

The logo of the University of Sussex, consisting of the letters 'US' in a stylized, white, serif font.

University of Sussex

## **Human Rights Law Clinic Papers 2016**

# **IMPOSITION OF THE DEATH PENALTY IN PAKISTAN: ASSESSING COMPLIANCE WITH INTERNATIONAL LAW AND STANDARDS**

---

To: Reema Omer, International Commission of Jurists

Submitted by: Suleman Zeb

May 2016

This memorandum is a research paper prepared on a pro bono basis by students undertaking the LLM in International Human Rights Law at Sussex Law School at the University of Sussex. It is a pedagogical exercise to train students in the practice and application of international human rights law. It does not involve the giving of professional legal advice. This memorandum cannot in any way bind, or lead to any form of liability or responsibility for its authors, the convenor of the Human Rights Law Clinic, the Sussex Centre for Human Rights Research or the University of Sussex.

## Sussex Law School Human Rights Law Clinic

The Human Rights Law Clinic operates as an optional module in the LLM degree in International Human Rights Law at Sussex Law School at the University of Sussex. The Clinic offers students the chance to build on law and theory through the preparation of pro bono legal opinions for clients. Students work under the supervision of the Clinic's convenor, an academic and practitioner in human rights, on specific legal questions related to international human rights law coming from clients. Depending on the complexity and nature of the legal opinions sought, students work individually or in small groups to produce memoranda for their clients, following a process of consultation with clients, close supervision, oversight and review by the Clinic's convenor, seminar discussions on work in progress, and presentations to clients of draft memoranda.

[www.sussex.ac.uk/schrr/clinic](http://www.sussex.ac.uk/schrr/clinic)

## Sussex Centre for Human Rights Research

Sussex Law School's Sussex Centre for Human Rights Research aims to foster a vibrant research culture for human rights researchers within the Sussex Law School. Its work has a global as well as national focus and its researchers adopt a range of approaches to human rights research (e.g. doctrinal, critical, theoretical, practical and inter-disciplinary). The Human Rights Law Clinic operates in pursuit of the Centre's objectives to feed into human rights debates and collaborate with relevant organisations, locally, nationally and internationally; and to attract and give opportunities to high-quality postgraduate students.

[www.sussex.ac.uk/schrr](http://www.sussex.ac.uk/schrr)

## **Contents**

Introduction

Background

Capital punishment 'only for the most serious crimes'

What is a 'most serious crime'?

Supreme Court cases regarding the death penalty

Drug-related offences

*International laws and standards*

*Pakistani law*

*Supreme Court jurisprudence*

*Evaluation*

Murder (Qatl-e-amd)

*International laws and standards*

*Pakistani law*

*Supreme Court jurisprudence*

*Evaluation*

Terrorism

*Pakistani law*

*Supreme Court jurisprudence*

*Evaluation*

Imposition of capital punishment only when prescribed by law

Imposition of capital punishment prohibited for certain persons

Persons under the age of 18

Pregnant women

Conclusion

## **Introduction**

Twenty-seven offences carry the death penalty under Pakistan's criminal law.<sup>1</sup> These offences range from stripping a woman of her clothes<sup>2</sup>, to kidnapping/abducting for ransom<sup>3</sup>. In practice however, executions are only carried out in relation to murder and terrorism.

In 2008, a moratorium was placed on the execution of persons sentenced to death. People were still being sentenced, although executions were not being carried out. After a terrorist attack in December 2016 on the Army Public School in Peshawar killing 150 people, mostly students, the moratorium was lifted and Pakistan resumed executions. 389 people have been executed since December 2014.<sup>4</sup>

This memorandum begins with a basic background regarding the context of the death penalty in Pakistan. The international regulations regarding the death penalty will be then be examined to give context, following this is the main body of the memorandum, which discusses the jurisprudence of Pakistan's Supreme Court (SC) (Pakistan's highest appellate court) concerning the penalty's imposition, examining all reported cases between the years 2012 and 2016. SC judgments are analysed to ascertain what factors are taken into account when confirming a sentence. The decisions are scrutinized in relation to the first three International Safeguards that Guarantee the Protection of the Rights of People Facing the Death Penalty of the Economic and Social Council (ECOSOC), adopted in 1984,<sup>5</sup> primarily concentrating on the first safeguard.

## **Background**

The death penalty in Pakistan is primarily imposed in murder and terrorism-related cases. While drug-related offences also carry the penalty, the sentence is often commuted to life imprisonment. Since not all offences that carry the death penalty are given the sentence, this memorandum will only discuss drug-related offences, murder, and terrorism.

