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## PARTICIPANTS' PAPERS

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### COUNTRY REPORT: PAKISTAN

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#### I. VICTIMS OF CRIME

In Pakistan, the present criminal justice system is primarily based upon the codified penal and procedural laws designed by the British masters in the colonial era of British Indian history. It includes the Criminal Procedure Code of 1898 and Penal Code of 1860. Since these criminal laws did not provide for any concept of restorative justice we have not inherited a system having any such provisions. Our system is still based upon the accusatorial principle i.e. the state is a party in any criminal transaction. Punishment of the offender as a rule has been provided as the only penalty for the criminals instead of extending any relief/remedy to the victim. It truly speaks of the underlying objective that the state is interested in maintaining 'order' and writ of the state in the society instead of taking care of the victim.

##### A. Statutes

However in the course of development, Pakistan as a country tried to improve the inherited criminal laws to make them more consistent with and beneficial for the society. In brief, these codified changes are:

##### 1. Qisas and Diyat Ordinance

"Crime of retribution and compensation (*Diyah*) involve homicide, bodily injury or other forms of harm committed against the physical security of the person. Homicide is of three categories: - It may be pre-meditated, involuntary, or voluntary. Only pre-meditated homicide involves a penalty under the law of Qisas. Qisas refers to a specified punishment in Quran and Sunnah. They are labeled as such because the punishment imposed is either a just-retributive penalty equivalent to the injury inflicted on the victim, or takes the form of pecuniary compensation (Diyat) for the victim's injuries. Diyat is imposed only if just-retribution is not executable or the victim waives his right to demand it. The decision whether or not to prosecute rests with the victim and his relatives. In the event of a conviction they have the choice between the sanction of retribution or exacting compensation or pardoning the offender altogether. In the last event the court reserves power of discretionary punishment of the offender.

The Quran has described a very important principle of civil law, i.e. equality of men and the necessity of awarding proportionate punishment to all offenders, without distinction, unless and until the offender is pardoned by the relatives of the victim under circumstances that are expected to lead to improvement of conditions.

The Islamic law of just-retribution provides a very effective and practical means to put a stop to murder and safeguard human life. A man who shows a callous disregard for the life of a fellow-person loses his right to live. The option to pardon allowed to the heirs of the slain person, should not be regarded as likely to encourage murder, for such option is not synonymous with exemption from punishment as in ordinary circumstances the murderer will have to pay the blood-money. Moreover, the would-be murderer possesses no means to know that the heirs of the person whose murder he contemplated will actually be persuaded to pardon him; so the fear of capital punishment will always be there to deter him from the commission of the crime. Again, pardon or remission is permissible only where the circumstances are such that the pardon or remission is likely to improve conditions and bring about good results for all parties concerned.

To prevent crime, Islam really aims at the elimination of the conditions that cause it. It seeks to remove the very root-cause of all crimes by working a complete moral reformation in man. But it does not remain

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content with that. It also prescribes deterrent laws in conformity with the dictates of reason, justice and humanity.

The individualization of punishment under Islamic law is fundamental, whether as to *Hadd*, *Qisas* or *Tazir*. The *Diyah*, by contrast, is not strictly punishment, but is in the nature of compensation, which must be paid to the victim as reparation for injury. It is sometimes confused with punishment because the amount of compensation is specified in advance. That practice is evidence of the firm adherence to the principle.

#### *Difference between Qisas and Revenge*

There is a difference between *Qisas* and *Revenge*. In *revenge*, the punishment inflicted on the offender is neither equal nor similar and some times innocent people can become a victim of *revenge*. While in *qisas* the equality of quantum of crime and of punishment is strictly adhered to. The law requires that a person shall not inflict a greater degree of harm than that which has been inflicted. If equality in awarding punishment by way of *qisas* is not practicable or possible then some other punishment is awarded. Secondly the process of *revenge* goes on between strong and weak while *qisas* is awarded by the order of the court and the entire community is under an obligation to help the victim until *qisas* is executed.

#### *Preference of Diyah over Qisas*

As between *Qisas* (just-retribution) and *Diyah* (blood money), the Quran clearly indicates the preference for the *Diyah* and forgiveness. Islam recommends reconciliation in murder cases so that peace and tranquility emerges ultimately. Murder is a compoundable offence under the existing law.

Thus, the combination of *Diyah* and forgiveness produces a powerful material and spiritual inducement to forsake *Qisas* as retaliation. Consequently, one must interpret the crimes of *Qisas* as being based on a general deterrence policy which recognizes the victim's sense of vindictiveness against his aggressor, while limiting the consequences of the penalty to the harm done and establishing the alternative remedies of victim compensation or outright forgiveness.

