



Consultation Paper on Homicide, Assault & Sentencing in the Somaliland Penal Code

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Executive Summary

This paper focuses on specific sections of the Somaliland Penal Code which deal with homicide, assault and hurt offences. It also addresses the sentences for these crimes, which includes a consideration of the death penalty.

The work which went into this paper follows on from the Horizon Institute's initial review of the Penal Code. It is based on a review of the specific provisions dealing with homicide, assault and hurt offences. It does not consider or raise every single possible issue with respect to these offences. Rather, it raises some crucial points which need to be discussed and highlights sections which are in urgent need of reform to bring the Penal Code in line with the Constitution and Sharia, but also to make it relevant to modern day Somaliland.

The Paper is based on research of other jurisdictions, both Western common law countries, such as the UK and USA, as well as Islamic law jurisdictions, such as, Malaysia, Egypt, and the Maldives. It makes recommendations on how provisions in the Penal Code could be amended and puts forward issues which need to be discussed by all relevant justice sector stakeholders and religious leaders. It is hoped that following a consultation process, there will be consensus on how to approach the issues raised in this paper. Lastly, the paper sets out recommendations for the way forward.

It is important that Somaliland institutions and relevant individuals are involved in the consultation process to ensure that any eventual amendments to the Penal Code have legitimacy and reflect the views of the citizens of Somaliland. The reform process will be a lengthy one if the Penal Code is to undergo comprehensive review and if its provisions are to be reformed in order to ensure effective laws which comply with the Constitution and Sharia. This paper, which will form the basis for the first round of consultations, is the first step towards reform. It is hoped that this first round of consultations can serve as a model for other consultations on other provisions of the Penal Code. This participatory approach to reform is aimed at ensuring that the people of Somaliland have ownership over any new draft Penal Code and that it eventually becomes law.

Introduction

This paper is intended to form the basis of consultations to take place between the Law Reform Commission (“LRC”) and other justice sector stakeholders, as well as religious leaders in Somaliland. It highlights particular areas that need to be reformed and discussed amongst stakeholders for the purposes of reaching consensus. This work follows on from an initial review of the PC carried out by the Horizon Institute (“Horizon”) and a workshop on reform of the PC which was held from 30 to 31 August 2014 organised by the LRC (“Workshop”).¹

One of the aims of the reform process is to bring the PC in line with the Somaliland Constitution, which, pursuant to Article 5 (2), requires that all laws be “grounded on and not be contrary to Islamic Sharia.” The Constitution also guarantees several fundamental rights and Article 21 (2) requires respect for rights and freedoms, as contained in international conventions. Somaliland has gone further than the Republic of Somalia in accepting international conventions.² Accordingly, any review of the PC must ensure respect for the rights contained in international and regional conventions such as the International Covenant on Civil and Political Rights (“ICCPR”), the African Charter on Human and Peoples’ Rights, and thematic human rights treaties, such as the Convention on the Rights of the Child and the Convention on the Elimination of all forms of Discrimination against Women.

The focus of this paper is on three interlinked areas set out in Part XII, Chapter 1 of the PC (“Crimes against the Life and Safety of Individuals”) which are:

- (i) Homicide offences, which include crimes such as murder, infanticide, offences relating to suicide, and death caused by negligence;
- (ii) Assault and hurt; and
- (iii) Sentencing for these offences, including a consideration of the death penalty and practical considerations regarding its implementation.

¹ About 50 participants selected from government institutions, members of the two Houses of Parliament, judiciary sectors, police commissioners, traditional and religious leaders, civil society organisations, UNDP, UNODC and international organisations attended the Workshop.

² Footnote 44 to Article 21 (2): “This links the interpretation of these rights to the relevant international human rights conventions, and is not confined to the few Siyad Barre’s Somali Democratic Republic acceded to, which were the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Covenant on Civil and Political Rights (CCPR) and its Optional Protocol (all acceded to in the last dying days of the dictatorship on 24 April 1990; The Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment (CAT) acceded to on 23 February 1990, and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) acceded to on 25 September 1975. Somaliland considers itself bound through succession by these conventions and is prepared to go beyond that and has already indicated that it will comply with a number of other UN conventions, as signified by this constitutional provision. Also as Somaliland is an African, Arab and Muslim nation (see Article 10(6) of the Constitution), this constitutional commitment includes regional human rights conventions.”

These areas involve issues which participants of the Workshop were particularly concerned about. Many were dissatisfied with laws relating to murder and that punishments did not adequately reflect the crimes. Many were also concerned with the interference by clan elders in cases – an issue linked to that of sentencing where some persons guilty of murder or other serious offences may be released following the payment of diya by clan or family members.

This paper highlights particular issues in order to get stakeholders' views on key areas. For example, whether there should be different grades of murder? Should attempted suicide be a crime? Is it time to reform the system of payment of diya? At the end of the consultations, it is hoped that the LRC and Horizon will have the views of a range of stakeholders, and that there will be consensus on how to approach the relevant offences in the PC in order to bring them in line with the Constitution and Sharia.