In the first three months of 2016 alone, there were at least ten cases heard in the SC regarding the penalty. However, most are concerned with the facts of the case, rather than particular law. Thus a number of cases were not considered by this memorandum in order to focus on particular issues of law.

The 1984 Safeguards specify 9 safeguards to be complied with when implementing the death penalty in countries that have not abolished it. This memorandum concentrates on the first three:

---

<sup>1</sup> 'Death Penalty Offences.' (HRCP2015), <<http://hrcp-web.org/hrcpweb/death-penalty-offences/>>, (accessed 9 May 2016).

<sup>2</sup> Pakistan Penal Code 1860, section 354-A.

<sup>3</sup> Pakistan Penal Code 1860, section 365-A.

<sup>4</sup> 'Death Penalty Offences.' (HRCP2015), <<http://hrcp-web.org/hrcpweb/death-penalty-offences/>>, (accessed 9 May 2016).

<sup>5</sup> Economic and Social Council, Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted under ECOSOC Resolution 1984/50.

1. "Capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences."
2. "Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."
3. "Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane."

## **Capital punishment 'only for the most serious crimes'**

Despite giving a very basic definition of "most serious crime", i.e. that the offender intended to cause the death of a victim, or another extremely grave consequence, what the first safeguard actually means can be subjective.<sup>6</sup>

### What is a 'most serious crime'?

Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) uses similar language to the ECOSOC safeguards, providing: "...sentence of death may be imposed only for the most serious crimes...". The Human Rights Committee (HR Committee), in its General Comment 6, stated that the sentence is an "exceptional measure", thus Article 6(2) must be "read restrictively".<sup>7</sup>

The safeguards expanded on Article 6(2). In contrast to the HR Committee's General Comment, the safeguards add the phrase "...other extremely grave consequences". This renders the definition vague. To clarify what the phrase means, the UN Secretary-General, in his sixth quinquennial report, mentioned that the offence should be life-threatening and that death is a very likely consequence.<sup>8</sup> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions narrowed it further, stating there needs to be "an intention to kill which resulted in the loss of life".<sup>9</sup> The HR Committee, so far, only considers murder to be a most serious crime.<sup>10</sup>

The use of the term "intention to kill" incorporates a mens rea requirement. It requires that a lethal consequence took place due to an action, of which the intention was for the death of the victim(s). This is supported by the report of the Special Rapporteur stating that "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill".<sup>11</sup>

---

<sup>6</sup> Report of the Secretary General Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, UN Doc E/1995/78 (1995), para 54.

<sup>7</sup> Human Rights Committee, 'General Comment 6, Article 6', UN Doc HRI/GEN/1/Rev.1 at 6 (1994), para 7.

<sup>8</sup> Secretary General report (1995), op. cit., para 54.

<sup>9</sup> Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, UN Doc A/HRC/4/20 (2007), para 65.

<sup>10</sup> Ibid., para 52.

<sup>11</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc E/CN.4/1998/68/aDD.3 (1998), para 21.

The aforementioned statements regard the meaning of “most serious crime”. The next question to ask is whether these parameters amount to customary international law (CIL).

The safeguards are not legally binding. They obtained international support from the UN General Assembly,<sup>12</sup> and the aforementioned UN documents attempt to explain the meaning of “most serious crime”. Thus, though not prohibited by CIL, a change in custom favouring abolishment has developed.<sup>13</sup> However, since the interpretations are not “universally accepted”,<sup>14</sup> these explanations have not achieved a strong foothold as binding interpretations of the safeguards.<sup>15</sup>

The HR Committee states that “apostasy, committing a homosexual act, illicit sex, embezzlement by officials, and theft by force,” are not characteristics of crimes that satisfy the “most serious crimes” criteria. However, some Islamic States hold that adultery and apostasy are “most serious crimes”. Other states regard political offences and economic crimes as warranting the death penalty.<sup>16</sup> The HR Committee’s statement may shed light to the meaning of “most serious crime,” however they are not binding<sup>17</sup>, as a result, the interpretation does not form international law. However, some argue that under the ICCPR, the death penalty is an exceptional measure that requires strict conditions to be met.<sup>18</sup>

Another point to bear in mind is the status of the ICCPR in Pakistani jurisprudence. Pakistan entered a reservation to Article 6 of the ICCPR.<sup>19</sup> However, in June 2011, Pakistan withdrew it.<sup>20</sup> While this withdrawal means that Article 6 is binding upon Pakistan, its interpretation is not. The safeguards are also not binding,<sup>21</sup> and with the interpretation not being “universally accepted”, the UN claims regarding what “most serious crimes” entails, is arguably not strict nor constituting binding CIL, although it holds persuasive weight.

