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£PAKISTAN:

@LEGAL CHANGES AFFECTING APPLICATION OF THE DEATH PENALTY

## 1. Introduction

In August and September 1990 President Ghulam Ishaq Khan promulgated two ordinances which altered the process by which death sentences can be commuted and redefined certain crimes and punishments under the Pakistan Penal Code. The second, the Qisas and Diyat Ordinance, was promulgated again in January 1991 and incorporates the changes introduced under the first<sup>1</sup>.

On 10 December 1990 a further ordinance was promulgated making kidnapping for ransom punishable by death. Under the ordinance kidnappers could be sentenced to death or life imprisonment. Previously a life sentence was the maximum. On 28 February 1991, the National Assembly passed a bill which amended the Pakistan Penal Code to provide the death sentence for kidnapping for ransom. Under another bill passed by the National Assembly that day, courts established under the Suppression of Terrorist Activities (Special Courts) Act of 1975, were empowered to try this offence. Amnesty International is concerned that these courts do not fulfil internationally recognised standards for fair trial.

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.

## 2. Amnesty International's position on the death penalty

Amnesty International recognizes the government's right to bring those guilty of criminal offences to justice, but is unconditionally opposed to the death penalty in all cases. The organization believes the death penalty violates the right to life and the prohibition of cruel, inhuman and degrading punishment, as proclaimed in Articles 3 and 5 of the Universal Declaration of Human Rights. In Amnesty International's view the death penalty is inherently

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<sup>1</sup>For more information on this new legislation, see also Pakistan: Introduction of New Forms of Cruel Punishment of March 1991 (AI Index: ASA 33/04/91).

unjust and arbitrary, however heinous the crime for which it is provided and however scrupulous the procedures by which it is enforced. In Pakistan, most death sentences are imposed for the crime of murder. Most murders are crimes of passion, while the death penalty is the systematic deprivation of life in a premeditated way. The risk of error is inescapable, yet the penalty is irrevocable. Studies on the topic show that there is no reliable evidence to demonstrate that the death penalty helps avoid other serious harm, for example by deterring the crimes for which it is available. Indeed, there is some evidence, albeit inconclusive, that the death penalty can actually contribute to such crimes. It may certainly distract governments from seeking more effective means to combat serious crime.

In countries which have not abolished the death penalty, international standards require that the strictest possible procedural and substantive guarantees are applied. These minimum safeguards are set forth in a number of documents, including the United Nations Economic and Social Council safeguards guaranteeing protection of the rights of those facing the death penalty (annex to ECOSOC resolution 1984/50), which were endorsed by the UN General Assembly in 1984. Safeguard 7 requires that anyone sentenced to death shall have the right to seek pardon or commutation of sentence, and that pardon or commutation may be granted in all cases of capital punishment. Safeguard 5 requires that capital punishment may only be carried out following trial procedures conforming at least to the standards of fairness contained in Article 14 of the International Covenant on Civil and Political Rights.

The UN General Assembly resolution 32/61 of 1977 states that "the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment". Amnesty International has urged successive governments in Pakistan to reduce the number of offences subject to the death penalty as a first step towards abolition, in keeping with the spirit of this resolution.

### **3. Executions in Pakistan**

Amnesty International is not aware of any executions having been carried out since December 1988, when the newly-elected Prime Minister, Benazir Bhutto, requested the then Acting President Ghulam Ishaq Khan to commute all pending death sentences. The President stayed all executions and commuted over 2000 death sentences to life imprisonment. Since then, death sentences have continued to be imposed by the courts<sup>2</sup>, but there have been no executions to Amnesty International's knowledge. Amnesty International welcomed the commutation of death sentences, and considers the lack of executions in Pakistan since December 1988 to be a most encouraging development for human rights protection.

The government of Benazir Bhutto was dismissed by President Ghulam Ishaq Khan in August 1990. Elections were held in October 1990, which were won by the Islamic Democratic Alliance (IDA). A new Prime Minister, Nawaz Sharif, was sworn into office in November 1990.

Prime Minister Nawaz Sharif has expressed the view that the death penalty serves as a deterrent against serious crime, and is reported to be in favour of public hangings. Amnesty

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<sup>2</sup> Amnesty International recorded over 50 death sentences passed during 1990.