1. General Issues

Before considering the specific crimes, it is important to highlight some general concerns. The PC currently has a general part (Book I: Offences in General), which includes matters such as causation, elements of crimes and defences. It is common to have a general part dealing with such issues. However, it is recommended that the following matters also be addressed in the sections dealing with the specific offences.

1.1. Elements of the Crime

Part II, Chapter II of the PC currently deals with elements constituting an offence. Articles 20 to 24 address matters such as causation and the requisite mental element for an offence. However, these general elements are not necessarily sufficient. For example, as discussed later in this paper, it is necessary to clearly define the act and the intention required to establish the crime of murder and other homicide offences.

1.2. Criminal Negligence

This is relevant to homicide and assault/hurt offences. Currently, the PC criminalises all negligence resulting in death or "hurt" as defined in Articles 445 and 446. Article 24 (1)(c) of the PC addresses crimes committed with "*culpa*" (negligence) without specifying a threshold that needs to be met, such as gross negligence or recklessness. In other jurisdictions, negligence does not always lead to criminal culpability. Instead, the negligence must reach a certain level to result in criminal responsibility. It is recommended that the PC also adopt a threshold for criminal negligence and that there be a separate section under the General Part addressing this.

Related to this issue is also crimes committed by corporates, in particular, corporate manslaughter. It is recommended that corporate manslaughter be addressed separately when considering offences of corporates. It is, therefore, not addressed in this paper.

1.3. Recommendations

- Ensure that the sections addressing specific crimes clearly define the elements which need to be established to prove the offence.
- Include a section in the PC dealing with criminal negligence and ensure that only a certain level of negligence will result in criminal culpability, such as, gross negligence and/or recklessness.

2. Homicide Offences

2.1. Murder and Related Offences

Relevant Sections of the Penal Code:

1. Article 434 of the PC states that “[w]hoever commits murder shall be punished with death”. The PC provides no further details of what must be established to prove murder.
2. Article 441 (“Preterintentional Homicide”) deals with death that results from assault or “hurt”, as contained in Articles 439 and 440, and provides for a sentence of imprisonment from ten to 15 years.
3. Article 445 addresses death caused by “culpable negligence”. The punishment is imprisonment from six months to five years, and in the case of the death of more than one person or the death of one person and hurt to one or more persons, the sentence shall not exceed an aggregate of 12 years imprisonment.

Issues to Consider:

1. Article 434 does not adequately define the offence of murder. While Article 24 defines general elements of a crime, it is recommended that the PC specify the mental element and requisite act for murder. For example: the unlawful killing of a person with intent to cause death.
2. Whether the offence of murder encompasses the killing of a person with intent to cause serious bodily injury is an issue which needs to be discussed. There is a strong argument for adopting a very narrow definition of the most serious homicide offence, as it carries the severest of penalties, namely, the death penalty. The PC could, therefore, have categories of homicide offences, as adopted in several other jurisdictions, which would depend on the intention of the offender and the nature of the death or injury. For example, in the UK, murder is the most serious homicide offence, defined as unlawful killing with intent to cause death or grievous bodily harm. The UK has a lesser offence of manslaughter, which is the unlawful and intentional killing without malice or deliberation but the type of offence that occurs in the heat of passion. In other jurisdictions (e.g. USA, South Africa, Australia), there are degrees of murder, depending on whether the killing was: (i) premeditated (first degree murder); or (ii) spontaneous or intended to cause serious injury or was the result of a dangerous act showing a complete disregard for human life (second degree murder).

3. Although the PC has the lesser offence of “preterintentional homicide” (Article 441), this is an outdated term and requires review. It does not adequately deal with homicide that falls somewhere between premeditated murder and death resulting from an act intended to cause serious bodily injury. Moreover, in some cases where death results from an intention to cause serious bodily injury, it may be appropriate to treat it as a category of murder attracting a higher sentence than the maximum of 15 years imprisonment currently prescribed in Article 441. For example, in Malaysia, the maximum penalty for culpable homicide not amounting to murder is 20 years imprisonment, and in the UK, the maximum penalty for manslaughter can be up to life imprisonment.
4. With regard to death caused by negligence (Article 445), as mentioned above, it is recommended that a general provision in the PC specify a certain level of negligence that is required for criminal liability. For example, in many jurisdictions, only death resulting from gross negligence is classed as a homicide offence (e.g. involuntary manslaughter in the UK). Less serious cases of negligence should ideally be addressed by civil law.