## **Supreme Court cases regarding the death penalty**

Regarding the imposition of the death penalty in Pakistan, this section of the memorandum considers three offences: drug-related offences; murder; and terrorism.

### Drug-related offences

#### *International laws and standards*

According to the HR Committee, drug crimes do not amount to a “most serious crime”. In its Concluding Observations on Thailand, the Committee noted with concern that the death penalty in Thailand was “...not restricted to the ‘most serious crimes’ within the meaning of

---

<sup>12</sup> The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty, Report, London: International Bar Association, (2008), p. 5.

<sup>13</sup> Ibid, p. 3.

<sup>14</sup> Ibid, p. 5.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid, p. 4, note 3.

<sup>18</sup> International Bar Association (2008), op. cit., p. 6.

<sup>19</sup> Pakistan’s Reservations to the International Covenant on Civil and Political Rights, Report, Berlin: Democracy Reporting International, 2010, p. 2.

<sup>20</sup> International Bar Association (2008), op. cit., p. 5.

<sup>21</sup> International Standards on the Death Penalty, Report, London: Amnesty International, 1997, p. 45.

article 6, paragraph 2, and is applicable to drug trafficking".<sup>22</sup> This was reiterated in the 2007 annual report of the Special Rapporteur, stating that drug-related crimes are not "most serious crimes"<sup>23</sup>.

The 1998 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (CAITNDPS) uses the term "particularly serious" to define certain drug-related crimes.<sup>24</sup> However, for the crimes to be elevated to this "particularly serious" nature, additional factors must be present.<sup>25</sup>

Rick Lines states that drug offences in domestic legislation are either too narrow in scope, small in quantity or informal to be "most serious crimes".<sup>26</sup> However, the CAITNDPS, the 1971 Convention on Psychotropic Substances and the 1961 Single Convention on Narcotic Drugs, speaks of the possibility of States enforcing "more strict or severe measures" than the ones provided for in the treaties.<sup>27</sup> The 1961 and 1971 Conventions use the death penalty as an example of these measures.<sup>28</sup> Lines, however, states that they were "illustrative examples",<sup>29</sup> and that since CAITNDPS does not mention the death penalty as an example, this may indicate a shift in perspective favouring non-imposition of the penalty.<sup>30</sup>

There is no explicit international law that makes the death penalty impermissible for drug-related crimes. However, when looking at the aforementioned instruments, one is inclined to agree with Lines. A shift away from the penalty is prevalent.

### *Pakistani law*

Section 9(c) of the Control of Narcotic Substances Act (1997) (CNSA) states that a breach of sections 6, 7 or 8 (prohibiting possession, import/export, and trafficking/financing of trafficking of prohibited substances, respectively) can result in "death or imprisonment for life, or imprisonment for a term which may extend to fourteen years... if the quantity of narcotic drug... exceeds the limits specified in clause (b): Provided that if the quantity exceeds ten kilograms the punishment shall not be less than imprisonment for life". Section 9(b) explains that contravention of sections 6, 7 or 8 can result in a maximum of seven years imprisonment if the quantity of substance exceeds 100g, but is less than 1kg. Thus if the quantity of substance exceeds 1kg, the convict may be sentenced to death, and if it exceeds 10kg the chances are higher. However, what differing circumstances warrant life imprisonment, or death is not mentioned.

---

<sup>22</sup> Human Rights Committee, Concluding Observations of the Human Rights Committee: Thailand, UN Doc CCPR/CO/84/THA (2005), para 14.

<sup>23</sup> Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions (2007), op. cit., para 51.

<sup>24</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 3.

<sup>25</sup> Lines, Rick, "A Most Serious Crime?—The Death Penalty for Drug Offences and International Human Rights Law." *Amicus Journal*, 21 (2010), p. 24.

<sup>26</sup> *Ibid.*

<sup>27</sup> Single Convention on Narcotic Drugs, Article 39; Convention on Psychotropic Substances, Article 23; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 24.

<sup>28</sup> Commentary on the Single Convention on Narcotic Drugs, para 429; Commentary on the Convention on Psychotropic Substances, para 370.

<sup>29</sup> Lines (2010), op. cit., p. 25.

<sup>30</sup> *Ibid.*

### *Supreme Court jurisprudence*

Between the years 2012-2016, no death sentences were upheld by the SC in drug-related cases.

