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**£PAKISTAN:
@NEW FORMS OF CRUEL AND DEGRADING PUNISHMENT**

I. Introduction

In September 1990 President Ghulam Ishaq Khan promulgated the Qisas and Diyat Ordinance, which redefines certain crimes and punishments under the Pakistan Penal Code and provides punishments which, by internationally-accepted human rights standards, are considered cruel, inhuman or degrading. The Ordinance also requires the participation of medical officers in implementing these punishments.¹ Amnesty International opposes these punishments on the grounds that they constitute cruel, inhuman and degrading punishment prohibited by a number of international human rights standards. These include the United Nations Universal Declaration of Human Rights, the UN Torture Convention, the International Covenant on Civil and Political Rights and the Standard Minimum Rules for the Treatment of Prisoners. Amnesty International also believes that the participation of medical personnel in inflicting these punishments conflicts with international medical ethical standards such as the World Medical Association's Declaration of Tokyo adopted in 1975 and the UN Principles of Medical Ethics.

II. The Qisas and Diyat Ordinance²

The preamble to the Qisas and Diyat Ordinance explains that it is intended "to amend the Pakistan Penal Code (XLV of 1860), and the Code of Criminal Procedure, 1898 (Act V of

¹ Ordinances remain in force for 120 days. If parliament does not vote on an ordinance within this time, making it part of the permanent law, the ordinance will lapse unless it is promulgated again. The Qisas and Diyat Ordinance was promulgated again in January 1991.

² The discussion which follows is based on the text of the Qisas and Diyat Ordinance 1991 (Criminal Law (Amendment) Ordinance (I of 1991)), which was promulgated in January 1991. The Ordinances promulgated in August and September are superseded by this text.

1898), to bring them in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah". The Pakistan Penal Code (PPC) and the Code of Criminal Procedure (CCP) both date from the British colonial period and are based on the common law. Certain crimes and punishments were redefined in earlier years, in accordance with President Zia-ul-Haq's policy of Islamization of the law, with the introduction of the Enforcement of Hudood Ordinances in 1979. This process continued with the creation in 1980 of a Federal Shariat Court, which is empowered to review any law and decide whether or not it is "repugnant to the Injunctions of Islam". If a law is declared repugnant to Islam, the government is required to amend it accordingly.

The Federal Shariat Court had declared the existing laws relating to murder and bodily hurt³ to be contrary to Islam on several occasions, and the government had appealed against these judgements to the Shariat bench of the Supreme Court. On 5 July 1989, during the term of office of the Pakistan People's Party government under Prime Minister Benazir Bhutto, the Shariat bench of the Supreme Court ruled that legal provisions relating to murder, bodily hurt and the government's powers to commute sentences were repugnant to Islam, and required the government to change the law by March 1990. The government filed a review petition in response, and the required changes were not introduced in law by the time the government was dismissed in August 1990.

The discussion of the Qisas and Diyat Ordinance contained in this paper is concerned solely with the changes it introduces relating to cruel, inhuman or degrading punishments other than the death penalty.⁴

III. Bodily Hurt and qisas punishment

The Qisas and Diyat Ordinance defines several categories of bodily hurt, each of which is subject to specified forms of punishment. The punishment for most kinds of hurt is compensation and/or imprisonment. Some kinds of hurt, however, can be subject to qisas punishment: that is, equal punishment for the offence committed. It is in cases where qisas punishment can be given that the ordinance requires an authorized medical officer to be involved.⁵

The concept of qisas is defined in the ordinance as "punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatl-i-amd (intentional killing), in exercise of the right of the victim or a wali (heir of the victim, or the provincial government if there is no heir)". This

³ Under the ordinance, "hurt" is committed by anyone who "causes pain, harm, disease, infirmity or injury to any person or impairs, disables or dismembers any organ of the body or part thereof of any person without causing his death".

⁴ The changes introduced by this Ordinance affecting application of the death penalty are discussed in a separate paper, Pakistan: Legal Changes Affecting Application of the Death Penalty, AI Index: ASA 33/03/91, March 1991.

