Provocation: A Defence for Honour Killing in Pakistan

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Abstract

Killing in the name of honour still ranks as one of the most commonly committed crimes in Pakistan. Regardless of the Criminal Law (Amendment) (Offences in the Name or Pretext of Honour) Act 2016 enacting provisions which explicitly mandate strict punishments for the perpetrators of such crimes, not much change in the post-conviction results has been seen. The courts are still seen to continue with the perception of this being a crime where the perpetrator deserves some clemency, as his homicidal reaction was proportional in trying to save his honour. This paper looks at the pre-2016 era for honour crimes with sole focus on the defence of 'grave and sudden provocation' given for honour killings. This will be done to complete an overview of the opinions which allowed for this defence to be established within the legal system in Pakistan.

Introduction

In the Islamic Republic of Pakistan, hundreds of women are killed every year in the name of honour. The latest research shows there to have been over 15000 cases of honour crimes since 2004[1] and over 700 cases of honour crimes from June 2017 - August 2018.[2] Such a barbaric and inhuman custom has existed in the subcontinent for many centuries. Under the pre-colonial criminal justice system of India, the perpetrators of such killings were dealt with like any other offenders of murder; without any exception or impunity from prosecution and punishment. However, it was the Indian Penal Code drafted by the British in 1860 that brought in the practice of treating the offenders of honour killings with leniency and latitude. In 1990, Pakistan introduced its own version of 'Islamic' Criminal Law which allowed for a compromise between the parties of a murder case. The 'new law'[3] reconceptualised the norms of culpable homicide and murder in this country. Under the new law the offence of murder was not defined as a crime against the legal order of the state but as against the legal heirs of the victim.

The Criminal Law (Amendment) (Offences in the Name or Pretext of Honour) Act 2016 was passed by the parliament in October 2016. This Act has introduced a plethora of amendments which have comparatively restricted the previous clemency afforded to perpetrators of honour killings. These include the doctrine of

[1] Human Rights Commission of Pakistan, 'Media Monitoring of Human Rights Violations and Concerns in Pakistan' <http://hrcp-web.org/hrcpweb/campaigns/> accessed 11 September 2018.

[2] Editorial, 'Rise in 'honour' crimes' (*Dawn*, 13 September 2018) <https://www.dawn.com/news/1432634> accessed 20 September 2018.

[3] Throughout this article, the term 'new law' means the law of *qisas* and *diyat* that replaced the old law of homicide and murder in Pakistan Penal Code in 1990 by the Criminal Law (Second Amendment) Ordinance 1990 (VII of 1990); PLD 1990 CS 110.

Fasad-fil-arz,[4] providing explicit mention of the death penalty and life imprisonment for honour killings and imprisonment for life for the convict even if (s)he has been pardoned by the family of the accused.

Honour killing is a common, highly charged, emotive and a notorious issue in the present day. It is widely believed and portrayed as only sheer violence against women whilst ignoring also the killing of paramours murdered as a consequence. In this context, such killings relate to a practice in which women are murdered by their male relatives to restore the honour they lose when 'their' women defile it. Generally, it is held that women severely injure their men's honour when they fail to guard their virginity and chastity.

Along with the Islamic laws that are concerned with the punishment of *zina*[5] and murder, the executive and the judiciary in Pakistan have also been criticised for dealing with the perpetrators of honour killings with leniency. This article examines the treatment of the issue of honour killings under the new law of murder and homicide 'transplanted' into the Pakistan Penal Code.[6] Although it does not refer to the post-2016 legal amendments, it is still relevant as it will be shown that the legal regime the 2016 Act sought to introduce has yet to produce the desired change.

[4] Whereby severity of the punishment awarded is determined by looking at the previous convictions of the convict.
[5] *Zina* means illegal sexual intercourse and embraces both fornication and adultery, though each entail different punishments. If a married person is proved to have committed *zina* (s)he is punished by stoning to death and the one who is unmarried is punished by whipping with 100 lashes.
[6] Hereinafter 'PPC'.