This can be seen in *Ameer Zeb v The State*, which, although not concerning imposition of the death penalty, is instructive as to the seriousness with which drug offences are treated.<sup>31</sup> The appellant was arrested in possession of 20kg of hashish. The authorities separated a sample from each packet and combined them together into one for testing by the Chemical Examiner, who found hashish in the sample. The trial court sentenced the appellant to life imprisonment under section 9(c). In the SC, the appellant argued that, due to the fact that 20 packets, each containing four slabs, were recovered, every slab had to be examined separately. Concluding that since the sample weighed 10g, and each slab weighed 250g, he could only be convicted for one slab. The SC acknowledged that the punishments in CNSA were harsh, stating, “the harsher the sentence the stricter the standard of proof”.<sup>32</sup> The SC converted the conviction to section 9(b), sentencing him to imprisonment for fifteen months.

While the appeal regarded conviction and not sentence, it raises an important question. If under section 9(c) an amount of substance exceeding 1kg warrants the death penalty, then why was it not imposed for the larger amount of 20kg? Leading to the next question, what amount is required to warrant death?

In *Shaukat Ali alias Billa v The State*.<sup>33</sup> the facts were similar to *Ameer Zeb*, regarding separate examination of samples. The defence cited *Ameer Zeb*, stating that each packet had to be examined separately. However the trial court sentenced Shaukat Ali to death. The appellant requested his sentence be commuted to life imprisonment as the amalgamated hashish’s total weight was 10kg, thus the proviso in section 9(c) was thereby not engaged, i.e. any amount less than 10 kg had to be less than life imprisonment. The SC agreed and sentenced him accordingly.

Although the facts were similar, the difference between Shaukat Ali’s case and *Ameer Zeb*’s was the total amount of hashish recovered (20kg in the case of *Ameer Zeb*, versus 400kg for Shaukat Ali). The judgment in *Ameer Zeb* stressed that sentences specified in the CNSA “depend upon the quantity of the recovered substance and not upon the narcotic content...”.<sup>34</sup> Thus life imprisonment is the maximum sentence imposable for 10kg of substance. However, it did not mention whether 400kg was enough to warrant death. Even if that is assumed so, what amount tips the scales is not clear.

In *Shah Muhammad v The State*,<sup>35</sup> the appellant was found with 340kg of hashish contained in different packets. Muhammad was convicted under section 9(c) and sentenced to life imprisonment by the trial court. He appealed to the SC on similar grounds as those in *Ameer Zeb*. The SC found nothing wrong with the chemical examination and dismissed his appeal, although acknowledging the possibility that the total weight of recovered hashish was 17kg..

---

<sup>31</sup> *Ameer Zeb v The State* (2012) PLD 380.

<sup>32</sup> *Ibid*, para 5.

<sup>33</sup> *Shaukat Ali alias Billa v The State* (2015) SCMR 308.

<sup>34</sup> *Supra* Note 33, para 5.

<sup>35</sup> *Shah Muhammad v The State* (2012) SCMR 1276.



This conclusion should be contrasted with *Shaukat Ali* (decided after *Shah Muhammad*), in which case 400kg was deemed by the trial court to have been sufficient to warrant imposition of the death penalty, whereas in *Shah Muhammad* the slightly lower amount of 340kg did not.

Despite quantity of the recovered substance being the sole basis of sentencing,<sup>36</sup> the case of *Khuda Bakhsh v The State* provides an additional basis.<sup>37</sup> The SC judgment stated that the nature of the narcotic substance should also be considered, as “some narcotics are more harmful than others”.<sup>38</sup> This contradicts the judgment in *Ameer Zeb*, which states that narcotic content of the substance does not determine the sentence. The judge in *Khuda Bakhsh* also stated, *obiter*: “The imprisonment for life or death is attracted when the threshold of ten kilograms (proviso to section 9)” is reached.<sup>39</sup> Contrary to the approach in *Shaukat Ali*, this implies that, depending on the narcotic substance, more than 10kg of narcotics can warrant the death penalty.

### *Evaluation*

The sentence of death in drug-related crimes is wrought with complications. Section 9(c) (and its interpretations) requires that either death or life imprisonment be awarded where the quantity of the narcotic substance exceeds 10kg, although it does not specify when life imprisonment, or death is sentenced. The *Khuda Bakhsh* judgment implies the type of drug is also a factor, contradicting the *Ameer Zeb* and *Shaukat Ali* judgements that state that the amount of substance is the sole factor.