Recommendations:

- Include a specific definition of murder including the required act and intention of the perpetrator. For example, the unlawful killing of a person with intent to cause death.
- Consider categories of homicide offences to ensure that the offence adequately reflects the nature of the killing and that only the most serious crime of murder attracts the death penalty. This could include a requirement in the definition of murder that the killing be premeditated.
- Consider lesser homicide offences, such as, second degree murder and/or manslaughter, where the killing is spontaneous or the result of an act intended to cause serious bodily injury.
- Consider removing the offence of preterintentional homicide in order to replace it with second degree murder and/or manslaughter.
- Ensure that the offence of death caused by negligence is properly defined so that only gross negligence and/or recklessness will result in criminal liability. ‘

2.2. Infanticide

Relevant Sections of the PC:

The PC separately deals with the killing of a child through the offence of “infanticide” in Article 435. It encompasses the killing of a child by *any* person and not just the child’s mother, where the killing is for reasons of “honour”. It is treated as a lesser offence than murder and attracts a reduced sentence of ten to 15 years imprisonment.

Issues to Consider:

The crime of infanticide in the PC is not the same as found in most other jurisdictions and is problematic. For example, a man who kills the child of a woman with whom he is accused of having an affair, even where the killing is premeditated, would receive a lesser sentence than that for murder. Moreover, the offence could potentially encompass a range of situations, as the term “honour” is not defined. The UN General Assembly, the Human Rights Committee, and its Committee on the Elimination of Discrimination against Women have all recommended that “honour” crimes should not attract a lesser sentence.

It is useful to look at how the offence of infanticide is defined in other jurisdictions. For example, Malaysia, which also incorporates elements of Sharia law in its penal code, defines infanticide as follows: “When any woman by any wilful act or omission causes the death of her newly-born, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child,” and due to “the balance of her mind was then disturbed, she shall, notwithstanding that the circumstances [] would have amounted to murder, be guilty of the offence of infanticide”.³ The punishment in Malaysia for infanticide is imprisonment for up to 20 years and a fine.⁴ The UK has a similar offence of infanticide.⁵

The key issue here is that infanticide is an offence that should only apply to the natural mother of an infant who kills as a result of the state of her mind caused by childbirth. In all other cases where the victim is a child, this should be treated as an aggravating circumstance for sentencing purposes.

Recommendations:

- The current offence of infanticide should be amended to include the killing of a child by its natural mother soon after childbirth where the balance of her mind is disturbed as a result of the birth.
- Any other form of killing of a child should be treated as murder or manslaughter, depending on the circumstances.
- Where the requirements for infanticide are not met, the fact that the victim is an infant or child should be treated as an aggravating factor.

2.3. Suicide Offences

Relevant Sections of the PC:

The PC currently includes three offences relating to suicide, which are as follows:

³ Section 309A of the Malaysian Penal Code.

⁴ Section 309B of the Malaysian Penal Code.

⁵ The killing of an infant (under 12 months) by its natural mother where the balance of her mind is disturbed as a consequence of childbirth.

- (i) Death caused to a person with his own consent (Article 436);
- (ii) Attempted suicide (Article 437); and
- (iii) Instigating or aiding suicide (Article 438).

Issues to Consider:

The provisions in the PC relating to suicide are similar to those found in other jurisdictions, with the exception of attempted suicide, which is no longer an offence in many countries. Under Article 437, the punishment for attempted suicide is imprisonment for up to five years, or a fine. Horizon recommend that this provision be reviewed to consider the decriminalisation of attempted suicide, or at the very least, reduce the sentence. Suicide is often the result of mental health issues or some form of abuse. Rather than incarcerate such persons, it is recommended that they instead be supported or rehabilitated.

Provisions in the PC regarding death by consent, and instigating or aiding suicide, are similar to those found in many other jurisdictions. Article 436 recognises that death caused to a person with his or her own consent is a serious offence attracting a penalty of six to 15 years imprisonment. However, a key issue is whether there should be exceptions to the offence in Article 436. For example, death by omission raises issues with regard to medical professionals who may withhold certain life-saving treatment at the request of a patient. This could include someone who states that they do not want to be put on a life support machine. Currently, a doctor in this situation would face prosecution under Article 436. If such cases are to be an exception, there should be provisions in the PC setting out steps that medical professionals must take before deciding to withhold life-saving treatment. For example, determining that the patient has the capacity to consent to the withholding of such treatment, and that the decision is made pursuant to at least two doctors.

Another important issue is how to treat individuals who have assisted or aided a suicide of a terminally ill relative pursuant to their request, and have been wholly motivated by compassion. It should be considered whether it is in the public interest to prosecute such persons. Or, if they are to be prosecuted, are these mitigating factors warranting a lenient sentence? For example, the UK has a Policy for Prosecution in Respect of Cases of Encouraging or Assisting Suicide which sets out factors for and against prosecuting cases of assisted suicide.⁶

Recommendations:

- Should attempted suicide be decriminalised? If not, should the current sentence for the offence be reduced to, for example, one year?
- Should there be exceptions to the offence of death by consent where death results from an omission? In particular, this could encompass medical professionals who withhold life-saving treatment further to a patient's consent.
- Consider public interest factors against prosecuting all cases of assisted suicide. For example, where a person assists in the suicide of a terminally ill relative or a relative in a debilitating and/or painful condition, or should such cases be treated as mitigating circumstances?