A. The Law on Homicide and Concerns of 'Honour'

In Islam, fornication and adultery are sins as well as criminal offences. Under Islamic law, if one complains that someone has committed fornication or adultery and later on fails to provide the required evidence[7] in court to substantiate his/her statement, the complainant is charged under the offence of *Qazf*.[8] The only exception to this rule is a husband who sees his wife committing adultery but is unable to provide the required evidence of her wrong in the court of law. Such a husband would not be charged for *Qazf*. Rather, such an allegation against his wife supported with special oaths would enable the court to separate the pair under the doctrine of *Lian*.[9]

This article sheds light on how Pakistani courts mixed up these simple and straightforward legal issues of Islamic law while interpreting the new law of homicide and murder, i.e., *Qisas* and *Diyat* law. The study shows how the higher courts of Pakistan, just after three years of the promulgation of the *Qisas* and *Diyat* law, declared that the old notion of grave and sudden provocation should be presumed to be included in the new law of homicide and murder. This was a clear appropriation of the new law by the judges trained in the Western legal tradition to bring in their personal

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[7] Under the Quranic injunctions, chapter 4 verse 15, the requirements regarding the obligatory number of witnesses to prove the case of adultery are four Muslim witnesses.

[8] Unproved allegation that an individual has committed *zina* (unlawful sexual intercourse). Chapter 24 verse 13 of the Quran deals with the punishment of *Qazf*.

[9] *Lian* is a kind of divorce in which a husband charges his wife with adultery and alleges that he has had seen his wife committing adultery but has no proof of it. The court administer oath on him and asks his wife to deny the allegation on oath. On her denial the court terminates the marriage contract.

understanding of Islamic criminal law, old western legal notions and self-structured concepts of *ghairat*[10] and honour in the new law of murder and homicide promulgated in the country.

In the case of *Muhammad Sadiq v The State*, 1961, it was found for the first time that the High Court referred to the Muslim society while considering the plea of grave and sudden provocation.[11] The Sessions Court dismissed the accused's plea of grave and sudden provocation and sentenced him under the charge of murder. The Appellate Court however reversed the findings of the Trial Court. The court altered the charge from murder to culpable homicide and sentenced him three years rigorous imprisonment.[12]

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[10] *Ghairat* is an Arabic word which means honour, shame, modesty and indignation. The word is also used in Urdu and Punjabi as well in all of these meanings, but in an exaggerated form.

[11] Accused Muhammad Sadiq had seen his maternal uncle's wife and step-mother of Shaukat Ali, deceased, making love with Shaukat. Finding them copulating, he lost his self-control and killed Shaukat under grave and sudden provocation. Tahir H. Wasti, 'The Law on Honour Killing: A British Innovation in the Criminal Law of the Indian Subcontinent and its Subsequent Metamorphosis under Pakistan Penal Code' (2010) 25(2) South Asian Studies 361, 371.

[12] Accepting the plea of grave and sudden provocation in the backdrop of the Muslim Society the court observed: 'On the other hand, we cannot be oblivious to the fact that the deceased was caught while engaged in an act which was revolting to all senses of decency and morality known to society, particular to Muslim society. He was engaged in love making with no other woman than his own step mother who being the wife of his father according to the Quranic injunction was within the prohibited degree….[I]t is true that there is no evidence that the deceased was actually engaged in sexual intercourse with Mst. Hamidan when the appellant surprised them, yet considering the moral values and standard of chastity and social behaviour precluded for Muslim society, the act in which the deceased was engaged was no less obnoxious to and in principle it should not make any difference whether the victim of crime is actually engaged in love making preparatory to fornication or in the actual act of fornication.'

As noted by Tahir H. Wasti, this judgment only referred to Quranic injunctions arbitrarily, focusing only on those verses of the Quran which forbade a sexual relationship between a step-mother and a son while ignoring verses which set standards of evidence to confirm accusations.[13]

In 1968, the Karachi High Court in *Kalu Alias Kalandar Bux v The State* accepted the plea of the accused that he killed the deceased to vindicate his honour.[14] They relied on the judgments given by the courts under the provision of grave and sudden provocation and gave its benefit to the accused. Interestingly, they reduced the sentence from death to imprisonment of life without altering the charge from murder to culpable homicide. The judges did not make any reference to Muslim society, the sanctity of marriage in Islam, or the right of a husband to keep his wife with him. This decision was a significant turn in the legal history of the punishments for honour killings wherein the court, without amending the charge of murder to culpable homicide through grave and sudden provocation, passed an alternative sentence of imprisonment for life, provided under section 302 of the Pakistan (Indian) Penal Code 1860 as the accused had murdered the deceased to vindicate his family honour.

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[13] Wasti (n 8) 372.