SC Jurisprudence between 2012 and 2016 has not upheld capital punishment in the case relating to 9(c). In light of international standards, stating drug-related offences are unlikely to fall within the category of ‘most serious crimes’, this is a welcomed approach. However, the lack of clarity promoted by the *obiter* statement in *Khuda Bakhsh*, that the death penalty might be imposed where the amount of narcotics is above 10kg, remains cause for concern. If the SC were to take such a view in upholding the death sentence in drug-related offences, this would involve a violation of accepted international standards concerning the imposition of the death penalty.

### Murder (Qatl-e-amd)

#### *International laws and standards*

According to the HR Committee, murder is the only offence that satisfies the “most serious crime” restriction.<sup>40</sup> The first safeguard requires that the scope of “most serious crimes” “should not go beyond intentional crimes with lethal or other extremely grave consequences”. A mens rea requirement thus comes into play.<sup>41</sup> However, despite the fact that murder may justifiably attract the death penalty, according to UN human rights bodies

---

<sup>36</sup> *Ameer Zeb v The State* (2012) PLD 380; and *Shah Muhammad v The State* (2012) SCMR 1276.

<sup>37</sup> *Khuda Bakhsh v The State* (2015) SCMR 735.

<sup>38</sup> *Ibid*, para 9.

<sup>39</sup> *Ibid*, para 10.

<sup>40</sup> Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions (2007), *op. cit.*, para 52.

<sup>41</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (1998), *op. cit.*

the mandatory death penalty is not in compliance with the restriction.<sup>42</sup> Some Islamic states do award the death penalty as a mandatory sentence.<sup>43</sup> The next section will deal with Pakistan's use of the Islamic principle of qisas, and examine its implementation of the death penalty.

### *Pakistani law*

The potential punishments attracted by a conviction for murder (qatl-e-amd) are mentioned in section 302 of the Pakistan Penal Code (PPC), in accordance with Sharia interpretation. Section 302(a) attracts the punishment of death as qisas for qatl-e-amd if proof specified in 304 is available. Section 302(b) states that in regards to facts and circumstances, the punishment may be death as qisas or life imprisonment as ta'zir if proof specified in s304 is unavailable. Section 302(c) attracts imprisonment for up to 25 years if qisas is not applicable.

In the context of qatl-e-amd, "qisas" means causing the convicts death, in exercise of the right of the walis - heir(s) of the victim.<sup>44</sup> "Ta'zir" means punishment other than qisas or diyat - (blood money/compensation).

Section 307(1)(b) states Qisas will not be enforced if an heir of the victim voluntarily waives his right of qisas,<sup>45</sup> or accepts compensation as a compromise.<sup>46</sup> Thus, if an accused is found guilty, an aspect of his/her fate rests in the hands of the heirs.

### *Supreme Court jurisprudence*

In *Ahmed v The State*, the SC used the facts of the case to commute the sentence from death to life imprisonment, based on circumstantial evidence, delay in the lodging of the police report, and lack of proof of motive.<sup>47</sup> The SC concluded that while the evidence was circumstantial, it pointed towards the defendant's guilt, but did not warrant the death penalty. This approach might be treated as relating to two aspects of the safeguards, i.e. the intent to kill, and clear evidence of guilt.

A case example of murder resulting in imposition of the death sentence is *Haji Muhammad – Alias Jhoora v The State*.<sup>48</sup> The appellant killed the husband of his former wife. He was found guilty under section 302(b) of the PPC and sentenced to death. When appealing for a reduction in sentence, the SC stated that, he acted in a "pre-planned manner", and committed a "heinous offence"<sup>49</sup> by murdering the victim and kidnapping his former wife and daughter afterwards. They found no reason to reduce his sentence.

---

<sup>42</sup> International Commission against the Death Penalty, 'The death penalty and the "most serious crimes". A country-by-country overview of the death penalty in law and practice in retentionist states' (January 2013), <[http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes\\_final\\_6Feb2013.pdf](http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes_final_6Feb2013.pdf)>, p. 7, (accessed 9 May 2016).

<sup>43</sup> Ibid.

<sup>44</sup> Pakistan Penal Code 1860, section 299(k).

<sup>45</sup> Ibid, section 309.

<sup>46</sup> Ibid, section 10.

<sup>47</sup> *Ahmed v The State* (2015) SCMR 993.

<sup>48</sup> *Haji Muhammad – Alias Jhoora v The State* (2014) PLD 322.

<sup>49</sup> Ibid, para 10.

