed in accordance with notorious customary practices, pursuant to decisions of tribal councils, and with planning and premeditation. Such a narrow definition would undermine the attempted exclusion of the defense of grave and sudden provocation, and reduce the minimum penalty provisions, thereby taking the vast majority of honor killings outside the scope of the Act.⁶⁴

VI. THE SUPREME COURT'S PERSISTENT ADHERENCE TO THE DOCTRINE OF GRAVE AND SUDDEN PROVOCATION

Recent decisions of the Supreme Court are harbingers of the darkness beyond the limited horizons of Pakistan's superior judiciary. In *Muhammad Ameer v. The State* the petitioner sought leave to appeal to the Supreme Court of Pakistan against a judgment of the Lahore High Court in which that court had upheld his conviction for *Qatl-i-Amd* liable to *tazir* and sentenced him to life imprisonment.⁶⁵ The High Court also directed the petitioner to pay a compensation of Rs. 1 lac (approximately USD \$1,650)

⁶³ CRIMINAL LAW (AMENDMENT) ACT, §2 (2004).

⁶⁴ Such a narrow interpretation is unfortunately supported by subsequent provisions of the Act which dispense with the clause "in the name or on the pretext of honor" and simply define honor killings in terms of offenses "committed in the name or on the pretext of *karo kari*, *siyah kari* or similar other customs or practices." See CRIMINAL LAW (AMENDMENT) ACT, §§14, 15 and 16 (2004).

⁶⁵ *Muhammad Ameer v. The State*, P.L.D. 2006 S.C. 283.

or to undergo rigorous imprisonment for two additional years in the instance that the offender has defaulted on such payment. The prosecution had alleged that the petitioner and his brother had ambushed the two victims and open-fired upon them. The motivation of this double-murder was stated to be the dishonor caused to the petitioner's family by the illicit relationship between one of the victims and the petitioner's daughter. In his defense, the petitioner did not deny his role in the incident, but contended that he had lost his self control due to grave and sudden provocation upon hearing that his daughter had been raped by the deceased.⁶⁶

The Supreme Court refused to grant leave to appeal stating that even if the petitioner's version was fully believed, intervention would not be justified:

The commission of an offence due to *Ghairat* or family honour must be differentiated from the grave and sudden provocation in consequence to which crime is committed in the light of facts and circumstances of each case. The plea of grave and sudden provocation may not be available to an accused who having taken plea of *Ghairat* and family honour, committed the crime with premeditation.⁶⁷

As such, the court drew a distinction between honor killing and grave and sudden provocation that dates back to its pre-1990 jurisprudence. In essence, the Court defined honor killing as those murders which are committed coolly and with premeditation.⁶⁸ It also implied that if murder is committed in the name of honor, but without premeditation, it will continue to fall within the purview of the doctrine of grave and sudden provocation. If this approach is followed to its logical conclusion, this vicious circle will repeat itself twice within the short span of less than two decades.

CONCLUSION

The Supreme Court's approach in *Muhammad Ameer* suggests a continuing willingness to allow the defense of grave and sudden provocation in most cases of murder committed "in the name or on the pretext of honor". Certain deficiencies in the structure and ambiguities rooted in the text of the 2004 Act appear to indicate that this Act shall not be given due deference by the Supreme Court. In essence, this will result in Pakistan's

⁶⁶ *Id.* at 288.

⁶⁷ *Id.*

⁶⁸ It is impossible to differentiate between this case and the judgment in *Allah Wasaya*, 1977 S.C.M.R. 44.

superior courts' continuous leniency in the sentencing of honor killings It has become extremely difficult to comprehend, let alone justify, judicial allegiance to grave and sudden provocation in these cases, lately in the face of statutory intervention as well as Islamic law doctrine. This allegiance appears to be rooted in the belief that it is 'natural' and 'moral' for a man to kill a female relative when his honor is jeopardized because of her, and that it is, therefore, unfair to punish him in these circumstances. This approach negates the use of criminal law as a tool for socio-cultural engineering or for fostering certain progressive attitudes in its subjects. This retrogressive approach will only lead to the loss of more innocent lives, the branding of Pakistan as an extremist society, and the continual dishonor of Pakistan's Supreme Court.

Those who advocate the end of the legal patronage of honor killings in Pakistan ought to prepare themselves for yet another battle. It would be advisable to argue for effective and broad implementation of mandatory, minimum imprisonment terms — preferably life imprisonment — for all murders committed in the name of honor, including those committed while in the "heat of passion", irrespective of the particular category of *Qatl-i-Amd* the offence may technically fall under. Statutory curtailment of judicial discretion in sentencing appears to be the only viable option. It is also an option which has gained acceptance under the particular strain of Islamic legal theory favored by Pakistan's courts and the supporters of the Qisas and Diyat laws.⁶⁹

⁶⁹ See text accompanying *supra* note 18. The quoted passage from *Gul Hasan Khan* acknowledges the state's discretion in specifying *tazir* punishments even where the accused is justified in killing the victim under Islamic law.