#### *Qisas in Hurt Cases*

The law includes many detailed provisions regarding cases of hurt and "Itlaf" (total or partial damage to any limb or organ of the body) and has provided for "Arsh" "Zaman" and "Diyah" as various modes of compensation.

In cases where extreme punishment of *Qisas* is not an adequate relief, *Diyah* is payable according to the yardstick fixed by law. At times, the full amount of compensation in the form of *Diyah* is payable to the aggrieved whereas, at other occasions, only a proportionate amount of *Diyah* is recoverable. If, for instance, the sole organ or limb of a person is totally damaged due to the act of an individual and he is deprived of making use thereof permanently, the full amount of *Diyah* would be recoverable. The cutting off of the nose etc. of an individual can be quoted as an instance. If both organs or limbs like hands, eyes, feet are damaged, full compensation in the form of *Diyah* would be payable but if one of the two is damaged then proportionate *Diyah* to the extent of one-half would be payable. This principle would follow in other cases as well.

It should be noted that in certain circumstances, a fine could only be imposed if the damage caused is of a negligible extent. If a person has, for instance, six fingers of a hand and damage is caused totally or partially to the sixth additional finger, no compensation in the form of *Diyah* can be recovered. But the aggrieved person can only approach the court that shall award him reasonable compensation by imposing a fine on the offender. Similarly, if certain damage is caused to a sexual organ of an impotent male person, the victim can only be compensated by way of payment of a fine because it cannot be said that he suffered an irreparable loss. The fact cannot, however, be lost sight of that in certain cases a larger amount of compensation by way of *Diyah* can also be granted if the damage caused is of an extensive nature. If, for instance, one of the teeth out of 32 teeth is initially damaged but the said damage has also adversely affected the remaining 31 teeth, the offender must compensate the victim for the damage caused partially to the said 31 teeth.

#### *Other Expenses Recoverable*

It would be an injustice to the victim, if he is not awarded compensation for the injuries sustained, but rather left to expend his own money on the treatment of the inflicted injuries. The present law is not oblivious to the practical difficulties and the hardships of the victim and has specifically provided that the victim must be given adequate relief and compensation for the following: -

1. Hospital expenses.

2. Pain and suffering caused by the injury and
3. Pecuniary loss.

#### *Provision for Negligent Driving*

Negligent Driving and other rash acts causing hurt entail criminal punishment under the law besides “Arsh” and “Daman” specified for the offence.

#### *Aaqilah*

Sometimes an offender may be helped by his community to pay the blood money. When death has been caused by negligence or mistake, Aaqilah of the offender i.e. those who have a common interest with the offender arising out of their profession or simple neighborhood or the merchants who occupy premises in the same market, must pay the blood money to heirs of the deceased. The reason is that it is the duty of the person’s Aaqilah to watch over his conduct and the law presumes that the wrongdoer would not have acted in the way he did, unless they neglected their duties. In this way his community has been burdened with the so-called light penalty.

#### *Qasamah*

To prevent crime and making every locality conscious of being a helping hand in the overall objective of good order in society another novel concept has been introduced by the law, which is called “Qasamah”.

It is a general term for oath. As *Qasamah* means, “to divide”, we seem to have here the usual transition between the meanings to cut and to decide so that *Kasam*’ would be the deciding, strong word.

If a dead body is found in a certain locality with signs of foulplay on it the heirs of the deceased are entitled to select a maximum of fifty inhabitants from the place to take an oath that none of them killed him. If they take the oath then the competent court of jurisdiction has the discretion to nominate several or all of the inhabitants for the payment of blood money. Whoever refuses to take the oath shall be kept in simple imprisonment until the time of his confession, or his willingness to take the oath, or disclosure of information pertaining to the real murderer. Similarly, if a dead body is found at the door of a man’s house he will take the oath and if he swears that he did not kill him, then the court will decide as to whom is liable for the payment of Compensation.

#### *Ghurrah*

Ghurrah (compensation) is due in the case of destruction of an embryo or a fully formed child still-born as a result of assault suffered by the mother during her pregnancy. Thus the law provides an effective remedy in case of injury to unborn children.

From the above discussion, it is vividly clear that the Penal law of the country has provided ample opportunities of compensatory justice to the victim in the shape of Qisas, Diyat, Arsh, Zaman, Aaqila, Qasamah and Ghurrah. As mentioned earlier no homicide, hurt, injury or damage remains uncompensated, but despite the prevalent law, the ideal results in the area of restorative justice are yet to be achieved.