In *Muhammad Anwar v The State*, the offence of murder was compounded.<sup>50</sup> The petitioner was convicted under section 302(b), sentenced to death, and ordered to pay compensation. He forwarded an application to gain permission to compromise with the heirs of the victim. Once the heirs accepted compensation, the Court acquitted the petitioner.

Qatl-e-amd does have its complexities. In *Dilawar Hussain v The State*, the petitioner's death sentence was reduced to life imprisonment.<sup>51</sup> The reasoning was two-fold. First, it was proven that he never intended to kill the deceased. Second, as he had been incarcerated for 17 years, the SC took the view that he had served nearly a full life sentence. The SC did not base the reduction of sentence solely on the years spent incarcerated, it was a relevant factor among other mitigating circumstances, reiterated in later jurisprudence<sup>52</sup>. He was sentenced under section 302(b), as qatl-e-amd can be committed when a person with the intention of causing bodily injury to a person causes such injury, which would cause death in the ordinary course of nature<sup>53</sup>. Thus, where qatl-e-amd is committed by causing bodily injury that was likely to cause death, but without intent to kill, there is a better chance in being sentenced to life imprisonment over death. It appears that the SC in such circumstances would only uphold a death sentence if the intention to cause death is prevalent, and may commute the sentence to life imprisonment if the intent was doubted. This approach shows that it is intention that converts homicide into a "most serious crime".

Another situation is where one, but not all heirs of the victim accept compensation. In *Abdul Ghaffar and others v The State*, the SC stated that even if all the heirs enter into a compromise with the defendant, the Court has the final say, its decision based on the "facts and circumstances of the case".<sup>54</sup> The judges agreed that one heir's compromise was a relevant factor, but not a conclusive one. This was reiterated in later jurisprudence.<sup>55</sup>

### *Evaluation*

According to Pakistani law, the offence of murder carries the death penalty, and is one of the few crimes where the penalty is imposed. However, it is not as simple as an eye for an eye. Many factors are taken into consideration. In *Haji Muhammad*, the SC upheld the death sentence as the offence was "pre-planned", and "heinous".<sup>56</sup> The facts brought to light his motive and intention, thus his appeal was dismissed.

In *Dilawar Hussain*, the appeal was granted, and the sentence reduced to life imprisonment because two things were proven. First, that he never intended to kill the deceased, and secondly that due to the fact that he had already been behind bars for so long, that he had nearly served a full life sentence. Both factors had to be present to commute the sentence. What this shows was that the SC takes into account various circumstances in order to ensure whether the death penalty is to be implemented or not.

---

<sup>50</sup> *Muhammad Anwar v The State* (2012) PLD 769.

<sup>51</sup> *Dilawar Hussain v The State* (2013) SCMR 1582.

<sup>52</sup> See: *Haji Muhammad alias Jhoora v The State* (2014) PLD 322; and *Khalid Iqbal and 2 others v Mirza Khan and Others* (2015) PLD 50.

<sup>53</sup> Pakistan Penal Code 1860, section 300.

<sup>54</sup> *Abdul Ghaffar and others v The State* (2015) SCMR 1064, para 10.

<sup>55</sup> See: *Muhammad Amin v The State* (2016) SCMR 116.

<sup>56</sup> *Haji Muhammad – Alias Jhoora v The State*, op. cit., para 10.

The jurisprudence shows that the SC is only willing to implement the death penalty where it is proven the person committed the crime with intent to kill. However, if the SC finds the person guilty beyond all reasonable doubt, the matter ends up being in the hands of the heirs of the victim. Resulting in the power to choose a person's fate to be in the hands of laymen and women guided by emotion, and not jurists guided by law.

## Terrorism

### *Pakistani law*

Section 7(a) of the Anti-Terrorism Act 1997 (ATA) provides the death penalty or life imprisonment on whoever commits a terrorist act whereby a person dies. Section 7(e) provides the death penalty, or life imprisonment, for kidnapping/hostage-taking for ransom. Section 7(f) allows for imposition of the death penalty, or life imprisonment, for a terrorist act involving hijacking.

According to section 6(1) of the ATA, "terrorism" is defined as the use of threat of action that: a) is within the meaning of subsection 2; and b) is designed to coerce/intimidate/overawe Government/public/section of public/community/sect, or to cause a sense of fear of security in the society; or c) is designed to advance a religious/sectarian/ethnic cause. Sub-section (2) lists different acts of terrorism.

The ATA is often used alongside the PPC. Cases in which the defendant is tried for terrorism accompany a charge under the PPC.