⁶ Available at http://www.cps.gov.uk/publications/prosecution/assisted_suicide.html

3. Assault and “Hurt”

3.1. Assault

Relevant Sections of the PC:

Article 439 of the PC deals with the offence of “assault”. Article 439 (1) defines the act as someone who “strikes another” but causes “no physical or mental illness”. The sentence is imprisonment for up to six months or a fine.

Issues to Consider:

The PC provision on assault is similar to that found in other jurisdictions. However, unlike some other countries, such as Malaysia and the UK, Article 439 does not include threats of force or violence. Stakeholders can consider whether the PC offence of assault should include threats which would cause any reasonable person to apprehend force or violence. This would ensure protection and redress for victims who are made to feel serious fear of violence.

3.2. Hurt

Relevant Sections of the PC:

The PC includes the more serious offence of “hurt”. This crime is divided into the three categories of: hurt; grievous hurt; and very grievous hurt. Article 440 (1) deals with “hurt” which results in “physical or mental illness” and the sentence is imprisonment from three months to three years. Article 440 (2) addresses grievous hurt and provides that the “hurt shall be deemed to be grievous” with imprisonment from three to seven years where:

- a) The act results in an illness which endangers the life of the person injured or in an illness or incapacity which prevents him from attending his ordinary occupation for a period exceeding forty days.
- b) The act produces a permanent weakening of a sense or organ.
- c) The party injured is a pregnant woman and the act results in the acceleration of the birth.

Article 440 (3) deals with “hurt” that is “very grievous” with imprisonment from six to 12 years. Very grievous hurt is where the act results in:

- a) An illness certainly or probably incurable.
- b) The loss of a sense.
- c) The loss of a limb, or a mutilation which renders the limb useless, or the loss of the use of an organ or of the capacity to procreate or a permanent and serious difficulty in speech.

- d) Deformity, or the permanent disfigurement of the face.
- e) The miscarriage of the person injured.

Issues to Consider:

The categories of “hurt” in the PC are similar to the offences of “harm” or “hurt” in other jurisdictions such as the UK and Malaysia. Notably, UK law provides for psychological harm that involves more than mere emotions such as fear, distress or panic. The Somaliland PC also includes “mental illness”. It is worth considering the meaning of the terms “mental illness” and “psychiatric harm” to determine which may be the most appropriate.

Similar to the Somaliland PC, the Malaysian Penal Code includes the offences of “hurt” and “grievous hurt” and the injuries listed are similar to those in the Somaliland PC encompassing disabilities, broken bones and disfigurement. Section 320 (h) of the Malaysian Penal Code specifies severe bodily pain or the inability to follow ordinary pursuits for a period of 20 days, in contrast to the requirement of 40 days for the offence of “grievous” hurt in Article 440 (2) of the Somaliland PC. However, Article 440 (3) of the Somaliland PC also includes the more serious offence of “very grievous” hurt, which specifies no minimum number of days for which the injury must last. It should, nonetheless, be discussed whether the number of days specified in Article 440 (2) of the PC should be reduced.

Article 440 (2) also refers to the “occupation” of the victim (the victim is prevented from attending to his “ordinary occupation for a period of forty days”). It could be considered whether the term “ordinary pursuits” (which is used in Section 320 (h) of the Malaysian Penal Code) would better ensure that individuals who are not working but are prevented from carrying out their day to day activities as a result of their injuries, would be covered.⁷

Notably, UK law also encompasses the reckless transmission of a sexual infection or disease. Currently, the wording in Article 440 of the Somaliland PC would not necessarily include this. Such infections or diseases do not always endanger life, or incapacitate a person (as required in Article 440 (2)(a)), nor do they necessarily result in a permanent weakening of a sense or organ. They may also be curable, thereby falling short of Article 440 (3)(a). Although the transmission of a sexual disease may be covered by the offence of “hurt” under Article 440 (1), it can potentially be serious and is a form of injury that deserves to be treated as more than minor harm or injury. It is, therefore, important to consider whether the transmission of a sexual infection or disease could amount to the more serious offence of “grievous” hurt or in some cases, even “very grievous” hurt, and if so, whether express provision needs to be made in the PC.

Recommendations:

⁷⁷ See for example, section 320 (a) of the Malaysian Penal Code.

- Consider a wider definition of “assault” to include “threats of violence or force”, or “acts that result in a reasonable belief that violence or force will be used or a reasonable fear or imminent bodily injury.”
- Instead of mental illness, consider the term “psychiatric harm, illness or injuries” in order to allow for a broader range of psychiatric injuries that could result in assault or “hurt” cases.
- In order to ensure that the PC includes individuals who may not be working, it is recommended that it instead refer to “ordinary occupation or pursuits” in Article 440 (2) instead of just “ordinary occupation”.
- Discuss whether the requisite period of 40 days in Article 440 (2) is too high a threshold for a victim to meet. It would perhaps have the effect of excluding certain debilitating injuries. For example, an injury which prevents someone from walking or going about their normal activities for one month would not be encompassed and would instead be covered by the lesser offence of “hurt”.
- Where reference is made to “illness” in Article 440, it could be useful to expressly refer to “physical or psychiatric illness”.
- Article 440 (3)(c) could be phrased more broadly as “injury resulting in permanent disability” rather than the current “loss of a limb, or a mutilation which renders the limb useless, or the loss of the use of an organ or of the capacity to procreate, or a permanent and serious difficulty in speech.”
- Consider whether the PC should include the transmission of a sexual disease or infection as a form of “hurt”, and where serious, “grievous” hurt.