#### 2. Haddood Ordinances of 1979

Hadd means to check or stop. It also means measure, limit and in law it means a punishment, the measure of which has been definitely fixed by the Holy Quran and Sunnah i.e. by the Holy Prophet (peace be upon him). The major crimes covered under this category are theft, robbery, illegal sexual intercourse, drinking of alcohol etc.

Since Islam as a religion carries a full social system in its lap, therefore it has provided a complete societal restorative system for the tranquility, harmony and health of the society as a whole. In Pakistan, offences against the Property Ordinance, Zina Ordinance and Prohibition Order envisage such provisions. A detailed discussion of these laws will infringe the remaining topics.

In Islam the various categories of punishment have been prescribed according to the nature, type, and its impact on the society or the individual victim. If the offence infringes the rights of Allah or in other words if it is against the good order and welfare of the entire community then the punishment is harsh. If it is a matter concerning the individual then leniency can be adopted, which may even include forgiveness by the victim and his family, as well as patching up of the matter through compromise.

## **B. Pilot Programmes or Schemes for Crime Victims**

As far as pilot programmes or schemes meant for deliberate or concerted efforts on the part of government are concerned, no such initiative has been taken or is in the offing. Statistical information or evaluation of outcomes is therefore out of the question.

## **C. Measures to Protect Victims of Crime**

In Pakistan victims of crime can only be protected through tougher bail conditions and the police by the request of and at the victim's expense. Similarly there is no quasi-legal setup for swift victim restoration. Compensation paid by the offender after compromise reached through the efforts of elders/notables of the locality is the only restoration. We are not in a position to provide separate rooms in courts for victims, witnesses and offenders. Victims of crime have to appear before the court of law in order to record their statements. Similarly there is no organizational set up for any immediate and direct support for the victims of crime.

## **D. Participation of Victims in the Criminal Justice Process**

The victim has a right of complaint, right to arrange a private prosecution for his case, and a right to record his statement in the court of law. If he has entered into a compromise with the offender, on the victim's request the offender can be released in compoundable cases.

## **E. Provision of Information to Victims of Crime**

The law of Pakistan provides for the giving of information to the victim of crime at different stages in a criminal proceeding. At the time of registration of a criminal complaint he receives a copy of the registered First Information Report. On the eve of arrest of the offender, he is called for the purpose of an identification parade. As per the law the state is bound to inform the complainant at the time of submission of the complete case file to the court for trial.

## **F. Problems**

### 1. Lack of Governmental Interest

Pakistan, as a country, has not been able to formulate any such deliberate programme or scheme to protect the rights of victims. Nor is it on the agenda to envisage a targeted law for such an issue. Why is this missing? Frankly speaking, it is not a priority of the government. Firstly we as a country have been struggling for political stability since independence in 1947 and have not been able to strengthen our cardinal institutions. Secondly, financial constraints of the government hamper any such initiative.

### 2. Divergent Social Conditions

In a country, which is heterogeneous in social systems, geography and ethnicity, it is not possible to follow an agenda of directed change as is required to provide for a victim protection system.

### 3. Illiteracy and Backwardness

Since the conceptual framework for the purpose is missing, development of institutions is unthinkable. Such concepts are concomitant with the economic development that, in turn, is dependent on the education-level and infrastructure of a country. We as a country are still living in a developing stage having a low literacy rate, battered governmental institutions and backwardness. We are suffering from some intrinsic handicaps since independence, which have inhibited us from progress.

### 4. Lack of Community Interest

On the other hand, individuals or community organizations are also not interested in the phenomenon. In fact there is a problem of awareness. We as a society have not been able to take up the issue. Sporadic efforts are there, for example some NGOs are working for rape victims or against child abuse. But their role is negligible, cosmetic, and dubious in nature.

## **G. Solutions**

### 1. Awareness Campaign

Although the concept is concomitant with the development as discussed above, an awareness campaign could be started for the issue, and it would definitely serve the purpose. The first step in achieving the objective should be conceptualization of the issue. This would be through interaction with those people who

are running the system in different developed countries. The Present seminar will provide an opportunity for member developing countries for conceptualization of the issue. Such seminars will trigger an awareness campaign and development of crime victim protection institutions will follow.

## 2. Role of Community

Since the government of Pakistan is not in a position to prioritize the issue, the role of community-based organizations has become more important. Developed countries as well as individuals of the society should dole out funds and human resources for the establishment of restorative institutions.