### *Supreme Court jurisprudence*

In *Malik Muhammad Mumtaz Qadri v The State*, the appellant was charged with offences under section 7(a) of the ATA and section 302(b) of the PPC.<sup>57</sup> The appellant was a member of the Punjab Police, and the official bodyguard for the Governor of Punjab, Salman Taseer. Whilst on duty, he killed Taseer due to the deceased's critical view of the blasphemy law. His charge under section 7(a) was based on him stating that the murder of the Governor was "a lesson for all apostates, as finally they have to meet the same fate".<sup>58</sup> Thus fulfilling the requirements under sections 6(1)(b) and (c), adding a terrorism charge to his qatl-e-amd conviction. The terrorism charge results in the convict no longer being able to compound the offence by paying compensation.

The judgment in *Kareem Nawaz Khan v The State* clarifies that sentences imposed under section 7(a) of the ATA and section 302(b) of the PPC are independent.<sup>59</sup> If the convict enters into an agreement with the victim's heirs, this could change his/her sentence under section 302(b), but not the sentence under section 7(a) of the ATA.

However, in the case of *Muhammad Nawaz v The State*, it was found that while section 7(a) is non-compoundable, payment of compensation, compounding his qatl-e-amd conviction, could commute his sentence to life imprisonment under section 7(a).<sup>60</sup>

---

<sup>57</sup> *Malik Muhammad Mumtaz Qadri v The State* (2016) PLD 17.

<sup>58</sup> *Ibid*, para 4.

<sup>59</sup> *Kareem Nawaz Khan v The State* (2016) SCMR 29.

<sup>60</sup> *Muhammad Nawaz v The State* (2014) PLD 383.

While recent cases regarding section 7(e) have been heard, the SC often does not uphold the death sentence in them. However, this is due to the prosecution failing to prove the defendant guilty beyond all reasonable doubt.<sup>61</sup> An exception is found in *Hamid Mahmood and another v The State*, where the Court did not commute the death penalty.<sup>62</sup> However, Mahmood was convicted for both section 7(e) and qatl-e-amd.

### *Evaluation*

Sections 7(a), (e) and (f) attach terrorism charges to the offences of murder, kidnapping for ransom, and hijacking. These offences are already illegal, and carry the death penalty.<sup>63</sup> However the ATA has an effect on their sentencing. Section 7(a) makes murder non-compoundable. If compensation is paid, there is a chance that the sentence will be reduced to life imprisonment.<sup>64</sup> This classifies terrorism as a more serious offence than murder.

The lack of the death penalty's imposition in cases of kidnapping for ransom indicates that the SC is not willing to impose it in such cases. In regards to recent case law, it only did so when the offender was also charged with qatl-e-amd.

In regards to the ECOSOC Safeguards, it can be observed that the "most serious crime" requirement is arguably fulfilled in cases regarding Section 7(a), as lethal intent is proven. However, in regards to sections 7(e) and 7(f), the crimes do not require the loss of life. Ransom and hijacking do not necessarily entail death, and thus arguably do not meet the "most serious crime" threshold.

## **Imposition of capital punishment only when prescribed by law**

The second ECOSOC safeguard requires capital punishment "be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission...". This specifically targets the principle of legality and the prohibition against retroactive punishment. According to Article 12(1) of Pakistan's Constitution, no law shall have retroactive effect.

In the case of *Zafar Iqbal v The State*, the appellant was sentenced to death in the Anti-Terrorism Court for breach of section 7(a) of the ATA. His charge of qatl-e-amd under section 302 of the PPC was dropped due to his ATA conviction.<sup>65</sup> However, he had committed the offence before the ATA was enforceable. He argued that he should be acquitted since the Anti-terrorism Court judge dropped the qatl-e-amd charge, and he was being retroactively punished for terrorism. The SC recognised the initial mistake, and altered the conviction from section 7(a) of the ATA to section 302(b) of the PPC.

---

<sup>61</sup> See *Azeem Khan and another v Mujahid Khan and others* (2016) SCMR 274.

<sup>62</sup> *Hamid Mahmood and another v The State* (2013) SCMR 1314.

<sup>63</sup> Pakistan Penal Code 1860, sections 365-A and 402A.

<sup>64</sup> *Muhammad Nawaz v The State*, op. cit..

<sup>65</sup> *Zafar Iqbal v The State* (2015) PLD 307.

### *Evaluation*

The lack of retroactive punishment in the past five years is indicative of this safeguard being fulfilled. Article 12(1) of Pakistan's Constitution protects citizens from being retroactively punished.

## **Imposition of capital punishment prohibited for certain persons**

The third ECOSOC safeguard requires that the death penalty cannot be implemented regarding persons who were minors when the crime was committed, pregnant women or new mothers, and the insane.