International is thus concerned that executions may start again in Pakistan, which would be a significant set-back for human rights.

#### **4. The Qisas and Diyat Ordinance<sup>3</sup>**

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 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 accordance with the government's policy of Islamization of the law under President Zia-ul-Haq, who introduced 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 hurt to be contrary to Islam on several occasions, and the government had appealed against these judgments 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, 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 had not been 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 primarily with the changes it introduces affecting the application of the death penalty. These changes are summarized below.<sup>4</sup>

##### **4.1 Crimes punishable by death under the Qisas and Diyat Ordinance**

Several sections of the Pakistan Penal Code (PPC) and the Code of Criminal Procedure (CCP) are amended or substituted by the ordinance, redefining in Islamic terms crimes relating to

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<sup>3</sup> 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.

<sup>4</sup> Recent comment by Amnesty International on the use of the death penalty in Pakistan is contained in Pakistan: The Death Penalty, AI Index: ASA 33/01/88, January 1988 and Pakistan: Human Rights Safeguards: Memorandum Submitted to the Government Following a Visit in July-August 1989, AI Index: ASA 33/03/90, May 1990.

murder and bodily hurt<sup>5</sup>, and their punishments. Under Islamic law the punishment for murder, homicide or infliction of injury can either be in the form of qisas (equal punishment for the crime committed) or diyat (compensation payable to the victim or the heirs). These concepts are applied in different ways in different Islamic systems.

Sections 299 - 338 of the PPC, which defined offences affecting life and the human body and their punishments, have been substituted under the Qisas and Diyat Ordinance with new provisions. The new provisions introduce Islamic concepts of crime and punishment to this area of criminal law. The death penalty can now be given as qisas (equal punishment for the crime committed) for intentionally causing death, or for causing the death of someone other than the person intended. The death penalty or life imprisonment can also be given as ta'zir (discretionary punishment) for these crimes, depending on the circumstances. The death sentence can only be given as qisas if the accused confesses before a competent court or if the rules of evidence under Article 17 of the Qanun-e-Shahadat, 1984 (Presidential Order No. 10 of 1984) are fulfilled.<sup>6</sup> A minor or insane person cannot be sentenced to death as qisas; nor can a person who has killed his child or grandchild; nor can a person whose direct descendants are the heirs of the victim. If the standards of evidence required for qisas punishment are not fulfilled, the court can pass ta'zir punishment instead, taking the circumstances of the case into account.

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)". In a murder case this means that, if the relevant rules of evidence are fulfilled, the heirs of the victim have a right to have qisas (equal punishment) inflicted on the offender. The heirs may also waive this right, however, in which case the death penalty cannot be enforced as a qisas punishment.

In most cases where the death penalty cannot be applied as a qisas punishment for murder, the convict becomes liable to pay diyat (compensation) to the heirs of the victim, and may also be sentenced to imprisonment. The ordinance specifies a minimum value of diyat, but the actual value of diyat to be paid in each case is to be determined by the court, "keeping in view the financial position of the convict and the heirs of the victim".

In qisas cases, the ordinance alters the role of the state in the prosecution of criminal cases: the state's role is to ensure fair passage of the case through the courts, but the victim or the victim's heirs has the right to decide whether or not the punishment will be inflicted after qisas sentence has been passed. However, should they forgive the offender and waive qisas

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<sup>5</sup> Under the Ordinance, the crime of "hurt" is defined as follows: "Whoever 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, is said to cause hurt."

<sup>6</sup> 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 man or one woman or such other evidence as the circumstances of the case may warrant".

punishment, the state does still retain the right to intervene and punish the offender with a ta'zir punishment. In cases of intentional killing where the heirs have waived qisas punishment, the ordinance provides up to ten year's imprisonment as ta'zir, or up to 14 year's imprisonment in the case of a habitual offender.