## 3. Role of Government

On the other hand the legal aspects required for the development of crime victim institutions should be covered through legislation by the government. Deliberate and concerted efforts are needed on the part of the government in order to provide a legal framework and motivation to the community based organizations for taking up the issue.

## **II. RESTORATIVE JUSTICE APPROACHES**

### **A. Current Situation**

Restorative Justice as such is a new and emerging concept having a bearing upon the restoration and rehabilitation of crime victims and offenders. It can be defined as a systematic response to wrongdoing that emphasizes healing of the wounds of the victim caused or revealed by crime. It is not a quasi-legal pluralist alternative to the modern juridical order. It is a middle-range paradigm, a stabilizing influence fostering confidence in mainstream legal and political institutions.

In the backdrop of the above-mentioned concepts, Pakistan as a country is not following a deliberate and specific programme for achieving a restorative justice system. However the present laws related to criminology envisage provisions, which can become the basis for adopting a balanced restorative justice approach. These laws include;

- (i) Qisas and Diyat ordinance: as discussed in the previous pages.
- (ii) Juvenile Justice System Ordinance-2002

In a deliberate effort the government of Pakistan has enacted a law for Juvenile delinquents. The main thrust of the law is on restoration, and rehabilitation of teenagers who are booked under certain offences so that they can again become useful members of the community.

### 1. Salient Features of the Act

Although deficient in certain critical areas, the Act incorporates several provisions that add to the protections afforded to children under domestic law. These provisions include:-

- (i) Requiring provincial governments to establish one or more juvenile court for each local area, with exclusive jurisdiction over cases involving children.
- (ii) Granting children a right to counsel at government expense and providing that court-appointed counsel have at least five years of standing in the profession.
- (iii) Prohibiting the imposition of the death sentence, amputation, or whipping of children, or assignment to hard labour while in a "borstal or other such institution".
- (iv) Prohibiting the imposition of handcuffs, fetters, or corporal punishment on children" at any time while in custody.
- (v) Prohibiting the arrest of children below the age of fifteen under laws relating to preventive detention or vagrancy.
- (vi) It specifies the persons who may be present during a juvenile trial, and prohibits publication of the proceedings of a trial without the juvenile court's authorization.
- (vii) Immediately upon the arrest of a child, police must notify his or her guardian as well as a probation officer, who is to prepare "a report on the child's character, education, social and economic background".
- (viii) On taking cognizance of an offence the juvenile court shall decide the case within four months.

### **B. Absence of Targeted Programmes**

As far as targeted programmes like VORP or VOM or FGC are concerned, these are post-dated concepts for our country. We have the basic laws which provide a foundation for a restorative justice system but such programmes need more awareness, community participation and the will of the government. We do have the

conciliatory committees, peace committees or mediation councils but those are informal and specific to certain communities of the country.

### **C. Conducive Conditions**

Conducive conditions for adopting a diversion system for restorative justice vary from social group to social group. Pakistan as a heterogeneous country cannot follow a uniform approach for the purpose. It is full of divergent social setups having their peculiar norms of taking on the victims of crime and offenders.

### **D. Fate of Outcomes of the Restorative Process**

Outcomes of a restorative process are, legally speaking, bound to be ratified/validated by a court of law if a legal process in a certain crime case has been put into motion. However, it is a well established judicial practice in Pakistan that decisions coming out of a restorative process are ratified & validated by the court of law especially in compoundable offences like murder, etc.

Though criminal law or procedure in the country does not specifically provide for such restorative process the compoundable nature of certain offences allows the adaptation of the restorative process.

### **E. Ensuring Clause**

Different social groups ensure out of court settlements as the courts in Pakistan entertain the outcomes of a Restorative process.

Social pressure in the phenomenon is an ensuring clause. However courts are not bound to necessarily ratify the compromise.

### **F. Problems and Solutions**

Pakistani society as a whole enjoys a well established family system and tribal affinities. We are well interwoven in our social groups, especially in rural areas. Resolution of conflicts and problems through a committee of elders (conciliation committee) has been a norm in our rural areas since long ago. We are not facing the problem of anomie or "Lonely crowd syndrome" as is faced by the developed world specially the west. Therefore adopting a well-defined restorative justice approach is not as difficult as it would be in the west where 'neighborhood' does not exist. However, since we are passing through a transition phase in which urbanization has been a hallmark, therefore family institutions & primary groups are bound to break. We are going towards the stage of "Lonely crowd syndrome". Therefore I see this time as ripe for adopting modern techniques & approaches of the restorative justice process.