[14] The deceased had enticed away the accused' sister which damaged his honour severely. Despite the fact that submitting to the enormous pressure put upon him, the deceased had returned her back to her family yet he was endeavouring to get her back through legal means. On searching his dead body, the police recovered an application addressed to the Deputy Superintendent of Police wherein it was stated therein that his wife, Mst Rehmat, had been snatched by her father and brothers. It was prayed therein that his wife should be restored to him. The fact of the marriage was not considered enough by the father and brothers which had made the deceased a member of their family. The judges also did not pay any attention to this preposition. Wasti (n 8), 372-373.

Another example of the courts' commuting sentences[15] without altering the charge from murder to culpable homicide was provided in the case of *Shoukat Ali v. State*, 1977, where the appellant had killed his cousin who was going with her friend, a boy, while accompanied by her mother. The appellant stated that he tried to dissuade her from dishonouring the family but she did not listen and instead attacked him which resulted in him killing her.[16]

B. The New Defence: Grave and Sudden Provocation

These were the judgments that introduced a new element of mitigation in the sentences passed under the charge of murder. This was quite extraordinary as the judges began to assume something in favour of the accused whenever they brought forward the defence of family honour as the reason for killing the accused.

The message these judgments were giving to society can be inferred from a judgment of the Supreme Court given in 1985 in *Mohib Ali's case.*[17] The Supreme Court upheld the judgment of the High Court whereby it had rejected the plea of grave and sudden provocation by the appellant and held:

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[15] From death to life imprisonment.

[16] Here the High Court observed: 'The appellant, presumably, thought that Mst Noor Jehan, would not mend her ways, and was bringing bad name to the family. He decided to wipe off this insult to the family in his own misguided way.' Wasti (n 8) 373.

[17] *Mohib Ali v. The State* 1985 SCMR 2055.

'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 license to people to kill innocent people.'[18]

In January 1988, the Shariat Appellate Bench of the Supreme Court of Pakistan took up the eleven Shariat Appeals[19] together for hearing which were reported in 1989. The Supreme Court declared sections 299 to 338, which dealt with offences against human body, repugnant to the injunctions of Islam. Since the judgment of the Supreme Court had to go a long way in the formulation and the interpretation of the future law of homicide and murder by the State, Justice Taqi Usmani took upon himself to explain the culpability of a homicide committed under grave and sudden provocation. Moreover, the Honourable Justice contended that:

> 'Exemption I, of the Section 300 does take care of such situations and the murderer husband is exempted from the punishment of murder only for the reason that such an act excites grave and sudden provocation. However, under Islamic law, the exemption from the punishment of murder is not based on the reason that the action enrages a grave kind of provocation but, is owing to fact that he found his wife committing such an act that could have been punished with death penalty. Therefore, if grave and sudden provocation arises from an act that is not liable to be punished with death in Islam and such provocation is also not an act of self-defence then the person cannot be exempted from the punishment of *qisas*. Since, under the philosophy of Islam taking life of someone who is *masoom-ud-dam* (whose blood

[18] Ibid 2057.
[19] All appeals were heard together and reported under the main heading of *Federation of Pakistan v Gul Hassan Khan*, PLD 1989, SC, 633.

> is protected by law), is a very grave offence and entails the punishment of *qisas*. The gravity of provocation does not mitigate the severity of this offence and does not call for the reduction in the punishment. Every human being is made responsible to an extent that he should not take the life of another human being, whose blood is protected in Islam by losing self-control under grave and sudden provocation. Therefore, under Islamic injunctions it is not enough to show, to escape from *qisas*, that the murdered did something provocative. Rather, he should show and prove that murdered was doing something which was punishable by death under Islam. Only in this situation, he may get away from the *qisas* (still he may be held liable for *tazir* punishment because he took law in his own hands).'

The new law, i.e., Islamic law of homicide and murder, titled as Criminal Law (Second Amendment) Ordinance VII of 1990, came into effect in 1990 which substituted section 299 to 338 of the PPC. In 1992, *Abdul Wahid's case*[20] was placed before the Supreme Appellate Court[21] which was comprised of two High Courts and one Supreme Court Judge. The Chairman of the full bench was Justice Nasim Hasan Shah, who had earlier sat as a member of the Shariat Appellate bench of the Supreme Court that heard the *Gul Hasan Case*. This was the first case reported under the new law decided by such a high bench of the country.

[20] *The State v. Abdul Wahid* PLD 1992 SC 1596.