## 5 Other crimes punishable by death

In Pakistan, the offence for which most people are sentenced to death is murder, but several other offences are also punishable with death. The Qisas and Diyat Ordinance does not alter the definition of, nor the application of the death penalty to, these other offences, which include:

- waging war, or abetting the waging of war, against the state (Section 121, PPC);
- abetting mutiny (Section 132, PPC);
- kidnapping a person under the age of 10 with the intent of murder or causing grievous harm (Section 264-A, PPC);
- dacoity [robbery by five or more people] (Section 396, PPC);
- hijacking (Section 402-B, PPC) and harbouring a hijacker (Section 402-c, PPC);
- defiling the name of the prophet Mohammad (Section 295-C, PPC).

Several other laws also provide the death penalty as maximum punishment, including the Explosive Substances Act of 1908 and the Army Act of 1952. Under the Hudood Ordinances, introduced in 1979, sexual offences (including both rape and adultery) and murder in the course of robbery can be punished by death, and stoning to death was also introduced as punishment for certain sexual offences.<sup>7</sup>

## 6 Appeals Procedures for Prisoners Sentenced to Death

Civilian prisoners charged with capital offences are usually tried by a Sessions Judge or an Additional Sessions Judge. Following a death sentence, an appeal to the appropriate provincial high court is automatic, although the backlog of cases pending appeal can mean that prisoners wait for several years before their appeal is heard. If the sentence is confirmed by the High Court, the prisoner can appeal to the Supreme Court. This further appeals procedure is optional, however, and the Supreme Court may not accept all cases for hearing. During 1990, Amnesty International learned of five death sentences which, on appeal to the provincial high court, were commuted to terms of imprisonment and four cases in which the high court acquitted prisoners who had been sentenced to death. Amnesty International learned of three prisoners who were acquitted by the Supreme Court during 1990, after earlier having had their death sentences confirmed by the provincial high court, and of one case in which the Supreme Court commuted a death sentence to a term of imprisonment.

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<sup>7</sup> No sentence of stoning passed by an ordinary court has been carried out. However, in September 1987 a man was reported to have been stoned to death in Mohmand Agency, one of the tribal areas under separate administration, following sentencing by a jirga (council of tribal elders). Another execution by stoning was reported in February 1991 in Khyber Agency following trial by a jirga. The man who was executed had been found guilty of rape.

Prisoners who have been sentenced under the Hudood Ordinances must appeal to the Federal Shariat Court, and not to the provincial high court. The final avenue of appeal in cases where the Federal Shariat Court has reversed an acquittal order and imposed the death penalty, or has imposed a more severe penalty than was imposed by the court of the first instance, is to the Shariat Appellate Bench of the Supreme Court.

Death sentences imposed by court-martial under the Army Act are subject to confirmation by the military authorities. The military authorities and the federal government are empowered under the Army Act to grant pardon or to remit or commute the sentence.

## **7 Provisions for Commutation of Death Sentences under the Qisas and Diyat Ordinance**

Before amendments in the Qisas and Diyat Ordinance, death sentences could be commuted under the PPC and the CCP by the President, federal government or the relevant provincial government without the consent of the offender. As amended under the Qisas and Diyat Ordinance, commutations may continue to be made as before under the PPC by the federal or provincial government, provided that in a case where the offender is convicted for having caused a death, the death sentence "shall not be commuted without the consent of the heirs of the victim" (Section 54 PPC). The ordinance similarly amends Section 402 of the CCP to specify that sentences may not be commuted without the consent of the heirs.

### **7.1 Powers of 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 remains empowered under the Constitution to commute sentences himself.

## **8 Execution**

No death sentence can be carried out unless confirmed by the provincial High Court. Under an amendment introduced under the Qisas and Diyat Ordinance, even once confirmed a death sentence cannot be carried out if the heirs of the victim pardon the convict or reach a compromise with the convict. Indeed, an execution could be halted by the heirs "even at the last moment before execution of the sentence". This would apply to death sentences imposed as either qisas or ta'zir punishment.

The Qisas and Diyat Ordinance specifies that when the death sentence has been imposed as a qisas punishment, it must be carried out "by a functionary of the Government by causing death of the convict as the court may direct". Since the ordinance came into force, some courts have imposed sentences of public hanging.

Before an execution is carried out as qisas punishment, the heirs of the victim must be informed of the date, time and place of the execution, and the execution must not be carried out until they, or their authorized representatives, are present. However, if the heirs fail to attend after receiving notification of the execution, the court can give permission for the execution to take place without them.