4. Defences

General defences are currently set out in Book I, Part II, Chapter III of the PC (“Circumstances Excluding Punishment”). Defences in the PC which are relevant to homicide and assault cases include:

- (i) Exercise of a right or performance of a duty (Article 33) and lawful use of arms. For example, a police officer carrying out his duties.
- (ii) Self-defence or the defence of others (“Private Defence”, Article 34), provided it is proportionate.
- (iii) Necessity (Article 36), provided it is proportionate.

The PC also sets out certain factors under a separate section (Part III, Chapter 1, Section 1: The Offender and the Party Injured), with a heading “Liability”. These factors are similar to partial defences found in other jurisdictions. They include issues such as lack of capacity (Articles 47, 49, 58) and diminished responsibility for reasons, such as “mental deficiency”, and intoxication (Articles 51 to 57). Some jurisdictions treat these factors as partial defences, which have the effect of reducing an offence to a lesser one. For example, in the UK, a partial defence, such as diminished responsibility, may reduce a finding of murder to manslaughter. However, in the PC, these factors only reduce the punishment and, therefore, serve as mitigating factors.

One option would be to set out complete and partial defences, which are relevant to homicide and assault/hurt cases, in the specific sections dealing with those offences. Factors such as incapacity, diminished responsibility and loss of control, could specifically be referred to as partial defences – separate from mitigating factors.

Additional partial defences that could be added in the PC include:

- (i) Provocation: This is currently addressed under “Ordinary Extenuating Circumstances” in Article 40 of the PC. However, it could instead have the effect of reducing an offence to a lesser one. For example, reducing very grievous hurt to grievous hurt, or murder to a lesser homicide offence, such as manslaughter or second degree murder.
- (ii) Suicide pact: The PC currently has the offences of death caused by consent, attempted suicide, and instigating or aiding suicide. However, a suicide pact would encompass a situation where, for example, two or more people take steps to end their lives but one or more survive. While the steps taken by the survivors may have ordinarily amounted to murder, where it is established that a suicide pact existed, the survivor would instead be convicted of a lesser homicide offence such as manslaughter. Where it was not established that the survivor intended to take his own life too, the case would fall within the offence of assisting, aiding or instigating suicide.
- (iii) Infanticide: Currently, this is treated as a separate offence in the PC. It has already been recommended that this offence be amended to encompass only natural mothers who kill their infant as a result of childbirth and imbalance of the mind. Where infanticide is established, it would have the effect of reducing a conviction of murder to a lesser homicide offence, such as, manslaughter.

Recommendations:

- Consider including defences that are relevant to homicide and assault/hurt cases in the specific sections dealing with these offences.
- Consider introducing the concept of partial defences which would have the effect of convicting an accused for a lesser offence.

- Consider whether provocation, suicide pacts and infanticide should be treated as partial defences in the PC.

5. Sentencing in Homicide and Assault Cases

5.1. Introduction

The sentences in the PC are set out in the specific provisions dealing with the offences. The sentences for both homicide and assault cases require review to ensure that they reflect the gravity of the crime. Currently, the PC includes certain situations where sentences for homicide or assault will be reduced. Some of these factors are unreasonable and should be repealed.

5.2. Issues to Consider

Unreasonable Mitigating Factors:

The PC currently includes certain factors that have the effect of reducing a sentence and, therefore, serve as mitigating factors. These include the offence of infanticide (Article 435), homicide or hurt caused by parents (Article 442), and homicide or hurt for reasons of “honour” (Article 443).

(i) Infanticide

As already discussed, the current offence of infanticide requires review and the killing of a child for reasons of “honour” should not justify a reduced sentence. Infanticide, where carried out by an infant’s natural mother may be considered as a factor reducing a charge from, for example, murder to manslaughter, or first to second degree murder. However, other cases where the victim is a child or infant should be treated as aggravating circumstances warranting a higher sentence.

(ii) Homicide or Hurt Committed by Parent

Article 442 reduces the punishments for hurt or homicide for a parent exercising parental authority. Where the punishment is death, the sentence is reduced to 10 to 15 years imprisonment, and where it is imprisonment, the sentence will be one third to one half of the prescribed sentence. This provision is problematic. It creates a situation where a parent will face a lesser sentence for killing or seriously harming their own child without exception. For example, a parent who intentionally kills their own child in the process of disciplining them, will face a lesser sentence, that is, a maximum of 15 years’ imprisonment. Even where a parent unintentionally kills their child while disciplining, a sentence of 15 years’ imprisonment may be insufficient and fail to reflect the gravity of the offence.