[21] This high-powered bench was constituted under section 13 of the Special Courts for Speedy Trials Act 1992. The Appellate Court was comprised of one judge of the Supreme Court, being its chairman, and two judges of the High Court - the members.

C. The Islamic Right to Self Defence

Thereafter followed the judgment of Lahore High Court, which raised an edifice on the foundations laid down in *Muhammad Hanif's case*. Sitting singly, hearing the appeal in *Ali Muhammad v. The State*,[22] Justice Ausaf Ali further structured and widened the theory of the right of self-defence in Islam, propounded by Justice Shafiur Rehman. In Islam, the right to defend the honour is included in the right of self-defence he explained. He interpreted, though too broadly, a clause of Section 100 of the PPC that extends a woman's right of private defence to the extent of causing death in case she is assaulted with the intention of committing rape.

So far as the point of law on grave and sudden provocation is concerned, the court construed his pleas under the right of self-defence available to him under Islam. The judge heavily relied on Mohammad Hanif's case to hold that the accused killed the deceased in exercise of his right of self-defence. In elaboration of the right of self-defence in Islam and interpreting it in the reference of the new law, the judge made substantial efforts to prove this new point. He cited three instances from a book entitled: *Kitab-ul-Ikhtiar*.

1) If a person has seen another man committing *zina* with wife of any person, then the latter can kill him if he does not desist from the act after a call or shout.

2) If a person sees another man committing *zina*, with his wife, then it is desired for him to kill him.

3) If a person sees the other committing sodomy with a child or *zina* with his woman, then his murder is not liable to *qisas*.

[22] *Ali Muhammad v. The State*, 1993 SCMR 557.

In both judgments, the courts relied on a principle derived from the English common law that the prosecution is bound to prove its case beyond the shadow of doubt; and if the evidence presented by the prosecution is insufficient to prove its case, then the statement of the accused has to be accepted in totality and without scrutiny.

Interestingly, in both the cases which paved the way for bringing in old notions into the new law, the accused had accepted the commission of murders only at the end of the trial. They had plenty of opportunity to lead the evidence that could prove the contents of their story. It is amazing, how both the courts did not consider it just to examine the principles of accepting the accused' version of events in the light of the Quran and Sunnah.

In *Muhammad Rafique v The State*,[23] case the Lahore High Court, though again reiterating the principle that if the conviction is to be based on the accused's plea alone, the plea has to be accepted to reduce the punishment of the accused awarded by the trial court accepting the ground of sudden and grave provocation. The accused was the brother in law of the deceased, Mst. Shamim Mai, who had seen her lying in a room in an objectionable position with Zahoor Ahmad. The trial court convicted the accused under section 302(c) and awarded him imprisonment for the term of twenty-five years. The Lahore High Court in the light of the judgment given in *Abdul Zahir's case* maintained the judgment of the trial court.

Interestingly, the judiciary of Pakistan irrespective of its competence, power, and sometimes even jurisdiction, had always tried to fall back on Islam and its sources to justify their reasoning in their judgments. Even more interestingly, the judges' point of departure had always been his own interpretation of the situation,

[23] *Muhammad Rafique v The State*, 2003 LHC 2252.

rather than that of the Quran and Sunnah, by the different schools of thoughts.

Conclusion

As can be seen from the discussion above, the development of the provocation defence was informed by male dominated attitudes which constructed women to be male property. This was held to be inextricably linked to the idea that any objectively reasonable man will inevitably commit homicide, provoked by the sexual deviance of his female relatives, especially, mothers, daughters, wives and sisters. The attitude reflected in the cases not only held this to be a settled position for men but also indicated an understanding where men were required to behave this way if they were to retain their position as men of honour. This was followed by the courts in introducing a defence which validated the position that it was acceptable for men to go as far as committing murder in order to ensure no female in their family was sexually deviant. This perception still takes effect, even with the significant changes brought about by the 2016 legislation.

An overview of the origin of the attitude enabling such behaviour shows that there are deep seated misguided notions, justifying expressions of male anger, which demand that such men be given protection from the complete brunt of their actions. This is unlike the treatment given to perpetrators of any other offence. Statistics show there to be a consistent rise in the victims of honour killings. If the legal system in Pakistan wishes to enact change which effects deterrence to honour crimes, it needs to take this information into account and design a strategy that would

successfully counter the pre-existing narrative fostering this behaviour.

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