If a pregnant woman is sentenced to death as qisas punishment, the court can consult an authorized medical officer and postpone the execution for up to two years after the child is born. During this period, the woman may be released on bail. If she is not released, she should be treated as if sentenced to simple imprisonment, and not as if sentenced to death.

## **9 Possible Implications of the Qisas and Diyat Ordinance with regard to Arbitrary Executions**

Several Pakistani lawyers have expressed concern that the changes in commutation procedures introduced under the Qisas and Diyat Ordinance may increase the arbitrariness of application of the death penalty. This possibility is raised by the requirement that death sentences cannot be commuted except with the consent of the heirs of the victim, who may grant mercy to the convict and accept compensation in place of execution. It is feared that the heirs may be less likely to reach a compromise settlement with a poor convict than with one that is wealthy. This would result in the death penalty increasingly being applied arbitrarily: poor people sentenced to death would be more likely to be executed than those who are rich.

International human rights standards concerned with application of the death penalty contain numerous safeguards against the arbitrary application of this punishment. These include the requirement that, "Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment" (safeguard 7 of the UN Economic and Social Council safeguards guaranteeing protection of the rights of those facing the death penalty (annex to ECOSOC resolution 1984/50), endorsed by the UN General Assembly in 1984).

## **10 Extension of the Death Penalty to Kidnapping for Ransom and Trials under the Suppression of Terrorist Activities (Special Courts) Act of 1975**

An ordinance introducing the death penalty for kidnapping for ransom was approved by President Ghulam Ishaq Khan on 10 December 1990. Under the ordinance, kidnappers could be sentenced to death or life imprisonment. Previously life imprisonment was the maximum possible sentence for this offence. On 28 February 1991, the National Assembly passed a bill which amended the Pakistan Penal Code to provide the death sentence for kidnapping for ransom. Under another bill passed by the National Assembly that day, courts established under the Suppression of Terrorist Activities (Special Courts) Act of 1975 were empowered to try this offence. The extension of the death penalty to kidnapping for ransom is believed to be a response to expressions of public concern about the high crime rate - including regular kidnapping - in Sind province.

Amnesty International has raised concerns with successive governments of Pakistan regarding certain procedures of courts constituted under the Special Courts for the Suppression of Terrorist Activities (Special Courts) Act since their introduction. These courts have exclusive jurisdiction over certain scheduled offences, and can award the death penalty. Of particular concern to Amnesty International is the shift in the burden of proof under Section 8 of the Act. Under Section 8, the accused can be presumed guilty in certain circumstances. These are when the accused is found to be in possession of, or to control, any article which is capable of being used to commit an offence under the Act. The accused is also "presumed to have committed the

offence" under Section 8 if he or she has been "apprehended in circumstances which lead to ... a reasonable suspicion that he has committed" a scheduled offence.

In practice, the presumption of guilt under Section 8 is conditional: the prosecution must prove that the accused was in possession of the article concerned, or was apprehended in the specified circumstances. Once that is proven, however, the burden of proving innocent intent appears to be laid upon the accused.

Safeguard 5 of the United Nations Economic and Social Council safeguards guaranteeing protection of the rights of those facing the death penalty requires that executions can only be carried out following trial procedures which conform at least to the standards of fairness contained in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). The provisions of article 14 of the ICCPR include the right of all persons charged with a criminal offence to be presumed innocent until proved guilty according to the law. The ambiguity introduced into the presumption of innocence under Section 8 of the Suppression of Terrorist Activities (Special Courts) Act does not accord with the observation of the Human Rights Committee<sup>8</sup> in General Comment 14 paragraph 7 that the presumption of innocence is "fundamental to the protection of human rights", and that "the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt."

Amnesty International has expressed concern to the government about this extension of the penalty, pointing out that the United Nations General Assembly Resolution of 8 December 1977 specifies that "the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment". It has also drawn the attention of the government to research findings which show that the death penalty has no special power to deter crime. The organization has also drawn the government's attention to provisions of the Suppression of Terrorist Activities (Special Courts) Act which fall short of international standards for fair trial.

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<sup>8</sup> The Human Rights Committee is the body established by the ICCPR to monitor implementation of the Covenant's provisions.