There is arguably no need for the Article 442 (1) exception. Parents who unintentionally cause harm or death to their child should be treated as any other person. There should never be any justification for serious harm or death caused to a child. According to the Convention on the Rights of the Child and its Committee, no form of violence against children, however light,

should ever be justified.⁸ The Committee has gone further and recommended removing any provisions that allow some degree of violence against children, even where there is a requirement of “reasonable” or “moderate” chastisement or correction in a family or home setting.⁹

There will be cases where parents, in the exercise of their parental authority, unintentionally cause harm or death to their child. However, in the case of death, if the PC includes further categories of homicide offences such as second degree murder or manslaughter/gross negligence manslaughter, these may encompass parents who have caused death to their child unintentionally. This would automatically lead to a lesser punishment than that for intentional premeditated killing.

Under Article 442 (2), where a parent commits assault, as defined in Article 439, in the exercise of their parental authority, they will not be punished. This is similar to provisions found in other jurisdictions, such as the UK, where assault results from a parent exercising reasonable punishment. However, where the punishment results in more serious injuries, reasonable punishment is no defence. Nor is it treated as a partial defence or a mitigating factor.

(iii) Homicide or Hurt for Reasons of Honour

Article 443 of the PC also reduces the sentence for homicide or hurt committed for reasons of “honour” against a spouse, daughter or sister committing fornication. The provision has the effect, to some extent, of justifying the killing or harm and disproportionately affects female victims. It is contrary to Sharia, pursuant to which a life cannot be taken without due process, as well as Article 24 of the Constitution which protects the right to life. In addition, the UN General Assembly, the Human Rights Committee (“HRC”), and its Committee on the Elimination of Discrimination against Women, have recommended that “honour” crimes, a form of gender based violence, should not be invoked by perpetrators to escape criminal responsibility, and should not attract a lesser sentence. Rather, they should be treated as seriously as other violent crimes. The HRC has further recommended that where crimes have been committed for reasons of “honour”, this should be treated as an aggravating factor.

Sentences for Homicide Offences:

The sentences for homicide offences also require review. If the PC is to include a new offence of manslaughter or some other homicide offence that is a lesser crime than murder (e.g. second degree murder), an appropriate sentence should be considered. For example, in the UK, the maximum sentence for manslaughter is life imprisonment and in Malaysia, the maximum sentence for culpable homicide not amounting to murder is 20 years imprisonment. The maximum sentence for preterintentional homicide in the Somaliland PC, which is currently the lesser homicide offence, is only 15 years. This may not reflect the seriousness of the offence in

⁸ See Article 19 of the Convention on the Rights of the Child and Committee on the Rights of the Child, General Comment No. 13 (2011), paras. 13, 17.

⁹ Committee on the Rights of the Child, General Comment No. 8 (2006), para. 31.

some cases. It is also important to ensure that the most severe punishment, namely the death penalty, is reserved for only the most serious homicide offence, namely, premeditated murder.

Sentences for Hurt Offences:

The maximum sentence in the PC for “very grievous hurt”, which is currently 12 years, should also be reviewed. For example, in the UK the maximum penalty for grievous bodily harm (wounding or causing GBH with intent) is life imprisonment, which demonstrates how serious the offence can potentially be.¹⁰

Aggravating and Mitigating Factors:

The PC lists several aggravating and mitigating (referred to as extenuating circumstances) factors under Articles 39 and 40. Articles 55 and 56 also provide that a sentence will be increased where the offender was suffering from “habitual” drunkenness caused by alcohol or drugs. Other aggravating factors relevant to homicide/hurt offences could be added to the PC, such as: particular vulnerability of the victim, such as a child/infant, elderly, sick or disabled; the offender used a weapon; the offender had a lead role in a gang or group; there was also sexual violence.

Mitigating factors specific to the offences of homicide/hurt which could be added to the PC include: lack of premeditation; provocation in a way that is not sufficient to amount to a defence; and a belief that the killing was an act of mercy. Currently, under Articles 55 and 56, “habitual drunkenness” caused by alcohol or drugs, has the effect of increasing an offender’s sentence. However, alcoholism and drug addiction are conditions requiring medical treatment and it should be considered whether they instead be treated as mitigating factors.

Payment of Diya or “Blood Money”:

One of the concerns that arose out of the Workshop, was the interference in cases by clan elders in order to reduce sentences. A common practice in Somaliland is the payment of diya or “blood money” for the offence of murder or other death penalty cases. This practice is contrary to Article 8 (1) of the Constitution which provides that all citizens of Somaliland shall enjoy equal rights and obligations before the law. Article 8 (2) states that precedence and discrimination on grounds of clan affiliation, among other grounds, is prohibited and programmes aimed at eradicating long lasting bad practices shall be a national obligation.