⁵ The ordinance defines "authorised medical officer" as: "a medical officer or a Medical Board, however designated, authorised by the Provincial Government".

means, for example, that if the relevant rules of evidence are fulfilled and the accused is found guilty of having severed the victim's finger, the victim has a right to have qisas punishment inflicted on the offender - which in this case would be severance of the offender's finger. The victim may also waive the right to qisas punishment, however, in which case the offender will receive an alternative punishment of paying compensation and/or imprisonment.

The kinds of hurt which can be punished with qisas are:

Name of type of hurt

Definition of type of hurt

itlaf-i-udw

the dismemberment, amputation or severance of any limb or organ of another person

itlaf-i-salahiyyat-i-udw

the destruction or permanent impairment of the functioning, power or capacity of an organ of the body of another person, or causing permanent disfigurement

shajjah-i-mudihah

hurt to the head or face of another person not amounting to itlaf-i-udw or itlaf-i-salahiyyat-i-udw, in which bone is exposed but not fractured

Under the ordinance, the causing of hurt by any person to extort "any confession or any information which may lead to the detection of any offence or misconduct", or to compel the restoration of property or the fulfilment of a claim or demand, is defined as a separate crime. This crime is subject to the kind of punishment provided for the form of hurt caused, including qisas, together with imprisonment. To Amnesty International's knowledge, this is the first time that a form of torture has been incorporated into the PPC as a specific offence.⁶

⁶ In a memorandum submitted to the Government of Pakistan in April 1990 and published in May 1990, Amnesty International included the recommendation that torture be introduced to criminal law as a specific offence (see Pakistan: Human Rights Safeguards: Memorandum Submitted to the Government following a Visit in July-August 1989, AI Index: ASA 33/03/90, May 1990). While welcoming the inclusion of a form of torture as a criminal offence under the Qisas and Diyat Ordinance, Amnesty International remains opposed to the provision for it to be punished in a manner considered cruel by international human rights standards.

IV. Medical Participation in Qisas Punishment

The ordinance requires that qisas punishments be carried out by a medical officer: "it [qisas] shall be executed in the public by an authorised medical officer". The medical officer is required to examine the offender beforehand, and to ensure that the punishment "does not cause the death of the offender or exceed the hurt caused by him to the victim". The ordinance does not specify the methods to be used in carrying out qisas punishment.⁷

A. Reported training of doctors to participate in qisas punishment

A daily Urdu-language newspaper reported on a lecture given by a District Attorney to doctors at the National Institute of Public Administration, Lahore. According to the report, the attorney told doctors that they had been delegated an important responsibility under the ordinance to give their opinion as to whether the convict's life would be endangered by inflicting the same amount of hurt on the convict as he had inflicted on the victim. He also said that under the ordinance, the amputation of a hand or foot as qisas punishment should not involve loss of blood sufficient to cause death, and that qisas punishment should not exceed the amount of hurt that the convict had caused to the victim. He stressed the importance of ensuring that in Pakistan criminal offences are punished strictly in accordance with Islam, and said that it is a doctors have a religious obligation to participate in the execution of these punishments (reported in Jang, Lahore, 13 January 1991).

Following publication of this report, a local human rights organization wrote to the President of the Pakistan Medical Association asking for confirmation of reports that doctors were receiving training in the execution of qisas punishments. By mid-March, they had not received a reply. However, the organization was able to interview a doctor who had attended one of the courses, who reported that: the courses are being held on the orders of the Federal Shariat Court; lawyers, doctors and public officials attend the courses; lectures are delivered by District Attorney, judges and religious scholars.

V. Implementation of Qisas Punishment

For sentence of qisas to be passed, certain standards of evidence must be fulfilled: the accused must have confessed to having committed the offence before a competent court, or the standards of evidence required under Article 17 of the Qunan-e-Shahadat 1984 (Presidential Order No. 10 of 1984) must have been met.⁸

⁷ Authorized medical officers are also required under the Offence Against Property (Enforcement of Hudood) Ordinance, 1979 (VI of 1979), to perform amputations as punishment for certain kinds of theft. However, although sentence of amputation has been passed by the courts, in practice it has not been carried out, apparently because medical officers have been unwilling to participate.