### Persons under the age of 18

Section 306 of the PPC protects minors and the insane from qisas in cases of qatl-e-amd.

In *Sher Bahadur v Fayyaz and others*, the prosecuting council appealed against the setting aside of life imprisonment by the Peshawar High Court (PHC) on grounds that the defendant was a juvenile.<sup>66</sup> They claimed that since the defendant never argued his age before the trial court, that an "adverse inference is to be drawn against the accused". They also contested the types of evidence presented to the court – School Leaving Certificate and the Computerized National Identity Card (CNIC) – stating they were not to be relied upon, as forging the documents is very easy. The SC ordered the case be heard afresh.

In *Muhammad Raheel alias Shafique v The State*, the appellant was sentenced to death on two counts of murder under section 302(b) of the PPC.<sup>67</sup> He neither argued his age in the Anti-Terrorism Court, nor in the High Court. When the appellant raised the issue in the SC, the judges used his age and other factors to reduce his sentence to six months imprisonment for each count, and compensation to be paid to the heirs of the deceased. No mention of an "adverse inference" was made.

Despite this, there have been allegations of executions of those that were minors at the time of their sentence.<sup>68</sup> It was alleged that Shafqat Hussain, who was executed on 4<sup>th</sup> August 2015, was 14 years old at the time of his conviction.<sup>69</sup> However, the investigation concluded that he was 23 years old at the time.<sup>70</sup>

### *Evaluation*

S306 of the PPC confirms that children and the insane cannot be granted the death penalty. However, in practice the standard of proof for minors is high.<sup>71</sup> As even the ID card of the individual is not trusted as evidence.<sup>72</sup>

---

<sup>66</sup> *Sher Bahadur v Fayyaz and others* (2015) SCMR 955.

<sup>67</sup> *Muhammad Raheel alias Shafique v The State* (2015) PLD 145.

<sup>68</sup> "Shafqat Hussain executed at Karachi Central Jail." Dawn News, (August 4, 2015), <<http://www.dawn.com/news/1186953>>, accessed May 9 2016.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> *Sher Bahadur v Fayyaz and others* (2015) SCMR 955.

<sup>72</sup> Ibid.

## Pregnant women

Section 314(c) of the PPC protects pregnant women, providing that convicted pregnant women may, after the court consults a medical officer, have their execution postponed for up to two years after their child's birth. This section only targets new mothers to the extent that they were pregnant when convicted. However, it does not expressly mention what would happen in a case where the woman was not pregnant, yet had a young child.

### *Evaluation*

Regarding the ECOSOC safeguards, pregnant women are protected under Pakistani law, however there is no express mention of young mothers. One may be able to interpret section 314(c), stating that as it allows for the postponement of qisas of pregnant women up until their child is two years old, that it may also work for mothers whose children are younger than two years. However, without express protection granted to young mothers, in statute or case law, this interpretation cannot be confirmed. Pregnant women may be protected, however this is after the Court consults a medical officer, this arguably contradicts the safeguard.

## **Conclusion**

Some offences that carry the death penalty in Pakistan do not satisfy the UN interpretation of the first ECOSOC safeguard. Drug-related crimes or kidnapping for extortion purposes, are not covered by the "most serious crimes" requirement, as per the interpretation by the UN. However, a pattern has developed in the SC, whereby the death penalty is reserved only for cases relating to murder or terrorism. In those circumstances, the SC upholds a death sentence where it seems that in accordance with the facts and circumstances of the case there was a premeditated act that took place, and the appellant intended for the deceased to be killed. However, the fact that other laws that carry the death sentence have not been redacted from the relevant criminal legislation means that their sentences are still valid, and can be passed.

The SC does not mention the ECOSOC safeguards when deciding upon cases, however there is still a high standard of proof to be fulfilled when upholding death sentences. It needs to be noted that while the sentence may be applicable in many cases, the Court is careful in imposing it. All facts and circumstances must point to the defendant's guilt in committing a premeditated act by which a person was killed. While there are troubling aspects of the law, such as the arguably high burden of proof regarding the age of the victim if s/he claims to be a juvenile, a pattern has developed which shows that the death penalty is reserved only for cases relating to murder or terrorism. Along with that the SC will not uphold a sentence until and unless it can be proven beyond all reasonable doubt that the defendant committed the crime. "The harsher the sentence, the stricter the standard of proof".<sup>73</sup>

---

<sup>73</sup> *Ameer Zeb v The State* (2012) PLD 380.