While the payment of diya is derived from Sharia law, there are strong arguments in favour of reviewing and reforming this practice. Offenders who do not have family or clan members to pay a victim’s family on their behalf will be treated differently to a rich offender, leading to unequal treatment based on status which is prohibited by Article 8 of the Constitution. While it is important to compensate a victim’s family, an offender should not escape punishment because of status and wealth. Somaliland should consider how the system of compensation can operate while ensuring that offenders are still punished in accordance with the PC.

¹⁰ Section 18 of the UK Offences Against the Person Act 1861.

5.3. Recommendations

While several general sentencing factors would be included in a general section dealing with sentencing – perhaps through an eventual development of sentencing guidelines – it is important to consider factors specific to homicide and assault/hurt cases. The following should be considered during the consultation process:

- Consider amending the provisions on infanticide so that it applies only where it is a case of a natural mother killing her infant as a result of her state of mind affected by childbirth. Where it applies, it should have the effect of reducing the offence of murder to a lesser homicide offence.
- Consider amending the provisions regarding homicide or assault committed by a parent so that offences committed by parents are not automatically treated as a lesser crime.
- Consider removing provisions allowing for lesser sentences for offences committed for reasons of “honour”.
- Consider including aggravating and mitigating factors specific to homicide and assault/hurt cases in the sections dealing with these offences.
- Review the current maximum sentences for homicide and hurt cases.
- Consider additional aggravating and mitigating factors in homicide and hurt cases.
- Discuss how to approach the payment of diya or “blood money”. In particular, should the PC expressly provide for the payment of compensation and ensure that such payment does not exclude an offender from serving his or her sentence?

5.4. The Death Penalty

Introduction:

Article 24 of the Constitution guarantees the right to life with the exception of the death penalty. The PC currently imposes the death penalty for certain offences, such as, murder and some crimes against the State. While human rights and customary international law support abolition of the death penalty, where it is not abolished, there are nonetheless important safeguards that should be in place pursuant to Sharia and human rights law.

Safeguards under Sharia and Human Rights:

Article 6 (2) of the ICCPR provides that in countries which have not yet abolished the death penalty, the sentence should only be imposed “for the most serious crimes.” In a general comment on Article 6 of the ICCPR, the UN Human Rights Committee has stated that “the expression ‘most serious’ must be read restrictively to mean that the death penalty should be quite an exceptional measure.”¹¹ Offences such as economic crimes, victimless offences, or crimes of a religious or political nature, including acts of treason, espionage and other vaguely defined acts usually described as “crimes against the State”, cannot be characterised as “most

¹¹ General Comment 6 on Article 6 of the International Covenant on Civil and Political Rights, adopted on 27 July 1982, para. 7.

serious crimes”. According to the HRC, imposition of the death penalty in such cases violates Article 6.¹² Therefore, with respect to Somaliland, it is recommended that the death penalty, for certain offences against the personality of the State, be reviewed.¹³

In addition, the UN Economic and Social Council has established safeguards on guaranteeing protection of the rights of those facing the death penalty (“Safeguards”).¹⁴ Many of these are also consistent with Sharia law principles. In particular, the death penalty should only be imposed when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.¹⁵ Pursuant to *Sharia*, for certain crimes, such as murder, where the death penalty applies, evidentiary requirements are very stringent. The accused person must either have confessed, or been found guilty based on the testimony of at least two witnesses without any doubt that he or she committed the crime.¹⁶ The burden of proof is, therefore, higher than the “beyond reasonable doubt” burden found in many jurisdictions.

The death penalty may only be carried out pursuant to a final judgment rendered by a competent court after legal process, which gives all possible safeguards to ensure a fair trial, including the right to adequate legal assistance at all stages of the proceedings.¹⁷ Pursuant to *Sharia*, a life cannot be taken without due process of the law.¹⁸

According to the Safeguards, accused persons must also have the right to appeal, and to seek pardon or commutation of their sentence.¹⁹ *Sharia* principles also stipulate that it is better to

¹² Concluding observations of the Human Rights Committee: Libyan Arab Jamahiriya, UN document CCPR/C/79/Add.101, 6 November 1998, para. 8. The Committee has also expressed concern about the availability of the death penalty for drug-related crimes (Concluding observations of the Human Rights Committee: Kuwait, UN document CCPR/CO/69/KWT, 27 July 2000, para. 13). Concluding Observations of the Human Rights Committee: Libyan Arab Jamahiriya, UN document CCPR/C/79/Add.101, 6 November 1998, para. 8. In relation to the restriction of the death penalty to the “most serious crimes”, the Committee has, in particular, expressed concern about “very vague categories of offences relating to internal and external security” (Concluding observations of the Human Rights Committee: Kuwait, UN document CCPR/CO/69/KWT, 27 July 2000, para. 13); about vaguely worded offences of opposition to order and national security violations (Concluding observations of the Human Rights Committee: Viet Nam, UN document CCPR/CO/75/VNM, 26 July 2002, para. 7); and about “political offences... couched in terms so broad that the imposition of the death penalty may be subject to essentially subjective criteria” (Concluding Observations of the Human Rights Committee: Democratic People's Republic of Korea, UN document CCPR/CO/72/PRK, 27 August 2001, para. 13). *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur...*, UN document E/CN.4/1999/39, 6 January 1999, para.63. The latter report also specifies that the same principle should apply to adultery, prostitution and matters of sexual orientation. The Somaliland PC however does not prescribe the death penalty for such acts.