⁸ Article 17 says that "the competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah". In cases that do not pertain to financial or future obligations or the enforcement of Hudood or other special law, "the Court may accept, or act on, the testimony of one

In certain cases, qisas punishment cannot be imposed: it cannot be imposed on an offender who is a minor or insane; when the hurt has been caused "at the instance of the victim"; when the organ which was damaged was physically imperfect and the convict does not suffer from a similar imperfection of the same organ; and when the organ of the offender liable to qisas is missing.

The Ordinance also specifies certain conditions under which sentence of qisas cannot be enforced. These include: when the victim waives the right to have qisas inflicted; when the offender has died; and when the offender has lost the organ liable to qisas before the punishment has been carried out. If the offender is a pregnant woman, there is provision for the court to consult with the medical officer and postpone the punishment for up to two years after the birth. During this time, the woman may be released on bail. If she is not released, she must be treated as if sentenced to simple imprisonment.

When qisas punishment is carried out, the ordinance specifies that the victim or, if he or she has died, the heirs, must be present at the time. If they do not attend after having been informed by the court of the date, time and place, a court officer can nevertheless give permission for the punishment to be carried out.

VI. Powers of the President to Remit, Commute or Suspend Sentences

Under Article 45 of the Constitution, the President is empowered "to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority". This provision has not been altered by the promulgation of the Qisas and Diyat Ordinance. Although the ordinance specifies that qisas punishment can be waived by the victim alone, the President is thus still empowered under the Constitution to commute sentences himself.

VII. International Standards Prohibiting Cruel, Inhuman or Degrading Punishments

Cruel, inhuman or degrading punishments are prohibited by several international human rights instruments, including those quoted below:

- Article 5 of the Universal Declaration of Human Rights says that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment";
- Article 2 of the Declaration against Torture reads, "Any act of torture or other cruel, inhuman or degrading treatment of punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights. This statement is also found in Article 7 of the

man or one woman or such other evidence as the circumstances of the case may warrant".

International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee established under the ICCPR has ruled that corporal punishment is included within the meaning of the expression "cruel, inhuman and/or degrading treatment or punishment" prohibited under Article 7 of the ICCPR;

- Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment includes in its definition of "torture" "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as ... punishing him for an act he or a third person has committed or is suspected of having committed ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity";
- Rule 31 of the UN Standard Minimum Rules for the Treatment of Prisoners specifies that "corporal punishment shall be completely prohibited".

VIII. International Standards Prohibiting Medical Participation in Torture or Cruel, Inhuman or Degrading Punishments

Several medical ethical codes regulate the relationship of doctors and prisoners in their care, and prohibit involvement in the execution of cruel, inhuman or degrading punishments:

- Article 1 of the Declaration of Tokyo of the World Medical Association states that "the doctor shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures";
- Article 3 of the same Tokyo Declaration says that "the doctor shall not be present during any procedure during which torture or other forms of cruel, inhuman or degrading treatment is used or threatened;
- Article 2 of the UN Principles of Medical Ethics adopted in 1982 says that "it is a gross contravention of medical ethic as well as an offense under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment;
- Article 4(b) of the UN Principles of Medical Ethics specifies that it contravenes medical ethics for doctors and other health professionals to "certify, or participate in the certification of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health ... or to participate in any way in the infliction of such treatment or punishment...".

A. The position of doctors in Pakistan on cruel and inhuman punishments in the past

In the past, doctors in Pakistan have condemned provisions for cruel and inhuman punishment, and to date they have apparently refused to perform the punishment of amputation. In 1983, during the martial law period, the Karachi branch of the Pakistan Medical Association passed a resolution condemning the continued use the punishment of flogging, describing it as "not only inhuman and against the dignity of man" and pointing out that it can "cause serious physical damage and irreversible psychological trauma especially in young people". The Karachi branch called upon the government not to involve the medical profession in the process of flogging and to stop such punishment on humanitarian and medical grounds.

IX. Amnesty International's Recommendations

Amnesty International is urging the Government of Pakistan to suspend all punishments considered cruel, inhuman or degrading by international human rights instruments and replace them with punishments which are consistent with international standards. It is also urging medical personnel in Pakistan to refuse any involvement in the execution of these punishments on the grounds that such involvement would contravene internationally-accepted medical ethics.