¹³ See PC, Part I, Crimes against the Personality of the State.

¹⁴ Approved by Economic and Social Council resolution 1984/50 of 25 May 1984.

¹⁵ Safeguards, para. 4.

¹⁶ “Avert the hudud punishment in case of doubt...for error in clemency is better than error in imposing punishment”. See Al-Zuhayli, *Al-Fiqh al-Islami wa Adillatuh* (Arabic) (1997) Vol. 7, p. 5307.

¹⁷ Safeguards, para. 5.

¹⁸ Qur’an, chapter 6: 15 (Do not kill a soul which Allah has made sacred except through the due process of the law).

¹⁹ Safeguards, paras. 6 and 7.

forgive than to err in punishment.²⁰ Moreover, the death penalty should not be carried out in cases where the accused is a minor, suffers from a mental illness or incapacity, or is pregnant.²¹

The following are examples of stringent evidentiary safeguards that could apply in death penalty cases:²²

- (i) A defendant may not be convicted of an offence based on a confession unless he or she freely testifies in open court and under the advice of counsel, confessing every element of the crime.
- (ii) All witnesses that provide the testimony establishing the proof required must undergo evaluation to establish their capacity and competence to tell the truth on the matters at issue.
- (iii) Evidence must not be contradicted. If the testimony of any witness, or any portion of the testimony of any witness, including the defendant, is contradicted by the testimony of another witness, that witness's testimony may not be considered as meeting the requirements of proof.
- (iv) An automatic appeal on all findings of fact and law.

It is important to discuss how the above safeguards could be incorporated into the PC, or perhaps into Somaliland's Criminal Procedure Code, to ensure that the death penalty is carried out in accordance with Sharia and the fundamental rights guaranteed by the Constitution and international human rights law.

Recommendations

- Review the PC to ensure that the death penalty is only applied in the most serious cases.
- Incorporate safeguards in the PC to ensure that the accused receives a fair trial, which must include the right to adequate legal representation.
- Include an automatic right of appeal on all matters of fact and law in all cases where the death penalty may be applied.
- Include the right to seek pardon or commutation of sentence.

²⁰ Qur'an, chapter 6:15 and Hadith: Sunan At-Tirmidhi ("Avoid applying legal punishment upon the Muslims if you are capable. If the criminal has a way out, then leave him to his way. Verily, it is better for the leader to make a mistake forgiving the criminal than it is for him to make a mistake punishing the innocent.")

²¹ Article 6(5) of the ICCPR: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." Article 5(3) of the African Charter on the Rights and Welfare of the Child states: "The death sentence shall not be pronounced for crimes committed by children". Article 2 of this treaty specifies that the term "child" refers to anyone under the age of 18. Paragraph 3 of the Safeguards provides: "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." In resolution 2005/59, adopted on 20 April 2005, the UN Commission on Human Rights urged all states that still maintain the death penalty "to exclude pregnant women and mothers with dependent infants from capital punishment" and "not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person".

²² Taken from the Final Report of the Maldivian Penal Law and Sentencing Codification Project, Draft Crimes and Sentencing Code, by Paul H Robinson, University of Pennsylvania Law School, Criminal Law Research Group ("Final Report of the Maldivian Penal Law") available at <http://ssrn.com/abstract=1522222> . Section 1204 of the draft Maldivian Penal Code.

- Either the PC, or relevant rules of evidence, should specify very strict evidentiary requirements in death penalty cases, in particular, a high burden of proof.
- Ensure that the PC specifies that the death penalty will not apply to the mentally ill or mentally incapacitated, minors, pregnant women or women with dependent infants.

6. Way Forward

This paper sets out issues for discussion and makes recommendations with respect to only a few areas of the PC. It is recommended that these issues be considered by justice sector stakeholders and religious leaders and that consensus be reached on all the main points recommended. In order to move the process forward, it is recommended that:

- The LRC, as the institution tasked with law reform, contact other justice stakeholders and religious leaders in order to establish a working group or committee that can be consulted on reform of the PC.
- Consultation meetings should take place for the purposes of discussing the issues raised in this paper and consensus should be reached on how to proceed.
- Once there is consensus among all relevant stakeholders on how the offences and sentences in this paper are to be dealt with, draft sections can be produced.
- A follow-on consultation should be held to discuss the new draft provisions with a view to finalising sections on homicide and assault offences.